2001

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CRIMINAL CODE 2001

EXPLANATORY MEMORANDUM

Circulated by authority of the Attorney-General
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CRIMINAL CODE 2001

Outline

The draft Criminal Code 2001 (the Bill) is the first stage in the progressive reform of the ACT's criminal legislation based on Chapter 2 of the Model Criminal Code developed by the national Model Criminal Code Officers Committee established by the Standing Committee of Attorneys-General. Several other Model Bills have already been adopted by the ACT, including legislation deal with food contamination, sexual servitude and forensic procedures.

The Bill sets out general principles of criminal responsibility which will eventually apply to all Territory offences. The principles are contained in Chapter 2 of the Model Criminal Code which has been endorsed by the Standing Committee of Attorneys-General. The principles will not apply to all offences immediately because there will be a large number of consequential amendments required in relation to many offences contained in legislation administered by various portfolios. This is necessary because existing offences are drafted on the basis of different principles. It has been decided that the principles will first apply to offences created after the Code commences.

The Government has taken a staged approach to the adoption of Chapter 2 of the Criminal Code to spread the work involved in making the consequential amendments. The staged approach should also assist practitioners and courts to adjust to the changed approach and minimise confusion.

The Commonwealth was the first Australian jurisdiction to enact Chapter 2 of the Model Criminal Code. The ACT's Bill is substantially similar to that passed by the Commonwealth in 1995, but in this first stage is less extensive. Consideration will be given to including the parts of Chapter 2 which are omitted from this Bill, at a later stage. The enactment of Chapter 2 will be a valuable aid in interpreting and applying offences created by statute and should resolve concerns which have been expressed from time to time by the Scrutiny of Bill Committee about matters such as the burden of proof.

The Commonwealth prepared a very detailed Explanatory Memorandum for its Bill, which included a discussion of the case law from which the Code provisions were derived. This Explanatory Memorandum reproduces extracts from its Commonwealth counterpart, and the Government is grateful to the Commonwealth Attorney-General's Department for making the Commonwealth's Explanatory Memorandum available for use by the ACT. Extracts from that document have been included for the information of readers and are reproduced in a different type-face (Times New Roman) from the remainder of this Explanatory Memorandum. The extracts have been amended slightly to ensure that the references to particular provisions reflect the numbering in the ACT Bill.

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Financial Impact

The amendments are not expect to have a financial impact in themselves, however, the development of the Code will involve a considerable amount of drafting. This drafting will be funded from existing resources.

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NOTES ON CLAUSES

Chapter 1 Preliminary

Clause 1 Short Title

This section explains that the name of the Act is the *Criminal Code 2001* ('the Code').

Clause 2 Commencement

This clause explains when the Act will commence. That date will be fixed by the Minister in a Gazette notice.

Clause 3 Dictionary

Clause 3 explains that there is a dictionary at the end of the Code, which forms part of the Code.

Chapter 2 General Principles Of Criminal Responsibility

Part 2.1 Purpose And Application

Clause 5 Purpose of ch 2

This clause explains the purpose of Chapter 2, which is to codify the general principles of criminal responsibility. It contains some of the general principles that apply to any offence irrespective of how the offence is created. As explained previously, the remaining principles may be incorporated at a later stage of the development of the Code.

Clause 6 Application

Chapter 2 applies to all Territory offences, but its application will be limited initially to offences created after its commencement. It will apply to all other offences only from 1 January 2006. This date has been chosen to allow sufficient time to make the necessary consequential amendments to bring existing offences into line with the structure created by the Code. In the event that these amendments are completed before then, the regulations can set another date.

Part 2.2 The elements of an offence

Division 2.2.1 General

Clause 7 Elements

Offences consist of physical and fault elements. The Code adopts the usual analytical division of the elements of criminal offences into the *actus reus* (which the

Code terms "physical elements") and the *mens rea* (which the Code terms "fault elements") .

Most offences consist of one or more physical elements each with its accompanying fault element. Subclause 7(2) explains that some offences do not have a fault element for one or any of the physical elements. Strict liability offences are an example of offences without fault elements. Sometimes there will be different fault elements for different physical elements.

