THE AUSTRALIAN *CRIMINAL CODE*: TIME FOR SOME CHANGES

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INTRODUCTION[1]

It has been an eventful year for the *Criminal Code* (Cth). Chapter 2 *General Principles of Criminal Responsibility* ('Chapter 2') emerged unscathed, indeed reinforced, as a consequence of judicial scrutiny by the High Court in *R v Tang*[2] and it was the subject of an extended exposition of the principles of statutory interpretation, incorporating elements of his McPherson Lectures, by Spigelman CJ in *R v JS*.[3] The High Court decision is remarkable for the strict literalism of its interpretation of Part 2.2 *The elements of an offence*. The judgment of Kirby J, though dissenting in the outcome, provides a valuable addition to his earlier judgment in *R v Barlow*,[4] on the principles of interpretation of legislation codifying the criminal law. Danger signs are apparent, however, in an equally literal reading of Chapter 2 by the Queensland Court of Criminal Appeal in *Crowther v Sala*,[5] which will be discussed later in this essay. As appellate case law on Chapter 2 grows, stresses on its structure that were unforeseen by its framers have begun to accumulate. If Chapter 2 is to continue to guide Parliament and courts in the formulation and interpretation of criminal legislation it will require continuing legislative maintenance.

My particular concern, in this essay, is the effect of mistake or ignorance on criminal responsibility. I have two objectives in the discussion that follows. The first is to propose a set of amendments to Chapter 2. These are set out in the appendix to the

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1 This paper is an abridged version of Ian Leader-Elliott, 'Cracking the Code: Emerging Stress Points in Chapter 2 Jurisprudence' (Paper presented at the Federal Criminal Justice Forum, Canberra, 29 September 2008) <http://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=1202982>. I owe thanks to many people for their advice and, in particular, to the anonymous referees for this journal whose suggestions, for the most part, have been gratefully accepted.

2 (2008) 236 CLR 1.

3 (2007) 175 A Crim R 108; Chief Justice James Jacob Spigelman, 'Statutory Interpretation and Human Rights'; 'The Application of Quasi Constitutional Laws'; 'Legitimate and Spurious Interpretation' (Speeches delivered at the McPherson Lectures, Brisbane, 10 March 2009 – 13 March 2009) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches#CJ>.

4 *R v Barlow* (1997) 188 CLR 1.

5 (2007) 170 A Crim R 389.

paper. The Fates will determine whether the proposals will provide an impetus, at least, for change. The second objective is more fundamental. Chapter 2 is a lineal descendant of the US *Model Penal Code*, which reached its final form in 1962[6] and now provides the template for criminal codes in the great majority of American states. That code is the central point of departure for any serious consideration of criminal law theory or doctrinal development in the United States.[7] It is to be hoped that the provisions of Chapter 2 will play an equally central role in Australian criminal law theory and doctrine. Recognition of the practical significance that its provisions will have is unavoidable. Though Chapter 2 has not been generally adopted in the states and territories its conventions, rules and principles are law in every court that exercises federal criminal jurisdiction. Federal criminal law is an increasingly important area of practice and theory. For some years now, criminal jurisdiction in Australia has been centripetal in its tendency. That has been particularly apparent in morals legislation, where Commonwealth criminal law imposes limits on what can be written, said or read and establishes boundaries to the activities of lawful commercial enterprises catering for the markets in recreational sex and drugs. The terrorism provisions of the *Code* have generated a complex body of case law precedent. In these areas of federal criminal law, conviction can result in disgrace, moral opprobrium and punishment that may exceed state or territorial sentences for murder. It is difficult to imagine the existing state of conceptual apartheid between common law and *Code* principles of criminal responsibility continuing indefinitely. The body of scholarship on the general provisions of the *Code* is not large.[8] In terms of my second objective, this exploration of problems in the federal law of criminal responsibility is presented in the hope that it may lend impetus to a re-orientation of Australian criminal law theory.

The argument of the paper is conservative in the sense that it proposes a 'rational reconstruction' of a set of related provisions in Chapter 2 of the *Code*.[9] It is an attempt

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6 *Model Penal Code* — Proposed Official Draft (American Law Institute, May 4, 1962).

7 Paul Robinson and Markus Dubber, 'The American *Model Penal Code*: A Brief Overview' (2007) 10 *New Criminal Law Review* 319, 340: 'For almost half a century, the *Model Penal Code* has been the dominant force in American criminal code reform and a catalyst for American criminal law scholarship.'

8 See Matthew Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152; Ian Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26 *Criminal Law Journal* 28; Matthew Goode, 'Codification of the Criminal Law?' (2004) 28 *Criminal Law Journa*l 226; Miriam Gani, 'Codifying the Criminal Law: Issues of Interpretation' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (2005) 197, 222; Ian Leader-Elliott, 'Benthamite Reflections on Codification of the General Principles of Criminal Liability: Towards the Panopticon' (2006) 9 *Buffalo Criminal Law Review* 391; Simon Bronitt and Miriam Gani, 'Criminal Codes in the 21st Century: The Paradox of the Liberal Promise' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Future of Criminal Law* (2009) 235. Among texts specifically dealing with the *Code*, see Ian Leader-Elliott, *The Commonwealth Criminal Code: A Guide for Practitioners* (2001); Stephen Odgers, *Principles of Federal Criminal Law* (2007). Among general texts, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005), ch 3, 'Principles of Criminal Responsibility' is remarkable for the authors' decision to adopt the conceptual vocabulary and structural framework of ch 2 of the *Criminal Code*, in place of common law 'actus reus' and 'mens rea', as the basis for their text.

9 On 'rational reconstruction', see Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007) 5–6.

to present a consistent and morally coherent reformulation of those provisions in Chapter 2 that are concerned with the effect of mistake or ignorance on criminal responsibility. It is essentially an internal critique, written from within the framework of Chapter 2. For that reason, the mistake of law defence that will be proposed is limited by comparison with some more ambitious proposals for such a defence.[10] Nothing in the argument that follows is intended to preclude a more ambitious approach to the problem. It would also be possible to include within Chapter 2 one or more modular defences that would apply only when their application was specified by the legislature in an offence.[11] For the moment, however, resolution of existing obscurities and inconsistencies is a sufficiently exacting task and one that may provide a useful foundation for more radical endeavours.

For brevity I will telescope mistake and ignorance into 'error' unless it is necessary to distinguish them. Common law principles of criminal responsibility are relatively well settled when errors of fact are in issue and Chapter 2 faithfully reproduced the received common law doctrine of its time.[12] Errors of fact concerning the physical elements of an offence can defeat a prosecution allegation of intention, knowledge or recklessness.[13] It makes no difference that the error was unreasonable. If D failed to realise that the ring her boyfriend gave her was stolen, she cannot be convicted of handling stolen goods, however foolish her credulity. In offences that do not require proof of fault, Australian common law has evolved an articulate, sophisticated doctrine of strict liability which permits reliance on the defence of reasonable mistake of fact as a bar to criminal responsibility. There is no defence of reasonable ignorance and in consequence, the borderline between mistake and ignorance is contentious. Both of these familiar common law doctrines have been reproduced in Chapter 2 as central formal conventions of criminal responsibility in *Code* offences.[14] They can be largely ignored for the purposes of this paper. I will be concerned not with the effect of errors of fact but with the effects on criminal responsibility of what may be described as 'normative error' — mistake or ignorance about something that the defendant should have known. The inherent fuzziness of the concept of normative error is not of concern; there are just three varieties of the species for consideration:

(1) *Errors about standards of conduct*: It is not uncommon for federal criminal law to make criminal liability depend on breach of a standard of conduct that would be

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10 See, eg, proposals for a defence based on official inducement resulting in mistake of law: A Ashworth, 'Testing Fidelity to Legal Values: Official Involvement and Criminal Justice' in Stephen Shute and Andrew Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (2002) 299. Discussed: Jeremy Horder, *Excusing Crime* (2005) 270–6.

11 See, eg, the specialised defence in ch 9, pt 9.1 *Serious drug offences*, 313.2 *Defence – reasonable belief that conduct is justified or excused by or under a law*. A model defence of this nature might be included within ch 2, for use as required by the legislature, when framing offences.

12 *Criminal Code* (Cth) ss 5.6 Offences that do not specify fault elements, 6.1 Strict liability, 6.2 Absolute liability, 9.2 Mistake of fact (strict liability). See: *He Kaw Teh v The Queen* (1985) 157 CLR 523. But see *CTM v The Queen* (2008) 236 CLR 440, which revises some aspects of the common law doctrine of reasonable mistake. The implications of the latter decision for the common law will not be considered in this essay.

13 Mistake or ignorance do not cease to be relevant to the determination of fault when negligence is in issue. In that case, however, the enquiry will shift to consideration of what D *should* have known or realised.

14 See ch 2, pt 2.2, divs 5 *Fault elements* and 6 *Cases where fault elements are not required.*

observed by an ordinary or reasonable person. Liability for offences requiring proof of dishonesty, indecency, offensiveness and the like frequently set their standards by reference to these exemplary figures. Though most people know what is required in the way of honesty, decency and other virtues, a minority may be ignorant or mistaken about the standards that govern the conduct of reasonable or ordinary people.

(2) *Errors about the law*: People can blunder into apparent criminality as a consequence of error about the existence of a criminal prohibition or error as to the law determining the application of the prohibition. As an example of the latter possibility, an importer may know very well that it is unlawful to import prohibited drugs but fail to realise that the particular substance imported is on the prohibited list

(3) *Errors about legal rights*: In general, a person who has a legal right to act in a certain way will not commit a criminal offence when that right is exercised.[15] Error about the existence or extent of a legal right may lead a defendant to engage in criminal conduct unawares. The most familiar cases in common law are those in which a defendant seeks to avoid conviction for theft on the ground that their conduct was in pursuance of a legal right,

The three varieties of error are closely related. Indeed, the third is an instance of error of law, distinguished by the fact that D acts in the mistaken belief that there is a positive legal entitlement to act in that way. The problems involved in determining the effect of error of law on criminal responsibility at common law are familiar. The effect of mistake or ignorance about standards, though related to mistake of law and claim of right, is more obscure and deserves extended discussion which would go well beyond the scope of this paper.[16] Though the high point of subjectivism in criminal law theory has passed, it is arguable that offences of indecent, dishonest or offensive conduct — offences that will often involve significant moral obloquy[17] — should permit an escape from criminal responsibility for defendants who were ignorant or mistaken about the standards that determine what is indecent, dishonest or offensive.

