THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CRIMINAL CODE BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice, the Hon. Duncan Kerr MP)
The Criminal Code Bill 1994 (the 1994 Bill) is the first stage in the progressive development of a Commonwealth Criminal Code which will contain a complete and revised criminal law for the Commonwealth. The 1994 Bill sets out general principles of criminal responsibility which will within 5 years apply to all Commonwealth offences. The principles are contained in Chapter 2 of the Criminal Code. The principles will not apply to all offences immediately because there will be a large number of consequential amendments required in relation to many offences contained in legislation administered by various portfolios. This is necessary because existing offences are drafted on the basis of different principles. It has been decided that the principles will first apply to what are currently Crimes Act 1914 offences. This will occur when those offences are moved into the Criminal Code. It is hoped that process will be completed during 1995.

The Government has taken a staged approach to the development of the Criminal Code for several reasons. The first is to spread the work involved in making the consequential amendments. The second is to ensure that before the work on the consequential amendments is started, we can be certain that the basic principles to be applied are acceptable to the Parliament. Thirdly, it will allow the orderly introduction of the principles. This should assist practitioners and courts to adjust to the changed approach and minimise confusion. Finally, it will demonstrate the Commonwealth’s commitment to the Code project and to State and Territory Governments who have collaborated in the development of the Model Criminal Code. Through the Standing Committee of Attorneys-General, all Governments have agreed to aim for enacting the Model Criminal Code in each jurisdiction by the centenary of federation - the year 2001.

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.

Apart from section 4 of the Crimes Act 1914 (which applies common law principles to offences under that Act), Commonwealth criminal law currently relies on section 80 of the Judiciary Act 1903 for most of its general principles of criminal responsibility. Unlike section 4, section 80 picks up local State or Territory law. As the general principles vary significantly between jurisdictions, it means that a person accused of the same offence in one State may have a
better chance of being aquitted than he or she would if the conduct occurred in another State. This is difficult to justify and was recognised as such by the Gibbs Review of Commonwealth Criminal law in its July 1990 interim report ‘General Principles of Criminal Responsibility’.

Indeed the ‘Gibbs Committee’, chaired by Sir Harry Gibbs GCMG, AC, KBE, former Chief Justice and including the Honourable Justice Ray Watson and Mr Andrew Menzies, AM, OBE, by recommending that there be general principles of criminal responsibility for Commonwealth law, planted the seed of what became a national initiative to standardise the building blocks foundations of the criminal law across the nation. By November, 1992 the Standing Committee of Attorneys-General Criminal Law Officers Committee (now the Model Criminal Code Officers Committee) had developed agreed general principles for a Model Criminal Code for Australia. That process is continuing and by the year 1998 there should be a complete draft Model Criminal Code which deals with all common serious offences.

Given Constitutional differences the Commonwealth Criminal Code will be different from the new State and Territory Criminal Codes - its subject matter will include the existing Crimes Act 1914 and other serious offences. While this is the case, offences common to the Commonwealth and State Codes will be expressed in substantially the same terms and offences unique to the Commonwealth Criminal Code will be constructed having regard to the same principles of criminal responsibility. The benefit of this will be that no matter where a trial is held in Australia, offences will need to be proved in the same way. This will have enormous benefits in terms of simplifying joint Commonwealth/State investigations and trials, the mobility of the legal profession and investigators and to Australian citizens as they do business or travel around the country.

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.’

Chapter 2 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 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.

The substantive provisions of the Code are contained in a Schedule to the 1994 Bill. At this stage the Code will only have 2 chapters. Chapter 1 provides that the only offences against laws of the Commonwealth are those offences created by, or under the authority of, the Code or any other Act. Once it comes into force there will be no common law offences. At the second stage of the development of the Code, Chapter 1 will be expanded to have numerous mechanical provisions currently in the *Crimes Act 1914*, such as penalty units, double jeopardy and provisions dealing with extraterritorial application.

Chapter 2 deals with ‘General Principles of Criminal Responsibility.’ It is divided into 12 Divisions:

Part 2.1 - Division 2

This Division outlines the purpose of the Chapter, that is to codify the general principles of criminal responsibility. It also states that the Chapter applies to all offences against the Code and that the Chapter will apply to all other offences on and after the day occurring 5 years after the Code receives Royal Assent.

Part 2.2 - Divisions 3 - 6

These Divisions set out the physical and fault elements of offences and describes instances where no fault elements apply, such as where there is strict or absolute liability.

Part 2.3 - Divisions 7 - 10

These Divisions describe the circumstances where there is no criminal responsibility, such as: children under 10 years of age; where a person is suffering from mental impairment; where the person is involuntarily intoxicated; under a mistaken belief; has a claim of right; or there is some intervening conduct or event such as duress, emergency or self-defence.

The Code prevents a person from relying on the defence of mistake of law or subordinate legislation, except in certain limited circumstances.

Part 2.4 - Division 11

This Division describes extensions of criminal liability such as attempts, complicity and common purpose, innocent agency, incitement and conspiracy.
Part 2.5 - Division 12

This Division deals with corporate criminal responsibility. This sets a basic standard of responsibility for bodies corporate in relation to general offences. It does not mean that the Commonwealth will not substitute other standards in relation to areas of law which require more stringent standards, such as laws regulating the behaviour of bodies corporate in relation environmental matters.

The Code introduces what is a unique notion that criminal responsibility should attach to bodies corporates where the corporate culture encourages situations which lead to the commission of offences. The Division maintains certain defences for companies but makes them accountable for their general managerial responsibilities and policy. It provides that negligence may be proven by failure to provide adequate communication within the body corporate.

Part 2.6 - Division 13

This Division deals with proof of criminal responsibility and it sets out the relevant burdens of proof to be discharged by both the prosecution and defence. It also deals with averments and restricts their use.

FINANCIAL IMPACT

The amendments are expected to have only a minor financial impact on Government expenditure. There are likely to be some overall benefits accruing in the longer term as the law will be simplified by the Code, but this is not quantifiable.
NOTES ON CLAUSES

Clause 1 - Short Title

This section is formal and cites the Act as the Criminal Code Act 1994 ('the Code').