Clause 8 Establishing guilt of offences.

In order to find a person guilty of an offence, the existence of the relevant physical elements of the offence and one fault element for each of the physical elements which requires a fault element, must be proved. The provisions dealing with who must prove the elements, and to what standard, are set out in part 2.6 of the Code.

Division 2.2.2 Physical elements

Clause 9 Physical Elements

Clause 9 explains that the physical elements of an offence may be conduct, a circumstance in which conduct occurs, or a result of conduct.

An act, an omission to perform an act or a state of affairs may all be conduct. There is no definition of "act". The reason for this is explained in the Commonwealth Explanatory Memorandum:

The meaning of the term "act" has been problematic both at common law and under the existing State 'Griffith Codes'. There are two difficulties.

The first difficulty is whether acts are comprised only of physical components or whether they also contain a minimal mental component of voluntariness, (that is the will to act). Voluntariness is usually regarded as part of the act and the Code has adopted that analysis. However, this makes it extremely difficult to distinguish between voluntariness and intent in simple offences (called offences of "basic intent"). This issue is dealt with in more detail in relation to voluntariness.

The second, more difficult, problem was how the Code should deal with the often crucial facts and circumstances surrounding conduct which gave that conduct colour and meaning but are not legal elements of the offence. For example, take a case where the defendant pushes a glass into a victims face. Should the "act" be understood narrowly as just a bodily movement (the movement of defendant's hand) or more broadly to include the circumstance that the defendant had a glass in his hand? The problem is that if "act" includes circumstances defining the conduct, then the distinction between "act" and "circumstances" seems to collapse. This would also confuse the relationship between conduct and the fault elements. The fault elements should assume a distinction between acts and circumstances.

In a series of cases: *Vallance* (1961) 108 CLR 56; *Mamote-Kulang* (1964) 111 CLR 62; *Timbu Kolian* (1968) 119 CLR 47; *Kaporonovski* (1973) 133 CLR 209; and *Falconer* (1990) 171 CLR 30 the High Court has considered the meaning of "act" in section 23 of the State Griffith Codes. At first, different meanings were attributed to the term by different members

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of the Court. Thus, in the context of discharge of a firearm wounding a person, the meanings ranged from the physical movement involved in the contraction of the trigger finger to the actual wounding of the victim.

However, by 1973 with the *Kaporonovski* decision, one view had emerged as the broadly accepted view of the Court and this was confirmed in *Falconer*. In that case Mason CJ, Brennan and McHugh JJ at p.38 and 39 said:

> "In our opinion, the true meaning of 'act' in s.23 is that which Kitto J. in *Vallance* attributed to 'act' in s.31(1) of the Tasmanian Code, namely, a bodily action which, either alone or in conjunction with some quality of the action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility ... Adopting the meaning of 'act' expressed by Kitto J. in *Vallance*, the act with which we are concerned in this case is the discharge by Mrs Falconer of the loaded gun; it is neither restricted to the mere contraction of the trigger finger nor does it extend to the fatal wounding of Mr Falconer."

A similar analysis has been applied by the High Court in cases on the common law. Ultimately, it was concluded that the better course is not to define "act" and to rely on the common sense approach of the courts to apply the interpretation in *Falconer*. Although this may not solve all the problems in this difficult area, defining "act" could well introduce other more difficult problems.

Clause 10 Voluntariness

Subclause 10(1) explains that in order for conduct to exist it must be voluntary, and subclause 10(2) explains that conduct is only voluntary if it is willed by the person whose conduct it is.

In further explaining what is voluntary and what is not, the Commonwealth Explanatory Memorandum stated:

Despite the traditional analysis of crimes into *actus reus* and *mens rea*, the notion of what it means to "act" goes beyond mere physical movement. At a minimum there needs to be some operation of the will before a physical movement is described as an act. The physical movements of a person who is asleep, for example, probably should not be regarded as acts at all, and certainly should not be regarded as acts for the purposes of criminal responsibility. This would be inconsistent with the principle of free will which underlies the rules of criminal responsibility. These propositions are embodied in the rule that people are not held responsible for involuntary "acts", that is physical movements which occur without there being any will to perform that act. This situation is usually referred to as automatism.