Unlike the settled doctrine of strict liability with its defence of reasonable mistake of fact and the established commitment to subjectivity when liability requires proof of intention, knowledge or recklessness, the three areas that I have outlined are contested territories in the common law. Those unresolved conflicts are exposed in Chapter 2 as a consequence of the formality of its structural distinctions between physical elements and fault elements in the definition of an 'offence' and the divide between 'offence' and 'defence' in Part 2.2 *The elements of an offence* and Part 2.3 *Circumstances in which there is no criminal responsibility*. The structural formality of Chapter 2 requires resolution of issues that common law leaves to the more intricate processes of judicial and academic casuistry. It is arguable, of course, that inarticulate silence is preferable to premature attempts at precision in some of the problem areas that will be discussed. I will continue, however, in the optimistic expectation that the structural distinctions of

15 Exceptions are possible in offences of dishonesty, if the exercise of the right can be characterised as dishonest: see *R v Turner (No 2)* [1971] 1 WLR 901.

16 See Leader-Elliott, above n 1, on the problems of 'claim of right' in ch 2 – *General Principles of Criminal Responsibility*.

17 *R v Feely* [1973] QB 530, 539: '[A] taking to which no moral obloquy can reasonably attach is not within the concept of stealing…'

Chapter 2, with certain amendments, can provide a framework within which common law uncertainties about normative errors and criminal responsibility are resolved.

Before moving to the substantive issues, it is necessary to sketch some methodological guidelines and explain the structure of criminal responsibility in Chapter 2.

SOME COMMENTS ON THE INTERPRETATION OF CHAPTER 2

Much of what we count as the common law of crime is, in reality, a gloss on legislation, described by Stephen as 'a kind of secondary common law.'[18] Chapter 2 displaces a substantial part of this secondary common law when federal offences are charged. It states a set of principles, conventions and rules that will govern the interpretation of Commonwealth criminal laws, unless provision is made to the contrary. Chapter 2 was intended, in particular, to displace the common law rules and presumptions relating to fault in statutory offences, that were revived and restated by the High Court in *He Kaw Teh v The Queen*.[19] Explicit statement of a principle, convention or rule in the *Code* bars recourse to the common law.

The Commonwealth *Criminal Code* is a schedule to the *Criminal Code Act 1995* (Cth) ('*Criminal Code Act*'). Apart from the provisions that determine commencement and certain geographical applications of the *Code*, the *Criminal Code Act* includes a rudimentary interpretive provision. This is supplemented by the claim in Chapter 2 that it is comprehensive in its statement of the principles of criminal responsibility. That claim is disputable. Many of the provisions appear to be conventions that will be deployed, when legislative policy is formulated, in accordance with principles that are external to Chapter 2.[20] I will have more to say of these shortly.

Criminal Code Act 1995

4 Definitions

(1) Expressions used in the Code (or in a particular provision of the Code) that are defined in the Dictionary at the end of the Code have the meanings given to them in the Dictionary.

(2) Definitions in the Code of expressions used in the Code apply to its construction except insofar as the context or subject matter otherwise indicates or requires.

Criminal Code

2.1 Purpose

The purpose of…[Chapter 2] is to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

The relationship between the declarations in s 4 of the *Criminal Code Act* and s 2.1 *Purpose* in the *Criminal Code* is of some interest. The Act declares that definitions of

18 James Fitzjames Stephen, *A General View of the Criminal Law of England* (2nd ed, 1890) 59.

19 (1985) 157 CLR 523.

20 Note, too, the absence of any attempt to codify common law rules or principles relating to the interpretation of codes. See Miriam Gani, 'Codifying the Criminal Law: Implications for Interpretation' (2005) 29 *Criminal Law Journal* 264 on the 'irony' of continuing reliance on common law rules in this respect.

expressions used in the *Code* apply unless 'context or subject matter' indicates that the definition is displaced. That reference to context and subject matter applies generally to the *Code* provisions, whether they occur in Chapter 2 or in the substantive chapters of the *Code* that follow.[21] It is apparent, however, that not all definitions are equal. Definitions of expressions in Chapter 2, as for example definitions of the fault elements of intention, knowledge, recklessness and negligence, are intended to be of general application across the entire body of federal criminal law. It is implicit in the *Code* that the general principles and the definitions of concepts in Chapter 2 take priority over the localised 'context and subject matter' of particular offences.[22] Principles and definitions can be displaced, of course, by legislative pre-emption. But the evident purpose of Chapter 2 was to enunciate a set of principles and deploy a conceptual vocabulary that will apply to all federal offences unless displaced in by explicit provision or necessary implication.[23] The provisions of Chapter 2 do have special status to this extent at least — they are to apply to the interpretation of federal offences in the absence of a clearly apparent, contrary indication.[24]

There are several methodological guidelines in the discussion that follows. So far as it is possible to do so, I take literally the statement in s 4 of the *Criminal Code Act* that the 'expressions used in the *Code*' and in other federal offences accord with their definitions in the Chapter 2. Second, the discussion will be consistent in its application of Chapter 2 terminology, conventions, rules and principles throughout the analysis. The object of the analysis is to propose amendments that eliminate some existing areas of incoherence and inarticulate confusion in Chapter 2. The third methodological guideline is that the legislative encoding of criminal prohibitions takes priority over their judicial decoding. It will be assumed that a primary function of Chapter 2 is to provide a set of concepts, conventions and structural rules that will enable Parliament to delineate its prohibitions with maximum clarity. From this essentially legislative perspective, it is apparent that Chapter 2 can hardly be considered apart from the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*[25] ('*Guide*

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21 There appears to have been an oversight on the part of the Legislature in relation to the scope of s 4 of the *Criminal Code Act* 1995. The definitions used in ch 2 should apply generally to *all* federal offences, whether or not they are to be found in the *Criminal Code*.

22 2.2 *Application*. Compare the vitiation of the general principles of Sir Samuel Griffith's Queensland Criminal Code, that resulted from their subordination to the local particularities of the substantive offences: discussed, Ian Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26 *Criminal Law Journal*, 28, 29–31.

23 See especially the provisions that require specific provisions to displace default settings: ss 4.3 *Omissions*, 5.1 *Fault elements*, 5.6 *Offences that do not specify fault elements*, 6.1 *Strict liability*, 6.2 *Absolute liability*, 9.3 *Mistake or ignorance of statute law*, 9.4 *Mistake or ignorance of subordinate legislation*, 11.6 *Reference in Acts to offences*, 13.2 *Standard of proof — prosecution*, 13.4 *Legal burden of proof – defence*. See also div 14 *Standard geographical jurisdiction*.

24 Section 4(2) *Definitions*. The provision is misleading insofar as it suggests that the rule is limited in its application to the interpretation of expressions in offences in the *Code*. It is evidently intended to apply to all Commonwealth offences, whether they occur in the Code or in other Commonwealth legislation.

25 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (December 2007) <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers> at 1 August 2009. The current version of the Guide, dated December 2007, is an interim version pending publication of a revised version.

to Framing') which provides a set of detailed, supplementary rules and guidelines for expressing criminal prohibitions. There is, indeed, a question whether the central sections of the *Guide to Framing* should not be cast in legislative form. Many of the conventions stated in the *Guide to Framing* are akin to those which find their usual home in Acts interpretation legislation.

OFFENCES AND DEFENCES

The definitional structure of Chapter 2 is austere. An offence consists of physical elements and fault elements.[26] There is no third category of matters that go towards the constitution of an offence. Physical elements are conduct, circumstances and results.[27] That is an exhaustive list of the physical elements. Fault elements include intention, knowledge, recklessness and negligence, each of which is defined in Chapter 2. That is not, however, an exhaustive list of fault elements. Chapter 2 recognises that the legislature will make use, on occasion, of other fault elements as, for example, in offences that require proof of the fault element of 'belief' — usually in the compound form of 'knowledge or belief'.[28]

Each physical element of an offence is accompanied by a fault element unless specific provision is made to dispense with fault for that element.[29] If there is no statutory reference to a fault element, s 5.6 *Offences that do not specify fault elements* requires proof that the conduct of the offender was intentional and that circumstances and results, if any, were accompanied by recklessness.

The austerity of the Chapter 2 definition of 'physical elements' has complicated the task of drafting federal offences. Unlike the US *Model Penal Code*, the *Criminal Code* (Cth) does not recognise the useful distinction between 'material elements' of an offence and 'non material elements' that have no bearing on the offender's culpability.[30] So, for example, circumstances or results that establish Commonwealth jurisdiction are 'physical elements' of the offence in which they appear though they will usually have no bearing on the blameworthiness of the offender's conduct. As a consequence of the absence of any equivalent to the 'non material elements' of the US *Model Penal Code*, specific provision must be made in many federal offences to disarm the presumptions of s 5.6 *Offences that do not specify fault elements* in relation to the jurisdictional limits of the offence.[31] If that is not done, unmeritorious defendants would be acquitted if it could not be proved that they were aware that it was the

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26 Section 3.1 *Elements*.

27 Section 4.1 *Physical Elements*.

28 The *Guide to Framing*, above n 25, insists, in s 4.4 *Fault elements*, on the use of standard fault elements unless a legislative objective cannot be achieved by their use.

29 Chapter 2 div 6 *Cases where fault elements are not required*.

30 Model Penal Code — Proposed Official Draft (American Law Institute, 1962) s 1.13 *General Definitions*.

31 The absence of any distinction between material and non material elements has resulted in a regrettable departure from common law principles in ch 2, pt 2.4 *Extensions of criminal responsibility*. If liability for a physical element of an offence is strict or absolute, liability for attempt, complicity, incitement and conspiracy is also absolute, with respect to that element. Though the original reason for this departure from common law principles had to do with 'jurisdictional' elements, the imposition of strict and absolute liability in the inchoate offences is unlimited in its potential scope.

Commonwealth that was the victim of their crime, rather than a state or an individual.[32]

It is a fundamental structural feature of Chapter 2 that the question whether a person has committed the offence must be distinguished from the question whether the person is liable to conviction for that offence. In Chapter 2 terminology, criminal 'guilt' — commission of the 'offence' — is distinguished from criminal 'responsibility' for that 'offence'.[33] Since 'offence' is defined in terms of its physical and fault elements, proof that the offence was committed does not eliminate the possibility that the defendant may have a defence that will excuse or justify their commission of the offence. 'Criminal responsibility', as distinct from 'guilt', requires proof both of the elements of the offence and elimination of any 'exception, exemption, excuse, qualification or justification provided by the law creating [the] offence'.[34] There are potentially interesting questions about the distinctions that might be made among these barriers to criminal responsibility but for present purposes it is sufficient to refer to them collectively as 'defences'.

