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Bills Digest

No. 88 2001–02

Transport and Regional Services Legislation
Amendment (Application of Criminal Code) Bill
2002

ISSN 1328-8091

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Published by the Department of the Parliamentary Library, 2002

I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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Transport and Regional Services Legislation Amendment
(Application of Criminal Code) Bill 2002

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8 March 2002

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Transport and Regional Services Legislation Amendment (Application of Criminal Code) Bill 2002

Date Introduced: 20 February 2002

House: House of Representatives

Portfolio: Transport and Regional Services

Commencement: On the day after Royal Assent

Purpose

The Bill amends four statutes in the Transport and Regional Services portfolio to harmonise them with the principles of criminal responsibility contained in Chapter 2 of the Criminal Code.

Background

For an account of the background to the Criminal Code and a brief description of Chapter 2 of the Code, see the Bills Digest for the Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000 (*Bills Digest No. 92, 2000-2001*). Chapter 2 of the Criminal Code contains principles of criminal responsibility. Beginning in 1995, a staggered program commenced of applying those principles to Commonwealth criminal laws. Chapter 2 applies to all offences against the Code. From 1 January 1997, it applied to all new Commonwealth offences. From 15 December 2001, it applied to all pre-existing Commonwealth offences.

With the 15 December deadline in mind, the Commonwealth reviewed pre-existing offence provisions with a view to harmonising them with Chapter 2, modifying the application of Chapter 2 where necessary or clarifying how Chapter 2 applied. As a result, 20 bills designed to amend legislation across a range of portfolios were introduced into the Parliament and passed before it was prorogued for the November 2001 General Election.¹

However, the program of legislative reform was not completed prior to 15 December 2001. The Explanatory Memorandum for the Bill remarks:

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The amendments will ensure that the offence provisions operate in the manner they did prior to the application of the Criminal Code. The Bill affects a small number of offence provisions that were not included in the Transport and Regional Services Legislation Amendment (Application of Criminal Code) Act 2001, and are therefore inconsistent with the Criminal Code principles.²

Some major aspects of criminal responsibility relevant to the Transport and Regional Services Legislation Amendment (Application of Criminal Code) Bill 2002 are described below.

Offences—Physical elements and fault elements

The Criminal Code provides that an offence consists of physical elements and fault elements. Physical elements relate to external events such as conduct or the result of conduct. Fault elements relate to a person's state of mind eg intention, knowledge, recklessness and negligence.

The Criminal Code defines the physical elements of an offence to be conduct, the circumstances in which it occurs and the results of conduct.³ An omission to act can be a physical element if there is appropriate statutory provision or if it is the result of a breach of duty to act.⁴ Each offence must contain at least one physical element, but any combination of physical elements may be present in an offence provision.

In general, for every physical element of an offence, the prosecution must also prove a corresponding fault element. The Code establishes four fault elements—intention, knowledge, recklessness and negligence⁵—in descending order of culpability. Where the physical element of an offence consists of conduct, intention is the default fault element. However, if the physical element is a circumstance or a result of conduct the default fault element is recklessness.⁶ The Code does not prevent an offence from specifying an alternative fault element⁷, but indicates that the default fault element will apply in the absence of a specified fault element.⁸

The Bill amends offence provisions so that their constituent fault and physical elements correspond with the scheme supplied by the Criminal Code.

Proof of criminal responsibility

It is the duty of the prosecution to prove the guilt of the accused person.⁹ The prosecution bears the legal burden of proving every element of an offence. The legal burden means 'in relation to a matter, the burden of proving the existence of the matter'.¹⁰ The prosecution must discharge the legal burden of proof beyond reasonable doubt, unless the law creating the offence provides otherwise. Further, the prosecution bears a legal burden of disproving any matter where the defendant has discharged an evidential burden.

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Generally, where a burden of proof is placed on a defendant it is an evidential burden only.¹¹ The evidential burden can be discharged by the defendant pointing to evidence suggesting there was a reasonable possibility that a matter existed or did not exist.¹² The Code provides that a defendant will have a legal burden of proof only if the law creating the offence so provides. When a legal burden is placed on the defendant it must be discharged on the balance of probabilities.¹³ The prosecution must still prove that the defendant committed the offence beyond reasonable doubt.