In cases where the prosecution has to prove intention or recklessness, the practical operation of the voluntariness requirement is slight. This is because it will be easier for the accused simply to argue that he or she lacked the necessary fault element. The degree of the impairment of the accused's consciousness has to be profound before the claim that he or she did not intend to act *at all* will be credible. Further, for many offences where the mental element does not go beyond the immediate circumstances of the physical movement, the difference between voluntariness and intent almost disappears...

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The practical significance of automatism arises in offences where the prosecution does not have to prove intent, knowledge or recklessness. The draft follows the current position in requiring that conduct be a product of the will. In light of *Falconer*, it is now clear that the common law and the Griffith Codes positions are the same on this issue.

[Clause 10(3)] contains examples of conduct which is not voluntary and makes it clear that the list of conduct which is not voluntary is inclusive, though it is hard to imagine any involuntary conduct which would not be covered by the list. The term "reflex" is less appropriate than "unwilled bodily movement"; some reflex acts can be regarded as voluntary (for example, the reflex responses of a skilled sportsperson). Because impaired states of consciousness may vary in degree, [subclause 10(3)(c)] is drafted to leave the jury to decide whether the condition was so profound that it rendered the conduct involuntary...

[Subclause 10(4)] provides that an omission to perform an act is only voluntary if the act omitted was one which the person is capable of performing. Clearly, the physical element of an offence constituted by conduct can include conduct constituted wholly by an omission to act. However, it was decided to accept the common law and Griffith Codes position that omissions attract liability only if the statute creating the offence explicitly says so, or the omission was in breach of a legal duty to act...

It will be necessary for the prosecution to prove that the omission was accompanied by any relevant fault element. The circumstances in which there is a legal duty to act will be set out in the relevant offence provisions.

[Subclause 10(5)] provides that if the offence consists only of a state of affairs, for example being a vagrant, then the state of affairs can only be voluntary if the person is capable of exercising control over it. Offences like "being a drug addict" are to be avoided because that they penalise conduct which is involuntary. [Subclause 10(5)] maintains the general principle of voluntariness for such offences...

Unlike the Commonwealth legislation, the Code does not include provisions dealing with intoxication. Provisions to the same effect as those in the Commonwealth Code were inserted into the *Crimes Act 1900* last year, in new part 11B.

Clause 11 Omissions

This clause explains that an omission to perform an act can only be a physical element of an offence in those cases where the offence expressly or impliedly provides that it is committed by an omission to perform an act which the defendant has a legal duty to perform.

Division 2.2.3 Fault elements

Clause 12 Fault elements

This clause explains that the fault elements for a physical element may be intention, knowledge, recklessness or negligence. Intention is regarded as more blameworthy than negligence, therefore offences with a fault element of intention will have a higher penalty level than a similar offence with a fault element of negligence.

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The four fault levels are not exhaustive of all the possible fault elements that may exist. These are set out in descending order of culpability. A law which creates a particular offence can specify other fault elements for physical elements of that offence. For example, some offences have a fault element of doing, or failing to do, something "dishonestly" or "unreasonably".

The Commonwealth Explanatory Memorandum discussed the key fault elements set out in subclause 12(1):

The Griffith Codes and the common law take different approaches to the structure of the rules of criminal responsibility. However, while the difference should not be minimised, its practical effect is less than is often thought. The essential difference between the two systems is that criminal responsibility under the common law is based on subjective fault elements: what the accused knew, believed or intended at the time of the conduct. This is not so under the basic provisions of the Griffith Codes.

In many offences under the Griffith Codes (eg section 302 of the Queensland Code (murder)), one or more forms of intention are express elements of the offence. In these cases, the difference between the Griffith Codes and the common law as regards intention is less marked. While many of the provisions of the Codes — particularly those related to property — also require a subjective fault element, the basic provisions of the Codes do not. Instead, under those provisions criminal responsibility is negated by accident, or honest and reasonable mistake, or where the event occurred independently of the will of the accused. Under the relevant Code provisions, as interpreted by the courts, a range of grounds of exculpation are thus available to the defence.

