

Australia's Commonwealth Criminal Code
Codification of "General Principles of Criminal Responsibility"

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Introduction

Australia has a federal system of government, under which power is distributed between the central Commonwealth government and the regional State governments. The Constitution confers on the Commonwealth government specific subjects over which the Commonwealth government can make laws, for example taxation, interstate and international trade, immigration and external affairs.

Criminal offences feature in numerous Commonwealth Acts and Regulations and these cover many subject areas. As a national prosecuting agency, the CDPP prosecutes offences against many Acts and Regulations. These range from the Civil Aviation Act to the Corporations Law to taxations laws, from the Customs Act to the Social Security Act, the Financial Transactions Reports Act to the Copyright and Trade Mark Acts, from the Fisheries Act and Environment Protection and Biodiversity Conservation Act to the Crimes (Currency Act) and even to the Marriage Act.

The main offences prosecuted by the CDPP involve drug importation, offences against corporate law, fraud on the Commonwealth in its various guises, such as tax fraud, medifraud and social security fraud, money laundering, people smuggling, sexual servitude and terrorism.

The Commonwealth has enacted a criminal code which is fundamental to the operation of Commonwealth criminal law. It was designed to achieve consistency and equity in the operation of the Commonwealth criminal law throughout Australia. The Explanatory Memorandum for the original Bill stated:

"It is hoped that the 1994 Bill will not only be the beginning of a new era for Commonwealth criminal law, by ensuring that those who are accused of Federal offences are subject to the same principles in all parts of Australia, but for the criminal law of Australia generally. It is the beginning of one of the most ambitious legal simplification programs ever attempted in Australia" (at page 1).

It went on to state:

The new general principles of criminal responsibility represent a unique blending of the two main approaches to the criminal law in Australia. New South Wales, Victoria, South Australia and the Australian Capital Territory have a criminal law based on common law principles ('the common law States'). While most of their offences are contained in Acts and Regulations, they are often based on court-made common law principles and are still subject to some principles which are not contained in legislation. Western Australia, Queensland, Tasmania and the Northern Territory have adopted 'codification' and do not rely on the common law - their criminal law is entirely contained in Acts and Regulations. The main Acts codifying the criminal law in those States are called 'Codes.'

Ch2 of the Criminal Code which will be enacted by the 1994 Bill is itself a codification of the law, but much of it is based on contemporary common law principles which apply in the common law States. This does not mean that all preceding court-made law will be irrelevant to interpretation of the Criminal Code. For example, English courts have drawn on the pre-existing law of larceny to assist interpretation of the English Theft Act 1968 which is a codification of the law. That will also be possible under this Code (at page 2).

The purpose of this paper is to provide an overview of the criminal code used in the Commonwealth, particularly focusing on the codification of the general principles of criminal responsibility.

Outline of the *Criminal Code*

Chapter 1 provides that the only offences against laws of the Commonwealth are those created by, or under the authority of the *Criminal Code* or any other Act, thereby excluding common law offences.

Chapter 2 provides the general principles of criminal responsibility. It sets out the elements of offences and what is required to establish guilt in respect of offences, including as to the required burden of proof. It sets out the circumstances in which there is no criminal responsibility, as well as circumstances where criminal responsibility may be extended. Provision is made with respect to the geographical jurisdiction of Commonwealth offences. Special provision is made with respect to corporate criminal responsibility. The majority of this paper will consider the principles of criminal responsibility.

The other chapters of the *Criminal Code* contain offences in various subject areas, including terrorism offences, fraudulent conduct, bribery and related offences, slavery and sexual servitude, serious drug offences, money laundering offences and telecommunications services offences.

Terms in the *Criminal Code* are defined in the Dictionary at the end of the *Criminal Code*.

Implementation of the *Criminal Code*

On 1 January 1997, the *Criminal Code* was proclaimed and commenced operation. The application of Chapter 2 was staged over a considerable period however, in that it was only applicable where individual Acts expressly applied it, by 2001 some 75 Acts had applied it, or offences were added to the *Criminal Code*. These were not, however, offences that were commonly prosecuted. It was not until 2001, when offences relating to theft, fraud, making false statements, forgery, bribery and related offences were added to the *Criminal Code* on 24 May 2001 that it had a much broader application. These offences were largely based on the English and Victorian Theft Acts.

On 15 December 2001, the *Criminal Code* was made applicable to all Commonwealth offences and from this time it was fully operational. It applies across Australia without variation in relation to federal offences.

