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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CRIMINAL CODE 2002

EXPLANATORY MEMORANDUM

Circulated by authority
of the Attorney-General
Mr Jon Stanhope MLA

CRIMINAL CODE 2002

Outline

The Criminal Code 2002 (the Bill) is the second stage in the progressive reform of the ACT's criminal legislation. The process commenced in September last year when the Legislative Assembly passed the *Criminal Code 2001* (the 2001 Code). The 2001 Code sets out some but not all of the general principles of criminal responsibility in Chapter 2 of the Model Criminal Code developed by the national Model Criminal Code Officers Committee ("MCCOC"), established by the Standing Committee of Attorneys-General. The Bill comprises Chapters 1, 2 and 4 of the Model Criminal Code. Chapter 1 is intended to eventually contain the mechanical provisions of the Code. It will not come into force until January 2006 and when it does there will be no common law offences in the ACT. Chapter 2 incorporates the provisions of the 2001 Code together with the remaining general principles of criminal responsibility recommended in Chapter 2 of the Model Criminal Code. Chapter 4 will enact modern property damage, computer and sabotage offences recommended in the MCCOC report, *Damage and Computer Offences*, issued in February 2001. To avoid the renumbering difficulties that would arise if the 2001 Code were amended section by section, the Bill repeals the 2001 Code and replaces it with a new Code (the Code).

Chapter 2 of the Bill sets out general principles of criminal responsibility, which will eventually apply to all ACT 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. These amendments are 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.

This Government has continued the staged approach to the adoption of Chapter 2 of the Model Criminal Code initiated by the previous Government, to spread the work involved in making the necessary 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 and the Bill is substantially similar to that passed by the Commonwealth in 1995. The enactment of Chapter 2 will be a valuable aid in interpreting and applying offences created by statute and should resolve concerns that have been expressed from time to time by the Scrutiny of Bills 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 the Commonwealth Explanatory Memorandum included in this brief have been amended slightly to ensure that the references to particular provisions reflect the numbering in the ACT Bill.

Chapter 4 of the Bill substantially reproduces the Model Criminal Code property damage, computer and sabotage offences, which in turn draw significantly on the United Kingdom *Criminal Damage Act 1971* and *Computer Misuse Act 1990*, the Council of Europe *Draft*

Convention on Cybercrime and the United Nations General Assembly *Convention for the Suppression of Terrorist Bombing*. The Chapter 4 provisions comprise a complementary scheme of legislation, with interlocking parts. The computer offences extend familiar concepts of criminal damage or destruction to conduct which impairs computer data or electronic communication between computers and the sabotage offences are in turn directed at persons who cause or threaten to cause damage to a public facility by committing a property damage offence or by causing an unauthorised computer function. Because of the overlap that can sometimes occur, the criminal damage and computer offences in clauses 103, 116 and 117 allow, in appropriate cases, for an alternative verdict to be returned for any one of those offences if one of them is charged.

Part 4.1 of Chapter 4 contains the property damage offences. In addition to the basic offence of damaging property (clause 103), the Part includes offences of threat to cause property damage (clause 107) threat to cause property damage to induce fear of death or injury (clause 106), possession of a thing to damage property (clause 108), arson (clause 104), threat to damage property by arson (subclause 104(2)) and causing bushfires (clause 105). In addition to the other defences that may apply the Part also includes specific defences for some offences where the perpetrator has a claim of right or interest in the property (clause 110) or there is consent (to the property being damaged), believed consent or what may loosely be described as "constructive" consent (clause 109).

Part 4.2 of Chapter 4 deals with the misuse of computers and damage to computer data and provides for offences of unauthorised access, modification or impairment of data to commit a serious offence (clause 115), unauthorised modification of data to impair access to or reliability of data (clause 116), unauthorised impairment of electronic communications (clause 117), possession of data with intent to commit a serious computer offence (clause 118), producing, supplying or obtaining data intending a serious computer offence (clause 119), unauthorised access to or modification of restricted data (clause 120) and unauthorised impairment of data held in a computer disk, credit card, or other device used to store data by electronic means (clause 121). Part 4.3 contains the offences of sabotage (clause 123) and threatened sabotage (clause 124).

Financial Impact

The Bill is not expected to have a financial impact in itself, however, the development of the Code will involve a considerable amount of drafting. This drafting will be funded from existing resources.

NOTES ON CLAUSES

Chapter 1 Preliminary

Clause 1 Name of Act

This clause explains that the name of the Act is the *Criminal Code 2002* ('the Code').

Clause 2 Commencement

This clause explains that the Code will commence on 1 January 2003. Not all of the provisions of the Code will apply immediately to all offences and this is explained in more detail below.

Clause 3 Dictionary

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

Clause 4 Notes

This provision explains that the *Notes* that appear in the Code are explanatory only and do not form part of the Code. They are no more than a guide to readers and are not part of the actual legislation that constitutes the Code.

Clause 5 Codification

Once the Code comes fully into force there will be no common law offences in the ACT. Accordingly this clause provides that the only offences will be those created by or under the authority of the Code or some other ACT legislation, including subordinate legislation. This provision lies at the heart of the codification project, which is to make the criminal law more accessible and more easily understood.

This provision will not come into effect until the "default application date" (currently 1 January 2006 - see clause 10) to allow time to properly examine the full range of existing common law offences and convert those to be retained in a statutory form in the Code. The reason for delaying the application of the Code with respect to existing offences is explained in more detail in the commentary to clause 8 below.

Chapter 2 General Principles of Criminal Responsibility

Part 2.1 Purpose and application

Clause 6 Purpose of ch 2

This clause explains the purpose of Chapter 2, which is to codify the general principles of criminal responsibility. It contains all of the general principles that apply to any ACT offence irrespective of how the offence is created.

Clause 7 Application of ch 2

In accordance with the purpose expressed in clause 6, this clause provides that the general principles of criminal responsibility in Chapter 2 apply to all ACT offences, whether they are contained in the Code or in any other ACT legislation, including subordinate legislation. However, this provision needs to be read in conjunction with clause 8 which, with some exceptions, will delay the application of the Code with respect to offences created before 1 January 2003.

Clause 8 Delayed application of ch 2 to certain offences

Clauses 8, 9 and 10 should be read together. They explain the stages at which the various provisions of the Code will come into force with respect to existing and new offences. The effect of these provisions is that first, except for Division 2.3.2 (Lack of capacity – mental impairment) and paragraph 66(2)(d), all the provisions of Chapter 2 of the Code will apply immediately to all ACT offences created on or after 1 January 2003. Secondly, the "immediately applied provisions" of Chapter 2 (see the commentary on clause 10) will apply to all ACT offences, whether they were created before of after 1 January 2003. Finally, subclauses 8(1) and (2) provide, in effect, that the remainder of Chapter 2 will not apply to offences created before 1 January 2003 until the "default application date" (currently 1 January 2006) unless the relevant Act or subordinate legislation expressly applies Chapter 2 to the offence or expressly or otherwise manifestly displaces the delayed application provisions of this clause.

It is necessary to delay the application of Chapter 2 of the Code to allow sufficient time to properly examine all the existing offences in the ACT statute book and at common law and to make all consequential amendments to bring them into line with the general principles of Chapter 2 of the Code. This process is referred to in this explanatory memorandum as the "harmonisation process".

Subclause 8(3) makes it clear that subordinate legislation under an Act can apply the Code to offences created by the subordinate legislation.

Subclause 8(4) explains that all the provisions in Chapter 2 can be considered in determining the application of the "immediately applied provisions" to an offence.

Once the Code is fully in force the delayed application provisions of clause 8 will no longer be necessary. Accordingly subclause 8(5) provides that clause 8 will expire on the default application date.

Clause 9 Delayed application of div 2.3.2

This clause explains that Division 2.3.2 (Lack of capacity – mental impairment) and paragraph 66(2)(d) will not apply to any offence (pre or post 1 January 2003) until the "default application date" (currently 1 January 2006). Again, the purpose of the delayed application is to ensure that careful and proper consideration is given to the amendments that will need to be made to relevant existing legislation to bring it into line so that it conforms with the general principles in the Code. This will include appropriate amendments to the *Mental Health (Treatment and Care) Act 1994*, the *Children and Young People Act 1999* and Part 13 of the *Crimes Act 1900* ("the Crimes Act").

This clause will also expire on the default application date.

Clause 10 Definitions – default application date and immediately applied provisions

This clause explains that 1 January 2006 is the "default application date" unless the regulations prescribe another date. In the event that the harmonisation process is completed before 1 January 2006, the regulations can set another date for applying the Code to the pre January 2003 offences and the legislation relating to the mentally impaired.

This clause also lists the provisions of Chapter 2 that will apply immediately to all offences. The "immediately applied provisions", are subclause 15(5) (concerning evidence of self induced intoxication in determining whether conduct is voluntary); clauses 24 and 25 (concerning the criminal responsibility of children under the age of 14); clauses 29 to 33 (concerning the criminal responsibility of persons who are intoxicated); clauses 43 to 47 (which provide for the ancillary offences of "attempt", "complicity and common purpose", "innocent agency" "incitement" and "conspiracy"); Part 2.6 (proof of criminal responsibility) and Part 2.7 (except for paragraph 66(2)(d)) which concerns the extraterritorial application of ACT offences. The commentary below deals in more detail with each of the immediately applied provisions.

This clause will also expire on the default application date.

Part 2.2 The elements of an offence

Division 2.2.1 General

Clause 11 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 11(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 12 Establishing guilt of offences

This clause states the presumption of innocence in summary form. That is, a person is innocent of an offence until the elements of the offence are proved. In order to find a person guilty of an offence, it is necessary to prove the existence of the relevant physical elements of the offence and the relevant fault element or fault elements (if any) required for each physical element of the offence. If the law that creates the offence requires the existence of one of two or more fault elements for a physical element of the offence, it will be sufficient if only one of the alternative fault elements exists for that physical element. In rare cases where more than one fault element is required for a physical element of the offence all the fault elements for that physical element must exist. However, it is important to note subclause 20(4) in this regard. It provides that if "recklessness" is a fault elment for a physical element of an offence, proof of "intention", "knowledege" or recklessness will satisfy that fault element.

The provisions dealing with who must prove the elements of an offence and to what standard, are set out in Part 2.6 of the Code.

Division 2.2.2 Physical elements

Clause 13 Definitions – conduct and engage in conduct

This clause defines the terms "conduct" and "engage in conduct", which are used throughout the Act. "Conduct" can be an act, an omission to perform an act or a state of affairs. Similarly, "engage in conduct" means to do an act or omit to do an act.

Clause 14 Physical elements

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

There is no definition of the term "act". The reason for this omission 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.
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> 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.
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> 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 the 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.
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> 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 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.
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> 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:
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> > "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 15 Voluntariness

Subclause 15(1) explains that in order for conduct to constitute a physical element of an offence it must be voluntary, and subclause 15(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.
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> 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…
>
> 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.
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> [Subclause 15(2)] 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, [example 3 in subclause 15(2)] is drafted to leave the jury to decide whether the condition was so profound that it rendered the conduct involuntary…

The Commonwealth Explanatory Memorandum also explained the remaining provision of this clause as follows:

> [Subclause 15(3)] 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 15(4)] 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 15(4)] maintains the general principle of voluntariness for such offences…
>
> [Subclause 15(5)] provides that evidence of self-induced intoxication cannot be considered in determining whether the conduct was voluntary. It was decided in the Standing Committee of Attorneys-General that there should not be a defence of "gross intoxication" (where that intoxication was self-induced), that is the defendant was so grossly intoxicated that his or her act was not "voluntary" but instead it should follow the decision in *Majewski* [1977] AC 480. *Majewski* does allow evidence of intoxication to be used to deny intention or recklessness in offences of "specific intent." This approach is consistent with that adopted in the main common law jurisdictions (England, Canada and the USA; and the Griffith Code States (Queensland, Western Australia, Tasmania and the Northern Territory). It will replace the common law in [other Australian jurisdictions] where 'gross intoxication' may be taken into account in relation to all offences as a result of the High Court's decision in *O'Connor'* (1980) 146 CLR 64. Ministers recognised that to legislate to enable intoxication to be used as an excuse for otherwise criminal conduct in relation to simple offences of "basic intent" (such as assault), when alcohol and drug abuse are such a significant social problem, would be unacceptable.

The commentary below on clauses 30 and 31 explain what constitutes self induced intoxication and offences of "basic" and "specific" intent.

Clause 16 Omissions

This clause explains that an omission to perform an act can only be a physical element of an offence if the offence provision makes it a physical element or impliedly provides that the offence is committed by an omission to perform an act that the defendant has a legal duty to perform.

Division 2.2.3 Fault elements

Clause 17 Fault elements

This clause explains that the fault elements for a physical element may be intention, knowledge, recklessness or negligence. These are set out in descending order of culpability. Intention is regarded as more blameworthy than negligence and therefore offences with a fault element of intention will have higher penalties than similar offences with a fault element of negligence.

The four fault elements referred to in subclause 17(1) are the usual or "standard" fault elements of an offence but they are not an exhaustive list of the fault elements that can apply. Accordingly, subclause 17(2) makes it clear that a law that creates an offence can specify other fault elements for physical elements of the 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 17(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.
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> 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 because it is unreasonable. 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.

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 18 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.

[Subclause 18(3)] 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 20].
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> [Subclause 18(2)] 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.