The differences between the two approaches can be illustrated by an example based on section 317A of the Qld Code. This section makes it an offence, amongst other things, to carry or place dangerous goods on board an aircraft. No element of intention is stated.

Under common law rules, the onus would be on the prosecution to establish that the defendant knew he or she was placing dangerous goods on board an aircraft (see *He Kaw Teh* (1985) 157 CLR 523) or was aware of at least a likelihood that the goods he or she was placing were dangerous: *Bahri Kural* (1987) 162 CLR 502. In a common law jurisdiction, the case would not be allowed to go to the jury if the Crown failed to prove this element. Under the Griffith Codes, the prosecution case would normally go to the jury without proof of knowledge by the defendant of the nature of the goods. The Crown would only need to disprove involuntariness and accident in terms of section 23, or honest and reasonable but mistaken belief under section 24, if those issues were raised.

The defence of mistake is also a point of difference. At common law, an honest albeit unreasonable mistake can afford a defence to offences involving a mental element. Under the Griffith Codes, regardless of whether the offence involves a mental element, a mistake of fact will only afford a defence where a mistake is both honest and reasonable. Notwithstanding that apparent difference, the experience of juries in common law jurisdictions is that they reject the defence where the mistake is not credible <u>because it is unreasonable</u>. In light of these considerations, it can be seen that while the difference between the Griffith Codes and common law jurisdictions is not as great as it is sometimes portrayed, there are differences which will affect the outcome in some cases. In particular, fewer cases are likely to get to the jury under the common law because generally under the Griffith Codes the prosecution does not have to prove a fault element.

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The Griffith Codes have served their respective jurisdictions well. However, it must be noted that when first enacted in the late nineteenth/early twentieth century, the Griffith Codes were closer to the common law as it then stood. The common law has changed significantly since then. The main change lies in the strengthening of the presumption that intent is part of the definition of all offences and the combination of that change with the spirit of *Woolmington* [1935] AC 462 — that the prosecution bears the burden of proof, and hence the burden of proving intent. This contrasts with the significant group of Griffith Code provisions which do not specify intent but leave it to be raised indirectly if at all by casting an evidential burden on the defendant to raise accident or mistake under sections 23 or 24 before requiring the prosecution to disprove them. The Griffith Codes now stand outside the mainstream of legal development of the late 20th century which has stressed and indeed expanded the requirements for subjective fault. In this regard it was noted that the US Model Penal Code, the English Draft Code, the Canadian Draft Code, the Gibbs Committee's Draft Bill and the NZ Crimes Bill 1989 have all taken the subjective fault element approach.

Therefore it was decided to follow the subjective fault element approach in this Code.

Clause 13 Intention

The purpose of this clause is to explain what is meant by "intention", the most culpable fault element. It provides that a person has intention with respect to conduct if he or she means to engage in that conduct.

The Commonwealth Explanatory Memorandum explained that:

The definition is based on the English Draft Code, but the definition of intention in relation to "conduct" is derived from the Canadian Draft Code.

[Clause 13] provides that a person has intention with respect to a circumstance if he or she believes that it exists or will exist. While the distinction between circumstances and consequences is problematic at the margins, there is a clear difference in most cases.

The approach taken is at variance with the Gibbs Committee's decision to define "intention" to include advertence to probability. There are a number of reasons for this. Conceptually, it confuses intention and recklessness. Moreover, the legislature and the courts are unduly hampered if they want to require proof of "true intention" — in the sense of meaning an event to occur. In relation to recklessness, advertence to probability without the evaluative element of unjustifiability of risk omits a central component of the notion of recklessness which is discussed further in the note on [clause 15].

[Subclause 13(3)] provides that a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events. It was felt the definition of "intention" should include awareness that the result will occur in the ordinary course of events, or is morally or virtually certain to occur. Therefore the definition follows the wording proposed in the English Draft Code. The contrary position is that such an awareness or foresight is at best evidence, perhaps very good evidence, of intention, but does not amount to intention. That is the position taken by the House of Lords in *Moloney* [1985] AC 905; *Hancock* [1986] AC 455. See also *Nedrick* [1986] 1 WLR 1025.