One of the principal difficulties in implementing the *Criminal Code* was the need to ensure that existing offences were in line with the general principles in Chapter 2 of the *Criminal Code*. A very large number of offences had to be "harmonised" so that there were no anomalies when the general principles applied to those offences. Identifying and harmonising offences involved a large amount of effort. This task has had other

benefits as the exercise has led to greater consistency in the drafting of offences and as to applicable penalties.

Chapter 2 – General principles of Criminal Responsibility

Chapter 2 is central to the *Criminal Code*. Its purpose is to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles that apply to all criminal offences against the laws of the Commonwealth.

The stated purpose of Chapter 2 of the *Criminal Code* is to codify the general principles of criminal responsibility under the laws of the Commonwealth.¹ The *Criminal Code*, like any other statute, can be overridden by other legislation but because of the fundamental nature of the principles involved it is not expected that this will be done lightly.²

1. Elements of an offence

An offence is defined by the *Criminal Code* to consist of:

- **physical elements;** and,
- **fault elements.**³

Physical elements refer to the external elements of the crime, till now known as the actus reus.

Fault elements refer to the state of mind or fault of the accused which must be proven for guilt to attach, till now known as mens rea.

These are the basic building blocks of criminal liability under the *Criminal Code*. In order for a person to be found guilty of committing an offence the relevant physical and accompanying fault elements contained in the particular offence must be established.⁴ It is therefore necessary to 'break down' an offence to reveal the physical and fault elements that must be established in order to make out the offence.

A fault element will attach to each physical element of an offence unless the law creating the offence expressly provides for a particular fault element.⁵ Where a law creating an offence does not specify the fault element attaching to a physical element of an offence, and the provision does not expressly state that strict or absolute liability applies to the physical element, then a 'default' fault element will supply the relevant fault element.⁶ The *Criminal Code* sets out what these 'default' fault elements are in s5.6.

¹ Section 2.1.

² Explanatory Memorandum to the Criminal Code Bill 1994 at p 6.

³ Section 3.1(1). However, the law that creates the offence may provide that there is no fault element for one or more physical elements. The law may provide different fault elements for different physical elements – sections 3.2(2) and (3).

⁴ Section 3.2.

⁵ This is the practical effect of the combination of sections 3.1, 5.6, 6.1 and 6.2.

⁶ Sections 6.1(2) and 6.2(2) and section 5.6.

There may be different fault elements for the different physical elements.⁷

a. Physical elements

A physical element for an offence may be:

- *conduct* - defined as an act, omission to perform an act or a state of affairs (e.g. being in possession of something);
- *a circumstance in which conduct occurs* (e.g. where a person harmed is a Commonwealth public official); or
- *a result of conduct* (e.g. cause harm to a Commonwealth public official).⁸

Of the physical elements only the word “*conduct*” is defined in the *Criminal Code*. Of the components of “*conduct*” only “*omission*” is defined.⁹ In particular, “*act*” is not defined.¹⁰ A “*circumstance in which conduct occurs*” and a “*result of conduct*” are also not defined.

Conduct can only be a physical element if it is voluntary in the sense that it is the product of the will of the person whose conduct it is.¹¹

b. Fault elements

The fault elements for an offence may be:

- *intention*;
- *knowledge*;
- *recklessness*;
- *negligence*; or
- *another fault element specified by particular legislation*.¹²

The meaning of the four fault elements (intention, knowledge, recklessness and negligence) will depend on the physical element to which they are being applied.

Conduct – a person will have intention with respect to conduct if he or she means to engage in that conduct.¹³

⁷ Section 3.1(3).

⁸ Sections 4.1(1) and (2).

⁹ Section 4.3.

¹⁰ The Explanatory Memorandum for the Criminal Code Bill 1994 stated at p9 that ultimately it was concluded that the better course is not to define “act” and rely on the common sense approach of the courts, for example the High Court’s approach in *Falconer* (1990) 171 CLR 30. There, “act” was described as a bodily action which alone or in conjunction with some quality of the action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility: See Mason CJ, Brennan and McHugh JJ at page 38.

¹¹ Sections 4.2(1) and (2).

¹² Sections 5.1(1).

¹³ Section 5.2(1).