Clause 19 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 20 Recklessness

Subclause 20(1) 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.

Subclause 20(2) 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.

The Commonwealth Explanatory Memorandum detailed the history of these provisions:

> This definition [in subclause 20(2)] 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.
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> [Subclause 20(1)] 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.
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> [Subclauses 20(1) and (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 [20] adequately distinguishes between the culpability of those who knowingly take substantial and 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 20(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 20(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 21 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.

Clause 22 Offences that do not provide fault elements

Subclause 22(1) provides that if the law that creates the offence does not specify a fault element for a physical element of the offence that consists only of conduct, intention is the fault element for that physical element.

Subclause 22(2) provides that if the law that creates the offence does not specify a fault element for a physical element of an offence that consists of a circumstance or a result, recklessness is the fault element for the physical element.

The legislation must be specific if intention or recklessness is not the desired fault element for a physical element of the offence.

Division 2.2.4 Cases where fault elements are not required.

Clause 23 Strict Liability

In common with most Australian jurisdictions, ACT legislation contains a large number of strict liability offences (that is, no fault elements apply) that are not clearly identified as such. This is often the cause of considerable confusion and a waste of valuable court time. The aim of clause 23 is to ensure that in future, all ACT offences will make it clear on their face whether or not they are strict liability offences.

Subclause 23 (1) 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. Essentially this means that conduct alone is sufficient to make the defendant culpable.

Subclause 23 (2) also envisages that there will be offences where strict liability applies to a particular physical element of the offence. There will be no fault element for this physical element, though fault elements could apply to another physical element of the offence.

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 23(3) makes it clear that other defences may still be available for use in strict liability offences.

Clause 24 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

Divisions 2.3.1 to 2.3.3 set out the principles of criminal responsibility relating to children and young persons; mentally impaired persons and persons intoxicated at the time of their alleged conduct. Since the Code provisions on children and intoxication are essentially a restatement of the current law in the ACT they will take effect immediately from the time the Code comes into force on 1 January 2003. On the other hand, careful consideration will need to be given to the amendments required to the current law arising from the mental impairment provisions of the Code and therefore, for the present at least, those provisions will not come into force until the default application date.

Division 2.3.1 Lack of capacity – children

Clause 25 Children under 10

This clause provides that a child under the age of 10 lacks criminal responsibility and therefore cannot be convicted of a crime. This is currently the law in the ACT (section 71 of the *Children and Young People Act 1999*) and is consistent with the position in all jurisdictions in Australia, except Tasmania.

Clause 26 Children 10 and over but under 14

This provision also repeats the law as it currently stands in the ACT and the rest of Australia. It provides that a child aged 10 or more but under 14 is not criminally responsible unless the child knows that his or her conduct is wrong. To establish criminal responsibility in these case the onus will be on the prosecution to prove beyond a reasonable doubt that the child knew that his or her conduct was wrong. Since this is essentially a question of fact, it will ultimately lie on the jury to determine on the evidence whether the child in fact knew that the conduct was wrong.

Division 2.3.2 Lack of Capacity – mental impairment

Clause 27 Definition – mental impairment

This is an important provision that sets out definitions of “mental impairment” and “mental illness” for the purposes of the Code and more particularly, for the purposes of clauses 28 and 29, which encompass the principles on the criminal responsibility of mentally impaired persons. Mental impairment is defined to include senility, intellectual disability, mental illness (which is also defined), brain damage and severe personality disorder. The definition is not exhaustive and therefore other forms of mental impairment may give rise to a lack of criminal responsibility.

The Commonwealth Explanatory Memorandum expanded on this and on the definition of “mental illness”, as follows:

> [The definition of “mental impairment”] is an inclusory definition because the *McNaghten* term "disease of the mind" has caused a great deal of difficulty for the courts without any satisfactory conclusion. The balance of authority favours the view that ultimately the question of whether a condition is a "disease of the mind" is for the jury.
>
> This definition includes severe personality disorders within the definition of "mental impairment", thus allowing that condition to form the basis of a mental impairment defence.
>
> The issues in relation to criminal responsibility are moral rather than medical. Ultimately, it was decided that the issue of personality disorder was too complex to be resolved by a blanket exclusion and that a jury should be allowed to consider whether, for example, a defendant's severe personality disorder prevented him or her from knowing the wrongness of the conduct. This approach accords with the broad definition of "disease of the mind" under the *McNaghten* Rules. The term “severe” was included to emphasise the degree of the disorder.
>
> [Clause 27] defines mental illness as an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli, (though such a condition may be evidence of mental illness if it involves some abnormality and is prone to recur).

The Code confines a defendant who argues that a mental impairment caused him or her to act involuntarily or without the necessary fault element to the mental impairment defence [subclause 29(1)]. Therefore, in some cases - for example, when involuntariness is in issue, it will be crucial to determine whether the involuntariness arose from a mental impairment. Difficulties have arisen in deciding whether conditions such as epilepsy, diabetes and dissociation amount to a mental illness. Ultimately, the test settled on by the majority of the High Court in *Falconer* asks the jury to determine whether the defendant's mind was healthy or unhealthy, (1990-91) 171 CLR 30 at 53-4. Although that test will leave a quite fundamental question to the jury in a limited number of cases, it was considered that there is no way to specify the issue more closely. Therefore the proposed subsection codifies the *Falconer* test.

Clause 28 Mental impairment and criminal responsibility

This clause provides that a person is not criminally responsible for an offence if, at the time of the relevant conduct, the person was suffering from a mental impairment that had the effect that (a) the person did not know the nature and quality of the conduct; or (b) that the person did not know that the conduct was wrong; or (c) that the person was unable to control the conduct. A mentally impaired person is not criminally responsible if any one of these effects is present at the time of his or her conduct.

The Commonwealth Explanatory Memorandum explained:

The provision is based on the *McNaghten* test. The *McNaghten* test proceeds in two stages. First, it must be established that the defendant has a "disease of the mind". Then it must be shown that the "disease of the mind" caused the defendant not to "know" the nature and quality of his or her act, or that it was wrong.

The first arm of the test in [subclause 28(1)] follows *McNaghten* closely. The second arm of the test also follows *McNaghten* but incorporates the famous formulation, often used by trial courts to this day, formulated by Mr Justice Dixon in *Porter* (1933) 55 CLR 182. Although some concern was expressed about codifying the case law in this way, the consultation process revealed that the formulation is widely used in trial courts and, in view of this, it was concluded that it should be reflected in the Code. (As pointed out in *Willgoss* (1960) 105 CLR 295, 301, a direction in these terms would not be appropriate in the case of a person who *knows* his or her conduct is wrong but has no *feeling* that it is wrong.)

This formulation moves away from the existing Griffith Code concepts based on *capacity* in favour of tests phrased in terms of what the defendant actually knew.

[Paragraph 28(1)(c)] adds a third head to the *McNaghten* rules: inability to control conduct. This is available under the Griffith Codes but not at common law; see *Brown* [1960] AC 432. The Murray Report in Western Australia (1983) and the O'Regan Report in Queensland (1991) recommended its retention. On the other hand, the Gibbs Committee and the VLRC, *Mental Malfunction* did not recommend it.

[Subclause 28(2)] provides that the reference to rightness and wrongness in the second arm of the test is to the sense of right and wrong held by reasonable people. This follows the VLRC, *Mental Malfunction* at para 55. It is also in accord with a comprehensive review of authority and principle in *Chaulk* (1991) 62 CCC (3d) 193.

[Subclause 28(3)] provides that the question of whether a person is suffering from a mental impairment is one of fact; thus it must be decided by a jury.

Under [Subclause 28(4)] there is a presumption that a person is not suffering from a mental impairment. This can be displaced by either the prosecution or defence on the balance of probabilities.

In all jurisdictions, if the defendant wishes to rely on the insanity defence, he or she bears the burden of proving the defence on the balance of probabilities.

The rule has been the subject of considerable discussion and criticism. (See, for example, the case of *Chaulk* (1991) 62 CCC (3d) 193 and *Youssef* (1990) 50 A Crim R 1). The Draft follows the recommendations of VLRC Mental Malfunction paras 67-70, which pointed out the severe difficulties involved in changing the standard of proof in this area. It is contrary to the decision of the Western

Australian Court of Criminal Appeal in *Donovan* [1990] WAR 112 but consistent with the views of the WA Law Reform Commission, Criminal Process and Persons Suffering from Mental Disorder at p.21. The criticism- that the reverse onus of proof can remove the onus on the prosecution to prove the fault element - is dealt with below in the note concerning [subclauses 28(7) & 29(1)] - 'priority of defences.' In the common law jurisdictions, it now appears the prosecution can raise insanity (*Bratty* [1963] AC 386, *Ayoub* (1984) 10 Crim LR 312.) The position in the Griffith Code States varies.

[Subclause 28(6)] only allows the prosecution to rely on this section if the court gives leave. While the prosecution may raise the mental impairment defence in the common law jurisdictions, under the Queensland Code, the prosecution may only raise the insanity defence once evidence of a "disease of the mind or natural mental infirmity" has been admitted. The Gibbs Committee also favoured a leave requirement (para 9.42) and the Criminal Law Officers Committee came to the same conclusion in view of the consequences of the mental impairment verdict.

[Subclauses 28(7) & 29(1)] provide for priority of defences. Thus [subclause 28(7)] provides that the tribunal of fact (in the case of jury trials, the jury) must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment.

Clause 29 Mental impairment and other defences

Subclause 29(1) explains that a person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but can rely on mental impairment to deny criminal responsibility. The Commonwealth Explanatory Memorandum explained:

Where the accused lacks a fault element required by the crime alleged, or lacked (due to "mental impairment" as defined) "voluntariness", the accused is confined to the mental impairment defence… [A] verdict of acquittal on the basis of involuntariness under [subclause 15(1)] is precluded by [subclause 28(7)] if the jury is satisfied that the involuntariness flowed from a mental impairment. This is consistent with the VLRC, *Mental Malfunction* at para 61; *Bratty* [1963] AC 386; and s.36 of the English Draft Code.

[Subclause 29(2)] provides that if the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by mental impairment, the delusion cannot otherwise be relied upon as a defence. Such defendants should be confined to the mental impairment defence [subclause 29(1)].

Division 2.3.3 Intoxication

Clause 30 Intoxication - interpretation

This is a definition provision that applies to the Code generally but more particularly to clauses 31 to 34, which set out the relevant principles that apply in cases where an alleged offender is intoxicated at the time of the relevant conduct.

The term "fault element of basic intent" is pivotal to these provisions and is defined as a fault element of intention for a physical element that consists only of conduct.

The Commonwealth Explanatory Memorandum expanded on this as follows:

A fault element of intention with respect to a circumstance or with respect to a [result] is not a fault element of basic intent. *DPP -v- Majewski* [1977] AC 480 refers to 'basic intent offences' but, because an offence may have a number of fault elements [the definition of "fault element of basic intent"] is drafted in terms of basic intent fault elements rather than basic intent offences. This is the drafting approach used throughout chapter 2.

> Conceptually [the definition of "fault element of basic intent"] is tied to the definitions of the fault elements in [clauses 17 to 21]. [This definition] applies to a fault element which requires proof of intent (not knowledge or recklessness) and is basic intent in the sense that it only applies to intent to engage in conduct (not intent with respect to circumstances or consequences). This implements the law in Majewski. Thus a defendant would not be able to use voluntary intoxication to deny intent to act or omit, but could use it to deny intent, knowledge or recklessness with respect to circumstances or consequences.

A person's intoxication may be caused by alcohol, a drug or any other substance and will be taken to be self-induced unless it is brought about involuntarily or by fraud or sudden or extraordinary emergency, accident, reasonable mistake, duress or force. It will also be regarded as not self–induced if a person takes a drug in accordance with the directions of a medical practitioner (in the case of a prescription drug) or the recommendations of the manufacturer (in the case of non prescription drugs) and suffers an adverse or abnormal reaction resulting in intoxication. This is intended to ensure that persons are not held criminally liable for the adverse or abnormal reactions they may suffer to a drug taken properly and for the purpose for which it was intended. But these exceptions will not apply if, at the time the person takes the drug, he or she knew or had reason to believe that using the drug would significantly impair his or her judgment or control.

Clause 31 Intoxication – offences involving basic intent

This clause provides that evidence of intoxication that is self-induced cannot be considered in determining whether the defendant intended to carry out the conduct (or intended to omit carrying out the conduct) that constituted the offence. This provision lies at the heart of the Code regime on intoxication and ensures that persons cannot rely on self-induced intoxication to escape criminal liability by claiming that they lacked the "basic intent" to commit the crime. But as indicated above, this provision does not prevent the court from considering evidence of self-induced intoxication in relation to a fault element of intention with regard to a result or a circumstance. For example, in the case of an assault, evidence of self-induced intoxication cannot be used to show that the defendant lacked the "basic" intent to carry out the act of punching the victim but such evidence can be used to show that the defendant lacked the intention to bring about the result of inflicting grievous bodily harm on the victim.