Clause 2 - Commencement

This clause provides that the Act commences on a day to be fixed by proclamation. If it is not commenced within a period of 5 years after Royal Assent it will commence at the end of that period.

Chapter 2 is designed in a way where it will be possible to commence it in relation to its own provisions prior to it applying to other Commonwealth offences. During 1995 further amendments will be developed which after appropriate adjustments to fault elements and reforms recommended by the Gibbs Committee will move the offence provisions of the Crimes Act 1914 into the Code.

When that occurs the Act will be proclaimed and under proposed subsection 2.2(1) of the Code Chapter 2 of the Code will commence in relation to its own provisions but under proposed subsection 2.2(2) of the Code it will not apply to other offences until a date not later than at the end of 5 years. This will allow appropriate consequential amendments to be made without undue disruption to the legislation program. It will of course always be possible for another law to apply the Chapter 2 principles at an earlier date.

Clause 3 - The Criminal Code

Clause 3 provides that the Schedule containing the Criminal Code has effect as a law of the Commonwealth and the citation. Placing the Code in a schedule to the Act follows the practice of other jurisdictions such as Queensland and Western Australia. It places the Code in a self-contained segment which will facilitate ease of reference and the construction of the Code around these initial provisions.

Clause 4 - Definitions

Clause 4 provides for a dictionary at the end of the Code. While at this stage the dictionary has limited utility, it will become more useful as the Code develops.
SCHEDULE

CHAPTER 1 - PRELIMINARY

Division 1

Proposed Section 1.1 - Codification

This provision provides for the replacement of the common law offences with the Code offences. Once the Code has commenced, offences will only exist in Acts and Regulations. There are very few Commonwealth common law offences. These have been identified by the Gibbs Committee in its July, 1990 Interim Report (pages 259 to 272), the more relevant ones being breach of statutory command, misprison of felony, forcible entry in relation to Commonwealth property, fraud in office and refusal to serve in public office. These offences will be removed by this provision, and where appropriate, they will be covered by the Code itself. As has been mentioned above, the replacement of the preceding law will be irrelevant to interpretation of the Code. For example, English courts have drawn on the pre-existing law of larceny to assist interpretation of the English Theft Act 1968. This will also be possible under this Code.

CHAPTER 2 - GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY

PART 2.1 — PURPOSE AND APPLICATION

Division 2

Proposed section 2.1 - Purpose

Proposed section 2.1 provides that the purpose of Chapter 2 is to codify the general principles of criminal responsibility and that it contains all the general principles that apply to any offence irrespective of how the offence is created.

Proposed section 2.1 also applies the general principles of criminal responsibility to all offences. Of course, like other statutes, Parliament can override the provisions in this chapter of the Code, either elsewhere in the Code or in other legislation. Generally, because of the fundamental nature of the principles of criminal responsibility, this should not be done lightly. However, it would be possible, for example, to exclude the requirement of voluntariness (proposed section 4.2(1)) in a particular offence.
It is possible that subsequent legislation will vary the 'general principles' of chapter 2 in relation to specific offences. In the interests of the integrity of the scheme, variation should not occur without clear justification for it, and there are some principles that, because of the basic nature of the principles, it is difficult to imagine should be varied at all. Other principles might be susceptible to variation more readily, in particular those dealing with the liability of corporations (proposed Part 2.5).

Proposed section 2.2 - Application

Proposed subsection 2.2(1) applies this Chapter 2 to all offences against the Code. Subsection 2.2(2) applies Chapter 2 to all Commonwealth offences 5 years after the day on which the Code receives Royal Assent.

The Crimes Act 1914 offences are to be moved into the Code prior to the expiry of the 5 years. It is hoped this will occur during 1995. From that time on the general principles will apply to all offences contained in the Code. The modification of the Crimes Act 1914 offences to make them relevant to Code's general principles will become a die for the modification of other Commonwealth offences.

The 5 year period leading up to the application of the Code to other offences will enable the completion of necessary consequential amendments. During that 5 year period it is envisaged that offences in new legislation will reflect the Code principles and will apply them by reference. At the end of the 5 years, work on the Standing Committee of Attorneys-General Model Criminal Code will also be complete and relevant provisions from it will also be included in the Commonwealth Code.

PART 2.2 — THE ELEMENTS OF AN OFFENCE

Division 3 - General

Proposed Section 3.1 - Elements

Proposed section 3.1(1) states that offences consist of physical and fault elements. This adopts the usual analytical division of the elements of criminal offences into the actus reus and the mens rea. "Physical elements" may be conduct, or a circumstance in which conduct occurs or a result of conduct as defined in proposed subsection 4.1(1). "Fault elements" refer to the state of mind or fault of the accused.

Normally, offences will consist of one or more physical elements each with its accompanying fault element. However, proposed subsection 3.1(2) provides that some offences will not require a fault element for one or more or even any
of the physical elements (for example strict liability offences, see proposed section 6.1). Further, proposed subsection 3.1(3) provides that there may be different fault elements for different physical elements. This already occurs in many offences, but by recognising it in this way the Code provides a common way of approaching those offences.

Proposed section 3.2 - Establishing guilt in respect of offences.

Proposed section 3.2 provides that 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 prove one fault element for each physical element which requires a fault element. This states the position dealt with in more detail at Part 2.6, Division 13 of the Code which deals with the proof of criminal responsibility.

Division 4 - Physical elements

Proposed Section 4.1 - Physical Elements

Proposed subsection 4.1(1) provides that physical elements of an offence may be conduct, a circumstance in which conduct occurs, or a result of conduct.

"Conduct" is defined in proposed subsection 4.1(2) to mean an act, an omission to perform an act or a state of affairs.

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

The first difficulty is whether acts are comprised only of physical components or whether they also contain a minimal mental component of voluntariness, (that is the will to act). Voluntariness is usually regarded as part of the act and the Code has adopted that analysis. However, this makes it extremely difficult to distinguish between voluntariness and intent in simple offences (called offences of "basic intent"). This issue is dealt with in more detail in relation to voluntariness (see proposed section 4.2 below).