It would have been preferable, for clarity, if Chapter 2 had referred to 'liability' for an offence — a term which allows defeasibility — rather than 'guilt', which sounds conclusory, to mark the provisional stage between proof of the elements of the offence and consideration of any defences that might defeat a finding of criminal responsibility.[35] The intended structure of responsibility is, however, abundantly clear.

CRIMINAL RESPONSIBILITY IS A COMPOUND OF AN 'OFFENCE' AND ABSENCE OF ANY DEFENCE		
OFFENCE — 'GUILT'		**DEFENCES — 'RESPONSIBILITY'**
Physical Elements	**Fault Elements**	**Bars to Responsibility**
Conduct	Intention	Exception
Circumstance	Knowledge	Exemption
Result	Recklessness	Excuse
	Negligence	Qualification
	Others, as specified	Justification

32 See, in particular, *R v JS* (2007) 175 A Crim R 108, 132–7.

33 The terms 'guilt' and 'not guilty' are used consistently throughout the *Code* to distinguish between proof of the elements of the offence and failure to prove the elements: s 3.2 *Establishing guilt in respect of offences*, which makes no mention of defences, establishes *Code* usage from the outset. Compare the Model Penal Code (American Law Institute, 1962) which does not distinguish in this way between elements and defences: s 1.13 *General Definitions*, 'element of an offense' includes conduct, circumstances and results included in the definition of the offence and, in addition, conduct, circumstances or results 'that [negative] an excuse or justification' for the offence.

34 *Criminal Code* (Cth) s 13.3(3).

35 Reference to 'liability', to mark the point at which the elements of the offence have been established, as distinct from 'responsibility', when elements are established and defences excluded, would have been consistent with the usage in ss 6.1 *Strict liability*, 6.2 *Absolute liability*.

It has been argued that the distinction between offence and defence — 'guilt' and 'responsibility' in Chapter 2 — has profound implications for criminal law theory. The distinction is central to the recent work of RA Duff, a leading theorist, who expresses the difference in the terminology of 'responsibility' and 'liability' and advances principled grounds for determining the division between matters that go to the definition of the offence and matters that will excuse or justify the conduct of an offender.[36] It is unlikely, however, that the theoretical implications weighed so heavily with the framers of the *Code*. Profundity aside, the distinction is an essential convention in framing federal criminal laws.[37] The importance of the distinction is masked, however, by the casual manner of its expression in Chapter 2. The designation of a factor as an element of an offence or as a defence is simply a function of the allocation of the evidential or legal burden of proof. If the prosecution bears the evidential burden of proof on a 'matter',[38] it is an element; if the defendant bears the evidentiary burden on the matter, it is a defence.[39] The implications, which are not immediately obvious, can be illustrated by considering the role of intention in attribution of criminal responsibility. In the generality of cases, intention is a fault element and intentional commission of an offence is taken to be the central or paradigmatic instance of wrongdoing.[40] It is quite possible, however, for the legislature to eliminate fault elements for one or more physical elements of an offence and provide, instead, a defence that the particular element was *not* intended, so that the defendant will bear the evidential or legal burden of proof of absence of intention. Here the offence must be established before the issue of intention can arise and, if it does arise, it will do so in the form of a defence that the conduct was not intended, in which D will bear the evidential burden and may bear, in addition, the burden of persuasion. In these offences a denial of intention does not dispute the defendant's commission or 'guilt' of the offence; it disputes their criminal responsibility *for* the offence. Though such reversals are not common, when intention is a factor, there are a number of federal offences which take this form.[41] No principle of criminal responsibility enunciated in Chapter 2 guides the legislature when it determines

36 Duff, above n 9, ch 1. Duff reverses the terms however. The defendant is *responsible* for an offence if the elements are established and *liable* for the offence unless the offence is justified or excused.

37 See: Attorney-General's Department, above n 25, ch 4.

38 *Criminal Code* (Cth) ch 2, pt 2.6 — *Proof of criminal responsibility* refers throughout to 'matters' to be proved.

39 *Criminal Code* (Cth) s 13.3 *Evidential burden of proof — defence.*

40 See, in particular, RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990).

41 See, eg, *Criminal Code* (Cth) s 100.1(3); *Futures Industry Act 1986* (Cth) s 144; *National Health Act 1953* (Cth) s 82WC (repealed). The more common practice, which is functionally equivalent to a defence of denial of intention, is to presume intention and require the offender to disprove intention. These provisions are a curious and unnecessary departure from the conventions of the *Criminal Code* (Cth) ch 2. See, eg: *Criminal Code* (Cth) div 305 *Trafficking controlled drugs*, 320.5 *Presumption where trafficable quantities are involved*; *Atomic Energy Act 1953* (Cth) s 44 (repealed); *Workplace Relations Act 1996* (Cth) s 298S (repealed). The difference is potentially important: if intention is presumed, it is a 'fault element' and s 5.2 *Intention* is potentially applicable. If intention is not presumed and absence of intention is a defence, the definition has no application.

whether a matter bearing on criminal responsibility will be characterised as an element of the offence or as a defence. So far as Chapter 2 is concerned, it is entirely within the discretion of the legislature which can slice and dice its prohibitions as it will, without the hindrance or restraint of any statutory presumption, rule or principle that might guide the characterisation of a matter which determines criminal responsibility as an element or a defence.[42] There is no guarantee in Chapter 2 of the presumption of innocence or, indeed, of other fundamental principles of criminal responsibility.[43] Those principles are external to the *Code.* In practice, it is the *Guide to Framing* that expresses the general principles and establishes the conventions of layout in which defences are visually distinguished from elements by separate paragraphs and indicated by interpretive notes.[44]

As a consequence of this structure, in which the allocation of the burden of proof determines whether a factor is an element or a defence, the presumptive rule of s 5.6 *Offences that do not specify fault elements* has no application to exceptions, exemptions, excuses, qualifications or justifications.[45] Nor does s 9.2 *Mistake of fact (strict liability)* have any application, for that defence is limited in its application to mistaken beliefs that relate to an element of the offence. Liability with respect to exceptions, exemptions, excuses, qualifications and justifications is absolute, in the absence of contrary provision. Consider, for example, a simple prohibition against conduct X without the consent of V in which fault elements are not specified. The distinction between absence of consent as a circumstantial element of the offence and consent as a defence will be determined by the allocation of the evidential or legal burden of proof relating to the issue of consent. That allocation of the burden of proof will in turn determine whether the prosecution must prove that D was aware of the absence of consent. If absence of consent is an element, fault must be proved unless there is specific provision for strict or absolute liability. If consent is a defence, however, fault is irrelevant in the absence of specific provision to the contrary. Reasonable mistaken belief in consent is equally irrelevant because that defence can only apply to mistakes relating to an element of an offence. Like the presumption of innocence, the

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42 See also Simon Bronitt and Miriam Gani, above n 8.

43 The *Criminal Code* (Cth) is not remarkable in this respect. The distinction between elements and defences is equally open to legislative manipulation in the Model Penal Code (American Law Institute, 1962) s 1.12 and in The Law Commission for England and Wales, *Criminal Law: Codification of the Criminal Law – A Report to the Law Commission*, Law Com No 143 (1985), UK Draft Criminal Code Bill s 17. The principles that should govern the distinction are the subject of debate at the growing fringes of criminal law theory and quite beyond the possibility of codification. See RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007) and reviews by P Westen, 'Offences and Defences Again', (2008) 23 *Oxford Journal of Legal Studies* 563; Ian Leader-Elliott, 'A Critical Reading of RA Duff, *Answering for Crime*' (2009), *Adelaide Law Review*, forthcoming.

44 Attorney-General's Department, above n 25. See also Kirby J in *R v Tang* (2008) 236 CLR 1, 44.

45 Compare Model Penal Code (American Law Institute 1962) s 2.02. The presumptive fault elements apply to defences because absence of a defence counts as an 'element' of offences: s 1.13 'element', 'material element'. Common law is arguably the same. See Glanville Williams, 'Offences and Defences' (1982) 2 *Legal Studies* 233, 239–40. Williams, who was no friend to the distinction, remarks, at 244: '[T]here may be some reason of policy for treating defence elements differently from definitional elements; but if so the reason needs to be considered and stated.'

fundamental principle that criminal responsibility requires proof of fault is external to Chapter 2 of the *Code*.

Before turning to a consideration of mistake of law, I have a little more to say of the claim in s 2.1 *Purpose* that Chapter 2 'contains all the general principles of criminal responsibility that apply to any [federal] offence'. I have suggested that Chapter 2 does not 'contain' the presumption of innocence or the principle that criminal liability requires proof of fault. A similar analysis could be undertaken of other fundamental principles. Chapter 2 can be read, and I suggest that it should be read, as a manual of instructions for encoding and decoding criminal laws; the manual is, for the most part, neutral with respect to fundamental principles of criminal responsibility. There is, however, a central spine of unambiguous principle in Chapter 2, though it is implicit rather than explicit: it is the requirement of express legislative statement of the parameters of criminal responsibility in framing offences. This is the 'clear statement principle' enunciated by Spigelman CJ in the second of his McPherson Lectures.[46] Chapter 2 provides the analytic techniques and conceptual vocabulary that enable that principle to be realised. If that is accepted, there remains an intriguing question: what happened to the common law of criminal responsibility? Of course one could say that traces remain, secreted in the statutory interstices of Chapter 2 and, more generally, in federal offences. In the discussion of the problems of mistake of law and liability for breach of a behavioural standard, which will follow, I suggest that there will be occasions when judicial recourse to common law principles will be unavoidable for want of guidance in the *Code*. Perhaps, too, there are emergent principles that simply cannot be expressed in statutory form in the current state of criminal law theory. There is, however, a larger sense in which common law continues to provide an ultimate foundation for Commonwealth criminal law. Though one can point to instances where common law conventions are turned on their head — where, for example, absence of intention is characterised as a defence which the defendant must prove — they are infrequent. For the most part, federal offences are framed in conventional terms. Common law principles of criminal responsibility are embedded in the institutional practices of public service lawyers, law reform commissions, legislation committees and the Parliament. They form a significant part of the institutional practices that go by the name of 'legisprudence'.[47] John Gardner, in discussing the 'general part' of the criminal law, draws an illuminating distinction between the '*definitional* general part' and the '*supervisory* general part' of the criminal law.[48] The *definitional* general part corresponds to Chapter 2. It includes:

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46 Chief Justice John Jacob Spigelman, above n 3.