The Commonwealth Explanatory Memorandum described the remaining provisions in clause 31, as follows:

> [Subclause 31(2)] provides that the section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental. This may apply to the drunk who stumbles into another person lying in the street as opposed to the drunk who kicks the other person.
>
> [Subclause 31(3)] provides that the section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
>
> Under [Subclause 31(4)] a person may be regarded as having considered whether or not facts exist if he or she had considered, on a previous occasion, whether those facts existed in 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 those surrounding the previous occasion. This is consistent with [clause 36] (Mistake of fact - strict liability) and provides a fair way of dealing with mistake, but at the same time remain[s] consistent with the principles in relation to intoxication.

Clause 32 Intoxication – negligence as fault element

This clause sets out special rules for intoxication where "negligence' is a fault element of an offence. The Commonwealth Explanatory Memorandum described the provisions as follows:

> [Subclause 32(1)] provides that if negligence is a fault element for a particular physical element of an offence then in order to determine whether the fault element existed in relation to an intoxicated person, regard must be had to the standard of a reasonable person who is not intoxicated. Intoxication has no relevance to offences based on negligence, strict or absolute responsibility, unless the issue of voluntariness is raised, because they do not involve any subjective fault element. For example, the fact that the defendant was intoxicated is not relevant to the reasonable person test in negligence; the reasonable person is not intoxicated.
>
> [Subclause 32(2)] provides that if intoxication is not self-induced regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned. However, the restrictions on intoxication do not apply to people who become intoxicated involuntarily, for example, by fraud [paragraph 30(2)(b)]. Because the Code allows a consideration of evidence of intoxication to all fault element offences other than those of basic intent and negligence, there is no need to provide for involuntary intoxication in those cases. However, basic intent and negligence offences raise a special problem. It would be unfair to hold a person who had become involuntarily intoxicated to the standard of a reasonable person. In such cases, the defendant should be assessed by reference to the standard of a reasonable person who was intoxicated to the same extent as the defendant. Intoxication can vary in degree. An accused who is only moderately intoxicated as a result of being deceived by some third party will still be liable if his or her conduct falls greatly short of the standard of care that a reasonable person, intoxicated to the same extent, would have exercised As in the rest of the Code, it is possible expressly to exclude the operation of these rules on intoxication for specific offences. This will be considered, offence by offence, in codifying the substantive offences.

Clause 33 Intoxication – relevance to defences

Subclause 33(1) provides that if any part of a defence is based on actual knowledge or belief, evidence of intoxication can be considered in determining whether that knowledge or belief existed. However, this does not apply to an offence where each physical element has a fault element of basic intent and any part of a defence is based on actual knowledge or belief. Subclause 33(2) provides that in such cases evidence of self-induced intoxication cannot be considered in determining whether the relevant knowledge or belief existed.

If any part of a defence is based on reasonable belief, one of two rules will apply in determining whether the reasonable belief exists, depending on whether the defendant's intoxication is self induced or not. If it is self-induced subclause 33(3) provides that the standard of a reasonable person who is not intoxicated will apply in determining whether the reasonable belief exists. If the intoxication is not self-induced subclause 33(4) provides that the standard of a reasonable person intoxicated to the same extent as the defendant will apply.

Clause 34 Involuntary Intoxication

This clause provides that a person is not criminally responsible for an offence if his or her conduct is the result of intoxication that is not self-induced. The Commonwealth Explanatory Memorandum explained:

> In *Kingston (1993)* WLR 676 a defence was established akin to duress that the defendant only formed the relevant fault element as a result of involuntary intoxication, and this forms part of the law surrounding

Majewski. The case dealt with a situation where the defendant knew what he was doing when he committed the offence but had been influenced in his conduct as a result of someone else unknown to him spiking his drink.

Division 2.3.4 Mistake and ignorance.

Clause 35 Mistake or ignorance of fact - fault elements other than negligence

This clause explains that in certain circumstances a person is not criminally responsible for an offence with a physical element for which there is a fault element other than negligence. If a 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 35(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 35(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 35(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 36 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 36(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.
>
> 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 37 Mistake or ignorance of law creating offence

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 37(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 (subclause (2)).

Clause 38 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 38(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 38(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.

Division 2.3.5 External factors

This Division provides for a number of general defences that will apply to Territory offences.

Clause 39 Intervening conduct or event

The defence of intervening conduct or event only applies to strict and absolute liability offences and to the strict and absolute liability component of fault element offences. A person is not criminally responsible for such offences if the physical element to which strict or absolute liability applies is brought about by someone else or by a non-human act or event over which the person has no control and could not reasonably be expected to have guarded against.

The Commonwealth Explanatory Memorandum explained:

> The common law contains a defence of "external intervention" for strict and absolute responsibility offences. The defence is set out by Bray CJ in *Mayer v Marchant* (1973) 5 SASR 567:
>
> > "It is a defence to any criminal charge to show that the forbidden conduct occurred as the result of an act of a stranger, or as the result of non-human activity, over which the defendant had no control and against which he or she could not reasonably have been expected to guard."
>
> Although this looks like it might be a principle of causation, it operates in practice as a defence based on lack of fault to crimes of strict or absolute liability where a defendant can be proved to have committed the physical element of a strict liability offence. Despite the fact, for example, that the defendant's truck exceeded the prescribed weight limit, it did so because a third person had secretly loaded it with additional items and the defendant could not reasonably have been expected to guard against this. The defence is not necessary for offences containing fault elements because the defendant will lack the fault element or, in the case of negligence, argue that she or he had taken reasonable care.
>
> The WA and Queensland Codes have a similar provision in section 23 concerning accident. Both rules operate in a similar way to provide a defence to the defendant based on lack of fault in offences where no fault element is required. Because the Griffith Codes do not take the fault element approach and have a large number of offences lacking fault elements, the section 23 defence is more frequently used than in the common law jurisdictions. Under the Code, which does take the fault element approach, it is only necessary to provide this defence for strict and absolute liability offences.

Clause 40 Duress

This clause provides that a person is not criminally responsible for an offence that he or she carries out under duress. A person will be taken to be acting (or omitting to act) under duress only if he or she reasonably believes (a) that a threat has been made and will be carried out unless an offence is committed; (b) that there is no reasonable way that the threat can be rendered ineffective and (c) that the conduct is a reasonable response to the threat.

The Commonwealth Explanatory Memorandum explained the provisions of this clause as follows:

> It was decided that the defence should not be further limited in artificial ways. Where free will is overborne by duress, the nature of the offence is not relevant. The reasoning of the House of Lords in *Howe* [1987] 1 All ER 771 and the preceding decisions that duress should not be available in murder cases was not followed. The approach taken differs from section 31 of the WA Code which limits the applicability of the defence to certain defined kinds of serious offences. However, the approach taken accords with that taken by the Murray Report for WA (I, 48 and 160) and the VLRC, *Homicide* at pp. 100-6, but not with the O'Regan Report for Queensland at 37.

Finally, [subclause 40(3)] provides that the section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out. This limitation reflects the last substantive paragraph of section 31 of the WA Code. [Subclause 40(3)] includes the term "associating" to establish a temporal link between the association and the loss of the duress defence.

The defence should not be limited to defined kinds of threats (such as threats to inflict death or grievous bodily harm). It is usual to say that the defence is not available unless the accused or another has been threatened by death or grievous bodily harm. This appears in the case-law and also appears in the provisions of the Griffith Codes and the Gibbs recommendations (although the latter would also include threats of "serious sexual assault"). Yeo, "Private Defences, Duress and Necessity" (1991) 15 *Crim LJ* 139 at 143, argues that there should be no such limitation as a matter of logic-

"Once a person is under the influence of a threat, whatever he or she does depends on what the threatener demands. The crime demanded might be trivial or serious but it has no necessary connection with the type of threat confronting the accused. Policy reasons would, however, insist on a requirement that the accused's response was reasonably appropriate to the threat."

The objective test should provide a sufficient safeguard against abuse of the defence.

Clause 41 Sudden or extraordinary emergency

This clause provides that a person is not criminally responsible for an offence where his or her conduct is a response to circumstances of sudden or extraordinary emergency. The defence applies to fault element offences as well as strict and absolute liability offences. The Commonwealth Explanatory Memorandum explained the provisions of this clause as follows:

The usual term for this defence at common law is "necessity", but it was felt section 25 of the Griffith Codes is more appropriate, and that the defence should be available only in "a sudden or extraordinary emergency". In his notes to the Draft Griffith Code, Sir Samuel Griffith stated:

> "This section gives effect to the principle that no man is expected (for the purposes of the criminal law at all events) to be wiser and better than all mankind. It is conceived that it is a rule of the common law, as it undoubtedly is a rule upon which any jury would desire to act. It may, perhaps, be said that it sums up nearly all the common law rules as to excuses for an act which is prima facie criminal."

[Subsection 41(2)] provides the test for sudden or extraordinary emergency. It provides that the section applies if and only if the person carrying out the conduct reasonably believes that circumstances of sudden or extraordinary emergency exist and committing the offence is the only reasonable way to deal with the emergency and the conduct is a reasonable response to the emergency.

It recognises that an accused person is excused from committing what would otherwise be a criminal act in very limited circumstances. Like duress, the necessity of the occasion and the response to it are both subject to an objective test. The approach taken is an amalgam of the principles underlying the common law of necessity and the Griffith Codes equivalent. The proposed section has been redrafted so that the words "sudden or extraordinary emergency" are not defined in terms of "an urgent situation of imminent peril" but are left to the jury as ordinary words in the English language.

Clause 42 Self-defence

The provisions of this clause simplify the law on self-defence. The general principle is set out in subclause 42(1), which provides that a person is not criminally responsible for an offence if his or her conduct is carried out in self-defence.

The elements of the defence are essentially set out in subclause 42(2) which provides that it is only self-defence if the person's conduct is reasonable in the circumstances he or she perceives and the person believes the conduct is necessary for any one or more of the following reasons:

- to defend himself, herself or another;
- to prevent or terminate the unlawful imprisonment of himself, herself or another;
- to protect property from unlawful appropriation, destruction, damage or interference;
- to prevent any criminal trespass to any land or premises; and
- to remove from any land or premises a person who is committing criminal trespass.

The Commonwealth Explanatory Memorandum explained the provisions of clause 42 as follows:

> The test as to necessity is subjective but the test as to proportion is objective. It requires the response of the accused to be objectively proportionate to the situation which the accused subjectively believed she or he faced (the words "as perceived by him or her" were added to make this clear). This approach is consistent with section 45 of the Tasmanian Code.
>
> [Subclause 42(3)] restricts the defence to ensure it does not apply to force that involves the intentional infliction of death or really serious injury for the purpose of protecting property rights.
>
> It was decided not to define "really serious injury". These words are the equivalent to "grievous bodily harm", a term the courts been reluctant to define. The word "intentional" was added to ensure cases of accidental harm were not covered. This approach is consistent with the South Australian *Criminal Law Consolidation (Self-Defence) Amendment Act 1991* and the Western Australian *Criminal Law Amendment Act 1991*.
>
> The extension of the right to use force to situations where the purpose is to terminate the unlawful imprisonment of the accused or another is rarely invoked at common law and consequently the law is in an unsatisfactory state. The leading case *Rowe v Hawkins* (1858) 1 F&F 91, 175 ER 640 is draconian. [Subclause 42(2)] extends the current provisions in the Griffith Codes, although it may be argued that subsection 31(3) of the WA Code may be broad enough to cover the situation if the expression "unlawful violence" is wide enough to encompass the concept of unlawful imprisonment.
>
> In [paragraph 42(3)(b)] a further restriction is placed on the right to use force in self-defence, so that it is not available where the accused was responding to force which was in fact lawful and which the accused knew to be lawful. However the proposed section does allow a person to use self-defence against a deadly attack by a child or an insane person, even though the attacker is not criminally responsible [subclause 42(4)]. This provision is based on a similar recommendation made by the VLRC, *Homicide*, para 226.
>
> Although not of great practical relevance to Federal offences, revision of the law of self-defence is very important in State and Territory legislation to which the same principles will apply. In this connection the approach taken in [clause 42] should be noted. The decisions in the cases of *Runjanic* and *Kontinnen* [1991] 114 on the issue of battered women's syndrome have an important bearing on the defence of self-defence. Those cases recognised that expert evidence could be admitted to show that women who have suffered "habitual domestic violence are typically affected psychologically to the extent that their reactions and responses differ from those which might be expected from those which might be expected by persons who lack the advantage of an acquaintance with the results of those studies." The emphasis on subjectivity in the tests for self-defence in [clause 42] - compared to objective tests based on the perception of the reasonable person - will allow expert evidence on battered women's syndrome to be used to make the *actual* perceptions and responses of the woman defendant to be placed before the jury. The test of the necessity to use force in [clause 42] is fully subjective. The test of the proportionality of the response is objective but it is measured according to the defendant's perception of the situation she confronts. The approach of drawing the rules relating to defences in a way that would fairly accommodate the responses of women and men was preferred to an approach which would make such syndromes free-standing defences.

Clause 43 Lawful authority

This clause provides that a person is not criminally responsible for an offence if his or her conduct is justified or excused under law. The usual example is a police officer who uses physical force to effect an arrest. Although the officer's conduct may technically amount to an

assault, an offence is not committed because of his or her power (at common law and under sections 212 and 221 of the Crimes Act) to arrest and use reasonable force in circumstances where it is necessary.

Part 2.4 Extensions of criminal responsibility

This Part sets out the ancillary and inchoate offences that will apply in the ACT. These provisions will apply as soon as the Code comes into force on 1 January 2003 and the corresponding provisions in the Crimes Act will be repealed.