The second, more difficult, problem was how the Code should deal with the often crucial facts and circumstances surrounding conduct which gave that conduct colour and meaning but are not legal elements of the offence. For example, take a case where the defendant pushes a glass into a victims face. Should the 'act' be understood narrowly as just a bodily movement (the movement of defendant's hand) or more broadly to include the circumstance that the defendant had a glass in his hand? The problem is that if "act" includes circumstances defining the conduct, then the distinction between "act" and "circumstances" seems to collapse. This would also confuse the relationship between conduct and the fault elements. The fault elements should assume a
distinction between acts and circumstances ((for example, see proposed subsection 5.2(1)).

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.

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

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

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

Proposed section 4.2 - Voluntariness

Proposed subsection 4.2(1) provides that in order for conduct to exist it must be voluntary and 4.2(2) that conduct is only voluntary if it is a product of the will of the person whose conduct it is.

The problem of whether conduct involves any mental element has already been raised in the note on section 4.1. Despite the traditional analysis of crimes into actus reus and mens rea, the notion of what it means to "act" goes beyond mere physical movement. At a minimum there needs to be some operation of the will before a physical movement is described as an act. The physical movements of a person who is asleep, for example, probably should not be regarded as acts at all, and certainly should not be regarded as acts for the purposes of criminal responsibility. This would be inconsistent with the principle of free will which
underlies the rules of criminal responsibility. These propositions are embodied in the rule that people are not held responsible for involuntary "acts", that is physical movements which occur without there being any will to perform that act. This situation is usually referred to as automatism.

In cases where the prosecution has to prove intention or recklessness, the practical operation of the voluntariness requirement is slight. This is because it will be easier for the accused simply to argue that he or she lacked the necessary fault element. The degree of the impairment of the accused's consciousness has to be profound before the claim that he or she did not intend to act at all will be credible. Further, for many offences where the mental element does not go beyond the immediate circumstances of the physical movement, the difference between voluntariness and intent almost disappears (see the discussion of the term "act" under proposed section 4.1).

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.

Proposed subsection 4.2(3) contains examples of conduct which is not voluntary and makes it clear that the list of conduct which is not voluntary is inclusive, though it is hard to imagine any involuntary conduct which would not be covered by the list. The term "reflex" is less appropriate than "unwilled bodily movement"; some reflex acts can be regarded as voluntary (for example, the reflex responses of a skilled sportsperson). Because impaired states of consciousness may vary in degree, proposed paragraph 4.2(3)(c) is drafted to leave the jury to decide whether the condition was so profound that it rendered the conduct involuntary. The phrase "of a kind sufficient" was deleted from both sub-sections to focus on the actual state of the defendant's mind rather than his or her capacity to act voluntarily. The Code makes an exception to the principle of voluntariness in the case of voluntary intoxication at proposed subsection 4.2(6).

Proposed subsection 4.2(4) provides that an omission to perform an act is only voluntary if the act omitted was one which the person is capable of performing. Clearly, the physical element of an offence constituted by conduct can include conduct constituted wholly by an omission to act. However, it was decided to accept the common law and Griffith Codes position that omissions attract liability only if the statute creating the offence explicitly says so, or the omission was in breach of a legal duty to act (see proposed section 4.3).

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.
Proposed section 4.2(5) provides that if the offence consists only of a state of affairs, for example being a vagrant, then the state of affairs can only be voluntary if the person is capable of exercising control over it. Offences like "being a drug addict" are to be avoided because that they penalise conduct which is involuntary. 4.2(5) maintains the general principle of voluntariness for such offences.

Proposed subsection 4.2(6) 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 New South Wales, Victoria, South Australia and the Australian Capital Territory 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.

Proposed subsection 4.2(7) states that intoxication is not self induced unless it came about involuntarily or as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

Proposed section 4.3 - Omissions

Proposed section 4.3 states that an omission to perform an act can only be a physical element if the law creating the offence expressly makes it so or the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform. There are many such duties including duties related to protection of persons and others such as the duty to file a tax return.
Division 5 - Fault elements

Proposed Section 5.1 - Fault elements

Proposed subsection 5.1(1) states that a fault element for a physical element may be intention, knowledge, recklessness or negligence. These are set out in descending order of culpability. Subsection 5.1(2) explains that a law which creates a particular offence can specify other fault elements for physical elements of that offence.

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

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

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

Under common law rules, the onus would be on the prosecution to establish that the defendant knew he or she was placing dangerous goods on board an aircraft (see He Kaw Teh (1985) 157 CLR 523) or was aware of at least a likelihood that the goods he or she was placing were dangerous: Bahri Kural (1987) 162 CLR 502. In a common law jurisdiction, the case would not be allowed to go to the jury if the Crown failed to prove this element. Under the Griffith Codes, the prosecution case would normally go to the jury without proof of knowledge by the defendant of the nature of the goods. The Crown would only need to disprove involuntariness and accident in terms of section 23, or honest and reasonable but mistaken belief under section 24, if those issues were raised.
The defence of mistake is also a point of difference. At common law, an honest albeit unreasonable mistake can afford a defence to offences involving a mental element. Under the Griffith Codes, regardless of whether the offence involves a mental element, a mistake of fact will only afford a defence where a mistake is both honest and reasonable. Notwithstanding that apparent difference, the experience of juries in common law jurisdictions is that they reject the defence where the mistake is not credible 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 Woolminton [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.

**Proposed section 5.2 - Intention.**

Proposed subsection 5.2(1) provides that a person has intention with respect to conduct if he or she means to engage in that conduct. 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.

Proposed subsection 5.2(2) 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 proposed section 5.4.

Proposed section 5.2(3) provides that a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events. It was felt the definition of "intention" should include awareness that the result will occur in the ordinary course of events, or is morally or virtually certain to occur. Therefore the definition follows the wording proposed in the English Draft Code. The contrary position is that such an awareness or foresight is at best evidence, perhaps very good evidence, of intention, but does not amount to intention. That is the position taken by the House of Lords in Moloney [1985] AC 905; Hancock [1986] AC 455. See also Nedrick [1986] 1 WLR 1025.