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Clause 14 Knowledge

The effect of this clause is to make it clear that a person has knowledge of a circumstance or result if he or she is aware that it exists or will exist in the ordinary course of events.

The Commonwealth Explanatory Memorandum explained:

Knowledge is defined in relation to circumstances and results, but not in relation to conduct. There were no circumstances that could be thought of in which knowledge of conduct- as opposed to intention in relation to conduct - would be appropriate. It was decided knowledge should not be defined in terms of foresight of probability for similar reasons to those given in the context of intention. In addition to define knowledge in terms of foresight collapses knowledge and belief. One cannot "know" something unless it is so; but one can foresee the likelihood of something that is not so or will not be so.

It was decided that "wilful blindness" could not be considered to be a discrete fault element. Knowledge and recklessness fairly cover the field.

Clause 15 Recklessness

Subclause 15(1) explains that a person is reckless in relation to a circumstance if he or she is aware that there is a substantial risk that the circumstance exists or will exist, and that having regard to the known circumstances, it is unjustifiable to take the risk.

Subclause 15 (2) explains that a person is reckless in relation to a result if he or she is aware that there is a substantial risk that the result will happen, and that having regard to the known circumstances, it is unjustifiable to take the risk.

The Commonwealth Explanatory Memorandum detailed the history of this provision:

This definition substantially follows the US Model Penal Code in using "substantial" and "unjustifiable" as the two key words. Recklessness has been defined in terms of a "substantial" risk rather than in terms of probability or possibility because those terms invite speculation about mathematical chances and ignore the link between the degree of risk and the unjustifiability of running that risk in any given situation.

[Subclause 15(2)] provides that a person is reckless with respect to result if he or she is aware of the substantial risk that the result will occur and having regard to the circumstances known to him/her it is unjustifiable to take the risk. It now seems clear at common law that foresight of probability is restricted to murder and the foresight of possibility is the test for all other offences, including complicity in murder.

[Subclause 15(2)] makes it clear that the unjustifiability of the risk is to be assessed on the facts as the accused believes them to be. It was decided that the modification of the existing recklessness tests by substituting "substantial" for "probability" or "possibility" and adding the concept of unjustifiability set the proper level for recklessness. Distinguishing recklessness and negligence only on the basis of the subjective/objective test would have been too great a departure from the established concepts. The tests in proposed section [15] adequately distinguishes between the culpability of those who knowingly take substantial and

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unjustifiable risks and those who do not see risks but are criminally negligent. Although there may be some cases in which it may be more culpable to be negligent, in the generality of cases recklessness is traditionally and correctly seen as the more culpable state of mind.

[Subclause 15(3)] states that the question of whether a risk is unjustifiable is one of fact. The word "unjustifiable" has been used to express the evaluative element of recklessness rather than "unreasonably" as used by the Gibbs Committee in order to avoid confusion between recklessness and criminal negligence. This leaves the question whether the risk taken is "unjustifiable" for the jury (or the judge or magistrate in cases where there is no jury).

[Subclause 15(4)] provides that if recklessness is a fault element for a physical element of an offence proof of intention, knowledge or recklessness will satisfy that fault element.

Some jurisdictions employ the concept of "reckless indifference" in their criminal legislation. The Code definition should apply equally to that form of words. There are dicta to that effect in the High Court in *Royall* (1991) 65 ALJR 451.

Clause 16 Negligence

A person will be regarded as negligent with respect to a physical element of an offence if his or her conduct:

- falls so far short of the standard of care that a reasonable person would have exercised in the circumstances; and
- involves such a high risk that the physical element exists or will exist

that the conduct merits criminal punishment.

The Commonwealth Explanatory Memorandum explained:

The definition is based closely on *Nydam* [1977] VR 430.

The phrase "merits criminal punishment" is well-accepted and the best available to distinguish civil from criminal negligence, a distinction which has troubled courts since *Andrews* [1937] AC 576. The provision is designed to deal with different levels of criminal negligence for some offences (for example, the different levels of negligence for manslaughter and negligent driving, see *Buttsworth* [1983] 1 NSWLR 658).