Clause 44 Attempt

Currently the law of attempt in the ACT is essentially defined by the principles laid down on that subject by the common law. This provision will codify the law of attempt in the ACT.

Subclause 44(1) provides that a person who attempts to commit an offence commits the offence of attempt. That is, it is a separate and distinct crime from the offence the person attempted to commit. However, in accordance with usual principles the crime of attempt is punishable as if the attempted offence had been committed (subclause 44(9)). This accords with the law as it currently stands in the ACT (section 182 of the Crimes Act).

Not all conduct directed to the commission of an offence will amount to a crime of attempt. As subclause 44(2) explains, the conduct must be more than merely preparatory to the commission of an offence. The question whether conduct is merely preparatory is a question of fact to be determined by the tribunal of fact, which in most cases will be a jury.

The Commonwealth Explanatory Memorandum explained the provisions of this clause, as follows:

> The test for determining when a course of conduct has progressed far enough to warrant liability for attempt has been controversial in both Griffith Codes and common law jurisdictions. Tests such as "unequivocality", "substantial act", "acts of perpetration rather than preparation" and "the last act rule" have been debated in the cases and literature. The "more than merely preparatory" test catches cases where the defendant has the necessary fault element and has taken a step beyond mere preparation towards the perpetration of the offence.
>
> There will be cases where the distinction between preparation and perpetration will be difficult. The best solution to this problem is to leave it to the tribunal of fact. ...
>
> [Subclause 44(5)] provides that the fault elements for attempt are intention or knowledge. The starting point for attempt is that the accused must act intentionally or knowingly with respect to each physical element of the offence attempted.
>
> It was decided that it should be possible to commit an attempt by an omission, so long as the circumstances are such that the general rules of the Code permits the omission to be treated as criminal. See the English Law Commission, Attempt (para 13.46) and the Gibbs Committee recommendations (para 21.37-31.38, s.7C(5)) to the same effect. The use of the definition of "conduct" to achieve this result follows the Victorian provision (Crimes Act, s.321N) and the course advocated in consultations conducted by the Criminal Law Officers Committee. It follows that it should be possible, in the appropriate circumstances, for a person to be guilty of attempting to commit an offence, the conduct element of which is constituted by an omission. It is possible to attempt strict and absolute liability offences but intent or knowledge will have to be shown. This codifies the existing position, see *Mohan* [1976] QB 1.

Subclause 44(6) adds an important qualification to subclause 44(5). It provides that any "special liability provision" that applies to the primary offence also applies to the attempt to commit the primary offence. A "special liability provision" is defined in the Dictionary as either (a) a provision that applies absolute liability to one or more (but not all) the physical elements of an offence; or (b) a provision that provides that in prosecuting an offence it is not necessary to prove that the defendant knew or believed a particular thing.

The effect of subclause 44(6) is that to establish an attempt it will not be necessary to prove that the defendant had intention or knowledge with respect to those elements of the primary offence to which a special liability provision applies. Thus if the primary offence states that it is an offence to assault a police officer but that to establish that offence it is not necessary to prove that the defendant knew that the person was a police officer, then it is not necessary to prove that knowledge to establish the crime of attempt to assault a police officer.

The Commonwealth Explanatory Memorandum explained the remaining provisions of this clause as follows:

> [Subclause 44(4)] provides that a person may be found guilty even if committing the offence attempted is impossible or the person actually committed the offence attempted. This follows the Gibbs Committee recommendations. At pages 339-340 of their July 1990 report the Gibbs Committee referred to problems which arose in *Britten v Alpogut* (1986) 23 A Crim. R. 254 where the defendant was charged with attempting to import cannabis into Australia. The evidence established that the defendant believed that he was importing such a substance, but the actual substance found in the concealed bottom of a suitcase collected by the defendant was not cannabis - it was a substance which was not prohibited. The Gibbs Committee noted that if the English case of *Smith* [1975] AC 476 were to be followed in Australia, on no possible analysis of the facts could the defendant, under the existing law, be convicted for the attempted importation charge. Yet the defendant had done all in his power to commit the offence of importing prohibited drugs and was frustrated in this purpose only by the fact that the packages did not contain the drug. It follows that if defendants such as Alpogut were not punished, they might repeat the attempt and next time succeed. Therefore the Code makes it clear impossibility will not be a bar in this way. As a matter of consistency, the same rule also applies to conspiracy and incitement [see clauses 48 and 47 respectively].
>
> [Subclause 44(8)] provides that a person who is found guilty of attempting to commit an offence cannot be subsequently charged for the completed offence. This is called "the doctrine of merger" which says that where the same facts constitute both a felony and a misdemeanour, the misdemeanour "merges" into the felony and hence, for all intents and purposes, disappears....
>
> [Subclause 44(6)] provides that any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence. The word "defences" was added to take account of *Beckwith* (1976) 135 CLR 569.
>
> [Subclause 44(10)] provides that there can be no offence of attempt in relation to [clauses 45] (complicity and common purpose) or [48] (conspiracy).

Clause 45 Complicity and Common Purpose

This clause provides that a person who aids, abets, counsels or procures the commission of an offence by someone else is taken to have committed the offence and is punishable as if the person in fact committed the offence (subclauses 45(1) and (7)). The Code retains the traditional formula of "aid, abet, counsel or procure" because despite some difficulties with those terms, the meaning of the words is well understood.

For this offence to apply the other person must in fact commit an offence and the conduct of the defendant must in fact have aided, abetted, counselled or procured the offence by the other person (subclauses 45(2)(a) and (3)). Further, the defendant must have intended either (i) that his or her conduct would aid, etc the commission of any offence of the type the other person committed; or (ii) intended that his or her conduct would aid an offence and was reckless as to the possibility that the other person would commit the offence he or she in fact committed. Recklessness in this context amounts to an awareness of a substantial and unjustifiable risk that another offence beyond the one agreed would be committed. Thus a person who aids another to commit an armed robbery will also be guilty of murder if the other person commits murder and the first person had foreseen a substantial risk of that occurring, and it was unjustifiable to take that risk (subclause 45(2)).

Subclause 45(6) explains that a person may be found guilty of this offence even if the other person has not been prosecuted or has not been found guilty of the primary offence.

As in the case of the offence of attempt, subclause 45(4) provides that any "special liability provision" that applies to an offence will also apply to the offence of aiding, abetting, counselling or procuring the commission of the offence.

Subclause 45(5) is an important qualification to this offence in that it provides that a person cannot be found guilty of aiding etc the commission of an offence if, before the offence was committed, the person terminated his or her involvement and took all reasonable steps to prevent the offence.

The Commonwealth Explanatory Memorandum explained:

> The defendant is required to take "all reasonable steps to prevent the commission of the offence". What will count as taking all reasonable steps will vary according to the case but examples might be discouraging the principal offender, alerting the proposed victim, withdrawing goods necessary for committing the crime (eg a getaway car) and/or giving a timely warning to an appropriate law enforcement authority. The models for this provision are s.2.06(6)(c) of the US Model Penal Code and section 8(2) of the Western Australian Code. A similar defence exists at common law, see *Croft* [1944] KB 195; *Beccara and Cooper* (1975) 62 Cr App R 212.

Clause 46 Innocent agency

This clause provides that a person is taken to commit an offence if he or she has all the fault elements that apply to the physical elements of an offence and procures another person to engage in the conduct that makes up the conduct part of the physical elements of that offence. The person is punishable for this offence as if he or she had committed the offence.

The Commonwealth Explanatory Memorandum explained:

> The doctrine of "innocent agency" is well known to the criminal law. Proposed section 11.3 draws on section 2.06(2)(a) of the US Model Penal Code and section 7 of the WA Code. It is not necessary that the defendant cause the innocent agent to commit all the elements of the offence. So, for example, if the defendant assaults a victim while an innocent agent steals from the victim, then the defendant will be guilty of robbery. The defendant has committed the assault element personally and has committed the theft element via an innocent agent. The bracketed words "whether or not together with any conduct engaged in by the procurer" are added to make this clear.

> The word “innocent” is not included to avoid the necessity for the prosecution to prove that the agent was innocent. The section now overlaps with complicity. This makes no difference to the defendant’s liability since, if the agent was not innocent, the defendant would be guilty by reason of complicity.

Clause 47 Incitement

This clause provides that a person who urges another to commit an offence commits the offence of incitement.

The Commonwealth Explanatory Memorandum explained:

> The word “urge” was chosen carefully. The Gibbs Committee Draft Bill, s.7B(1) preferred "incitement" rather than spelling out "counsels, commands or advises". There are differing verbs employed in this area with little consideration of what the differences, if any, may be. The US Model Penal Code uses "encourages or requests" (s.5.02(1)). Section 7A of the Commonwealth *Crimes Act* currently uses "incites to, urges, aids or encourages". The English Draft Code (s.47(1)) and the Victorian *Crimes Act* (s.321G(1)), like the Gibbs proposal, use "incite" only. The Canadian Draft Code collapses complicity and incitement, but refers to "advises, encourages, urges, incites". From concern that some courts have interpreted “incites” as only requiring causing rather than advocating the offence the word “urges” is preferred as avoiding ambiguity.

The fault element that must be proved to establish the offence of incitement is intention. That is, the person must intend the incited offence to be committed (subclause 47(2)). However, as in the case of the offence of attempt, subclause 47(3) provides that any “special liability provision” that applies to an offence will also apply to the incitement offence (see the commentary on subclause 44(6)). Similarly, subclause 47(5) provides that any defences, procedures, limitations or qualifying provisions apply also to the offence of incitement in respect of that offence.

Consistent with the position taken in relation to attempt, subclause 47(4) provides that a person may be found guilty of incitement even if the intended offence is impossible.

For associated offences, the Commonwealth Explanatory Memorandum explained:

> [Subclause 47(6)] states that it should not be possible to be guilty of inciting to incite, inciting to conspire, or inciting to attempt. There has to be some limit on preliminary offences. This follows the position taken by the Gibbs Committee (paras 18.41-18.46) rather than that taken by the English Law Commission. The Gibbs Committee did not think it necessary to include a provision to achieve the abolition of incitement to incite in its Bill (s.7B) but, given the intention to codify, it would appear to be necessary.
>
> However, there will be no bar to a charge of attempting to incite. The charge exists at common law (see *Crichton* [1915] SASR 1 and the English authority cited in Meehan, *The Law of Criminal Attempt* (1984) at 201, note 392). This is primarily designed to deal with the situation in which a communication amounting to an incitement does not, for some reason, reach its intended recipient. This is consistent with s.5.01(3) US Model Penal Code, and the English Law Commission, *Attempt,* para 2.121.

The maximum penalties that apply to the offence of incitement are set out in subclause 47(1). The Commonwealth Explanatory Memorandum explained:

> The penalties have been graded to ensure that the penalty imposed for incitement properly reflects the gravity of the offence. The penalties reflect those recommended by the Gibbs Committee in its July 1990

report which at page 243 described the current general penalty under section 7A of the *Crimes Act 1914* which is only imprisonment for 12 months (or a fine of $6000 or both) as inadequate.

Clause 48 Conspiracy

This clause makes it an offence for a person to conspire with another to commit an offence punishable by more than 1 year imprisonment or by a fine of 200 penalty units ($20,000) or more, or both. An offence of conspiracy is punishable as if the conspired offence had been committed.

The offence is limited to conspired offences punishable by more than 1 year imprisonment (or the monetary equivalent) because it is considered that the conspiracy offence should not apply to minor offences. The offences to which the conspiracy offence applies coincide with the general definition of an indictable offence in section 136 of the *Legislation Act 2001*.