Circumstance – a person will have intention with respect to a circumstance if he or she believes that it exists or will exist.¹⁴

Result – 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.¹⁵

The *Criminal Code* provisions on the meaning of the fault elements in the context of the various physical elements are set out in the table below.

| Fault element | Physical element | How made out |
|----------------------|-------------------------|--|
| Intention | Conduct | He or she means to engage in that conduct. |
| | Circumstance | He or she believes it exists or will exist. |
| | Result | He or she means to bring it about or is aware it will occur in the ordinary course of events. |
| Knowledge | Circumstance | He or she is aware that it exists or will exist in the ordinary course of events. |
| | Result | |
| Recklessness | Circumstance | He or she is aware of a substantial risk that the circumstance exists or will exist and having regard to the circumstances known to him/her it is unjustifiable to take the risk. |
| | Result | He or she is aware of a substantial risk that the result will occur and having regard to the circumstances known to him/her it is unjustifiable to take the risk. |
| Negligence | Any physical element | Such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that the physical element exists or will exist that the conduct merits criminal punishment for the offence. |

Recklessness under the *Criminal Code* requires advertence to a “substantial risk” of the specified circumstance existing or the specified results occurring. It is not a test based on foresight. Proof of intention, knowledge or recklessness will satisfy the fault element of recklessness.¹⁶

¹⁴ Section 5.2(2).

¹⁵ Section 5.2(3).

¹⁶ Section 5.4(4).

c. Default fault elements

Where the law creating an offence does not specify the fault element relevant to the physical element concerned then section 5.6 of the *Criminal Code* will supply that fault element depending on whether the physical element concerned is conduct, namely a circumstance or a result. It will do so in the following way:

- *conduct*: the default fault element is intention.
- *circumstance or result*: the default fault element is recklessness. Where recklessness is the fault element, proof of intention, knowledge or recklessness will satisfy that fault element.¹⁷

It is important to note again that legislation must specify a fault element if the fault elements are to be anything other than the default fault elements supplied by s5.6.

Under the *Criminal Code* a fault element will apply to each physical element of an offence unless the law creating the offence expressly provides that there is no fault element for one or more of the physical elements.

d. Some examples applying the general principles

Identifying the relevant physical elements of the offence is the key to understanding what the prosecution needs to prove to establish the offence under the *Criminal Code*. As, has been seen, individual fault elements apply to each physical element of an offence, it is critical to identify the various physical elements of an offence and then determine the applicable fault element for that particular physical element.

The Serious Drug offences recently inserted into the *Criminal Code* provide clear examples where the offences are drafted on the basis of separate elements and where fault elements are specified. For example in Division 307 relating to import-export offences, section 307.1 provides as follows.

307.1 Importing and exporting commercial quantities of border controlled drugs or border controlled plants

- (1) A person commits an offence if:
- (a) the person imports or exports a substance; and
 - (b) the substance is a border controlled drug or border controlled plant; and
 - (c) the quantity imported or exported is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

- (2) The fault element for paragraph (1)(b) is recklessness.
- (3) Absolute liability applies to paragraph (1)(c).

¹⁷ Section 5.4(4).

The elements of the offence are:

(a) D imports/exports a substance (conduct).

Fault: intention (section 5.6(1) and section 5.2).

(b) The substance is a border controlled drug/plant (circumstance).

Fault: recklessness (section 307.1(2) and section 5.4).

(c) The quantity imported/exported is a commercial quantity (circumstance).

Fault: absolute liability (section 307.1(3) and section 6.2).

e. Strict and absolute liability

Before the *Criminal Code*, statements by the Legislature that an offence was one of strict or absolute liability were not common. Courts interpreted offences in this regard. Once the *Criminal Code* was in operation, however, it was essential that offences had these fault elements specified.

If an offence is one of strict liability there are no fault elements for any of the physical elements of the offence but the defence of mistaken but reasonable belief is available.¹⁸ So too, if strict liability applies to a particular physical element of the offence.¹⁹ But, if the offence is one of absolute liability, there are no fault elements for any of the physical elements of the offence, and there is no defence of mistaken but reasonable belief available.²⁰ The position is the same if absolute liability is imposed in relation to a physical element of an offence and not all of the physical elements of the offence.

The defence of mistake of fact states that a person is not criminally responsible for an offence that has a physical element for which there is no fault element if, at or before the time the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts and had those facts existed the conduct would not have constituted an offence.²¹

Where offences are specified to be of strict or absolute liability, or a physical element of those offences, the prosecution will still need to establish that the conduct was voluntary.²² The existence of strict liability or absolute liability does not make any other defence unavailable.²³

¹⁸ Section 6.1(1)(a) and section 9.2(1).

¹⁹ Section 6(1) and section 6(2).

²⁰ Section 6.2.