47 See Luc Wintgens, 'Rationality in Legislation — Legal Theory as Legisprudence: An Introduction' in Luc Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (2002), 1, 2: 'Legisprudence has as its object legislation and regulation, making use of the theoretical tools and insights of legal theory. The latter predominantly deals with the question of the *application* of law by the *judge*. Legisprudence enlarges the field of study to include the *creation* of law by the *legislator*.' See also *Legisprudence, International Journal for the Study of Legislation*, publication of which commenced in 2007.

48 J Gardner, 'On the General Part of the Criminal Law' in RA Duff (ed), *Philosophy and the Criminal Law* (1998) 208–9 (emphasis in original).

> doctrines that specify how crimes (and defences to crimes) are to be defined. They provide the detailed linguistic and conceptual apparatus of the law. …they set down the *hows* rather than the *whys* of criminalisation.[49]

The *supervisory* general part is that more abstract realm of principles, addressed to courts and legislatures alike, which will be realised or defeated, as the case may be, when the legislature uses the 'detailed linguistic and conceptual apparatus' of the definitional general part in formulating legislation. It is here, in the supervisory realm, that one finds what George Fletcher calls the 'universal grammar' of the criminal law: 'propositions that practitioners of criminal law theory around the world would, in varying degrees, hold to be true and binding as principle'.[50]

The distinction is helpful for present purposes. If one looks for declarations of principle, they are not to be found in Chapter 2 but in the *Guide to Framing*,[51] reports of the Senate Standing Committee for the Scrutiny of Bills,[52] law reform commissions and similar governmental bodies and, of course, in law reports, texts and journal literature. In this larger legisprudential sense, the common law of criminal responsibility is that body of principles which guides both the encoding and decoding of offences.[53] The object of the proposals that will follow is to enlarge the expressive resources of Chapter 2 in ways that are congruent with this broad conception of the common law.

THE MISTAKE OF LAW PROBLEM

Summary: The problem arises in cases where there is evidence that a defendant was mistaken or ignorant about the law and, as a consequence, the prosecution is unable to prove a fault element for the offence:

> A professional fisherman, charged with fishing in forbidden waters, claims that he was mistaken about the forbidden area, as a consequence of incorrect advice from the Fisheries Department. The offence requires proof of recklessness with respect to the circumstance that the activity took place in forbidden waters.[54]

Two principles, both of which claim common law provenance, conflict in such a case. The first principle is that ignorance of the law is no excuse. The consequence of that principle is that D must be convicted, however blameless his conduct. The second is that the prosecution must prove fault and, as a consequence, it will make no difference whether the fisherman was mistaken as to his location or as to the legal designation of that location. Fault cannot be established because he was not reckless with respect to fishing in the forbidden zone. Though he was blameless in this

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49 Ibid 208.

50 George Fletcher, *The Grammar of Criminal Law — Volume 1: Foundations* (2007) 96.

51 See, eg, the Attorney-General's Department, above n 25, 23–4, 28–31.

52 See, in particular, the Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002).

53 But see Bronitt and Gani, above n 8, 246–7, 252–4 who take a darker view of the process which they criticise as a 'bureaucratisation of the law-making process' at 246.

54 Based on *Ostrowski v Palmer* (2004) 218 CLR 493. Discussed in Ian Leader-Elliott, 'Benthamite Reflections on Codification of the General Principles of Criminal Liability: Towards the Panopticon' (2006) 9 *Buffalo Criminal Law Review* 391, 435–8. For a variation, in which the Court held that the captain of a fishing vessel made a mistake of fact, rather than law, as to the location of permitted fishing grounds, see *Mei Ying Su v Australian Fisheries Management Authority (No 2)* (2008) 251 ALR 135.

particular instance, simple ignorance or unreasonable failure to enquire about fishing restrictions would be equally inconsistent with proof of recklessness. The discussion that follows proposes a compromise: when a fault element is in issue, a new defence of reasonable mistake of law should be available to the defendant. The defence is not limited to instances of incorrect advice by authorities.

Discussion: Part 2.3 *Circumstances in which there is no criminal responsibility* contains all the general defences. This is the least successful part of Chapter 2, marked by failure of nerve in s 9.1 *Mistake or ignorance of fact (fault elements other than negligence)*;[55] multiple ambiguities in s 9.3 *Mistake or ignorance of statute law* and its companion, s 9.4 *Mistake or ignorance of subordinate legislation*; and outright confusion in s 9.5 *Claim of right*. Much of the confusion and ambiguity in Part 2.3 arises from failure to realise the implications of the fundamental division between elements and defences in Chapter 2.

The provisions dealing with mistake or ignorance of statutes or subordinate legislation[56] were inspired by corresponding provisions in the English Law Commission's Draft Criminal Code Bill ('UK Draft Criminal Code').[57] They bear a family resemblance to provisions in the US *Model Penal Code* and similar provisions in the *Rome Statute of the International Criminal Court* ('*Rome Statute*'). As a consequence of amending legislation in 2004, there are now two versions of s 9.3 *Mistake or ignorance of statute law*. The first version applies to offences committed between 15 December 2001, when the *Code* came into effect, and 28 February 2004, when the amending legislation came into effect. The recent decision of the NSW Court of Criminal Appeal in *R v JS*[58] deals with the original provision. Despite that decision, the meaning and effect of the original provision remains uncertain. Uncertainty about the meaning of s 9.3 *Mistake or ignorance of statute law* was not cured but compounded by the amendment. There are at least three, and perhaps more than three, possible interpretations of the current mistake of law provision.

The *Criminal Code* (Cth) provisions are set out below, with s 25 of the UK Draft Criminal Code for comparison. The proposition with which s 25 of the Draft Criminal

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55 Criminal Law Officers Committee (now Model Criminal Code Officers Committee), Report on the Model Criminal Code, *Chapters 1 and* 2: *General Principles of Criminal Responsibility* (1992) 55: 'Although, strictly speaking, evidence of mistake is only one sort of evidence which may cast doubt on the presence of a fault element, the Committee thought that for the sake of clarity, the Code should state the matter explicitly. In part the Committee was influenced by the fact that the Code will speak to a wider audience than lawyers. Even among lawyers, the law of mistake has produced a good deal of confusion.' See: *R v Donaldson and Poumako* (2009) 103 SASR 309.

56 Discussion will be limited to consideration of s 9.3 *Mistake or ignorance of statute law*. The argument and discussion is equally applicable to s 9.4 *Mistake or ignorance of subordinate legislation*.

57 The Law Commission for England and Wales, *Criminal Law: Codification of the Criminal Law – A Report to the Law Commission,* Law Com No 143 (1985), UK Draft Criminal Code Bill s 25.

58 (2007) 175 A Crim R 108. Note that the report cites, incorrectly, the amended provision at 115. The amended provision, which is not retrospective in its effect, had no possible application to the case. The judgment of Spigelman CJ at 132–7 deals, correctly, with the original provision.

Code opens is central to the discussion: 'Ignorance or mistake whether of fact or law may negative a fault element for an offence'.[59]

Mistake or ignorance of statute law

ENGLAND & WALES: DRAFT CRIMINAL CODE 1985

25 — *Ignorance or mistake*

(1) Ignorance or mistake whether of fact or law may negative a fault element for an offence

(2) Subject to subsection (1), ignorance or mistake as to a matter of criminal law is not a defence except where expressly so provided.

(3) A 'matter of criminal law' means

(a) the existence or definition of an offence or defence; or

(b) any rule of law relating to the prevention or prosecution of offences or the apprehension of offenders.

COMMONWEALTH CRIMINAL CODE: ORIGINAL VERSION — 2001–2004

9.3 — Mistake or ignorance of statute law:

(1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.

(2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:

(a) The Act is expressly or impliedly to the contrary effect; or

(b) The ignorance or mistake negates a fault element that applies to a physical element of the offence.

COMMONWEALTH CRIMINAL CODE: AMENDED VERSION — 2004[60]

9.3 — Mistake or ignorance of statute law:

(1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.

(2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if the Act is expressly to the contrary effect.

As background to the discussion that will follow, it is necessary to outline the nature of the problem that led Parliament to amend Chapter 2 in 2004. The problem itself — the 'cross-referencing problem' — seems trivial enough. Depending on the interpretation of the provision, the effects of the amendment may go well beyond a cure for the problem.

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59 The Law Commission for England and Wales, *Criminal Law: Codification of the Criminal Law — A Report to the Law Commission*, Law Com No 143 (1985), UK Draft Criminal Code Bill s 25(1).

60 *Criminal Code* (Cth) ss 9.3 *Mistake or ignorance of statute law* and 9.4 *Mistake or ignorance of subordinate legislation* were amended by the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* (Cth). The amending provision, which does not have retrospective effect, applies from 24 February 2004.

Legislation of any complexity will make use of definitional provisions and cross referencing. Drug offences provide convenient examples. The *Code* offence of possession of a controlled drug[61] refers to the definition of 'controlled drug' in s 300.2 *Definitions* which in turn refers to substances 'listed or described as a controlled drug in s 314'. Suppose D is caught in possession of cocaine, which is listed as a controlled drug. The fact that the substance is cocaine and that it is a controlled drug is a circumstantial element of the offence. Let us also suppose that D is well aware that the substance is cocaine and equally well aware that it is unlawful to possess cocaine. D is unfamiliar, however, with the *Code* and does not know that it is s 314.1 of the *Code* which lists cocaine as a controlled drug. No fault element is specified for the circumstance that the substance is a controlled drug. As a consequence, s 5.6 *Offences that do not specify fault elements* applies and the prosecution must prove that D was reckless with respect to that circumstance. Since the circumstance is defined by reference to a statutory definition and table of substances, it was feared that s 9.3(2)(b) would apply so that D would escape conviction unless the prosecution could prove knowledge of the terms of the statutory cross reference. It was an unacceptable possibility, however unlikely, that a court might take the view that Chapter 2 required the drug trafficker to know the statutory designation of cocaine as a prerequisite for conviction.