The Commonwealth Explanatory Memorandum explained the provisions of the conspiracy offence as follows:

> [Subclause 48(2)] provides that for the person to be guilty, the person must have entered into an agreement with one or more other persons and the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement and the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
>
> [Paragraphs 48(2)(a) & (b)] are drafted to clearly separate the agreement component of the conspiracy from the intent to commit an offence pursuant to that agreement. It was decided that intention was required and that recklessness would not suffice. This is in accordance with the proposals of the Gibbs Committee, (s.7D(1)(c)), and the common law (*Gerakiteys* (1983) 153 CLR 317). The concept of recklessness is foreign to an offence based wholly on agreement.
>
> The requirement of intention to commit the crime which was the object of agreement [paragraph 48(2)(b)] will prevent conviction for conspiracy where, for example, the only parties to the agreement are the accused and an agent provocateur.
>
> [Paragraph 48(2)(c)] requires that the accused or at least one other party to the agreement committed an overt act pursuant to the agreement. The view is taken that a simple agreement to commit a criminal offence without any further action by any of those party to the agreement is insufficient to warrant the attention of the criminal law. The requirement of overt act is common in American law, see s.5.03(5) US Model Penal Code. The requirement was criticised in some submissions on the basis that it is vague. It is understood that the requirement works well in the American jurisdictions which have it and there is no reason to believe it will not work in Australia.
>
> [Paragraph 48(4)(a)] provides that a person may be found guilty of conspiracy to commit an offence even if committing the offence is impossible (this is consistent with attempt and incitement).
>
> [Paragraph 48(4)(b)] provides that the person may be found guilty if the other party to the agreement is a body corporate. It is well established at common law that a company can be guilty of conspiracy, see *ICR Haulage* [1944] 1 KB 551; *Simmonds* (1967) 51 Cr App R 316.
>
> It was decided that it should be possible for a person to commit a conspiracy even where the only other party to the agreement is a person for whose benefit the offence exists. This is contained in paragraph [48(4)(c)]. An example would be an agreement between a child under the age of consent and an adult to commit the offence of unlawful sexual intercourse with the child. [For similar reasons the paragraph also provides that a person can be guilty of a conspiracy even if the other parties to the agreement are not criminally responsible].
>
> [Paragraph 48(4)(d)] provides that a person may be found guilty even though other parties to the alleged agreement have been acquitted of the conspiracy, unless a finding of guilt would be inconsistent with those acquittals.... This decision is in accord with *Darby* (1981) 148 CLR 668 and section 321B *Crimes Act 1958*

> (Vic). The Gibbs Committee concluded that the courts must not be hindered from examining the merits of what may be a quite complex situation by rules about formal inconsistencies on the face of the record.
>
> On the other hand, under [subclause 48(6)], it was decided that the Code should provide that a person who is the protective object of an offence cannot be found guilty of a conspiracy to commit that offence.
>
> [Subclause 48(5)] provides for disassociation from the offence. Consistent with the requirement of an overt act, there should be a defence of withdrawal or disassociation, for there would be time between the agreement and the commission of the overt act for that to take place. Unlike attempt and incitement, the disassociation here comes before there has been a criminal act. In that case, the policy of encouraging people to desist from criminal activity prevails. As for complicity, the requirement was changed from "making a reasonable effort" to taking "all reasonable steps" to prevent the commission of the offence agreed on. Again, what amounts to taking all reasonable steps will vary from case to case. Examples might include informing the other parties of the withdrawal, advising the intended victims and/or giving a timely warning to the appropriate law enforcement agency.
>
> [Subclause 48(7)] permits the use of all defences, principles, limitations or qualifying provisions that apply also to the offence of conspiracy to commit that offence.

Consistent with the position of the Code concerning attempts and incitement subclause 48(3) provides that any "special liability provision" that applies to an offence will also apply to the conspiracy offence (see the commentary on subclause 44(6)).

In the past the courts have been critical of the "overuse" of the conspiracy offence. To address this concern subclause 48(8) allows a court to dismiss a conspiracy charge if it considers that the interests of justice require it to do so. The most likely use of the power to dismiss will arise when the substantive offence could have been used, a criticism repeatedly voiced by the courts (see, for example, *Hoar* (1981) 148 CLR 32).

In addition, subclause 48(9) provides that the consent of the Attorney-General or Director of Public Prosecutions must be obtained before conspiracy proceedings can be commenced. However, in recognition of the urgent circumstances that may sometimes arise, subclause 48(10) provides that a person may be arrested, charged, remanded in custody or on bail before consent is given.

Part 2.5 Corporate criminal responsibility

Clause 49 General Principles

This clause provides that the Code applies to companies in the same way as it applies to natural persons, subject to the modifications set out in Part 2.5 and any other modifications that may be necessary because criminal responsibility is being imposed on companies rather than natural persons. The "other modifications" (not contained in this Part) will be developed by the courts as this area develops. Essentially, this clause has the effect that the general principles of liability, such as the definition of conduct in clause 13 and the definitions of the various fault elements in clauses 17-21 (eg. recklessness in clause 20) apply to companies.

As the Note suggests this clause should be read in conjunction with section 161 of the *Legislation Act 2001* and, in particular with subsection 161(2), which provides that an offence provision can apply to a corporation even if the offence is punishable by imprisonment only.

Clause 50 Physical elements

Clauses 50 to 52 explain how the physical and fault elements of an offence are attributed to companies.

Clause 50 provides that a physical element of an offence consisting of conduct is taken to be committed by a company if it is committed by an employee, agent or officer of the company acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority. A person's actual or apparent authority may extend beyond the actual or apparent scope of his or her employment.

As clause 14 explains, a physical element of an offence may be conduct, a result of conduct or a circumstance in which conduct or a result occurs. Clause 50 only refers to a physical element "consisting of conduct". However, if an individual's conduct is attributed to a company under this clause, the existence of any circumstance (relevant to the offence) in which his or her conduct happens will become a circumstance in which the attributed conduct of the company happens. This will also be the case in relation to any requirement for a result of conduct.

Clause 51 Corporation - fault elements other than negligence

A company is taken to have a fault element of intention, knowledge or recklessness in relation to an offence if it expressly, tacitly or impliedly authorises or permits the commission of the offence. Subclause 51(2) sets out the ways in which it may be established that a company authorised or permitted the commission of an offence.

The Commonwealth Explanatory Memorandum explained:

> These include proving that the body corporate board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence [Paragraph 51(2)(a)].
>
> They also include proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence [Paragraph 51(2)(a)].
>
> According to [Paragraphs 51(2)(a) and (b)] it may be shown that the conduct was performed or tolerated by the board of directors or a high managerial agent (defined as someone whose position in the company can be said to represent the policy of the company [subclause 51(6)]. The test is based almost exactly on s.2.07(1)(c) US Model Penal Code. It is envisaged that this provision will be used in one-off situations where it cannot be said that there is any ongoing authorisation of the conduct. The company has a defence in the case of a high managerial agent if the company proves that it used due diligence to prevent the offence [subclause 51(3)]. The defence is not available in the case of the board of directors itself.
>
> A further means by which it may be proved that a body corporate authorised or permitted the commission of the offence is proof that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provisions [Paragraph 51(2)(c)].
>
> A final means of proving the authorisation or permission is proving the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision [Paragraph 51(2)(d)].
>
> [Subclause 51(4)] provides that factors relevant to the corporate culture provisions include whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate and whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

> "Corporate culture" is defined in [subclause 51(6)] to mean an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.
>
> [Paragraph 51(2)(c)] deals with the more elusive situation of implicit authorisation where the corporate culture encourages non-compliance or fails to encourage compliance. The rationale for holding corporations liable on this basis is that "...the policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognised as authoritative within the corporation." (See Field and Jorg, "Corporate Manslaughter and Liability: Should we be going Dutch?" [1991] *Crim LR* 156 at 159).
>
> The sub[clause] extends the *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 173 rule which recognises that corporations can be held primarily responsible for the conduct of very senior officers. The rationale for this primary responsibility is that such an officer is acting as the company and the mind which directs his or her actions is the mind of the company.
>
> It extends the *Tesco* rule by allowing the prosecution to lead evidence that the company's unwritten rules tacitly authorised non-compliance or failed to create a culture of compliance. It would catch situations where, despite formal documents appearing to require compliance, the reality was that non-compliance was expected. For example, employees who know that if they do not break the law to meet production schedules (eg by removing safety guards on equipment), they will be dismissed. The company would be guilty of intentionally breaching safety legislation. Similarly, the corporate culture may tacitly authorise reckless offending (eg recklessly disregarding the substantial and unjustifiable risk of causing serious injury by removing the equipment guards). The company would be guilty of a reckless endangerment offence.
>
> [Subclause 51(5)] provides that if recklessness is not a fault element in relation to a physical element of an offence, [Subclause 51(2)] does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

Clause 52 Corporation – negligence

Where the relevant fault element of an offence is negligence and no individual employee, agent or officer of the company has that fault element, the company may be taken to be negligent if its conduct is negligent when viewed as a whole.

The Commonwealth Explanatory Memorandum explained:

> It is not necessary to establish that any *one* employee, etc was negligent. If the conduct of the company when viewed as a whole (that is by aggregating the acts of its servants, agents, employees and officers), is negligent, then the corporation is deemed to be negligent. In some cases this may involve balancing the acts of some servants against those of others in order to determine whether the company's conduct as a whole was negligent. This changes the common law on this point, see *R v HM Coroner for East Kent; ex parte Spooner* (1989) 88 Crim App R 10.

This provision should be read with clause 55, which provides that the alleged negligence of a company may be evidenced by the fact that the prohibited conduct was substantially attributable to inadequate management, control or supervision of the conduct of one or more of its employees, agents or officers or failure to provide adequate systems for providing relevant information to relevant people in the company.

Clause 53 Corporation – mistake of fact – strict liability

This clause explains the mechanism by which a company can rely on the "mistake of fact defence" (clause 36). It provides that a company can only rely on the defence if the employee, agent or officer who carried out the conduct had a mistaken but reasonable belief about facts, which if they existed, would have meant that the conduct did not constitute an offence and the company proves that it exercised appropriate diligence to prevent the conduct. This is consistent with the general approach of this Part on corporate criminal responsibility.

Again, this provision should be read with clause 55, which provides that the alleged failure of a company to exercise appropriate diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to inadequate management, control or supervision of the conduct of one or more of its employees, agents or officers or failure to provide adequate systems for providing relevant information to relevant people in the company.

Clause 54 Corporation - Intervening conduct or event.

This clause provides that a company cannot rely on the defence of "intervening conduct or event" (clause 39) on the ground that a physical element of an offence was brought about by another person, if the other person is an employee, agent or officer of the company.

Clause 55 Evidence of negligence or failure to exercise appropriate diligence

This is a definitional provision that relates to clauses 52 and 53 and is explained in the commentary to those provisions.

Part 2.6 Proof of Criminal Responsibility

Clause 56 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 57 Standard of proof - prosecution

This clause explains the standard of proof that 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 58 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 59, 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. Similarly, the clause makes it clear that in the case of a strict liability offence that allows the defence of reasonable excuse, the defendant has an evidential burden in relation to the defence.

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 59 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 58 and 59 should put the matter beyond doubt.

Clause 60 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 61 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 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.

Part 2.7 Geographical application

This Part applies ACT offences beyond the territorial limits of the ACT in certain cases. The regime is similar to the one in section 3 of the Crimes Act, which the ACT enacted in 1995 in accordance with the model recommended by the Standing Committee of Solicitors-General and adopted by the Standing Committee of Attorneys-General. New South Wales, South Australia and Tasmania also enacted the model provisions.

Since section 3 was enacted the courts have demonstrated a reluctance to apply the model, with Kirby J of the High Court describing the South Australian equivalent of section 3 as an "imperfect provision" (*Lipohar* [2000] 168 ALR 8). Accordingly, the Model Criminal Code Officers Committee reviewed the regime in its report on Chapter 4 of the Code and Part 2.7 is now the recommended regime for enactment by the States and Territories.

As the Commonwealth must have regard to different considerations in applying its law extraterritorially, the regime it has enacted is different to the regime recommended for the States and Territories. Accordingly, the observations quoted below on the respective provisions of Part 2.7 are reproduced from Chapter 4 of the report of the Model Criminal Code Officers Committee entitled, "Damage and Computer Offences and Amendment to Chapter 2: Jurisdiction".

Clause 62 Application and effect of part 2.7

This clause explains the purpose of the Part, which is to apply ACT offences beyond the territory of the ACT and Australia in cases where there is a "geographical nexus" between the offence and the ACT (subclause (1)). A geographical nexus is established if the offence is committed wholly or partly in the ACT or if it is committed wholly outside the ACT and the offence has an effect in the ACT (see the commentary to subclause 64(2) below).

The Part will give extraterritorial effect to all ACT offences (subclause (1)) unless the law that creates an offence expressly or implicitly excludes the operation of the Part with respect to that particular offence (subclause (3)). For example where the law makes the location of the offence an element of the offence (such as a law that prohibits entry to a "restricted area" in the ACT) or the law provides that the particular offence applies outside the ACT whether or not there is a geographical nexus.

Clause 63 Interpretation for part 2.7

This clause defines what is meant by the terms "the place where an offence is committed" and "the place where an offence has an effect", for the purposes of this Part, and in particular, for the definition of "geographical nexus" in subclause 64(2).

The Model Criminal Code Officers Committee explained at page 277:

> The definition of the place where the offence is committed is defined to mean the place in which the physical elements of the offence occur. This definition requires two comments. First, it is meant to refer to any place in which any of the physical elements of the offence occur. Offences may, both in current law and in the proposed law, occur in more than one place at any given time. Second, the term "physical elements" is a technical term under the Code and refers to the definition of "physical elements" in [Clause 14] of Chapter 2 of the Model Criminal Code - that is, conduct, circumstances or results.
>
> The definition of the place where an offence has an effect refers, inter alia, to any place whose "peace, welfare or good government" is threatened by the offence. The phrase "peace, welfare or good government" has been used as a demarcation of the constitutional limitation placed upon the otherwise plenary legislative power of a State. The High Court has indicated that "peace, welfare or good government" bears the same meaning as "peace, order or good government" [*Union Steamship v King* (1988) 166 CLR 1 at 9].

Clause 64 Extension of offences if required geographical nexus exists

This is the central provision of Part 2.7. It provides that an offence against the law of the ACT is committed if there is a geographical nexus between the ACT and the offence and, leaving aside any geographical considerations, all physical and mental elements of the offence also exist. A geographical nexus will exist in either of two ways. First, it will exist if the offence is committed wholly or partly in the ACT, regardless of whether it has an effect in the ACT; or the offence is committed wholly outside the ACT but it has an effect in the ACT (subclause 64(2)).

The Model Criminal Code Officers Committee explained at page 279:

> This is the key section in which the essential changes to the current model are made. It defines the necessary geographical nexus that must exist between the offence and the State or Territory claiming the power to try the offence. The section simply claims power to try the offence if the offence is committed wholly or partly in the State or Territory (that is to say, one or more of the physical elements occur in the State or Territory) or, if no physical elements occur in the State or Territory, the offence has an effect (as defined above) in the State or Territory.

