

2005

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CRIMINAL CODE HARMONISATION BILL 2005

EXPLANATORY STATEMENT

Circulated with the authority of
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Overview

The Criminal Code Harmonisation Bill 2005 (the Bill) contains amendments to legislation in the ACT statute book to bring pre 1 January 2003 offences and related provisions into line with the general principles of criminal responsibility contained in Chapter 2 of the *Criminal Code 2002* (the Code). It is the first of a series of bills that will see the eventual harmonisation of all ACT legislation with the Code.

The Criminal Code

The progressive reform and codification of the criminal law of the ACT commenced in September 2001 with the passage of the *Criminal Code 2001*. The reforms are primarily based on the Model Criminal Code (the MCC), developed by the national Model Criminal Code Officers Committee (MCCOC) and established by the Standing Committee of Attorneys-General. All governments committed themselves to the development of a uniform criminal code in 1991 and through the Standing Committee of Attorneys-General established MCCOC for that purpose. MCCOC is made up of Territory, State and Commonwealth criminal law advisers and since 1991 embarked on an extensive consultative program that saw the development of nine chapters of the MCC for implementation by all Australian jurisdictions.

Since September 2001 the Code has progressively grown in volume and to date it consists of 5 chapters, which deal with a broad and diverse range of matters; namely chapters 1 and 2, which deal with preliminary matters and, most importantly, with the general principles of criminal responsibility; chapter 3, which contains the Criminal Code offences on theft, fraud, bribery and related matters; chapter 4, which deals with property offences and computer crime; and the most recent addition, chapter 6, which contains the ACT's serious drug offences. Chapter 7, which deals with offences against the administration of justice, is being introduced into the Legislative Assembly in these sittings.

Criminal Code Harmonisation

For an offence to operate effectively under the Code regime it must be structured in a way that conforms to the general principles contained in the Code. For this reason, the Code was not applied to all offences on 1 January 2003 until the offences were reviewed. Harmonisation is essentially the process of reviewing and revising ACT offence provisions to ensure that they are in a form consistent with the principles of the Code.

The Bill is the result of the harmonisation process undertaken by the ACT Government and is the first of a series of bills to progressively harmonise pre January 2003 offences in the statute book. The Bill contains amendments to 32 Acts and 6 regulations.

The following notes explain the amendments made by the Bill, focusing on key concepts and issues rather than providing a description of each amendment in the schedule.

The harmonised offences

The general approach in harmonising the offences has been to reformulate offence provisions in line with chapter 2, to state more clearly the physical and fault elements of an offence. A physical element of an offence may be conduct, a result of conduct, or a circumstance in which result or conduct occurs and form the basic description of an

offence. A fault element for a particular physical element may be intention, knowledge, recklessness or negligence. The Code provides for an implied fault element where an offence does not specify a fault element in relation to a particular physical element or at all.

The provisions contained in the Bill have been reformulated to state in clear Code language what constitutes the physical and fault element of the offence (except in cases of strict liability – see below). Essentially the offences are to the same effect but in Code language. Associated criminal law provisions, such as exceptions and defences have also been reformulated.

Offences replaced by Chapter 7

The Criminal Code (Administration of Justice) Amendment Bill 2005 (Chapter 7 Bill) will include a number of summary offences that have been formulated as generic offences to replace “administration of justice” type offences that are commonly repeated throughout the statute book. The generic offences have generally been formulated in terms that are similar to the common offences that they are replacing. They include offences of failing to attend legal proceedings to give evidence (clause 720), failing to produce documents and other things (clause 721), failing to take the oath (clause 722), failing to answer questions (clause 723), a summary offence of giving false or misleading evidence (clause 724) and obstructing legal proceedings (clause 725). The Chapter 7 Bill will repeal offences in the Acts and regulations included in this Bill that are covered by the offences in chapter 7, including the new generic offences.

Application of strict liability

Stating that an offence is strict or absolute liability is required by the Code. If no statement is included a fault element will be imported into the offence (see section 22 of the Code). The requirement to state strict or absolute liability is one of the areas where the advantage of the Code is most clearly seen. Prior to the Code there was no general requirement to state strict or absolute liability in relation to an offence. As a result, whether an offence was intended to be strict or absolute liability often had to be interpreted by the courts.

During harmonisation the general approach is to continue to apply strict liability to existing strict liability offences provided that its application is appropriate. The Bill does not propose to create any new strict liability offences, only to state strict liability where a number of factors, including the nature of the offence, the language employed and the level of penalty infers a legislative intent for strict liability. Strict liability is usually employed where it is necessary to ensure the integrity of a regulatory scheme, such as those relating to public health and safety, the environment and the protection of the revenue. The mistake of fact defence expressly applies to strict liability as does the other defences in part 2.3 of the Code.