The idea that recklessness is a more culpable state of mind than criminal negligence is put to the test when one defines criminal negligence as requiring a judgment that the falling short of community standards be so great as to warrant criminal punishment whereas recklessness is found by a mere decision to take a substantial and unjustifiable risk. This would have been a greater problem had recklessness been defined in terms of foresight of possibility and the taking of an "unreasonable" risk.

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Division 2.2.4 Cases where fault elements are not required.

Clause 17 Strict Liability

ACT legislation creates a large number of regulatory offences which can be categorised as offences of strict liability. In the future, offences will make it clear on their face whether or not they are strict liability offences.

Clause 17 therefore provides that if a law that creates an offence provides that the offence is one of strict liability, there are no fault elements for any of the physical elements of the offence. This means that conduct alone is sufficient to make the defendant culpable.

Subclause 17(2) also envisages that there will be offences where the strict liability applies to a particular physical element of the offence. There will be no fault element for this physical element.

Under the Code, all strict liability offences will have a specific defence of mistake of fact. This defence is not available for those offences without a fault element that are classified as offences of "absolute liability", which are discussed below.

Clause 17(3) makes it clear that other defences may still be available for use in strict liability offences.

Clause 18 Absolute Liability

This clause deals with offences of absolute liability. If an offence states that it is one of absolute liability, there are no fault elements and the defence of mistake of fact is not available. Absolute liability may also apply to a particular physical element of an offence, and in such cases there is no fault element for that physical element and the defence of mistake of fact is not available.

The absence of a defence of mistake of fact accentuates the difference between strict liability and absolute liability offences. Other defences, for example that the person's conduct was not voluntary, would still be available.

Part 2.3 Circumstances where there is no criminal responsibility

Division 2.3.3 Circumstances involving mistake or ignorance.

Clause 19 Mistake of fact (fault elements other than negligence)

This clause explains that a person is not criminally responsible for an offence with a physical element for which there is a fault element other than negligence in certain circumstances. If person is under a mistaken belief, or is ignorant of relevant facts, when the physical element occurs, the existence of that mistaken belief or ignorance negates any fault element applying to that physical element. Consistent with the approach based on subjective fault elements, the Code provides that mistaken belief may negative intention, knowledge and recklessness. This codifies the common law position. The defence of mistake or ignorance of fact is not appropriate in negligence offences.

Subclause 19(2) explains that the reasonableness of the mistake is a factor for the "tribunal of fact" (the jury in the case of trial by jury, the court in other cases) to consider in deciding whether the mistaken belief was actually held. In other words, if the mistake or ignorance seems very unreasonable, the jury or the court may form the view that the defendant was not genuinely mistaken or ignorant.

As the Commonwealth Explanatory Memorandum explained:

This is consistent with the common law position (*Morgan* [1976] AC 182) but different from the approach taken under section 24 of the Griffith Codes which requires that the mistake be reasonable. [Subclause 19(1)] differs slightly from the Griffith Codes in that there is no explicit reference to the mistaken belief being "honest"; the inclusion of this word would be redundant.

Under [subclause 19(2)] the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances. Although, strictly speaking, evidence of a mistake is only one sort of evidence which may cast doubt on the presence of a fault element, for the sake of clarity, the Code states the matter explicitly.

Clause 20 Mistake of fact (strict liability)

This clause explains when a person is not criminally liable for a strict liability offence, or a relevant physical element to which strict liability applies, because of a mistake of fact. In brief, the defence will apply if, when the physical element occurs, the person considers whether or not facts exist and is under a mistaken but reasonable belief about those facts, and if the person had been correct the physical element would not have constituted an offence.

The Commonwealth Explanatory Memorandum explained:

This adopts the so-called *Proudman v Dayman* (1941) 67 CLR 536 defence of reasonable mistake of fact. Consideration was given to allowing ignorance as well as mistake. It was argued that there was little moral distinction between mistake and ignorance.. Ultimately it was decided ignorance should not be included because this would make strict liability more like negligence, thus eroding the higher standard of compliance set by strict responsibility. The proposed section is also consistent with *McKenzie v Coles* [1986] WAR 224.