²¹ Section 9.2(1).

²² Section 4.2(1).

²³ Sections 6.1(3) and 6.2(3).

2. Proof of criminal responsibility – Part 2.6

Section 13.1 provides that the prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged. The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

A legal burden in relation to a matter, means the burden of proving the existence of the matter. A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.²⁴

A defendant who wishes to deny responsibility by relying on any defence (other than in relation to mental impairment), bears an evidential burden.²⁵

An evidential burden means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.²⁶ Significantly, 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.²⁷

Similarly, a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.²⁸

In some instances a legal burden of proof may be placed on a defendant to establish a matter. This must be done expressly. The standard of proof on a defendant is on the balance of probabilities.²⁹

3. Extensions of criminal responsibility

Chapter 2 of the Criminal Code provides for the extension of criminal liability where there is:

- a conspiracy to commit an offence;
- Incitement to commit an offence
- an attempt to commit an offence
- complicity in an offence or
- an innocent agent is involved.

Chapter 2 specifies what is required to be proven to make out these extensions of criminal liability. In doing so, it attempts to codify the common law that had previously operated in relation to these concepts. For example, section 11.5 specifies what “conspiracy” is. It provides that a person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months or by a fine of 200

²⁴ Section 13.2.

²⁵ Section 13.3.

²⁶ Section 13.3(6)

²⁷ Section 13.3(4)

²⁸ Section 13.3.(3)

²⁹ Section 13.4 and section 13.5

penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

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 and at least one other party to the agreement must have committed an overt act pursuant to the agreement (section 11.5(2)).

Subsection (7A) provides that any special liability provisions that apply to an offence apply also to the offence of conspiring to commit that offence.

A “special liability provision” is defined in the Dictionary to the *Criminal Code* as:

(a) a provision that provides that absolute liability applies to one or more (but not all) of the physical elements of an offence; or

(b) a provision that provides that in a prosecution for an offence, it is not necessary to prove that the defendant knew a particular thing; or

(c) a provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew or believed a particular thing.

Subsection (7A) does not, however, overcome the requirement in relation to conspiracy, that the person must have entered an agreement with one or more persons that an offence would be committed pursuant to the agreement. This requires the facts involved in a particular offence to be the subject of an agreement. The entering of such an agreement is a physical element of conduct and it will be a factual issue on the available evidence what the agreement related to, namely the particular offence involved.

Subsection (3) sets out situations when a person may be found guilty of conspiracy. Subsections (4) and (5) set out when a person cannot be found guilty of conspiracy.

Subsection (6) provides that a court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.

Subsection (7) provides that any defences, etc that apply to an offence apply also to the offence of conspiracy to commit that offence.

4. Circumstances in which there is no criminal responsibility – Part 2.3

Pt2.3 of the *Criminal Code* sets out the general defences that are available under the *Criminal Code*. Other defences may be made available by specific provisions in the *Criminal Code* or in offence provisions.

Under the *Criminal Code* a person will not be criminally responsible if one of the following general defences apply:

- Incapacity by age;
- Mental impairment;

- Intoxication;
- Mistake or ignorance of fact (fault elements other than negligence);
- Mistake of fact (strict liability);
- Claim of right;
- Intervening conduct or event;
- Duress;
- Sudden or extraordinary emergency;
- Self defence; or,
- Lawful authority.

Insofar as mental impairment is concerned the defendant has the burden of proving on the balance of probabilities that he/she was suffering from such a mental impairment at the time. If, with the leave of the court, the prosecution raises the issue the prosecution has the same burden.³⁰

5. Corporate criminal responsibility – Part 2.5

In general the *Criminal Code* applies to bodies corporate in the same way as it applies to individuals but with some modifications due to the nature of a body corporate.³¹

A body corporate may be found guilty of any offence including one punishable by imprisonment. The *Criminal Code* provides:

Physical elements

A physical element must be attributed to a body corporate where it is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his/her employment or within his/her actual or apparent authority.³²

Fault elements other than negligence

Where intention, knowledge or recklessness is a fault element in relation to a physical element of an offence that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.³³

The *Criminal Code* provides some examples of evidence that will establish this authorisation or permission.³⁴ These include where a corporate culture³⁵ existed within a body corporate that directed, encouraged or tolerated or led to non-compliance with the relevant provision or that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision. So liability can potentially exist where formal documents required compliance with the law but where

³⁰ Section 7.3(3) and section 7.3(4).

³¹ Section 12.1.

³² Section 12.2.