Proposed Section 5.3 - Knowledge

Proposed section 5.3 states 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. 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.

Proposed Section 5.4 - Recklessness

Proposed subsection 5.4(1) provides that a person is reckless to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist or having regard to the known circumstances it is unjustifiable to take the risk. This definition substantially follows the US Model Penal Code in using "substantial" and "unjustifiable" as the two key words. Recklessness has been defined in terms of a "substantial" risk rather than in terms of probability or possibility because those terms invite speculation about mathematical chances.
and ignore the link between the degree of risk and the unjustifiability of running that risk in any given situation.

Proposed subsection 5.4(2) provides that a person is reckless with respect to result if he or she is aware of the substantial risk that the result will occur and having regard to the circumstances known to him/her it is unjustifiable to take the risk. It now seems clear at common law that foresight of probability is restricted to murder and the foresight of possibility is the test for all other offences, including complicity in murder.

Proposed section 5.4(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 5.4 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 (see the notes on proposed section 5.5). Although there are 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.

Proposed subsection 5.4(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).

Proposed subsection 5.4(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.
Proposed section 5.5 - Negligence

Proposed section 5.5 provides a person is negligent with respect to a physical element of an offence if his or her conduct involves such a great falling short of the standard of care that a reasonable person would have exercised in the circumstances or such a high risk that the physical element exists or will exist that the conduct merits criminal punishment. 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.

Proposed section 5.6 - Offences that do not specify fault elements

Proposed subsection 5.6(1) provides that if the law creating 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.

Proposed subsection 5.6(2) provides that if law creating 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 the fault elements are to be anything else.
Division 6 - Cases where fault elements are not required.

Proposed section 6.1 - Strict Liability

Proposed subsection 6.1(1) provides if a law that creates an offence provides that the offence is one of strict liability then there are no fault elements for any of the physical elements of the offence and the defence of mistake of fact under proposed section 9.2 is available. While it is possible for other laws to provide otherwise, and during the future consequential amendments exercise it may be necessary, the aim of this provision is ensure that each law clearly identifies strict liability offences by specifying those that are of that description. This is consistent with the approach of the Senate Standing Committee on Constitutional and Legal Affairs in its 1982 report on ‘Burden of Proof in Criminal Proceedings’ (Parliamentary Paper No. 319/1982). It is a valuable Parliamentary accountability mechanism.

Proposed subsection 6.1(2) provides that if a law that creates an offence provides that strict liability applies to a particular physical element of the offence, then there are no fault elements for that physical element but the defence of mistake of fact under proposed section 9.2 is available in relation to that physical element.

The term “strict liability” is not used consistently in the case law. Proposed sections 6.1 codifies the more generally accepted view that strict liability dispenses with a fault element for the physical element but allows a defence of mistake of fact. This is not allowed where the offence is one of absolute liability.

Proposed subsection 6.1(3) provides that strict liability does not make any other defence unavailable, such as necessity.

Proposed section 6.2 - Absolute Liability

Proposed subsections 6.2(1) and 6.2(2) state that if an offence provides that the whole offence is one of absolute liability or that absolute liability applies to a particular physical element of it then there are no fault elements for any element of the particular physical element as the case may be, and mistake of fact is not available. Absolute liability does not allow the defence of mistake; this accentuates the difference between the proposed sections 6.1 and 6.2. For the sake of clarity, proposed sections 6.2(3) states that other defences (for example, necessity) are available. The conduct constituting the physical element in both strict and absolute liability must be voluntary (see proposed subsection 4.2(1)).
PART 2.3 — CIRCUMSTANCES IN WHICH THERE IS NO CRIMINAL RESPONSIBILITY

Division 7 - Circumstances involving lack of capacity

Proposed section 7.1 - Children under 10

Proposed section 7.1 states that a child under 10 is not criminally responsible for an offence. Provisions on the age of criminal responsibility vary from jurisdiction to jurisdiction. Under the common law there is a presumption that no child under 7 years can commit a crime. Tasmania adheres to the common law. In the Australian Capital Territory it is under 8 years and in other jurisdictions it is under 10 years.

Proposed section 7.2 - Children over 10 but under 14

Proposed subsection 7.2(1) provides that a child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.

Proposed subsection 7.2(2) provides that the question whether a child knows that his or her conduct is wrong is one of fact and that the burden of proving this is on the prosecution.

Proposed section 7.3 - Mental impairment

Proposed subsection 7.3(1) provides that a person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment which had certain specified effects. These effects are that the person did not know the nature and quality of the conduct, or that the person did not know that the conduct was wrong or that the person was unable to control the conduct.

The provision is based on the McNaughten test. The mental impairment defence is primarily concerned with the determination of criminal responsibility, a legal rather than a medical task. Although the expertise of psychiatrists and psychologists is of great importance both in codifying the defence and in giving evidence in court, the alternative of strict categorization of the types of conditions which render a person not guilty on the ground of mental impairment is too inflexible. A broad definition of mental impairment allows the jury to hear psychiatric testimony based on the latest expertise while properly leaving the ultimate question of responsibility to the jury. The Gibbs Committee (paras 9.39-9.40) and the Victorian Law Reform Committee, Mental Malfucion (paras 45 and 48 - 51) reached a similar conclusion.
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 proposed subsection 7.2(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 represents an expansion and variation of section 27 of the existing Queensland and Western Australian Codes. It also moves away from the existing Griffith Code concepts based on capacity in favour of tests phrased in terms of what the defendant actually knew.

The subsection 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.

The Code 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.

Proposed subsection 7.3(2) 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 proposed subsection 7.3(3) 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 proposed subsections 7.3(5) and (6) - ‘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.

Proposed subsection 7.3(4) 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.

Proposed subsections 7.3(5) and 7.3(6) provide for priority of defences. Thus 7.3(5) 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. 7.3(6) provides that a person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but can rely on the proposed section to deny criminal responsibility.