[Subclause 20(2)] provides that a person may be regarded as having considered whether or not facts exist if he or she had considered, on a previous occasion, whether they existed in the circumstances surrounding that occasion and he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same or substantially the same as on the other occasion. This section was included to codify the rule in *Mayer v Marchant* (1973) 5 SASR 567 regarding a belief that a state of affairs is continuing.

Consideration was given to the situation where the accused acts contrary to law but under a mistaken belief which negatives a fault element of the offence charged but believes that he or she is committing another criminal offence. An example is a case in which the accused actually imports heroin believing that he or she is illegally importing dutiable watches.

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The accused must be acquitted of the offence "actually committed"(in the example, knowingly importing heroin) because he or she lacked the relevant knowledge. Nor can the accused be convicted for illegally importing the watches because he or she has not done so. The Code requires proof of the physical element of the offence (importing watches) and that is absent. However, the accused should be liable to be convicted of attempting to commit the offence he or she believed was being committed...

The offence attempted may be of greater, lesser or of equal seriousness compared to the one charged. However, the attempt conviction should not be made upon the same indictment or in the same trial unless the case was conducted from the beginning on the basis of a possible alternative conviction. This is consistent with the operation of section 24 of the Queensland and WA Codes, but is a departure from the common law. There is no specific reference to the onus of proof applicable to these provisions. They are governed by the general provisions on the burden of proof in [Part 2.6] of this chapter. These apply the principles set out in *He Kaw Teh* (1985) 157 CLR 523. Hence, once evidence fit to go to the jury has been raised, the prosecution bears the onus of disproving the mistake.

Clause 21 Mistake or ignorance of statute law

A person can be criminally responsible for an offence created by statute or regulation even if he or she is mistaken, or ignorant of, the existence or content of an offence or its scope.

Subclause 21(1) does not apply if the statute or regulation creating the offence so provides or the ignorance or mistake negates a fault element that applies to a physical element of the offence.

Clause 22 Claim of right

This clause explains that a person is not criminally responsible for an offence, in certain cases. If the offence has a physical element involving property, and when that element occurs, the person is under a mistaken belief about a proprietary or possessory right which would negate a fault element of the offence, the person is not criminally liable.

The Commonwealth Explanatory Memorandum explained:

It was decided that the "defence" of claim of right should appear in this part of the Code. "Claim of right" normally negatives a fault element, usually, but not necessarily, one of dishonesty, and the Code should reflect that approach.

Under [subclause 22(2)] a person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.

However, [subclause 22(3)] precludes claim of right in relation to the use of force. Thus in an armed robbery where a defendant had a claim of right in relation to the goods taken, the defendant could still be convicted of the armed assault.

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Part 2.6 Proof Of Criminal Responsibility

Clause 23 Legal burden of proof - prosecution

This provision places on the prosecution the legal burden of proving every element of an offence relevant to the guilt of the person charged. The prosecution also bears the legal burden of disproving any matter in relation to which the defendant has discharged any evidential burden of proof which has been imposed on the defendant.

The "legal burden" means the burden of proving the existence of the matter to which the burden relates.

The Commonwealth Explanatory Memorandum stated:

One of the most respectfully cited statements in the law texts is the description in *Woolmington v Director of Public Prosecutions* (1935) AC 462 by Lord Sankey of the duty of the prosecution to prove the prisoner's guilt as "the golden thread always to be seen throughout the web of the English Criminal Law". Lord Sankey stated that the principle was subject to the special rules as to sanity and "subject also to any statutory exceptions".

Although it may seem unusual to include an apparently procedural issue in a chapter of the Code which deals with the general principles of responsibility, it is the combination of positive fault elements with the location of the burden of proving those elements on the prosecution that gives force to *Woolmington.*

Clause 24 Standard of proof - prosecution

This clause explains the standard of proof which applies to a legal burden of proof on the prosecution. The general (default) rule is that a legal burden on the prosecution must be discharged beyond reasonable doubt, but legislation may apply a different standard to a particular offence.