The Bill inserts a number of notes indicating that a defendant bears an evidential burden of proof in relation to certain matters.

Strict liability

At common law there is a presumption that every offence contains a mental element. However, an increasing number of statutory offences dispense with fault elements.¹⁴ Whether an offence is a strict liability offence depends on the interpretation of the offence provision. Working from common law principles, Chapter 2 of the Criminal Code requires offences of strict liability to be expressly identified as such.¹⁵ Failure to do so means that fault elements are applied to all the physical elements in the offence.

Strict liability is most often used in minor or regulatory offences attracting small penalties where requiring the prosecution to prove a fault element would render the legislation unenforceable because it would inhibit prosecution and make the hearing of cases more complex and lengthy.

As well as providing for the identification of strict liability offences, the Criminal Code allows a law which creates an offence to provide that strict liability applies to some physical elements of that offence.¹⁶

Although the prosecution need not prove fault in relation to strict liability, the Criminal Code supplies a defence of mistake of fact to strict liability offences and to other offences where strict liability is applied to some of their physical elements.¹⁷ The Code does not prevent defences other than mistake of fact applying.¹⁸

The Bill identifies one strict liability offence and one instance in which strict liability attaches to a physical element of an offence.

Defences

Defences to criminal offences are usually external to the physical and fault elements of offences and to offences themselves.¹⁹ Possibly for this reason, and to clearly identify defences as defences and not as elements of offences which have to be proved or disproved by the prosecution, the Bill relocates and re-phrases elements of excuse—such as 'without reasonable excuse'—in some offences so it is clear that they are defences and not elements of those offences.

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Main Provisions

Application of amendments

Clause 4 provides that an amendment applies to acts and omissions commencing or concluding after the amendment commences.

Amendments relating to fault elements

Item 1 of Schedule 1 amends subsection 15(4) of the *Aircraft Noise Levy Collection Act 1995*. At present this section provides that it is an offence to 'knowingly' present a document or make a statement that is false in a material particular to a person carrying out a function under the Act. The amendment removes the word 'knowingly' from subsection 15(4) because 'intention' is the Criminal Code fault element for a physical element of conduct and 'recklessness' is the fault element for a physical element of circumstance or result. 'Intention' and 'recklessness' will apply to the physical elements of conduct and circumstance respectively in the offence by default as a result of the application of Chapter 2 of the Criminal Code.

Items 4, 7, 18-21, 34 and 69 amend the *Air Navigation Act 1920* to remove the words 'intentionally or recklessly' in a number of existing offence provisions. An example is subsection 22D(1) which provides that an aircraft passenger:

must not intentionally or recklessly:

- (a) carry a weapon; or
- (b) otherwise have in his or her possession a weapon that is located at a place in the aircraft that is accessible to the person.

As the offence stands, the fault elements are inappropriate to the scheme established by the Criminal Code. The Criminal Code provides that 'intention' is the fault element for a physical element of conduct and 'recklessness' is the fault element for a physical element of circumstance or result. **Item 34** removes the words 'intentionally or recklessly' from subsection 22D(1). The fault elements of 'intention' and 'recklessness' will apply by default to the elements of conduct and circumstance respectively in the offence as a result of the operation of the Criminal Code.

Item 74 removes the words 'knowingly or recklessly' in subsection 132(2) of the *Airports Act 1996* for similar reasons.

Amendments relating to 'reasonable excuse'

Items 2, 3, 5, 6, 8-17, 22-33, 35-68 and 70-73 of Schedule 1 amend offence provisions in the *Air Navigation Act* by removing the words 'without reasonable excuse'²⁰ and reconstituting them to clearly indicate that they are statutory defences and not elements of

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the offences which would have to be proved by the prosecution. In each case, the amendments also note that the defendant bears an evidential burden in proving the defence. An example is the amendments made to subsection 22A(6) of the Air Navigation Act. Subsection 22A(6) presently provides that 'A screening authority must not, without reasonable excuse, contravene subsection (5)'. Subsection (5) provides that a screening authority must screen people, goods or vehicles in accordance with requirements relating to training, equipment specifications and other matters set down by the Departmental Secretary. **Item 22** removes the words 'without reasonable excuse' from subsection 22A(6). **Item 25** creates a new subsection which specifies that subsection (6) does not apply if 'the authority has a reasonable excuse'.