³³ Section 12.3.

³⁴ Section 12.3(2).

³⁵ Defined in section 12.3(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 activity takes place.

the unwritten rules tacitly authorised non-compliance or failed to create a culture of compliance. This extends the current common law position.³⁶

Another example is where a high managerial agent of the body corporate³⁷ tacitly or impliedly authorised the offence. A defence of due diligence exists for corporations in relation to their high managerial agents.³⁸

Negligence

This fault element may exist on the part of a body corporate if the body corporate is negligent when viewed as a whole, that is, by aggregating the conduct of any number of the employees, agent or officers. Negligence can be evidenced by inadequate management or control or failure to provide adequate communications within the body corporate.³⁹

Strict liability

A body corporate can rely on the defence of mistake of fact⁴⁰ if an employee agent or officer of the body corporate has the relevant state of mind and the body corporate proves that it exercised due diligence to prevent the conduct.⁴¹

Intervening conduct or event

A body corporate cannot rely on the defence of intervening conduct or event⁴² in respect of a physical element of an offence brought about by another person if the person is an employee, agent or officer of the body corporate.

6. Geographical jurisdiction – Part 2.7

The intention behind Pt2.7 is to clarify the geographical application of Commonwealth offences. Provision is made for different levels of jurisdiction to give effect to specific governmental purposes. There is a standard geographical jurisdiction and four categories of extended geographical jurisdiction A-D.⁴³

If an offence only requires a narrow territorial based geographical jurisdiction, then s14.1 automatically applies, and standard geographical jurisdiction operates. However, if it is desired that the offence should reach outside Australia, there are four options:

³⁶ Reflected in *Tesco Supermarkets v Natrass* [1972] AC 153.

³⁷ Defined in section 12.3(6) to mean an employee agent or officer of the body corporate with duties or responsibility that his or her conduct may be fairly assumed to represent the body corporate's policy.

³⁸ Sections 12.3(2) and (3).

³⁹ Section 12.4(3).

⁴⁰ Section 9.2.

⁴¹ Section 12.5.

⁴² Section 12.6 and section 10.1.

⁴³ Section 14.1 and sections 15.1 - 15.4.

- A covers Australian citizens for what they do anywhere in the world;
- B covers Australian citizens and residents for what they do anywhere in the world;
- C covers anyone for what they do anywhere in the world regardless of citizenship or residence, except where it is not unlawful in the other place, and
- D covers anyone for what they do anywhere in the world regardless of whether it is lawful elsewhere.

Operation of the *Criminal Code*

In seeking to provide clarity in relation to criminal liability, the *Criminal Code* has brought about key reforms:

- it has abolished common law offences;
- all Commonwealth offences are now subject to the same general principles of criminal responsibility;
- a regime for the geographic reach of offences has been established which provides certainty;
- defences are articulated and their application specified; and,
- offences or elements attracting strict or absolute liability are expressly specified.

The general principles of criminal responsibility have applied to all Commonwealth offences for some time. While it may take some explanation, courts are coming to grips with the element analysis that it demands. Judicial rulings have now been given in relation to a number of aspects.

Discoveries have been made. For example, it was discovered in the midst of a trial that the *Criminal Code* did not incorporate the common law doctrine of persons being liable as principals where they acted in concert in the commission of an offence as parties to a joint criminal enterprise.⁴⁴ The CDPP has strongly advocated that this principle should be recognised in the *Criminal Code*.

The *Criminal Code* does not cover all areas and has not dealt with all issues that are likely to arise. These include the use of 'ulterior intentions' in Commonwealth law, where offences are framed around engaging in conduct with an intention to achieve an objective which does not form part of the elements of the offence, for example possession of data - with intent to commit a computer offence contrary to s478.3 of the *Criminal Code*.

Due to the staggered application of the *Criminal Code*, as yet there have only been a small number of appellate decisions interpreting the general principles of criminal responsibility. However, these cases have highlighted the significance of the structure of offences and how their drafting can influence construction under the *Criminal Code*. Drafting can have significant implications, particularly in relation to what fault elements are applicable to physical elements. Clear drafting as to what the physical and fault elements of offences are is essential.

⁴⁴ See pages 261-3 of the *Guide for Practitioners*, and also *Tangye* (1997) 92 A Crim R 545 at 556-557.

Familiarity with the conceptual structure of the *Criminal Code* and its provisions are increasing. It has provided a greater degree of certainty in the prosecution of Commonwealth by clarifying the principles on which criminal responsibility is founded.