The amending provision was included in the omnibus Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004 (Cth). As its title indicates, the Bill was primarily concerned with various telecommunications offences involving banking fraud, credit card skimming, threats and harassment, sexual abuse of children and child pornography. These were exciting issues and the accompanying amendment of the mistake of law provision in Chapter 2 passed without notice: it received no specific mention in the Minister's second reading speech, in parliamentary debate or in the Senate Committee Report on the Bill. In the Explanatory Memorandum accompanying the Bill, the cross-referencing problem was the ostensible and the only reason given for the amendment. The *Guide to Framing* discussion of the amendment similarly restricts its effect to the cross-referencing problem. It is obvious, however, that potential applications of the amendment are not restricted in this way. Appreciation of its effect requires more careful scrutiny of the mistake of law problem than it received when the amendment was drafted and enacted.

Three ways of looking at mistake or ignorance of law

There is a fundamental common law principle that ignorance or mistake of law is no excuse for a criminal offence. There is said to be another fundamental common law principle that mistake or ignorance, whether of fact or law, can defeat an allegation of intention, knowledge or recklessness with respect to an element of an offence. The principles are in conflict. Common law, with its generous imprecision, permits courts to oscillate between them to reach an accord between the competing requirements of policy and justice for the purposes of the case in hand.[62] That flexibility of application is not possible in codified systems of criminal law, unless provision is made for a grant

61 *Criminal Code* (Cth) s 308.1 *Possessing controlled drugs*.

62 See, eg, the case of *P v R* (1986) 41 SASR 360. Discussed in Ian Leader-Elliott, 'Case and Comment: *P*' (1987) 11 *Criminal Law Journal* 112. The case was the subject of inconclusive consideration in *R v Taib; Ex parte Director of Public Prosecutions* (Cth) (1998) 158 ALR 744.

of interpretive licence to courts that would tend to defeat the object of codification.[63] The alternative to a grant of interpretive licence is to find and define a borderline between these competing principles.

Conflict between the two principles is endemic in the family of criminal codes that derive from the US *Model Penal Code*. It is, for example, equally apparent in the *Rome Statute*.[64] In the *Criminal Code* (Cth), the conflict is more painfully apparent because the definitional structure of Chapter 2 is significantly more rigid and articulate than it is in any other of these codes. There is no doubt that there will be occasions when mistake or ignorance of law *should* exonerate an offender, if moral blame counts for anything at all in the attribution of criminal responsibility. Common law provides many instances of exculpation, but no clear principle beyond the rough and ready rule that a mistake of law may (sometimes) defeat an allegation of mens rea. That rule owes everything to the indeterminacy of meaning of mens rea, the elimination of which was one of the central objectives of codification. Once the general principles are codified the central question is not whether, but when, error or ignorance of law should bar a finding of guilt or defeat responsibility. In an articulate structure of criminal responsibility some middle way must be found between the proposition that error or ignorance of law will always defeat an allegation of fault and the counter-proposition that error or ignorance of law is never an excuse. Chapter 2 manifestly fails to find an acceptable middle path.

I will advance three alternative interpretations of the current version of s 9.3 *Mistake or ignorance of statute law*. In the first, the provision has no application to the elements of the offence. The sole purpose of the provision is to make it clear that mistake or ignorance of law is no excuse for crime. The second and third interpretations do extend the application of the provision so that it applies to the elements of the offence in question. Each of these three interpretations is a possible reading of the provision; none is satisfactory. Section 9.3 requires reconstruction. The different interpretations will be presented briefly and without evaluative comment. Discussion and a proposal for reform will follow.

1 **The *R v Esop*[65] Interpretation**: A man from Bagdad was charged in 1836 with an 'unnatural offence', alleged to have been committed on board a ship docked in the Thames. It was argued on his behalf that the act was no crime in his native land and that his belief that what he was doing was innocent should exonerate him from criminal guilt under English law. The court rejected the argument without hesitation with the reflection: 'Numbers have been most improperly executed if it is

63 It is arguable that not all principles of criminal responsibility can be articulated in a statutory code. Section 8 of the *Criminal Code Act 1924* (Tas) preserves common law defences unless inconsistent with the provisions of the *Code*. Or, in the alternative, it may be advisable to incorporate common law by reference as, for example, in *Criminal Code* (Cth) s 11.2 *Complicity and common purpose*, which imposes liability on a person who 'aids, abets, counsels or procures the commission of an offence by another person' without defining that portmanteau expression. See generally on the relationship between code and common law, Gani, 'Codifying the Criminal Law: Implications for Interpretation', above n 20.

64 See Kevin J Heller, 'Mistake of Legal Element, the Common Law, and Article 32 in the Rome Statute: A Critical Analysis' (2008) 6 *Journal of International Criminal Justice* 419.

65 (1836) 173 ER 203.

a defence'.[66] The *Esop* principle, if I may so describe it, is enunciated in s 9.3 *Mistake or ignorance of statute law*. That is the sole and only effect of the provision. On a literal reading, the provision has no application until the elements of an 'offence' have been established. If the prosecution can prove the physical elements of the offence together with its fault elements, the defendant is guilty of the offence. Criminal responsibility follows as a matter of course because ignorance or mistake about the existence, content, scope or operation of a statute is no defence unless there is a statutory provision that is 'expressly to the contrary effect'.[67] On this reading of the provision, it simply codifies the common law principle that ignorance or mistake of law is no defence and indicates that Parliament may provide specific exceptions to that principle. It has nothing to say about the elements of the offence. No provision is made for mistake or ignorance of law that might defeat an allegation of fault because there is simply no need for it. If the prosecution cannot prove intention, knowledge, recklessness or negligence, that is the end of the matter for there is no 'offence' in such a case.[68] On the *Esop* interpretation, s 9.3 *Mistake or ignorance of statute law* merely states the truism that there is no defence of mistake or ignorance of law unless Parliament makes express provision to the contrary.

2 **The Elements Interpretation:** Section 9.3 *Mistake or ignorance of statute law* does not refer to 'an offence' in the Chapter 2 sense of the term where '[a]n offence consists of physical elements and fault elements.'[69] It refers in a loose or colloquial sense to the offence, or crime, which D is alleged to have committed. As a consequence, the provision draws no distinction between reliance on mistake or ignorance of law to deny a fault element of the offence and reliance on mistake or ignorance law as a defence when the elements have been proved. It follows that D, who is mistaken about the law, is guilty 'even if' one or more fault elements of the offence cannot be proved by the prosecution. Offences of providing deceptive, false or misleading information provide illustrative examples. There is a large number of these offences in Commonwealth law. In some the fault element with respect to falsity, whether of knowledge or recklessness, is explicit.[70] In others it is supplied by s 5.6 *Offences that do not specify fault elements*. Section 21A of the *Therapeutic Goods Act 1989* (Cth) is typical. The offence is relatively serious: it involves the infliction or potential infliction of harm to another and it is punishable by 5 years imprisonment. Guilt is

66 Ibid. Fortunately, the defendant was acquitted: witnesses for the prosecution were actuated by spite and their accusations could not be sustained.

67 In view of the manifest defects of s 9.3 *Mistake or ignorance of statute law*, it may seem pedantic to point out that the 'express provision to the contrary in the Act' to which sub-s (2) refers may not be found in the 'Act' to which sub-s (1) refers, but in another Commonwealth Act. The provision should extend to situations in which the defendant's criminal responsibility is the consequence of a conjunction of two or more Acts.

68 The authors of the UK Draft Criminal Code agreed that inclusion of such a provision was, strictly speaking, unnecessary. They included it nonetheless because they thought it 'worthwhile to enshrine in the Code the truth that a mistake as to the law, equally with one as to fact, can be a reason why a person is not at fault in the way prescribed for the offence'. *Codification of the Criminal Law*, (1985) Law Com No 143, 73.

69 *Criminal Code* (Cth) s 3.1 *Elements*.

70 As, for example, in the offences in the *Criminal Code* (Cth) ch 7, pt 7.4 *False or misleading statements*, which distinguishes grades of offending depending on whether knowledge or recklessness as to falsity is established.

incurred for a statement that is 'false or misleading in a material particular' with respect to certification of certain medicines 'under subsection 26A(2)' of the Act. Some of the matters to which s 26A(2) refers are matters of fact. Others, as for example certification that the medicine does not contain substances that are 'prohibited imports' within the meaning of the *Customs Act 1901* (Cth), are clearly legal in character. On the Elements interpretation of s 9.3 *Mistake of statute law*, D will escape conviction for the offence if D's mistake or ignorance was factual, no matter how unreasonable that ignorance or error may have been. D will be convicted, however, if the statement is false because D was ignorant or mistaken about the *Customs Act 1901* (Cth) designation of the substance. It will make no difference that D made a reasonable mistake, based perhaps on expert advice and that it represented D's best efforts to comply with the requirements of the Act.[71] Nor would it make any difference if the Act had been more specific in stating the fault requirements for the offence and included an express requirement of proof of knowledge with respect to the falsity of the statement or proof of an intention to mislead. On the Elements interpretation of s 9.3 the defendant is guilty of the offence even if it is impossible to prove the fault element required for the offence.[72] I have chosen an offence of providing false information because it provides a striking instance of the effect of the provision. The same result would follow if D was charged with an offence against s 135.2 *Obtaining financial advantage*. The offence — which includes no element of dishonesty — requires proof that the offender 'knew or believed' they were not entitled to receive the financial advantage. That requirement of fault is substantially limited however by s 9.3 *Mistake or ignorance of statute law* which dispenses with the requirement of fault in this instance. In the Elements interpretation, the object of the provision is to override the requirement that the prosecution prove knowledge or belief that there was no entitlement to receive the benefit, if D's denial of fault is based on mistake or ignorance about the law. The hypothetical fisherman who opened this section on mistake of law would also be convicted, though the prosecution could not prove recklessness with respect to the risk that he was fishing in forbidden waters.

3 **The Elements Interpretation and the Permissive Can Can:** The statutory provision that defendant can be criminally responsible, even if fault cannot be proved, is ambiguous in its reference to the 'offence' and inexplicit in its statement that the defendant '*can* be criminally responsible'. The conditions under which criminal responsibility can be imposed are not stated exhaustively in s 9.3 *Mistake or ignorance of statute law*. To say that the defendant *can* be criminally responsible *even if* mistaken does not tell us what other conditions must be satisfied for criminal responsibility. The provision may be taken to be permissive, so as to confer discretion on the court to determine whether the defendant's mistake or ignorance

71 See *Ostrowski v Palmer* (2004) 218 CLR 493 for an instance of uncompromising rigour in distinguishing between errors of law and errors of fact.