Items 80-81 make similar amendments in relation to reasonable excuse for the purposes of subsection 32AJ(2) of the *Civil Aviation Act 1988*.

Amendments relating to strict liability

Item 75 amends section 132 of the Airports Act. Section 132 enables regulations to be made about environmental standards at airports. Subsection 132(2) provides that a person who contravenes these regulations is guilty of an offence. **Item 75** inserts new subsection 132(2A) which provides that strict liability applies to the element of the offence that regulations were made under the section. As a result the prosecution will not have to prove a fault element for this physical element. However, as a result of the operation of the Criminal Code, a defendant will have a defence of mistake of fact.

Item 77 identifies subsection 23(2A) of the Civil Aviation Act as a strict liability offence. Subsection 23(2A) provides that it is an offence to consign dangerous goods aboard an aircraft except in accordance with the regulations or with the written permission of the Civil Aviation Safety Authority. The prosecution will not need to prove fault elements for this offence but a defendant will have a defence of mistake of fact as a result of the application of the Criminal Code. The maximum penalty for an offence against subsection 23(2A) is 2 years imprisonment. This is a substantial penalty for a strict liability offence.

At the time of writing, the Senate Standing Committee for the Scrutiny of Bills had not reported on the Transport and Regional Services Legislation Amendment (Application of Criminal Code) Bill 2002. However, the Committee has taken a particular interest in offences identified as strict liability offences by Application of Criminal Code bills.²¹ One of the assurances sought by the Senate Committee has been that no new strict liability offences are created by Application of Criminal Code bills. It does not appear that the amendments to subsection 23(2A) do create a new strict liability offence. When section 23 was amended in 1990, it contained two offence provisions relating to persons who carried or consigned dangerous goods aboard an aircraft.²² The first [subsection 23(2)] was an offence containing the mental elements of 'knowledge' and 'recklessness'. The penalty was 7 years imprisonment. The second offence [subsection 23(2A)] was worded in precisely the same terms except that no reference was made to fault elements and the maximum

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penalty was 2 years imprisonment. From this it can be concluded that the offence against subsection 23(2A) was probably intended to be a strict liability offence.

When the *Transport and Regional Services Legislation Amendment (Application of Criminal Code) Act 2001* was passed it removed the words 'knowingly or recklessly' from subsection 23(2) of the Civil Aviation Act. These words were not appropriate for the scheme of criminal responsibility introduced by the Criminal Code and their removal meant that default fault elements applied to the offence. However, no change was made to subsection 23(2A) to identify it as a strict liability offence. As a result, as section 23 now stands, it contains two identically worded, fault-based offence provisions²³ which carry different penalties.²⁴ The identification of subsection 23(2A) as a strict liability offence removes this anomaly.

Other amendments

Item 76 rewords subsections 20AA(3)-(5) of the Civil Aviation Act which create offences of operating aircraft without the requisite airworthiness certificates or maintenance releases. The amendments clarify both the fault elements and physical elements of the offences.

Item 78 amends paragraph 24(1)(a) of the Civil Aviation Act. Section 24 provides that a person in an aircraft shall not 'interfere with a crew member'. The amendment changes the provision so it provides that a person in an aircraft shall not 'do any act that interferes with a crew member'. The reason for making the amendment is to clarify the physical elements of the offence. The amendments indicate that 'interfering' with a crew member is a physical circumstance of result rather than one of conduct. The fault element of 'recklessness' applies to result whereas the higher threshold fault element, 'intention', applies to conduct. An amendment with a similar purpose and effect is made to subsection 24(2) by **item 79**.