Clause 65 Geographical application - double criminality

This clause clarifies the extent to which ACT offences will have extraterritorial application depending on whether an offence is partly committed in the ACT or wholly committed outside the ACT.

If the conduct of a crime takes place partly in the ACT and partly in another place (including another place outside Australia), the conduct will be an offence against ACT law even if it is not an offence in that other place (subclause 65(1)). If the relevant conduct takes place completely outside the ACT (including outside Australia) the ACT offence provisions will only apply in either of two cases; that is,

- only if the conduct is also an offence where it is committed; or if it is not,
- the tribunal of fact is satisfied that the offence is such a threat to the peace, welfare or good government of the ACT that it justifies criminal punishment in the ACT.

The Model Criminal Code Officers Committee explained at page 279:

> [There is a good argument that, where no physical elements occur in the State or Territory, there should be a requirement that those who have acted entirely lawfully in the place where all of the elements of the offence occurred should not be exposed to criminal liability in another place unless that other place has such an overriding interest in the suppression of that particular conduct that the reach of the statute (via this Part) and hence the imposition of criminal liability is warranted. This matter is dealt with in [Paragraph 65(2)(b)]. This is inevitably a question upon which no hard and fast rules can be devised, for this Part deals with a potentially enormous range of behaviours. Moreover, the inherent vagueness of such a criterion is not unprecedented - for example, the key criterion of "dishonesty" in relation to a wide variety of offences in Chapter 3 [relating to crimes of theft, fraud, bribery and related offences] is similarly one which is notoriously incapable of precise delineation.

Clause 66 Geographical application – procedure

This clause sets out procedural matters relating to the extraterritorial application of ACT offences and essentially repeats the law as it currently is in section 3 of the Crimes Act. The Model Criminal Code Officers Committee explained at page 281:

> These procedural provisions are a minor redraft of the existing SCAG model with no significant changes of substance. The only change worthy of note is that it includes a provision dealing with the situation in which there is a problem of proving a geographical nexus and the jury would not acquit the defendant but would rather find him or her not guilty on the ground of mental impairment. [Paragraph 66(2)(d)] clarifies the position by requiring a finding of not guilty on the grounds of mental impairment if they were the only grounds on which the trier of fact would have found the person not guilty of the offence. This is necessary to ensure these cases are appropriately recognised because they do not involve an acquittal.

Subclause 66(1) provides that the geographical nexus of an offence to the ACT is presumed to exist unless rebutted by the defendant on the balance of probabilities.

If a defendant disputes the existence of the geographical nexus, the court is required to proceed with the trial in the usual way and a determination as to whether the requisite nexus existed will be made by the tribunal of fact at the end of the trial (subclauses 2(a) and (b)). If the issue is raised before the trial, the court must reserve the matter for consideration at the trial (subclause 66(5)).

If at the end of the trial the tribunal of fact is satisfied on the balance of probabilities that the geographical nexus does not exist, it must return a finding to that effect and the court must dismiss the charge (paragraph 66(2)(b)). However, if it finds the defendant not guilty for "non geographical considerations", it must return a verdict of not guilty unless the only reason for this finding is the defendant's mental impairment, in which case it must return a verdict of not guilty on account of the defendant's mental impairment (paragraphs 66(2)(c) and (d)).

In some cases it is open to the court to make a determination about a defendant's guilt or innocence for an offence not charged before trial but for which the law allows the tribunal of fact to bring in an alternative verdict. In such cases the provisions of this clause also apply to alternative verdicts (subclause 66(3)) and the tribunal of fact may return a finding of guilt for the alternative offence unless it is satisfied on the balance of probabilities that the geographical nexus does not exist for the alternative offence (subclause 65(4)).

Clause 67 Geographical application – suspicion etc that offence committed

This clause explains that a person who may exercise a function under law if he or she suspects or believes (as the case may be) on reasonable grounds that an offence has been committed, can perform that function whether or not he or she has any suspicion or belief about whether the geographical nexus exists for the offence. This is consistent with the provisions of clause 65 which assign the matter of geographical nexus to be decided at trial by the tribunal of fact.

Chapter 4 Property Damage and Computer Offences

Part 4.1 Property Damage Offences

Division 4.1.1 Interpretation for part 4.1

The provisions in this Division define a number of terms relevant to the offences in this Part.

Clause 100 Definitions for part 4.1

Cause damage or another result – A number of offences in this Part require a causal link between the defendant's conduct and damage to property or some other result, such as "causes a fire" in relation to the bushfire offence (clause 105). This provision explains that for the offences in this Part the causal link is satisfied if the defendant's conduct "substantially contributes" to the damage or other result. It is not necessary to show that the person's conduct was the sole cause but simply that it was a substantial cause. This is a commonsense approach similar to the approach the Australian courts take with respect to homicide and inflicting personal injury. Similar provisions are included in Parts 4.2 and 4.3 relating to computer and sabotage offences.

Damage property – This clause outlines the ways in which property may be damaged for the purposes of the offences in this Part. The term includes destroying or defacing property; interfering with property in a way that causes it to be physically lost or for a use or function of it to be lost; obliterating a document or rendering it wholly or partly illegible; harming or killing an animal and cutting a plant from the land. The list is not exhaustive, however, and it is therefore open to a court to find that property was damaged in some other way. What amounts to "damage" will vary according to the nature of the property and may extend to conduct that does not involve gross physical interference with the property.

Property – This clause defines property as any real or personal property of a "tangible" nature. In addition to the more usual forms of property, such as land and fixtures, the term also includes domesticated wild creatures and human body parts or substances such as organs, blood, ova and semen. The inclusion of human tissue is consistent with the trend in the common law which currently recognises proprietary rights in human body parts that have been subjected to an exercise of skill or labour (for example, by dissection or preservation), *R v Kelly* [1998] 3 All ER 741. An example of "intangible" property not covered is the intellectual property in a thing, such as a painting. Although the offences would apply to the physical damage done to a painting they would not apply to the artistic work in the painting if, for example, it was claimed that the painting was displayed in a way that was damaging.

Clause 101 Person to whom property belongs

Most of the offences in this Part require proof of damage to property "belonging to someone else". For this Part property will be taken to belong to any person who has possession or control of it or who has a proprietary right or interest in it. If property is held under a trust, it will be taken to belong to all those who have a right to enforce the trust (subclause 2). But property will not be taken to belong to a person who only has an equitable interest arising from a constructive trust or an agreement to transfer or grant an interest in the property.

Subclause 101(3) is of particular importance because it provides that if property belongs to two or more people it will be taken to belong to all of them. This will ensure that the offences apply to joint owners who damage jointly owned property.

Clause 102 Threats

This clause clarifies the meaning of "threat" for this Part. A number of the offences include the elements of making a threat "to someone else" and intending to cause or reckless about causing a person to "fear" that the threat will be carried out. This clause explains that the element of threatening someone is satisfied if the threat is made to a group of people and that a threat may be made by any conduct, not just speech, and may be explicit or implied, conditional or unconditional. It also provides that the word 'fear" includes "apprehension" so that an offence is committed even if the nominal victim faces the threatened danger with icy detachment or nerves of steel.

Division 4.1.2 Offences

Clause 103 Damaging property

This clause sets out the Code's "general" property damage offence. It contrasts with the specific property damage offences of arson (clause 104) and causing bushfires (clause 105) in that it applies to damaging tangible property of all kinds and by whatever means.

Subclause (1) makes it an offence for a person to cause damage to the property of another with the intention of causing damage to that or some other property or reckless as to the risk of causing damage to that or some other property. "Intention" and "recklessness" are defined in clauses 18 and 20 of the Bill. Also, as the commentary in clause 100 shows, damage is broadly defined to include, amongst other things, destroying the property, causing it to be lost and impairing its use or operation. A maximum penalty of 10 years imprisonment or 1,000 penalty units ($100,000) or both applies for this offence.

An important feature of this offence is that it incorporates the common law convention of "transferred malice". That is, the offence will apply even if the property that was damaged was not the target of the defendant's conduct. A person who throws a stone with the intention of breaking a streetlight will still be guilty of this offence even if the stone misses and breaks a window.

Another important feature of this and the remaining offences in this Division is that liability is not graded by reference to the value of the property damaged. The same offence applies whether the property is worth $5 or $5 million. The law takes a similar approach with respect to theft. The value of the property involved may have very little bearing on the seriousness of the defendant's criminal conduct. Destroying a $5 component of a machine in a production line could generate far greater loss than the value of the component itself. These are matters more appropriately left to be considered in determining the appropriate sentence. Similarly, the prosecutorial discretion can be relied upon to ensure that trivial cases that fall within the literal scope of this offence are not prosecuted.

The property damage offence in this clause and the offences in clauses 116 (unauthorised modification of data to cause impairment) and 117 (unauthorised impairment of electronic communications) can overlap substantially. Determining the offence to charge in a particular case can involve questions of considerable technical complexity. Therefore, to avoid unmerited acquittals subclause (2) allows the court to convict the defendant of the alternative offences in clause 116 and 117 if he or she has been charged with an offence under this clause. Similar provisions are included in clauses 116 and 117.

Clause 104 Arson

This clause provides for the offences of arson and threat to commit arson.

Subclause (1) makes it an offence for a person to damage or destroy any building or vehicle by using fire or explosives and with the intention of damaging that or some other building or vehicle or reckless as to the risk of damaging that or some building or vehicle. A building includes part of a building or any moveable or non movable structure used, designed or adapted for residential purposes. A vehicle is defined as a motor vehicle, motorised vessel (a boat, etc) or an aircraft (subclause (4)). A maximum penalty of 15 years imprisonment or 1,500 penalty units ($150,000) or both applies for this offence.

As in the case of the "general" property damage offence (clause 103), the principle of "transferred malice" applies so that a person is criminally liable even if he or she damages the

wrong building or vehicle. It is sufficient that the offender intended to cause or was recklessness about causing damage to some building or vehicle.

An important distinguishing feature of the arson offence is that it is not limited to causing damage to property "belonging to someone else". It can also apply to owners who damage or destroy their own buildings or vehicles by fire or explosives. MCCOC gave the following reasons for adopting this position:

> "Two considerations persuade the Committee to disregard ownership in defining the elements of the offence. The Code limits arson to a restricted range of property [that is, buildings and vehicles] and liability is qualified by the provision of a defence of claim of right [clause 110]. As to the first of these considerations, the uncontrolled or capricious use of fire or explosives to destroy or damage buildings, vehicles, vessels or aircraft is highly likely to cause public alarm, public expense and public nuisance. Those harmful consequences will often follow, regardless of the fact that the person who does the damage happens to own the property in question. Harm or potential harm to the public at large, consequent on the nature of the property affected and the means employed, are more significant elements in this offence than they are in the lesser, general offence of property damage.
>
> There are occasions, of course, when demolition or destruction by fire or explosives are unexceptionable. [Clause 110] allows a defence of claim of right, which will justify or excuse any reasonable work of demolition or destruction by fire or explosives. The defence, in common with other Code defences, requires a person accused of the offence to point to some evidence that suggests the possibility that the conduct was justified or excused. There is no blanket immunity for owners which would allow them an unqualified right to damage or destroy their own property by fire or explosives.
>
> Claim of right requires evidence that the defendant believed that their proprietary right or interest authorised the use of fire or explosives as the means of causing damage or destruction. The owner's right to damage or destroy the property by other, less alarming, methods is not in issue."

Subclause 104(2) provides for the further offence of threatening to commit arson. To establish the offence it must be proved that the defendant made a threat to someone to damage by fire or explosive a building or vehicle belonging to that person or to a third person and that the defendant intended to cause or was reckless about causing the threatened person to fear that the threat would be carried out. It is not necessary to prove that the threatened person actually feared that the threat would be carried out (subclause 104(3) but only that the defendant intended to cause or was reckless about causing that fear. A maximum penalty of 7 years imprisonment or 700 penalty units ($70,000) or both applies for this offence.

Clause 105 Causing bushfires.

To establish this offence it must be proved that the defendant intentionally or recklessly caused a fire and that he or she was reckless as to the spread of the fire to vegetation on another person's property. A maximum penalty of 15 years imprisonment or 1,500 penalty units ($150,000) or both applies for this offence.

The physical element of "causing a fire" is defined in subclause (2) to include lighting a fire, maintaining a fire and failing to contain or extinguish a fire lit by that person, where that person could have contained or extinguished it. The extended definition of "causing a fire" means that the offence covers a person who intentionally or recklessly maintains a fire, even though the he or she realises there is a risk of the fire spreading to vegetation on someone else's property. It also covers a person who lights a fire unintentionally, or without being reckless as to lighting that fire, but who then fails to contain or extinguish the fire while he or she is capable of so doing, even though he or she realises there is a risk of the fire spreading to vegetation on someone else's property.

Subclause (2) also defines the concept of spread of a fire, to make it clear that "spread" does not mean any movement of the fire or any increase in the fire's volume, but the spread of the fire beyond the capacity of the person who caused the fire to contain or extinguish it. This definition of "spread" ensures that controlled burning activities are not covered by the offence.

The defence of consent in clause 109 applies to this offence even though it is an offence of endangerment rather than of damage to property. The person entitled to consent to damage to property is also a person entitled to consent to a risk of fire spreading to his or her property. Clause 109 includes a specific provision that makes it clear that the defence applies to this offence.