72 There is a faint suggestion in the judgment of Spigelman CJ in *R v JS* (2007) 175 A Crim R 108, 137 that explicit reference to a fault element, such as intention, knowledge or recklessness would disarm s 9.3(1) as an instance where the Act was 'expressly to the contrary effect'. The suggestion is untenable: s 5.6 *Offences that do not specify fault elements* is mandatory in its requirements. No distinction can be drawn between offences that make explicit reference to fault elements of intention or recklessness and those in which s 5.6 supplies the fault element.

of law will bar a finding that the offence has been committed.[73] The Permissive interpretation gains credibility from an underlying common law principle — itself permissive in form — that was given explicit expression in the UK Draft Criminal Code: 'Ignorance or mistake whether of fact or law *may* negative a fault element for an offence'[74] (emphasis added). In this particular instance, recourse to common law could be justified on the ground that the Permissive interpretation of s 9.3 *Mistake or ignorance of statute law* minimises the conflict, otherwise unresolved, between this provision, which dispenses with proof of fault, and the fault requirements of Part 2.2 *The elements of the offence*.[75]

It does not particularly matter, for the purposes of this paper, which of these three interpretations is correct. Investigation of the intention of the legislature — as distinct from the intention of the legislation — cannot be expected to provide guidance, for there is no indication that the legislature understood the nature of the problem. The first, *Esop* interpretation, would not solve the cross referencing problem — the ostensible reason for the 2004 amendment of s 9.3 *Mistake or ignorance of statute law*. If the mischief rule of interpretation is taken as a guide, it is clear that the *Esop* interpretation was not the meaning intended by the Commonwealth officials who devised the amendment.[76] It is, of course, another question whether their intentions are determinative.[77] The Elements interpretation certainly solves the cross referencing problem but it is extreme in its rejection of common law principle. It goes so far beyond the potential mischief of its predecessor that it is similarly unlikely to have been intended. The Permissive interpretation would certainly solve the problem of statutory cross references. There is nothing in the provision, however, that would limit its application to that particular problem. The Permissive interpretation runs contrary to the intended object of codification. In cases where the defendant was mistaken or ignorant about the law, it would leave the critical issue of fault to be determined on a case by case approach. A hypothetical drug trafficker who was mistaken about

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73 In *R v JS* (2007) 175 A Crim R 108, Spigelman CJ relies on the permissive form of the provision. His judgment is concerned, however, with the original provision, prior to amendment. The current version is less hospitable to the permissive interpretation.

74 The Law Commission for England and Wales, *Criminal Law: Codification of the Criminal Law — A Report to the Law Commission*, Law Com No 143 (1985), UK Draft Criminal Code Bill s 25(1).

75 See the discussion in Gani, 'Codifying the Criminal Law: Implications for Interpretation', above n 20, 273–5, with particular reference to the judgment of Kirby J in *R v Barlow* (1997) 188 CLR 1.

76 It is arguable that the cross-referencing problem did not require a statutory solution. One might expect any court, faced with the case of a drug trafficker who knew the substance to be cocaine, to reject out of hand the suggestion that liability requires, in addition, proof that the trafficker was familiar with the text of *Criminal Code* (Cth) Part 9.1 *Serious drug offences*. For the purposes of criminal liability, the statutory and the pharmacological designations of the substance are equivalents. Support for that conclusion might be drawn from the majority judgment in *R v Tang* (2008) 236 CLR 1. The question is not moot: the amendment is not retrospective in its effect and it is not impossible that the permissive interpretation will get a run before an appellate court. See *DPP (Cth) Reference No 1 of 2008* (2008) 220 FLR 345 where the court dismissed an untenable contention that the defendant was required to know the law without reference to s 9.3 *Mistake or ignorance of statute law*.

77 For recent discussion of the distinction, see *R v JS* (2007) 175 A Crim R 108; *CTM v The Queen* (2008) 236 CLR 440, 507 (Heydon J).

whether Gammabutyraloctone was a controlled drug might be convicted because policy requires a strict approach to drug offences. Another defendant, charged with making a false statement contrary to s 21A of the *Therapeutic Goods Act 1989* (Cth), might escape conviction on account of a mistake about the *Customs Act 1901* (Cth) designation of an ingredient in the medicine. In this particular offence, which does not form part of a regime of controls over illicit recreational drugs, a court might take the view that s 5.6 *Offences that do not specify fault elements*, reinforced by common law, applies so that fault must be proved with respect to the falsity of the statement.

The Permissive interpretation might be preferred, because it has at least the common law virtue of flexibility, but none of the interpretations is acceptable. There is a problem at the heart of the common law on mistake or ignorance of law which was concealed by that insouciant English proposal to enshrine 'the truth that a mistake as to the law, equally with one as to fact, can be the reason why a person is not at fault in the way prescribed for the offence'.[78] There is every reason for doubt that there is a common law principle that can be stated with such certitude, in the uncompromising language of a criminal code. In the UK Draft Criminal Code the principle was expressed with ambiguity that was perhaps calculated: 'Ignorance or mistake whether of fact or of law *may* negative a fault element of an offence'.[79]

Mistake or ignorance of law: A proposal for reform[80]

The assertion that common law draws no distinction between mistake of law and mistake of fact when fault is in issue is a pious fiction. There are, in any event, good grounds for rejecting the assertion that simple unreasoning ignorance or unreasonable error about law, as distinct from fact, should bar conviction for an offence. There is a difference, morally and in terms of one's obligations as a citizen, between errors of fact and errors of law. I will not argue the difference here; a persuasive case has been made elsewhere by Douglas Husak and Andrew von Hirsch[81] and it is, in any event, quite

78 See also *Model Penal Code and Commentaries: Official Draft and Revised Comments*, Part 1 General Provisions (American Law Institute, 1985) 25, 'It should also be noted that the general principle that ignorance or mistake of law is no excuse is greatly overstated; it has no application, for example, when circumstances made material by the definition of the offence include a legal element.' To the same effect, Markus Dubber, *Criminal Law: Model Penal Code* (2002) 102: The distinction between fact and law 'plays no role in the Model Code's approach to mistake. Under the Code, it makes no difference how a mistake is classified; the only thing that matters is whether or not it negatives an element of the offence'. It is worth noting that Dubber takes the view that the Model Penal Code does *not* reflect US common law on this point.

79 The Law Commission for England and Wales, *Criminal Law: Codification of the Criminal Law – A Report to the Law Commission*, Law Com No 143 (1985), UK Draft Criminal Code Bill s 25(1) (emphasis added).

80 Problems associated with mistake and ignorance of law in federal jurisdiction are increasingly apparent. See *Mei Ying Su v Australian Fisheries Management Authority (No 2)* (2008) 251 ALR 135; *DPP (Cth) Reference No 1 of 2008* (2008) 220 FLR 345; *R v Donaldson and Poumako* (2009) 103 SASR 309; *Roads and Traffic Authority (NSW) v O'Reilly* (2009) 52 MVR 243.

81 Douglas Husak and Andrew von Hirsch, 'Culpability and Mistake of Law' in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (1993) 157–74. See also Kevin Jon Heller, 'Mistake of Legal Element, the Common Law and Article 32 of the Rome Statute: A Critical Analysis' (2008) 6 *Journal of International Criminal Justice* 419.

clear that Australian common law provides no support for the unqualified assertion that there is no distinction between mistake or ignorance of law and mistake or ignorance of fact, when fault is in issue.[82] I will be concerned, rather, with the question whether it is possible to codify a principle or rule that will enable courts to recognise occasions when an allegation of fault should, and when it should not, be defeated by ignorance or mistake of law. The proposal will involve an abandonment of any requirement of fault in cases of ignorance or mistake of law and the provision, in lieu, of a defence of reasonable mistake of law. It should also be said at the outset, to avoid any possibility of misunderstanding, that the proposal leaves intact the principle that ignorance or mistake of law, no matter how reasonable, is no excuse once the physical and fault elements of an offence are established.[83]

Australian codifiers enjoy an advantage not available to their counterparts in the United Kingdom and United States. Here, a defence of mistake of law can be patterned after the existing defence of mistake of fact, with its extensive common law development since *Proudman v Dayman*[84] in 1941 and legislative formulation in s 9.2 *Mistake of fact (strict liability).* That defence has no counterpart in the US *Model Penal Code* or UK Draft Criminal Code: it is, perhaps, the most fundamental distinguishing feature of Australian criminal law theory.[85] A proposal for a defence of reasonable mistake of law is outlined in the Appendix to this paper. It is, in effect, a proposal for a form of strict liability when an offence that requires proof of fault has been committed as a consequence of the defendant's mistake of law. The existing body of common law jurisprudence and legislation on the defence of reasonable mistake of fact provides the basis for a principled and discriminating development of a parallel defence of reasonable mistake of law. There are five parameters of the defence of reasonable

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82 Criminal Law Officers Committee, above n 55, 59 bases its assertion of the proposition on The Law Commission for England and Wales, *Criminal Law: Codification of the Criminal Law — A Report to the Law Commission*, Law Com No 143 (1985), UK Draft Criminal Code Bill s 21, which cites no authority for it, and Attorney-General's Department, *Review of Commonwealth Criminal Law*: *Interim Report — Principles of Criminal Responsibility and Other Matters* (1990) Draft Bill s 3J. In the *Review* ch 6 'Mistake of Law,' the authority cited is Brent Fisse, *Howard's Criminal Law* (5th ed, 1990) 505. That text, which contains an unusually complete citation of authorities, does *not* support the draft provision. It states: 'The general rule is that ignorance or mistake of law is no excuse, *whether in relation to the mental element of offences*, the belief element of defences such as self-defence and duress, or in the…defence of reasonable mistake of fact. *A limited number of exceptions to this general rule have been recognised*' (emphasis added).

83 See, eg, *DPP (Cth) Reference No 1 of 2008* (2008) 220 FLR 345, where the Court held that the defendant's mistake or ignorance as to the law was not inconsistent with proof of the necessary fault element: prosecutorial reliance on s 9.3 *Mistake or ignorance of statute law* is unnecessary in such a case.

84 (1941) 67 CLR 536.