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. As indicated below (see commentary on proposed subsection 7.3(8)), a verdict of acquittal on the basis of involuntariness under proposed subsection 4.2(1) is precluded by proposed subsection 7.3(5) 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.
Proposed subsection 7.3(7) 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 (proposed subsection 7.3(6)).

Proposed subsection 7.3(8) defines mental impairment as including senility, intellectual disability, mental illness, brain damage and severe personality disorder.

It 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.

Proposed subsection 7.3(9) 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 (proposed subsection 7.3(5)). 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 *Falcons* test.

Division 8 - Intoxication

Proposed Section 8.1 - Definition - self-induced intoxication

Proposed section 8.1 provides that for the purpose of Division 8, intoxication is not self-induced if it came about involuntarily or as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

Proposed Section 8.2 - Intoxication (offences involving basic intent)

Proposed subsection 8.2(1) provides that evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.

Proposed subsection 8.2(2) states that a fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

A fault element of intention with respect to a circumstance or with respect to a circumstance 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, proposed subsection 8.2(2) is drafted in terms of basic intent fault elements rather than basic intent offences. This is the drafting approach used throughout chapter 2.

Conceptually 8.2(2) is tied to the definitions of the fault elements in proposed sections 5.1 to 5.5. 8.2(2) 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.

Proposed subsection 8.2(3) 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.
Proposed subsection 8.2(4) 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 proposed subsection 8.2(5) 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 proposed section 9.2 (Mistake of fact - strict liability) and provides a fair way of dealing with mistake, but at the same time remaining consistent with the principles in relation to intoxication.

Proposed section 8.3 - Intoxication (negligence as a fault element)

Proposed subsection 8.3(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.

Proposed subsection 8.3(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 (proposed section 8.1(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.
Proposed Section 8.4 - Intoxication (relevance to defences)

Proposed subsection 8.4(1) provides that if any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.

Proposed subsection 8.4(2) provides that if any part of a defence is based on reasonable belief then regard must be had to the standard of a reasonable person who is not intoxicated.

Proposed subsection 8.4(3) provides that if a person’s intoxication is not self-induced, in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

Under proposed subsection 8.4(4) if, in relation to an offence each physical element has a fault element of basic intent and any part of a defence is based on actual knowledge or belief, evidence of self-induced intoxication may not be considered in determining whether that knowledge or belief existed.

For clarity, proposed subsection 8.4(5) restates the position that a fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Proposed section 8.4 deals with an issue not covered by Majewski and which the texts say is unresolved. A number of defences have objective tests which will exclude the plea of intoxication, and provocation (to be dealt with in a later chapter of the Code) has special rules relating to intoxication. However, to the extent that they have subjective elements, the spirit of Majewski and the case of O'Grady (1987) 85 Cr App R 315 appear to require a rule which disallows intoxication in relation to actual knowledge for basic intent fault elements. This may be very complex in practice but does not seem to be required by the logic of Majewski. The alternative, of having the defences operate differently depending on whether the fault element was basic or not, does not appear to be the law in England under Majewski, and would be very complex in practice.

Proposed Section 8.5 - Involuntary Intoxication

Under proposed subsection 8.5 a person is not criminally responsible for an offence if the person’s conduct was a result of intoxication which was not self-induced.

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 9 - Circumstances involving mistake or ignorance.

Proposed Section 9.1 - Mistake of fact (fault elements other than negligence)

Proposed subsection 9.1(1) provides that a person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if at the time of the conduct constituting the physical element, the person is under a mistaken belief about or is ignorant of facts and 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. (There is no clear scope for the operation of mistake in negligence offences since they only require that the defendant intends to act.) The reasonableness of the mistake is merely a factor to consider in deciding whether the mistaken belief was actually held - proposed subsection 9.1.(2).

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. Section 9.1 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 proposed subsection 9.1(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.

Proposed Section 9.2 - Mistake of fact (strict liability)

Proposed subsection 9.2(1) provides that a person is not criminally liable for a strict liability offence (since proposed section 6.2 prevents this section applying in situations of absolute liability) if at or before the time of the conduct the person considers whether or not facts exist and is under a mistaken but reasonable belief about those facts and had those facts existed the conduct would not have constituted an offence.

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
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.

Proposed subsection 9.2(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. That will be open under proposed subsection 11.1(4)(a) which provides for conviction in relation to impossible attempts.

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 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.
Proposed Section 9.3 - Mistake or ignorance of statute law

Proposed subsection 9.3(1) provides that a person can be criminally responsible for an offence even if he or she is mistaken, or ignorant of, the existence or content of an Act that creates and offence or affects its scope. The Code adopts the general principles of section 21 of the English Draft Code, and s.3J of the Gibbs Committee’s Draft Bill, namely that ignorance or mistake of law is no excuse.

Proposed subsection 9.3(2) provides that 9.3(1) does not apply if the Act so provides or the ignorance or mistake negates a fault element that applies to a physical element of the offence.

Proposed Section 9.4 - Mistake or ignorance of subordinate legislation

Proposed subsection 9.4(1) similarly provides that a person can be criminally responsible even if he or she is ignorant of or mistaken about the existence or content of subordinate legislation that directly or indirectly affects the scope or operation of the offence.

However, proposed subsection 9.4(2) provides that 9.4(1) does not apply if the subordinate legislation indicates otherwise or the ignorance or mistake negates a fault element that applies to a physical element of the offence or if at the time copies of the subordinate legislation have not been made available to the public or persons likely to be affected by it and the person could not be aware of the content of the subordinate legislation even if he or she had exercised due diligence.

A similar provision appears in the Queensland Code but not the WA Code. Consideration was given to section 30 of the Northern Territory Criminal Code and s.3K of the Gibbs Committee’s Draft Bill. Such a defence is also proposed by the NZ Crimes Bill (s.26), the US Model Penal Code (s.2.04(3)(a)), and the Canadian Draft Code (s.3(7)(b)(i)).