Clause 25 Evidential burden of proof - defence

This clause explains that the general rule is that where a burden of proof is cast on the defendant, it is an evidential burden only. A defendant who wishes to deny criminal responsibility by relying on a provision of part 2.3 bears an evidential burden in relation to that matter. The general rule can be displaced, as provided by clause 26, which is explained below.

The clause makes it clear that a defendant who wishes to rely on an exception, exemption, excuse, justification or qualification to an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification, or justification need not accompany the description of the offence in order to apply to that offence.

A defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or the court.

The question whether an evidential burden has been discharged is one of law. The "evidential burden" in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

The Commonwealth Explanatory Memorandum stated:

These provisions accord with basic principles accepted in all jurisdictions. They have been reiterated by the High Court in *He Kaw Teh* (1984-5) 157 CLR 203.

There have been differences of opinion as to what onus is transferred to an accused. For example, the defence of honest and reasonable mistake under the Griffith Codes only requires the accused to put the matter in issue, and the onus is on the prosecution to negative it: *Loveday v Ayre and Ayre; Ex parte Ayre and Ayre* (1955) St R Qd 264. At common law, in offences not involving a mental element, it had been thought that the onus on the accused was persuasive: *Maher v Musson* (1934) 52 CLR 100, *Proudman v Dayman* (1041) 67 CLR at 541, until the High Court in *He Kaw Teh* v *The Queen* (1984-5) 157 CLR 523 aligned the common law position with that of the Code jurisdictions — (see pp. 535, 558-9, 574, 582 and 591-4). It would also appear that there is greater scope at common law to remove a case from the jury because the question of whether an evidential onus is discharged is one of law, whereas in Griffith Codes jurisdictions even slight evidence would render the question one of fact for the jury.

Clause 26 Legal burden of proof - defence

This clause makes it clear that a burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly specifies that the burden of proof in relation to the matter in question is a legal burden, or requires the defendant to prove the matter, or creates a presumption that the matter exists unless the contrary is proved.

This issue has been raised frequently by the Scrutiny of Bill Committee. The enactment of clauses 25 and 26 should put the matter beyond doubt.

Clause 27 Standard of proof - defence

This clause explains the standard of proof for a legal burden of proof borne by a defendant. The defendant's legal burden must be discharged on the balance of probabilities.

Clause 28 Use of averments

This clause explains that a law which allows the prosecution to make an averment is taken not to allow the prosecution to aver any fault element of an offence, nor does it allow the prosecution to make an averment for offences that are directly punishable by imprisonment.

The Commonwealth Explanatory Memorandum explained:

Averment provisions in some legislation permit the prosecutor to allege matters of fact in an information or complaint. The averment amounts to prima facie evidence of the matters

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averred. The Griffith Codes did not contain averment provisions, although the Queensland Code now does (eg s.638) and the WA Code contains deeming provisions. In the words of Dixon J in *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507-508, an averment provision:

> "...does not place upon the accused the onus of disproving the fact upon which his guilt depends but, while leaving the prosecutor the onus, initial and final, of establishing the ingredients of the offence beyond reasonable doubt, provides, in effect, that the allegations of the prosecutor shall be sufficient in law to discharge that onus."

The policy assumption underlying the Code is that averment provisions are generally inappropriate. The Code provides that the prosecution must not aver the intention of the defendant or other fault elements expressed by the provision creating the offence nor may it use averments in cases where the offence is directly punishable by imprisonment.

Chapter 3 Miscellaneous

Clause 29 Regulation making power

The purpose of this provision is to permit regulations to be made for the Code. An example of such regulations would be a regulation made under clause 6 to set a date on which the Code is to apply to existing offences.

Clause 30 Consequential amendments - Schedule

The Schedule contains minor amendments amending section 33G of the *Interpretation Act 1967* and omitting section 59 of the *Magistrates Court Act 1930*. These amendments deal with matters that will now be covered by the Code.

Dictionary

The "dictionary" has a small number of words which are mainly defined in the body of the Code. As the Code develops, the dictionary will expand and become more useful.

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