85 But see *CTM v The Queen* (2008) 236 CLR 440, in which all members of the High Court accepted the view that absence of reasonable mistake of fact is a form of common law mens rea, not a 'defence'. Though reasonable mistake of fact is characterised in this way, the evidential burden remains on D: the applicant, CTM, failed in the High Court on the ground that reasonable mistake of fact was not 'enlivened' and need not have gone to the jury, because there was insufficient evidence to support the hypothesis that he had made a reasonable mistake. The High Court decision is consistent with the *Criminal Code* (Cth) designation of reasonable mistake of fact as a defence — a designation which depends entirely on the allocation of the evidential burden.

mistake of fact that can provide the framework for a defence of reasonable mistake of law:

1 *Existence of an established borderline between mistake of law and mistake of fact*: Though courts have emphasised the difficulty involved in distinctions between fact and law, there are established common law criteria for the distinction.[86] The existing defence in s 9.2 *Mistake of fact (strict liability)* makes implicit reference to these common law criteria.[87] This is one among a number of points at which common law distinctions are probably inexpressible in statutory form. The proposed defence of reasonable mistake of law would be limited in its application by the same common law criteria.

2 *Mistake rather than ignorance*: The Criminal Law Officers Committee hesitated over the question whether the defence should extend to cases of reasonable ignorance before opting for a requirement of mistake.[88] Though common law may permit some flexibility in determining the question whether D was mistaken or merely ignorant,[89] Chapter 2 is uncompromising in its insistence on a mistaken belief.[90] The conclusion that ignorance should not be sufficient for the defence seems to have been based on the assumption that some form of enquiry about the circumstances is necessary before the defendant can escape conviction for an offence of strict liability. That requirement of mistake rather than mere ignorance is significantly more compelling when it is mistake of law, rather than fact, that is in issue. Though the obligation may often be unreasonably demanding, we are all expected to be 'on notice' that a very large part of the business, familial and recreational activities of our lives in a modern state may be the subject of legal regulation. To have a belief that one's conduct is lawful is to have a reason for that belief. The requirement of mistaken belief, as distinct from mere ignorance, can be justified as a requirement of minimal civic awareness.

3 *An objective standard*: To have a reason for a mistaken belief is not sufficient — the belief must be reasonable. Context and circumstances will determine what is and what is not reasonable. In areas of federal criminal law where the defence of reasonable mistake of law is likely to play a role, the availability of the defence will usually depend on the question whether the defendant's enquiries at the outset were reasonable and sufficient for the purposes of the activity that resulted in unwitting commission of the offence.[91]

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86 See *Ostrowski v Palmer* (2004) 218 CLR 493.

87 See ss 9.2 *Mistake of fact (strict liability)*, 9.3 *Mistake or ignorance of statute law,* 9.4 *Mistake or ignorance of subordinate legislation*, each of which requires the distinction to be observed.

88 Criminal Law Officers Committee, above n 55, 55.

89 See, eg, *CTM v The Queen* (2008) 236 CLR 440, 447 (Gleeson CJ, Gummow, Crennan and Kiefel JJ): 'The concept of mistake itself is protean', citing *State Rail Authority of NSW v Hunter Water Board* (1992) 28 NSWLR 721, 724. Compare *Moylan v State of Western Australia* (2007) 169 A Crim R 302, 313 [55] (Miller AJA): '[A]n accused person must show that he actually believed that a certain state of fact or facts existed which, if true, would mean that he would not be criminally responsible for the offence. A ""positive or affirmative"" belief must be present.'

90 See s 9.2(1)(a): The defence is only open to one who 'considered whether or not facts existed and is under a mistaken but reasonable belief about those facts'.

91 There appears to be considerable variation at common law, and in jurisdictions that adopted versions of the *Criminal Code 1899* (Qld) ('*Queensland Criminal Code*'), in the extent

4 *A mistaken belief that would have made the conduct innocent*: The defence will fail and the defendant will be guilty of offence A notwithstanding a reasonable but mistaken belief that the conduct amounted to offence B. The defences of reasonable mistake of fact and reasonable mistake of law should be identical in this respect. There is need, however, to ensure that 'innocence' should not be restricted in meaning to innocence of an offence against *federal* criminal law. Reasonable mistakes of law about jurisdiction should not result in acquittal. The defence should be limited to instances of mistaken belief that the conduct did not amount to an offence against federal, state, territorial or applicable foreign law. It is, incidentally, arguable that s 9.2 *Mistake of fact (strict liability)* should be limited in the same way.[92]

5 *A defence not a denial of fault*: The established distinction between elements and defences ensures that it is a question of law for the court to determine whether the defence of reasonable mistake of law is open in the circumstances of the case.[93] The proposed defence is available only when D denies a fault element of the offence charged. If the prosecution responds with the objection that D's denial of fault involves mistake or ignorance of law, the trial judge will be required to rule on this characteristically difficult issue. If the prosecution objection is not sustained, the proposed defence is irrelevant and the case against D will depend on proof of fault. If the prosecution objection is sustained, D's only recourse will be to rely on the proposed defence, which requires evidence in support of the possibility that D's putatively criminal conduct was actuated by a reasonable mistake of law. The difficult issue here — the distinction between mistake of fact and mistake of law — must be faced in any event: it is not a consequence of the proposal for a defence of reasonable mistake of law.

The proposed defence is conservative in its insistence on a reasonable mistake, rather than reasonable ignorance. There are instances where mere ignorance of law, whether reasonable or unreasonable, should bar a finding that D has committed the offence. The proposal for a defence of reasonable mistake of law does not militate against the possibility that the legislature might permit D's ignorance of law as a bar to proof of the offence. To revert to the example given earlier, it is arguable that a defendant charged with an offence of *intentionally* misleading or deceiving as a consequence of unreasonable mistake or even ignorance about the law should not be reduced to reliance on the proposed defence of reasonable mistake of law. But that is a case for an express provision in the definition of the offence that would require the prosecution to prove intention to mislead regardless of the nature of the defendant's error. That possibility is expressly contemplated in the existing s 9.3 *Mistake or*

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to which individual characteristics can be taken into account when determining whether a mistake was 'reasonable'. See the recent decision in *Bailey v Doncon* (2007) 178 A Crim R 358, 371, for a particularly indulgent formulation.

92 See s 9.2(1)(b) which permits a defence of reasonable mistake of fact when the conduct would not have constituted an 'offence' if the belief had been true. The Dictionary of the *Criminal Code* (Cth) limits 'offence' to 'an offence against a law of the Commonwealth'.

93 It now appears that Australian common law characterises absence of reasonable mistake of fact as a form of 'mens rea': see *CTM v The Queen* (2008) 236 CLR 440. Notwithstanding that characterisation, the defendant bears the burden of 'enlivening' the issue, which will not be submitted for the consideration of the trier of fact unless there is evidence of a reasonable mistake of fact.

ignorance of statute law. Chapter 2 is the home of presumptive rules that apply to the generality of offences; an offence of deception may require exclusion of the presumptive rule that I have proposed in favour of a more demanding requirement of fault.

THE BREACH OF BEHAVIOURAL STANDARDS PROBLEM

Summary: The problem arises in cases where the offence requires proof that the defendant was in breach of a standard of conduct defined by reference to the conduct of an ordinary or reasonable person. Though the conduct breaches that standard, the defendant says that she believed that reasonable or ordinary people would have considered the conduct to be within the margins of acceptability.

> The defendant, a professional photographer, charged with using a carriage service to publish child pornography,[94] claims that she believed that the images to be of high artistic merit and within the 'standards of morality, decency and propriety generally accepted by reasonable adults'.[95]

It appears that the standard by which the defendant must be judged — the standard of a 'reasonable adult' — is a physical element of the offence. If that is accepted, it follows that the prosecution will have to prove that D was aware of a substantial risk that reasonable adults would consider the material to be, in all the circumstances, offensive.[96] Though there may be some offences where it is appropriate to require proof that D was aware that conduct breached ordinary or reasonable standards of conduct, Chapter 2 should not make that a general, presumptive rule of liability. The appropriate reform is specific recognition in Chapter 2 that failure to meet a standard of conduct determined by reference to reasonable or ordinary people is a fault element.

Discussion: A considerable number of offences require proof that the defendant breached the standards of behaviour of ordinary or reasonable people. They include various offences of menacing, offensive, abusive, indecent and dishonest conduct. I will defer for the moment consideration of dishonesty, which is defined by reference to the standards of 'ordinary people' ['OP standard']. The other common behavioural standard refers to the standards of 'reasonable adults' or 'reasonable persons' ['RP standard']. The *Code* offence in s 474.17 *Using a carriage service to menace, harass or cause offence*, which was in issue in *Crowther v Sala*,[97] is typical. It is an offence to use a telecommunications link in a way that 'reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive'. The defendant, who was known for her eccentricity, telephoned a public servant and threatened to shoot him and everyone else in his office. A majority of the court characterised the RP standard as a circumstantial element of the offence. Since no fault element was specified for that or any other element of the offence, it followed that s 5.6 *Offences that do not specify fault elements* applied and the prosecution was required to prove that the defendant was reckless with respect to the risk that reasonable persons would regard her conduct as menacing. The decision has interesting implications for other provisions that use the

94 *Criminal Code* (Cth) s 474.19 *Using a carriage service for child pornography material*.
95 *Criminal Code* (Cth) ss 473.4 *Determining whether material is offensive*, 473.1 *Definitions*, 'child pornography'.
96 *Criminal Code* (Cth) s 474.19(2)(b).
97 (2007) 170 A Crim R 389.

same RP standard in customs and telecommunications offences involving abusive, indecent, menacing, harassing and offensive conduct, communications or media.

Section 474.17 is unusual. Specific statutory reference to the standards of ordinary or reasonable people is not common in statutory offences of offensive or menacing conduct. One might ask whether anything would have been lost if the offence had omitted reference to the RP standard and simply imposed a penalty for conduct that was, 'in all the circumstances, menacing, harassing or offensive'. Perhaps that would make no difference to the outcome. Though the reference to the RP standard is no longer overt, one might say that it is implicit in the prohibition. In the closely related context of the offence of insulting conduct in public places Gleeson CJ, speaking for a majority of the High Court in *Coleman v Power*,[98] articulated the implicit standard in terms of conduct so contrary to contemporary standards of public good order as to warrant conviction of the offence. That suggests in turn that s 5.6 *Offences that do not specify fault elements* might still require proof that the defendant was reckless with respect to the perceptions of ordinary or reasonable people about menacing, harassing or offensive conduct.[99] Since that implied standard defines the prohibited conduct, it might be argued that the RP standard remains a circumstantial element of the offence.