Clause 106 Threat to Cause Property Damage – fear of death or serious harm

To establish this offence it must be proved that the defendant intentionally made a threat to someone to damage property and that the defendant was reckless about causing that person to fear that carrying out of the threat would result in someone's death or serious harm. "Serious harm" is defined as any harm that "endangers or is likely to endanger a person's life" or any harm that "is or is likely to be significant and longstanding"(subclause (3)). The maximum penalty for this offence is 7 years imprisonment or 700 penalty units ($70,000) or both.

It is not necessary to prove that the defendant intended to carry out the threat or that he or she "intended" to induce fear that the threat would be carried out or that lives could be endangered. It is sufficient if the offender is recklessness as to the risk that the other person might fear death or serious harm.

The property involved can be any property. It need not be property that belongs to someone else or property of a specific kind (such as a building or vehicle as required in the threatened arson offence). Moreover, provided that the threatened action involves a risk of serious harm or death it does not matter whether the threatened damage is relatively minor. A threat to damage a safety device or an alarm by a minor act of interference could induce very serious concerns for personal and public safety.

As with the other "threat" offences in this Part, it is also unnecessary to prove that the threatened person actually feared that the threat would be carried out (subclause (2)). The offence is committed even if the threatened person knows that the threat cannot be carried out, for example, because precautions were taken that effectively rendered the threats hollow. As clause (3) makes clear, "fear" does not require proof that the victim panicked or suffered personal distress or disquiet.

Clause 107 Threat to cause property damage

The offence in this provision applies if a person intentionally threatens another to damage the property of the other or someone else and the first person intends the threatened person to fear that the threat will be carried out. It is not necessary to prove that the threatened person actually feared that the threat would be carried out (subclause (2)) but only that the offender intended the other person to fear it. A maximum penalty of 2 years imprisonment or 200 penalty units ($20,000) or both applies for this offence.

Like the offence in clause 106, the threat can be a threat to damage property of any kind and the damage proposed can be relatively minor in nature. But unlike the clause 106 offences it must be

property that belongs to someone else. Moreover, it is not necessary to prove that the offender intended to induce fear of harm to someone but simply fear that the threat would be carried out.

This provision is directed to the less serious cases of threats to damage property. Accordingly the offence has been confined to only apply if the offender "intends" to induce fear that his or her threat will be carried out. This is different to the threat of arson offence (subclause 104(2)) and the clause 106 offences, which allow recklessness as to the effect of the threat on the victim to be sufficient. The requirement to prove intention to induce fear will have the effect of excluding some conduct too trivial for criminal punishment, such as a joke that it not meant to be taken seriously. The prosecutorial discretion can also be relied upon to ensure that other trivial cases that fall within the literal scope of this offence are not prosecuted.

Clause 108 Possession of thing with intent to damage property

This provision makes it an offence for a person to possess a thing with the intention that he or she or someone else will use it to damage property that belongs to another. In addition to the usual way in which a person is understood to "possess a thing" the term also includes having control over disposing of a thing (such as the power to sell, trade, use up or destroy), whether or not it is in the person's actual custody, and having joint possession of a thing (subclause (2)). The maximum penalty for this offence is 3 years imprisonment or 300 penalty units ($30,000) or both.

Any "thing" that can be used to damage property is capable of being caught by this offence. This includes anything from a hammer to a vehicle or vessel and also an animal. The offence is properly confined because it only applies if the person "intends" the thing in his or her possession to be used to damage the property of another. The more common a thing is the more difficult it will be to establish that the person had the relevant intention. In such cases much will depend on the circumstances surrounding the person's possession of the thing involved. The more usual application of the offence will be in cases where the person possesses explosives or specialist equipment of some kind peculiarly adapted to cause some particular form of damage.

Offences of this nature are well known in existing law and have their origins in offences directed at persons equipped to commit a burglary. It is a preparatory offence designed to impose criminal liability when the conduct of the accused is well advanced towards the commission of an offence but falls short of the technical requirements to establish an attempt to commit the offence. Another important feature of this offence is that it applies even though the offender does not intend to use the thing personally. In some cases the offender will be the principal of the planned offence who has arranged for others to execute the plan.

Division 4.1.3 Defences

This Division sets out specific defences to the offences in this Part, which are in addition to any other offences that may apply. The defendant bears the evidential burden in relation to the defences in this Division (see the commentary on Part 2.6 of the Bill).

Clause 109 Consent – pt 4.1 offences

This clause provides a defence to the offences under this Part if at the time of the relevant conduct a person entitled to consent to the property being damage (usually the owner) had consented or the defendant believed that such a person had consented or would have consented if the person had known about the circumstances of the damage. For example, a veterinary surgeon

that, at the owner's request, gave a lethal injection to a suffering pet is clearly covered by the defence. It also applies if the surgeon believed that the owner consented even if the owner had not and even if the surgeon's belief was plainly unreasonable in the circumstances. As long as the belief was honestly held the defence applies. It also applies if, for example, in the absence of the owner and of any previous discussion on the matter, the surgeon administered the injection because he believed the owner would have wanted it if he or she had known of the extent of the pet's suffering.

Subclause (2) has been included to make it clear that the consent defence also applies to the bushfire offence (clause 105) even though it is an offence of endangerment rather than an offence of damage to property. The defence will apply to protect persons from liability who light fires with the consent of the owner or occupier of the land on which the fire is at risk of spreading. It will also apply if the person who caused the fire believed that the property owner had consented, or would have consented if he or she had known of the risk.

Clause 110 Claim of right – pt 4.1 offences

This clause provides a defence to the offences under this Part if at the time of the relevant conduct the defendant believed that he or she had a right or interest in the property that entitled him or her to engage in the conduct concerned. A "right or interest in property" is defined to include a right or privilege in or over land or waters, whether created by grant, licence or otherwise.

The arson offence is not limited to causing damage to property "belonging to someone else". It can also apply to owners who damage or destroy their own buildings or vehicles by fire or explosives. Therefore this defence does not protect an owner from conviction for the arson offence simply because the owner believed that he or she had a right or interest in the property. Rather, in this context the defence requires evidence that the owner believed that his or her proprietary right or interest authorised the use of fire or explosives as the means of causing damage or destruction. For example, because the owner believed that his or her permit from the public authority entitled him or her to do so.

Clause 111 Self-defence

This provision makes it clear that the defence of self defence in clause 42 of the Bill also applies to offences under this Part. The elements of the defence are discussed in detail in the commentary to clause 42. A person who breaks a bottle of his neighbour's prized bottle collection in order to expose the sharp edge and frighten off an intruder would have the benefit of the defence.

Part 4.2 Computer Offences

Clause 112 Definitions for pt 4.2

This clause defines terms used in the computer offences in this Part including the following:

Causes: Many of the offences in the Part rely on an element of causation, such as "causing" unauthorised access to or modification of computer data or impairing electronic communication between computers. This provision explains that a person will be taken to cause such

unauthorised access, modification or impairment if his or her conduct "substantially contributes" to it.

Access to data held in a computer: This term is directly relevant to the unauthorised access offences in clauses 115 and 120. The term means to display data by the computer or output it in some other way from the computer (eg print it or send it via the Internet); to copy or move the data elsewhere in the computer or to a data storage device (such as a computer disk) or to execute a program. The definition needs to be read in conjunction with clause 113 which provides that access to data held in a computer is limited to access caused by executing a function of a computer. Therefore, merely inspecting a computer screen does not amount to access to computer data.

Data held in a computer: This term includes data entered or copied into a computer; data held in a removable storage device in a computer (such as a computer disk) and data held in a data storage device on a computer network of which the computer forms a part (such as a file server). The definition is inclusive and extends to any data or programs in a computer, whether they form part of the operating system or have been entered into the computer for reference or use. Importantly, data or programs held on a disk or other removable storage device become "data held in a computer" when the disk is in a computer. As MCCOC stated:

> "This element of the definition is of particular significance to the application of [clause 83], which prohibits unauthorised impairment of computer data. The offence extends to impairment of data held on discs or other removable data storage devices. Once the device is electronically accessible by a computer, the data held on the device comes within the protective scope of the provisions. If modification of the data is unauthorised, liability follows, though the offender may own the particular computer, which effects the modification. The definition of data held in a computer extends to data in a device located outside the computer, so long as it is electronically accessible by that computer."

Data storage device: this term means anything containing or designed to contain data for use by a computer. It includes computer disks as well as file servers used by a network of computers.

Electronic communication, Impairment: These two terms concern and include the prevention of an electronic communication or impairing an electronic communication on an electronic link or network used by a computer. But do not include merely intercepting an electronic communication. Clause 113 also limits this term to impairment caused by executing a function of a computer.

Modification of data held in a computer: This term means to alter or remove data or add to data. The definition is also qualified by clause 113.

Clause 113 Limited meaning of *access to data* etc

As discussed, this clause qualifies the definitions in clause 112 relating to access to data, modification of data and impairment of electronic communication to or from a computer. It provides that those terms only encompass access, modification or impairment caused directly or indirectly by the execution of a function of a computer. That is, to prove an offence in this Part that uses those terms it must be established that the access, modification or impairment resulted from conduct that caused a computer to execute a programmed function. Merely inspecting a computer screen will not amount to access to computer data. Nor will causing physical damage to the computer hardware amount to "modifying" computer data or "impairing" electronic communication from a computer.

The requirement that access, modification or impairment, is to be "caused by the execution of a function of the computer" ensures that the offences in this Part will not only apply in cases where the function is activated in the usual way, via a keyboard, but also in cases were a person, with the relevant fault elements, puts a virus infected disk into circulation.

Clause 114 Meaning of *unauthorised* access, modification or impairment

This clause explains that access, modification and impairment is "unauthorised" if the person is not entitled to cause the access, modification or impairment. A computer technician employed to oversee, maintain, test and improve a company's computer programs would be entitled to access and modify the company's computer data and, therefore, the access and modification offences would not apply. On the other hand a hacker who accesses and modifies company data, in the absence of any entitlement, clearly acts without authorisation.

Subclause (2) adds a further clarification. It provides that access, modification or impairment is not unauthorised only because a person has an ulterior purpose for causing it. In other words, the fact that a person may intend to misuse his or her authorisation to access data does not alter the fact that the *access* was authorised. For example, a bank employee may be required to access customer accounts to perform his or her duties. The fact that on a particular occasion the employee uses his access privileges to spy on his neighbour's finances does not mean that *the access* was unauthorised (such conduct is more appropriately regulated by other means). But if the person is entitled to make particular modifications to data and instead modifies the data in another, unauthorised manner, that modification would be unauthorised.

Clause 115 Unauthorised access, modification or impairment with intent to commit a serious offence

This provision makes it an offence for a person to cause unauthorised access or modification of data held in a computer or to cause unauthorised impairment of electronic communication between computers, knowing that the access, modification or impairment is unauthorised and with the intention of committing or enabling the commission of a serious offence. A serious offence is defined in subclause (5) as any offence punishable by 5 years imprisonment or longer (including life imprisonment) and includes an offence in another jurisdiction that would be a serious offence if committed in the ACT. The maximum penalty for this offence is the maximum penalty that applies for the serious offence the person intended to commit or facilitate.

To establish this offence it does not matter whether the defendant knew that the intended offence was a serious offence (subclause 115(2)) or that the serious offence was impossible to commit (paragraph 115(3)(a)). It also does not matter that the defendant may have intended someone else to commit the serious offence (paragraph 115(1)(c)) or that it would be committed at a later time (paragraph 115(3)(b)).

An important feature of this offence is that the prohibition is not limited to the use of computer technology for fraud related purposes (compare section 134 of the *Crimes Act 1900*) but extends to catch relevant conduct directed to the commission of any serious offence. Accordingly a hacker who accesses and modifies data or impairs electronic communications with the intention of activating a malfunction and thereby causing damage to property or death or injury is criminally liable under this offence. The offence is preparatory in nature and will apply even if the intended offence is not completed. However, because of its character as a preparatory offence, liability for attempting this offence is expressly excluded (subclause 115(4)).

Clause 116 Unauthorised modification of data to cause impairment

This provision makes it an offence for a person to cause any unauthorised modification of data held in a computer, where the person knows that the modification is unauthorised, and intends or is reckless about impairing access to, or the reliability, security or operation of, data held in a computer. The maximum penalty for this offence is 10 years imprisonment or 1,000 penalty units ($100,000) or both.

The offence does not require proof of impairment. It is sufficient if the modification is done with an intention to impair or recklessness as to the risk of impairment (subclause 116(2)).

The offence prohibits two distinct kinds of harm. The first is the modification of data to impair the reliability, security or operation of that or other data and the second is the modification of data to impair access to that or other data. The offence covers a range of situations including (i) a person with limited authorisation who impairs data by engaging in an unauthorised operation on data or programs (ii) a hacker who obtains unauthorised access over the Internet and modifies data and causes impairment; and (iii) a person who circulates a disk containing a computer virus which infects the target computer data.

Subclause 116(3) allows the court to convict the defendant of the alternative offences in clause 103 (damaging property) and 117 (unauthorised impairment of electronic communication) if he or she has been charged with an offence under this clause.