While it is reasonable to presume that the contents of a statute are or should be known, that does not apply to the mass of subordinate legislation, unless it has been published, is available for sale, or the accused could reasonably be expected to have found out about it. Commonwealth subordinate legislation, for example, must be gazetted and on sale before it can be in force. Subsections 22(3) and (4) of the Queensland Code states that mere publication or notification in the Government Gazette is sufficient. It is unrealistic to believe such notification contributes to public awareness in any meaningful way, (see Mason J in Watson v Lee (1979) 144 CLR 374 at 408).
Proposed subsection 9.4(3) defines the term 'available' to include by sale and 'subordinate legislation' to mean an instrument of legislative character made under or in force under an Act. This will apply to regulations, orders, statutory instruments and the like.

Proposed Section 9.5 - Claim of right

Proposed subsection 9.5(1) provides that a person is not criminally responsible for an offence that has a physical element relating to property if at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right and the existence of that right would negate a fault element of the offence. It was decided that the "defence" of claim of right should appear in this part of the Code. "Claim of right" normally negates a fault element, usually, but not necessarily, one of dishonesty, and the Code should reflect that approach.

Under proposed subsection 9.5(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, proposed subsection 9.5(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 10 - Circumstances involving external factors

Proposed Section 10.1 - Intervening conduct or event

Proposed section 10.1 provides that a person is not criminally responsible for an offence with a physical element to which strict or absolute liability applies if the physical element is brought about by a person or non-human act or event over which the person has no control and the person could not reasonably be expected to guard against the bringing about of that physical element.

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.

Proposed Section 10.2 - Duress

Proposed subsection 10.2(1) provides that a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.

However, proposed subsection 10.2(2) provides that a person carries out conduct under duress only if he or she reasonably believes that a threat has been made that will be carried out unless an offence is committed and there is no reasonable way that the threat can be rendered ineffective and the conduct is a reasonable response to the threat.

It was decided that the defence should not be further limited in artificial ways. Where freewill 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 (1, 48 and 160) and the VLRC, Homicide at pp. 100-6, but not with the O'Regan Report for Queensland at 37.

Finally, proposed subsection 10.2(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. Proposed subsection 10.2(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.

Proposed Section 10.3 - Sudden or extraordinary emergency

Proposed subsection 10.3(1) provides a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.

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."

Proposed subsection 10.3(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.

Proposed Section 10.4 - Self-defence

Proposed subsection 10.4(1) provides that a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.

The law on self-defence in both common law and the Code jurisdictions has been criticised. Sections 248 and 249 of the WA Code and sections 271 and 272 of the Queensland Code are generally regarded as obscure and complex. Even without excessive self-defence, the High Court criticised the complexity of the common law in Zecevic (1987) 162 CLR 645. This proposed section simplifies the law.

Proposed subsection 10.4(2) outlines the test for the defence. It is self-defence only if the person believes the conduct is necessary to defend himself, herself or another person; or to prevent or terminate the unlawful imprisonment of himself or herself or another person; or to protect property from unlawful appropriation, destruction, damage or interference; or to prevent any criminal trespass to any land or premises; or to remove from any land or premises a person who is committing criminal trespass and the conduct is a reasonable response in the circumstances as he or she perceives them.

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.

Proposed subsection 10.4(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. Proposed subsection 10.4(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 proposed subsection 10.4(4) 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. 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 section 10.4 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 s10.4 - 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 s10.4 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.

PART 2.4 — EXTENSIONS OF CRIMINAL RESPONSIBILITY
Proposed Section 11.1 - Attempt

Proposed subsection 11.1(1) provides that a person who attempts to commit an offence is guilty of attempting to commit that offence but is to be punished as if the offence attempted had been committed.

The first part of the provision differs from the recommendation of the Gibbs Committee, that the offender be found guilty of the offence itself (see s.7C Draft Gibbs Bill). The result of the Gibbs clause would be that a person who attempts to kill another but fails would be guilty of murder. The distinction between the attempt and the completed offence is significant and should be reflected both in the verdict and the sentence. The Gibbs Committee recommendation on penalty is followed to emphasise the gravity of the offence although the accused would not be convicted of the principal offence.

Proposed subsection 11.1(2) provides the test for proximity. For the person to be guilty of attempting an offence, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

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. The decision in the case of Jones [1990] 1 WLR 1057 is questionable insofar as it implied that a person who, with intent to murder a victim and escape to Spain, was not proximate under the proposed test even where he obtained a gun, shortened it to facilitate concealment, donned a disguise and while armed and carrying Spanish money, lay in wait for his victim to arrive.

The "substantial step" test advocated by, for example, the US Model Penal Code and Professor Glanville Williams, "Wrong Turnings on the Law of Attempt" [1991] Crim LR 416 was considered but rejected as too broad because it could include acts of preparation. Some step towards the perpetration of the offence is essential.

The provision was constructed with an awareness of the difficulties that exist with the Griffith Code definition of attempt, and the artificial distinction drawn: see *Chellingworth* [1954] QWN 35. The formulation used accords with the recommendations of the Murray Code Review and the O'Regan Code Review.

Proposed subsection 11.1(3) 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.

Proposed subsection 11.1(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 proposed sections 11.4 and 11.5.)

Proposed subsection 11.1(5) 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.

What authority there is in Australia holds that the doctrine applies in those jurisdictions which retain the felony/misdemeanour distinction (Welker [1962] VR 244. This proposed subsection substantially follows s.422(2) and (3) of the Victorian Crimes Act).

Proposed subsection 11.1(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.

Proposed subsection 11.1(7) provides that there can be no offence of attempt in relation to proposed sections 11.2 (complicity and common purpose) or 11.5 (conspiracy).

Proposed Section 11.2 - Complicity and Common Purpose

Proposed subsection 11.2(1) provides that a person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed the offence and is punishable accordingly.

The Code retains the traditional formula of "aid, abet, counsel or procure". Despite some difficulties, the meaning of the words is well understood both in Griffith Codes (except for "abet" which is not used) and common law jurisdictions. The traditional formula is preferred to the Gibbs Committee formula of being "knowingly involved" in the commission of an offence because the latter would add little in substance and is more open-ended.