Absolute liability has not been applied to offences or physical elements in this Bill.

Exceptions and Defences

Consistent with removing offences from the statute book where an offence duplicates a Code offence, defences that duplicate the defences in part 2.3 of the Code are also being removed. Where it is necessary to include a specific exception or defence, the exceptions and defences have been reformulated in the Bill to clarify their effect. If an exception is taken as an element of the offence not only will the prosecution have the

burden of proof in relation to the exception but the relevant fault element will also apply. An exception places only an evidential burden on the defendant to adduce or point to evidence that suggests a reasonable possibility the exception applies. Exceptions and defences have generally been included within the section that creates the offence. For example, the *Fisheries Act 2000* has a general exception at section 83 which has been incorporated into the offences of the reformulated sections 75, 80 and 81.

The defences in the Bill have also been reviewed and assessed as to whether they impose an evidential or legal burden of proof on the defendant. The Bill largely imposes only an evidential burden except in section 12A of the *Animal Welfare Act 1992*; sections 12A and 20, *Business Names Act 1963*; section 58, *Community Title Act 2001* and section 24, *Lakes Act 1976*. Placing the burden on the defendant engages the presumption of innocence, protected by section 22(1) of the *Human Rights Act 2004* (HRA), but it is considered imposing the burden on the defendant is permissible in each case as a reasonable limitation under section 28 of the HRA. For example, section 20 of the *Business Names Act 1963* provides that it is for the defendant to prove they took reasonable steps to comply with the requirements for the use and display of their business name. The matter to be proven furthers the regulatory objective that a business name is used and displayed in compliance with the section. Also, the reasonable steps taken by the defendant will be matters that are peculiarly within the knowledge of the defendant. Other indications that it is a reasonable limitation upon the right are the low maximum penalty of \$500 (5 penalty units) and no imprisonment.

In addition, amendments have been made in the Bill rationalising the use of the reasonable excuse defence. What constitutes a reasonable excuse largely depends on the purpose of the offence provision as well as the circumstances of the particular case. This introduces a high level of uncertainty into the application of the defence. In many cases the defence is unnecessary because the excuses it is intended to cover are now covered by the defences contained in part 2.3 of the Code. Information was sought from ACT Government agencies about the excuses that might have been intended to be covered by existing reasonable excuse provisions. In the majority of cases the advice was that the general defences in part 2.3 covered the excuses. However, reasonable excuse has been retained for the offences in the *Bail Act 1992*, the *Residential Tenancies Act 1997* and for notice to produce offences (see for example, section 49(3), *Fisheries Act 2000*) because it is impracticable to attempt to specify every possible justifiable excuse that may apply.

The privilege against self-incrimination

Some provisions amended by the Bill require the production of information and documents. The majority of these provisions do not affect the privilege against self-incrimination preserved by section 170 of the *Legislation Act 2001*. A note has been included to alert readers to section 170 and also to section 171 which concerns client legal privilege. There are, though, two existing sections that do not preserve the privilege against self-incrimination and so in accordance with current criminal law policy, a ‘use derivative use immunity’ has been included at section 13 of the *Business Names Act 1963* and section 43 of the *First Home Owners Grant Act 2000*. These sections provide that a person is not excused from giving evidence on self-incrimination grounds however immunity from prosecution is allowed for any evidence that is directly or indirectly obtained because of the person’s compliance with a direction to give evidence etc. The immunity does not apply to the evidence if the person is prosecuted for an offence, usually in relation to the falsity or misleading nature of the information.

Harmonisation of common provisions

The statute book contains many provisions relating to identity cards issued to inspectors and authorised persons, the powers of inspectors and authorised persons to require name and address from persons and secrecy provisions to prohibit the disclosure of protected information. These provisions contain offences to ensure compliance, for instance, to return an identity card; to provide one's name and address; and not to divulge information obtained except in specified circumstances. These common provisions have been standardised using a common form of words. Standardised provisions avoid unintended technical distinctions and the appearance of incoherence associated with having numerous slightly different provisions to similar effect across ACT law. It is proposed to apply these standard provisions to all legislation where they appear.

Clauses

Clause 1 Name of Act

This clause sets out the name of the proposed Act as the *Criminal Code Harmonisation Act 2005*.

Clause 2 Commencement

This clause provides that the Act will commence 28 days after its notification on the Legislation Register. The delay is to allow the preparation of the republished Acts and regulations.

Clause 3 Legislation amended – sch 1

This clause states that the legislation mentioned in schedule 1 is amended by this Act.