Endnotes

- 1 *Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Act 2001; Communications and the Arts Legislation Amendment (Application of Criminal Code) Act 2001; Defence Legislation Amendment (Application of Criminal Code) Act 2001; Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Act 2001; Employment, Workplace Relations and Small Business Legislation Amendment (Application of Criminal Code) Act 2001; Environment and Heritage Legislation Amendment (Application of Criminal Code) Act 2001; Family and Community Services Legislation Amendment (Application of Criminal Code) Act 2001; Finance and Administration Legislation (Application of Criminal Code) Act 2001; Foreign Affairs and Trade Legislation Amendment (Application of Criminal Code) Act 2001, Health and Aged Care Legislation Amendment (Application of Criminal Code) Act 2001; Industry, Science and*

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Resources Legislation Amendment (Application of Criminal Code) Act 2001; Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001; Migration Legislation Amendment (Application of Criminal Code) Act 2001; Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Act 2001; Reconciliation and Aboriginal and Torres Strait Islander Affairs Legislation Amendment (Application of Criminal Code) Act 2001; Transport and Regional Services Legislation Amendment (Application of Criminal Code) Act 2001; Treasury Legislation Amendment (Application of Criminal Code) Act (No. 1) 2001; Treasury Legislation Amendment (Application of Criminal Code) Act (No. 2) 2001; Treasury Legislation Amendment (Application of Criminal Code) Act (No. 3) 2001; and Veterans' Affairs Legislation Amendment (Application of Criminal Code) Act 2001.

- 2 Explanatory Memorandum, Transport and Regional Services Legislation Amendment (Application of Criminal Code) Bill 2002, p. 1.
- 3 Criminal Code, section 4.1.
- 4 Criminal Code, section 4.3.
- 5 'Knowledge' is not a default fault element but can be applied to the physical elements of circumstance and result—see Criminal Code, section 5.3. 'Negligence' is not a default fault element but can be applied to a physical element of an offence—see Criminal Code, section 5.5.
- 6 Criminal Code, section 5.6. If 'recklessness' is the fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy the fault element—Criminal Code, subsection 5.4(4).
- 7 Criminal Code, subsection 5.1(1).
- 8 Criminal Code, section 5.6.
- 9 This is the 'golden thread' of English criminal law referred to in *Woolmington v. DPP* (1935) AC 462.
- 10 Criminal Code, subsection 13.1(3).
- 11 Criminal Code, subsection 13.3(1).
- 12 Criminal Code, subsection 13.3(6).
- 13 Criminal Code, sections 13.4 and 13.5.
- 14 *He Kaw Teh v. R* (1985) 157 CLR 523.
- 15 Criminal Code, subsection 6.1(1).
- 16 Criminal Code, subsection 6.1(2).
- 17 Criminal Code, paragraphs 6.1(1)(b) and 6.1(2)(b).
- 18 Criminal Code, subsection 6.1(3).
- 19 Matthew Goode, 'The Modern Criminal Code Project', *Australian Law Librarian*, 5(4), December 1997, pp. 267–76 at p. 267.
- 20 Or similar expressions.

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- 21 See, for example, *Alert Digest No.10 of 2001*, 22 August 2001 which commented on the Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Bill 2001.
- 22 Section 23 as amended by the *Civil Aviation Amendment Act 1990* read:
- (2) A person must not knowingly or recklessly carry or consign for carriage any dangerous goods on board an aircraft except:
- (a) in accordance with the regulations, including any conditions subject to which the regulations permit the carriage or consignment of those goods; or
- (b) with the written permission of the Authority and in accordance with any conditions specified in the permission.
- Penalty: Imprisonment for 7 years.
- (2A) A person must not carry or consign for carriage any dangerous goods on board an aircraft, except:
- (a) in accordance with the regulations, including any conditions subject to which the regulations permit the carriage or consignment of those goods; or
- (b) with the written permission of the Authority and in accordance with any conditions specified in the permission.
- Penalty: Imprisonment for 2 years.
- 23 Civil Aviation Act, section 23 as amended by the *Transport and Regional Services Legislation Amendment (Application of Criminal Code) Act 2001* reads:
- (2) A person must not carry or consign for carriage any dangerous goods on board an aircraft except:
- (a) in accordance with the regulations, including any conditions subject to which the regulations permit the carriage or consignment of those goods; or
- (b) with the written permission of CASA and in accordance with any conditions specified in the permission.
- Penalty: Imprisonment for 7 years.
- (2A) A person must not carry or consign for carriage any dangerous goods on board an aircraft, except:
- (a) in accordance with the regulations, including any conditions subject to which the regulations permit the carriage or consignment of those goods; or
- (b) with the written permission of CASA and in accordance with any conditions specified in the permission.
- Penalty: Imprisonment for 2 years.
- 24 Seven years imprisonment in subsection 23(2) and two years imprisonment in subsection 23(2A).

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