Proposed subsection 11.2 (2) provides that for a person to be guilty, the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence of the type committed by the other person and the offence must have been committed by the other person.

Further, proposed subsection 11.2(3) states that for a person to be guilty, the person must have intended that his or her conduct would have aided, etc the
commission of any offence of the type the other person committed or was reckless about the commission of the offence by that other person.

The mental element of complicity at common law required proof of "knowledge of the principal's intended or contemplated act (including knowledge of any specified fault on the part of the principal in relation to the results of the act or in the form of an ulterior intention) plus the specified intention to participate in such acts." (see Dennis, "The Mental Element for Accessories" in Smith, (ed), Criminal Law: Essays in Honour of JC Smith (1987) at 61).

The leading High Court case on this issue is Giorgianni (1985) 156 CLR 473. The question was whether the defendant was (or should) be guilty of complicity where he or she was reckless as to one or more of the elements of the principal offence. One commentator takes the view that Giorgianni requires respectively, knowledge and intention, and that recklessness will not do, but nevertheless argues that the mental element should encompass any situation in which the defendant "recklessly or intentionally promoted the principal offence actually committed by the defendant". On the other hand, s.2.06(3) of the US Model Penal Code requires proof that the defendant's purpose is to promote or facilitate the commission of the offence by the principal offender.

While the abolition of common purpose was considered because of its width. However, with the removal of recklessness generally from complicity, it was decided to restore common purpose in a modified form based on the general test of recklessness used in the Code (proposed subsections 5.4(1) & (2)), namely, foresight 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.

Proposed paragraph 11.2(3)(b) would allow conviction only if the defendant was aware of a substantial risk of the other person intending to sell and it was unjustifiable to take that risk.

Proposed subsection 11.2(4) 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 commission of the offence.

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.

Proposed subsection 11.2(5) provides that a person may be found guilty of aiding etc the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
Proposed Section 11.3 - Innocent agency

Proposed section 11.3 provides that a person who has, in relation to the physical element of an offence, a fault element applicable to that physical element, and procures conduct of another person would have constituted an offence on the part of the procurer if the procurer had engaged in it, is taken to have committed that offence and punished accordingly.

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.

Proposed Section 11.4 - Incitement

Proposed subsection 11.4(1) provides that a person who urges the commission of an offence is guilty of incitement.

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.

Proposed subsection 11.4(2) provides that the fault element for incitement is intention. Consistent with the approach in relation to attempt and complicity, recklessness is not included.
Proposed subsection 11.4(3) states that a person may be found guilty of incitement even if the offence was impossible. This is consistent with the position taken in relation to attempt (proposed paragraph 11.1(4)(a)).

Also as with attempt, proposed subsection 11.4(4) provides that any defences, procedures, limitations or qualifying provisions apply also to the offence of incitement in respect of that offence.

In relation to associated offences, proposed subsection 11.4(5) 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] SALR 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.

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.

Proposed Section 11.5 - Conspiracy

Proposed subsection 11.5 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 penalty units ($20,000) or more, is guilty of the offence of conspiracy to commit that offence. It provides that the offence is punishable as if the offence to which the conspiracy relates had been committed.

Given that the crime of conspiracy has been abused on some occasions and attracted criticism from the courts, the limitations were introduced as safeguards.
The first limitation concerns the scope of the offence, particularly in relation to acts which are not criminal themselves. This contrasts with section 86 of the *Crimes Act 1914* which includes conspiracy to prevent or defeat the execution or enforcement of a law of the Commonwealth. Section 86 was criticised for this in the Gibbs Committee July 1990 report and it will be replaced by the equivalent of proposed section 11.5(1) in the Crimes Amendment Bill 1994 which is to be introduced at the same time as this Bill but will commence at the end of 6 months after Royal Assent.

It was felt that if this left any gaps in the law, these were of minor significance in light of the principle that a person should not be guilty of a crime merely by reason of an agreement to do something not of itself criminal.

Secondly, it was decided that conspiracy to commit a minor offence should not be an offence. The Government has decided that at the Federal level the a more appropriate limit is to offences carrying a penalty of more than 12 months imprisonment or a fine of $20,000 or more. This coincides with the long-standing division between indictable (serious) offences and summary offences which all current penalties are based upon. The lower monetary limit has been set at that level following an examination of these penalties and reflects a more realistic division between serious and less serious offences.

As a further indication of its concern that the charge of conspiracy has been overused, or may be overused, it was felt that there should also be procedural restrictions on conspiracy charges. The charge should be subject to the consent of the DPP (or the equivalent authority), see proposed subsection 11.5(8).

Additionally proposed subsection 11.5(6) allows a court to dismiss the conspiracy count if it considers that the interests of justice require it to do so. The most likely use of this provision 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.

Proposed subsection 11.5(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.

Proposed paragraphs 11.5(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
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 (proposed paragraph 11.5(2)(b)) will prevent conviction for conspiracy where, for example, the only parties to the agreement are the accused and an agent provocateur.

Proposed paragraph 11.5(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.

Proposed paragraph 11.5(3)(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 11.5(3)(b) 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 11.5.(3)(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.

Paragraph 11.5(3)(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 (see proposed subsection 11.5(4)(a)). 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 proposed subsection 11.5(4), 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.
Proposed subsection 11.5(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.

As mentioned above proposed subsection 11.5(6) allows a court to dismiss a conspiracy charge in the interests of justice.

Proposed subsection 11.5(7) permits the use of all defences, principles, limitations or qualifying provisions that apply also to the offence of conspiracy to commit that offence. Finally proposed subsection 11.5(8) requires the consent of the Director of Public Prosecutions to proceedings for an offence of conspiracy.

Proposed section 11.6 - References in Acts to offences

Proposed section 11.6 is a mechanical provision to obviate the need for Acts to include inchoate offences by a specific definition.