Clause 117 Unauthorised Impairment of Electronic Communication

This provision makes it an offence for a person to cause any unauthorised impairment of electronic communication to or from a computer, where the person knows the impairment is unauthorised, and intends or is reckless about impairing the electronic communication. The maximum penalty for this offence is 10 years imprisonment or 1,000 penalty units ($100,000) or both.

Unlike the offence in clause 116 this offence requires proof that there was in fact an impairment of electronic communication.

The offence is designed to protect communication links between computers against what is sometimes referred to as “denial of service attacks”. This tactic includes flooding an e-mail address or web site with unwanted messages to overload the computer system and thereby cause it to breakdown or otherwise disrupt, impede or prevent it from functioning. Alternatively the target computer may itself be induced to generate such a large volume of messages to prevent communication, or addresses may be altered and messages re-routed.

Like other offences in this Chapter, this offence has a wide scope of application, from harms, which are transient, and trifling to conduct that results in serious economic loss or serious disruption of business, government or community activities. The prosecutorial discretion can be relied upon to ensure that trivial breaches of the provision are not prosecuted.

Subclause (2) allows the court to convict the defendant of the alternative offences in clause 103 (damaging property) and 116 (unauthorised modification of data to cause impairment) if he or she has been charged with an offence under this clause.

Clause 118 Possession of data with intent to commit serious computer offence

This clause makes it an offence for a person to possess or control data with the intention of committing or enabling the commission of a "serious computer offence" under this Part. A serious computer offence is defined (in clause 112) as an offence under clauses 115, 116 and 117 or conduct in another jurisdiction that is an offence in that jurisdiction and would be an offence against those provisions if it occurred in the ACT. The latter part of the definition (paragraph (b)) makes it clear that a person who, for example, "possesses" computer data in the ACT with the intention of committing a like "computer offence" in another jurisdiction is still liable for an offence under this clause if the conduct would also be an offence in that jurisdiction. The maximum penalty for this offence is 3 years imprisonment or 300 penalty units ($30,000) or both..

The offence is analogous to the offence of "possession of a thing with intent to damage property" in clause 108 of Part 4.1. It is designed to attach liability to people who possess programs or technology designed to hack into other people's computer systems or impair data or electronic communication. The essential element of the offence is the requirement of proof of an intention to commit a further offence. Like clause 108, but in contrast with clauses 116 (unauthorised modification of data to cause impairment) and 117 (unauthorised impairment of electronic communications), there is no liability for mere recklessness. The nature of the object or thing possessed will usually lend evidential support for the allegation that the person in possession intended the commission of a computer offence.

Subclause 118(2) defines the term "possession and control of data" in a way that extends the offence beyond cases where the data is physically held by the offender to encompass situations where the data is in the offender's control but in the possession of another. The term includes possessing a computer, a data storage device (eg a disk) or a document that stores or records data or *control* of data held in a computer possessed by someone else, even if the computer is outside the ACT.

A person can be found guilty of this offence even if the computer offence is impossible to commit (subclause 118(3) and even if the intention is that someone else will commit it (paragraph 118(1)(b)). As the offence is a preparatory offence, liability for attempting this offence is expressly excluded (subclause 118(4)).

Clause 119 Producing, supplying or obtaining data with intent to commit serious computer offence

This clause makes it an offence to produce, supply or obtain data with the intention of committing or enabling a serious computer offence by that person or another person. A serious computer offence is defined (in clause 112) as an offence under clauses 115, 116 and 117 or conduct in another jurisdiction that is an offence in that jurisdiction and would be an offence against those provisions if it occurred in the ACT. The maximum penalty for this offence is 3 years imprisonment or 300 penalty units ($30,000) or both.

This offence is similar to the offence in clause 118. The primary object is to catch those who devise, propagate or publish programs that are intended for use in committing an offence against clauses 115, 116 or 117 (or their equivalents in other jurisdictions), whereas the offence in clause 118 is targeted at those who have such programs in their possession or control. Because of the potential scope of this offence the law of attempt applies to impose liability on would-be

procurers, inventors and suppliers. Like clause 118, this offence applies even if committing the computer offence is impossible.

Clause 120 Unauthorised access to or modification of restricted data

This clause makes it an offence for a person to cause unauthorised access to, or modification of, restricted data held in a computer, where the person intends to cause the access or modification and knows that the access or modification is unauthorised. The maximum penalty is 2 years imprisonment or 200 penalty units ($20,000) or both.

The offence only relates to unauthorised access or modification of *restricted* data. “Restricted data” is defined to mean, "data held on a computer to which access is restricted by an access control system associated with a function of the computer". Therefore, a person only commits the offence if he or she bypasses an entry code, password or some other security feature. Similarly the offence only applies to *unauthorised* access or modifications. Activities such as the authorised assurance testing of the security of a computer system is not caught by the offence.

The restricted meaning of access and modification of data in clause 113 limits this offence to conduct that causes access or modification by means of a programmed function of the computer. Merely inspecting a computer screen or damaging the computer hardware will not amount to access or modification for this offence.

The offence will apply to hackers who bypass a computer security system and access personal or commercial information or alter that information. It will also apply to an employee who breaks a password on his or her employer's computer system in order to access the Internet or to access protected information. However, the offence will not apply to an employee who is authorised to access to the Internet at work and uses it to place bets on horse races.

Clause 121 Unauthorised impairment of data held in computer disc, credit card etc

This provision makes it an offence for a person to cause any unauthorised impairment of the reliability, security or operation of any data held in a computer disk, credit card or other device used to store data by electronic means, where the person intends to cause the impairment and knows that the impairment is unauthorised. The maximum penalty is 2 years imprisonment or 200 penalty units ($20,000) or both.

The offence supplements the more serious offence in clause 116 relating to the unauthorised modification of “data held in a computer” to cause impairment. This offence applies to data stored electronically on disks, credit cards, tokens or tickets. The offence in clause 116 requires that modification of data be caused by the execution of a computer function, whereas this offence is designed to cover impairment of data caused by other means such as passing a magnet over a credit card.

Part 4.3 Sabotage

Clause 122 Definitions for pt 4.3

This clause defines terms used in the sabotage and threatened sabotage offences in this Part. They are:

cause damage or disruption: This definition of causation follows the form adopted in the property damage and computer offences. It provides that a person causes damage or disruption if his or her conduct "substantially contributes" to the damage or disruption.

damage to a public facility: The offences of sabotage and threatened sabotage apply to conduct that damages or involves a threat of damage to a public facilities. This term is defined as damage to a public facility or part of the facility or *disruption* to the use or operation of the facility. The definition is wider than the counterpart definition of "damage" in relation to the property damage offences. This is because sabotage is intended to apply to both damage and disruption of a public facility. The consequences of disrupting a public facility can often be as serious as damaging it. Moreover, an attack on a public information system may cause a catastrophic breakdown of services though little or no physical damage results.

property offence: This term is defined as any of the offences in Part 4.1 or any conduct in another jurisdiction that is an offence in that jurisdiction and would be an offence against Part 4.1 if the conduct occurred in the ACT.

public facility: The public facilities that are the subject of the sabotage offences include government facilities; public infrastructure facilities that provides water, sewerage, energy, fuel, communication or other services to the public; public information systems, such as a system used to generate, send, receive, store or process electronic communications; public transport systems and public places. A facility is a public facility whether it is publicly or privately owned.

unauthorised computer function: This term is defined as "unauthorised access to data held in a computer" or "unauthorised modification of data held in a computer" or unauthorised impairment of electronic communication to or from a computer". Each of those terms mean the same in this Part as they mean in Part 4.2 This term is important to both the offences in this Part because sabotage can be committed by means involving computer crime as well as by more traditional means.

Clause 123 Sabotage

This clause makes it an offence for a person to cause damage to a public facility by committing a property offence or by causing an unauthorised computer function with the intention of causing major disruption to government functions or major disruption to the use of services by the public or major economic loss. The maximum penalty is 25 years imprisonment or 2,500 penalty units ($250,000) or both.

The offence is aimed at terrorism and related conduct. There is no restriction on the means of causing damage or disruption provided that the means involve the commission of a property damage offence or an unauthorised computer function. Though proof of some damage or disruption is required, it is not necessary to establish that the actual level of damage or disruption involved major disruption or major economic loss. It is sufficient that the defendant "intended" to cause major disruption or major economic loss.

Sabotage by means of an unauthorised computer function will usually involve conduct that "impairs" data or electronic communications. But the offence will also catch conduct that involves no more than unauthorised access to data or an electronic communication system. In

the United States hackers have been known to break into apparently secure government computer systems simply for the thrill of demonstrating their skills. Once it is known that the integrity of the system is breached, major disruption is possible if the system has to be shut down while new security precautions are taken. The offence would catch such conduct if the hacker intended to cause major disruption.

Clause 124 Threaten Sabotage

This clause makes it an offence for a person to intentionally make to someone else a threat to cause damage to a public facility by committing a property offence or by causing an unauthorised computer function, with the intention of causing the other person to fear that the threat will be carried out and will cause major disruption to government functions or major disruption to the use of services by the public or major economic loss. The maximum penalty is 15 years imprisonment or 1,500 penalty units ($150,000) or both.

As with the other "threat" offences in this Chapter it is not necessary to prove that the threatened person actually feared that the threat would be carried out (subclause 124(2)). Subclause 124(3) clarifies the meaning of "threat" for this offence in similar terms to clause 102. It provides that a threat may be made by any conduct, not just speech, and may be explicit or implied, conditional or unconditional. The requirement to threaten someone is satisfied if the threat is made to a group of people and the word 'fear" includes "apprehension" so that an offence is committed even if the threatened person is not fearful.

Chapter 5 Miscellaneous

Clause 125 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 8 to set a date on which the Code is to apply to existing offences.

Clause 126 Repeal of Criminal Code 2001

As explained above since this Bill incorporates all the provisions of the 2001 Code and incorporates the remaining general principles of criminal responsibility, it is not necessary to retain the 2001 Code. Accordingly this clause repeals the 2001 Code.

Clause 127 Consequential amendments – Schedule 1

The Schedule contains minor consequential amendments to relevant legislation arising from the enactment of the provisions of the Code.

Part 1.1 of the Schedule amends the definition of "domestic violence offences" in section 3 of the *Bail Act 1992* by including in that definition the property offences in clauses 103, 104, 106, 107 and 108 of the Code.

The amendment in this Part also adds a Note after the definition of "domestic violence offences" in the Bail Act. The Note explains that when that legislation refers to an offence against a Territory law it includes the ancillary offences in Part 2.4 of the Criminal Code and section 181 (accessory after the fact) of the *Crimes Act 1900* (which is not being repealed). That is, the offences such as attempt, complicity, incitement and conspiracy. A similar Note is also added to the legislation referred to in this Schedule in Parts 1.2, 1.3, 1.5-1.11, 1.13-1.15 and 1.21-1.27.

Part 1.4 repeals section 71 of the *Children and Young People Act 1999*, which will be replaced by clauses 25 and 26 of the Code. Subsection 72(1) of that Act will also be substituted with a new subsection 72(1). The new provision is to the same effect as the current provision but is cast in terms consistent with the language of the Code. It provides that if a police officer reasonably believes that a child under 10 years is committing an offence, the officer may apprehend the child with "necessary and reasonable force".

Part 1.6 of the Schedule makes amendments to the Crimes Act 1900. Item 1.8 repeals subsections 116(1), 117(1) and sections 118, 118A, 120 and 121 of that Act, which are being replaced by the property offences in Part 4.1 of the Code. Similarly, item 1.8 repeals Division 6.5 of Part 6 of the Crimes Act, which is being replaced by the computer offence provisions in Part 4.2 of the Code. Items 1.11 and 1.12 repeal sections 180 (aiding and abetting), 182 (attempts), 183 (incitement) and 184 (conspiracy) of Part 9 of the Crimes Act, which are being replaced with the provisions on these matters in Part 2.4 of the Code. Part 14 of the Crimes Act (Intoxication) will be replaced with clauses 15(5) and 30 to 34 of the Code. Item 1.15 will extend the definition in the Crimes Act of a "domestic violence offence" to include the property offences in clauses 103, 104, 106, 107 and 108 of the Code.

Part 1.12 amends provisions of the *Legislation Act 2001* by replacing references to the ancillary offences in Part 9 of the Crimes Act (that is attempt and conspiracy etc) with references to the ancillary offences in Part 2.4 of the Code and section 181 (accessory after the fact) of the Crimes Act (which is not being repealed). An example is also provided, and a definition of the Criminal Code is inserted in the dictionary of the Legislation Act.

Part 1.14 amends the definition in the *Protection Orders Act 2001* of a "domestic violence offence" to include the property offences in clauses 103, 104, 106, 107 and 108 of the Code.

Parts 1.16 to 1.20 amend the Road Transport legislation by applying the Code to offences against the Australian Road Rules and the *Road Transport (Safety and Traffic Management) Regulations 2000*. The other amendments in these items make minor changes to references in the Transport legislation to the Code or sections of the Code and also remove references to the Commonwealth Criminal Code.

Part 1.24 of the Schedule amends the definitions of "serious crime" and "sexual crime" in the *Victims of Crime (Financial Assistance) Act 1983*, to include the ancillary offences in Part 2.4 of the Code and section 181 of the Crimes Act.

Dictionary

The "dictionary" defines a number of terms that are mainly defined in the body of the Code. As the Code develops, the dictionary will expand and become more useful.