PART 2.5 — CORPORATE CRIMINAL RESPONSIBILITY

Division 12

Proposed section 12.1 - General Principles

Proposed subsection 12.1(1) provides that the Code applies to bodies corporate in the same way as it applies to individuals. It provides that this occurs with such modifications as are set out in the Part and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

While some of those modifications are set out in the section itself, others will have to be developed by the courts as this area develops. The subsection has the effect that the general principles of liability, such as the definition of conduct in proposed subsection 4.1(2) and the definitions of the various fault elements in proposed subsections 5.1-5.6 (eg recklessness in proposed section 5.4) apply to companies.
Subsection 12.1(2) provides a body corporate may be found guilty of any offence, including one punishable by imprisonment. The English Draft Code (s.30(7)) restricts liability to offences punishable by a fine. This is not acceptable, see for example, VLRC, *Homicide* paras 15-21.

**Proposed section 12.2 - Physical elements**

This section provides that if a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

**Proposed subsection 12.3 - Fault elements other than negligence**

Proposed subsection 12.3(1) provides that if 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.

Proposed subsection 12.3(2) indicates the means by which such an authorisation or permission may be established. These include proving that the body corporates 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 (12.3(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 (12.3(2)(b)).

According to proposed paragraphs 12.3(2)(a) & (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 (proposed subsection 12.3(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. 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 (12.3(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 (12.3(2)(d).

Proposed subsection 12.3(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 proposed subsection 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 activities take place.

Proposed subsection 12.3(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 subsection 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.
As a general rule reversal of the onus of proof just because a company was charged, especially for the most serious offences (e.g., manslaughter), could not be justified. Nevertheless, it recognised that it is still open to the legislature to employ reverse onus of proof provisions or strict liability for offences where the normal rules of criminal responsibility are considered inappropriate.

At the federal level, this will need to occur in a number of important areas, such as environmental protection, where the potential harm of committing the offence is enormous and difficult to detect before the damage is done. The Government is not planning to water down the requirements of section 65 of the *Ozone Protection Act 1989* in regards to the matters covered by that Act. Proposed section 12.3 concerns general principles suitable for ordinary offences; it will be the basis of liability if no other basis is provided.

In cases where the degree of harm and difficulty of detection is a particular problem, a stricter basis of liability will be appropriate, such as now exists in many Commonwealth offence provisions concerning corporations. It is not intended that Part 2.5 will become a new exclusive basis for corporate liability for Commonwealth offences.

Proposed subsection 12.3(5) provides that if recklessness is not a fault element in relation to a physical element of an offence, subsection 12.3(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.

**Proposed Section 12.4 - Negligence**

Proposed subsection 12.4(1) provides the test for negligence for a body corporate is set out in proposed section 5.5 as there was some confusion about the standard for negligence in the case of corporations.

According to proposed subsection 12.4(2) where negligence is the requisite fault element, and no individual employee, agent or officer has that fault element, the fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole.

Proposed subsection 12.4(3) provides that negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers or failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

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*

**Proposed section 12.5 - Mistake of fact (strict liability)**

Proposed section 12.5(1) provides that a body corporate can only rely on section
8.2 (mistake of fact - strict liability) in respect of conduct that would apart from
the section, constitute an offence on its part if the employee, agent or officer of
the body corporate was under a mistaken but reasonable belief about facts that,
had they existed, would have meant that the conduct would not have constituted
an offence and the body corporate proves that it exercised due diligence to
prevent the conduct.

Under proposed section 12.5(2) a failure to exercise due diligence may be
evidenced by the fact that the prohibited conduct was substantially attributable
to inadequate corporate management, control or supervision of the conduct of
one or more of its employees, agents or officers; or failure to provide adequate
systems for conveying relevant information to relevant persons in the body
corporate.

These provisions are consistent with the general approach adopted in relation to
the rest of Part 2.5.

**Proposed section 12.6 - Intervening conduct or event.**

Proposed section 12.6 provides that a body corporate cannot rely on section 10.1
(intervening conduct or event) in respect of a physical element of an offence
brought about by another person if the other person is an employee, agent or
officer of the body corporate.

**PART 2.6 — PROOF OF CRIMINAL RESPONSIBILITY**

**Proposed Sections 13.1 - Legal burden of proof - prosecution**

Proposed subsection 13.1(1) places the legal burden of proving every element of
an offence relevant to the guilt of the person charged. Subsection 13.1(2)
provides that the prosecution also bears the legal burden of disproving any
matter in relation to which the defendant has discharged the evidential burden of
proof imposed on the defendant. The “legal burden” means in relation to a
matter, means the burden of proving the existence of the matter.
One of the most respectfully cited statements in the lawbooks 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*.

**Proposed Section 13.2 - Standard of proof - prosecution**

Proposed subsection 13.2(1) provides the legal burden of proof on the prosecution must be discharged beyond reasonable doubt but subsection 13.2(2) provides that the law creating the offence may specify a different standard.

**Proposed Section 13.3 - Evidential burden of proof - defence**

Where a burden of proof is cast on the defendant, proposed subsection 13.3(1) provides it is an evidential burden only. Proposed subsection 13.3(2) provides a defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (age, intoxication, mistake or ignorance, claim of right, and defences such as duress and self-defence) other than section 7.3 (mental impairment) bears an evidential burden in relation to that matter.

Proposed subsection 13.3(3) provides that a defendant who wishes to rely on any exception, exemption, excuse, justification or qualification bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification, or justification need not accompany the description of the offence.

Proposed subsection 13.3(4) provides that the 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.

Under proposed subsection 13.3(5) 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.

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.

**Proposed section 13.4 - Legal burden of proof - defence**

Proposed section 13.4 provides that a burden of proof that a law 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.

**Proposed section 13.5 - Standard of proof - defence**

Proposed section 13.5 provides that a legal burden of proof on the defendant must be discharged on the balance of probabilities.

**Proposed Section 13.6 - Use of averments**

Proposed subsection 13.6 provides a law that allows the prosecution to make an averment is taken not to allow the prosecution to aver any fault element of an offence or to make an averment in prosecuting for an offence that is directly punishable by imprisonment.

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.

**DICTIONARY**

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