Common law provides uncertain guidance on the question whether the defendant's own structure of beliefs and values must be considered when determining whether criminal liability can be imposed for violation of a behavioural standard. There are, of course, clear cases in which the defendant's beliefs are irrelevant. It makes no difference what the defendant counts as serious harm when the question is whether the harm was so serious as to amount to 'grievous bodily harm'.[100] But that reference to 'grievous bodily harm' does not relate to a behavioural standard or engage considerations of moral, economic or political liberalism in the same way as offences that involve breach of standards of decency or acceptable behaviour.[101] The grievous bodily harm standard is different for another reason: it marks the difference between two degrees of serious wrongdoing, rather than a threshold of liability.

The closest common law analogy to *Crowther v Sala* is to be found in the development of the concept of dishonesty in UK common law. Apart from a couple of specific rules declaring that certain conduct was not to be counted as dishonest, the *Theft Act 1968* (UK) left the meaning of the concept at large. In 1973, in *R v Feely ('Feely')*,[102] the Court of Appeal held that dishonesty was to be determined by

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98 (2004) 220 CLR 1, 26 (Gleeson CJ) on insulting words: '[T]he language in question must be not merely derogatory of the person to whom it is addressed; it must be of such a nature that the use of the language, in the place where it is spoken, to a person of that kind, is contrary to contemporary standards of public good order, and goes beyond what, by those standards, is simply an exercise of freedom to express opinions on controversial issues.' See also *Ferguson v Walkley* (2008) 17 VR 647.

99 Compare, for example, *Ball v McIntyre* (1966) 9 FLR 237, 242–3, where Kerr J said that 'offensive' behaviour must be 'calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person.' Also, see generally the acute discussion and analysis in Bronitt and McSherry, *Principles of Criminal Law*, above n 8, 752–70.

100 *Charlie v The Queen* (1999) 199 CLR 387. The transcript of argument before the High Court is particularly interesting on this issue. See also *R v Watson* [1987] 1 Qd R 440.

101 *Ferguson v Walkley* (2008) 17 VR 647.

102 [1973] QB 530.

reference to the current standards of ordinary decent people. After almost a decade, in *R v Ghosh ('Ghosh')*,[103] the Court of Appeal added a further requirement: a defendant whose conduct violated those standards was not to be accounted dishonest unless the defendant realised that the conduct was dishonest by those standards ('*Ghosh* subjectivity').

Where dishonesty is concerned, Australian common law is different. In *Peters v The Queen ('Peters')*,[104] a majority of the High Court accepted what Andrew Ashworth describes as the 'variable populism' of the *Ghosh* test[105] but rejected the *Ghosh* requirement of proof that D knew that the conduct violated the OP standard. The decision in *Peters* may be taken to indicate that Australian common law does not require subjectivity about standards in the absence of very clear statutory indications to the contrary.[106]

The High Court decided *Peters* during the period between the publication of the Model Criminal Code Officers Committee ('MCCOC') reports on theft, fraud and conspiracy to defraud[107] and the enactment of Chapter 7 of the *Criminal Code* (Cth), which deals with offences of dishonesty. The MCCOC reports had recommended adoption of both the OP standard for dishonesty and *Ghosh* subjectivity with respect to that standard. It would not have been surprising if the Committee had resiled from its earlier position, adopted the majority decision in *Peters* and abandoned the requirement of *Ghosh* subjectivity. But the MCCOC did not resile and the concept of dishonesty in federal offences requires proof that D knew what ordinary people count as dishonesty. Several state and territorial jurisdictions followed the MCCOC and adopted both the OP standard and *Ghosh* subjectivity in their statutory definitions of dishonesty. The Commonwealth *Code* departs from the common law enunciated by the High Court in *Peters* in two quite different ways. The first was the calculated and quite deliberate incorporation of *Ghosh* subjectivity in definitions of dishonesty. The second, exemplified in *Crowther v Sala*, was the automatic application of s 5.6 *Offences that do not specify fault elements* to the RP standard as a circumstantial element of the offence. That second departure was almost certainly neither deliberate nor calculated.

The decision in *Crowther v Sala* can be welcomed as a salutary instance of strict construction of the requirements of Chapter 2 and, one might say, of recognition of the fundamental importance of its structural requirements when interpreting offences. The decision is also a danger signal, requiring legislative intervention. If the Queensland Court of Criminal Appeal had not been constrained by Chapter 2, it is unlikely that the case would have been decided the same way. If Australian common law does not require *Ghosh* subjectivity in dishonesty, it is unlikely that common law requires subjectivity about the standard that defines menacing or offensive conduct. There are very good reasons to doubt that *Ghosh* subjectivity is an appropriate requirement in offences of menacing, harassing or offensive conduct, let alone those involving indecent or abusive conduct, communications or media.

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103 [1982] QB 1053.

104 (1998) 192 CLR 493. See also *R v Balnaves* (2000) 117 A Crim R 85.

105 Andrew Ashworth, *Principles of Criminal Law* (4th ed, 2003) 387.

106 Similar considerations are apparent in the majority judgment in *R v Tang* (2008) 236 CLR 1.

107 Model Criminal Code Officers Committee, Report on the Model Criminal Code, *Chapter 3*: *Theft, Fraud, Bribery and Related Offences* (1995); Model Criminal Code Officers Committee, Report on the Model Criminal Code, *Chapter 3*: *Conspiracy to Defraud* (1997).

There is a further practical dimension to the question whether the RP behavioural standard should require *Ghosh* subjectivity. Prosecutions for offences of menacing, offensive and harassing conduct will tend to include a high proportion of cases that involve conflict between citizens and government officials. In federal criminal law that will almost always be the case, for jurisdictional reasons. Many of these defendants will be victims of social deprivation, displacement, mental abnormality or catastrophe. Others will be simply eccentric. Reasonable people usually take care to avoid conduct that menaces or offends government officials. Unreasonable people may be incapable of that restraint. The defendant in *Crowther v Sala* was at least eccentric in her responses to officialdom. It may be uncertain, in such cases, whether a defendant whose conduct violated an RP standard knew what the standard was. Ignorance of the standard may also be possible in other offences that are defined by reference to an RP or OP standard.

The implications of the preceding observations for the question whether the RP standard should be supplemented by *Ghosh* subjectivity are mixed and it would be inappropriate to pursue the issues further in this paper. It is possible that a requirement of *Ghosh* subjectivity might be appropriate in some offences that make use of an OP or RP standard but not in others; the offences are diverse in subject matter and social policy. It is also possible that the potentially discriminatory effect of some of these offences might be ameliorated by an implicit requirement that the conduct amount to a marked or egregious departure from acceptable standards.[108] My conclusion will be more modest. The policy issue should not be foreclosed by the mechanical combination of the rules of element analysis and the provisions of s 5.6 *Offences that do not specify fault elements* so as to require proof that the defendant understood the standard as a prerequisite for conviction. There is not, in this diversity of offences of breaching an OP or RP standard, the unifying element of moral obloquy that characterises the offences of dishonesty. A simple and appropriate amendment of s 5.1 *Fault elements* will avoid the automatic implication of *Ghosh* subjectivity when offences are defined by reference to the RP or OP standard. Violation of the standard should be recognised as a fault element. The UK Draft Criminal Code includes the following provision:

> 'fault element' means any element of an offence consisting —
>
> (a) of a state of mind with which a person acts; or
>
> (b) of a failure to comply with a standard of conduct; or
>
> (c) partly of such a state of mind and partly of such a failure.

Though the language of the English provision would be inappropriate in Chapter 2, a statutory declaration to the effect that falling short of an OP or RP standard constitutes a Division 5 fault element would be appropriate. Considered as a fault element, falling short of a standard would be comparable in form with the existing

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108 *Ferguson v Walkley* (2008) 17 VR 647. There is a serious issue for concern about the location of the threshold of liability for criminal offences that has so far escaped the attention of criminal law theorists. The problem is evident in the ch 2 definition of s 5.5 *Negligence*, which requires a departure from acceptable standards of conduct so marked as to '[merit] criminal punishment for the offence'. Quite apart from the circularity of the test, it is apparent that a substantial number of offences of strict and absolute liability set the threshold of liability well below that required when negligence must be proved. See, in particular, *Patterson v White* [2009] QDC 63 (Unreported, Robin J, 23 March 2009).

fault element of negligence. The immediate effect of that amendment would be to avoid the automatic application of s 5.6 *Offences that do not specify fault elements* when breach of the standard is characterised as a circumstantial element of an offence.

The amendment should refer specifically both to the RP standard and the OP standard. It should also refer to the 'reasonable adult' standard used in the definition of child pornography. It seems unlikely that there will ever be legislative need to invent yet another such standard with a fourth category of virtuous, virtual citizens. The effect of the amendment would also make it clear that dishonesty is a fault element.

CONCLUSION

I have suggested that Chapter 2 is not quite what its title proclaims. This is not a statement of the principles of criminal responsibility in the 'quasi-constitutional' sense that might make Chapter 2 an expression of some part of a 'common law bill of rights'.[109] One could hardly say that of a set of provisions that equips the legislature with a set of foolproof devices for reversing the burden of proof or eliminating any requirement that the prosecution prove fault.

That slightly deflationary appreciation of Chapter 2 is appropriate when one considers the problematic relationship between normative mistakes and criminal fault with which I have been concerned. There is no common law principle awaiting discovery and articulation that will resolve this problem. The best that can be expected is the formulation of a presumptive convention for the generality of cases. That remark is not restricted in its applications to the provisions dealing with mistake. Many of the provisions in Chapter 2 are similarly presumptive in their applications. They must be displaced when justice or necessity require greater particularity on the part of the legislature.

Though Chapter 2 is far from a restatement or distillation of common law principles of criminal responsibility, there is an implicit spine of principle in its provisions. It is the 'clear statement principle', enunciated by Spigelman CJ in his McPherson Lectures.[110] The great virtue of Chapter 2 is its articulation of a conceptual vocabulary, of reasonable precision, that can provide a transparent medium for discussion, critical evaluation and statutory communication of legislative policy by the Parliament.

Codifications of the conceptual vocabulary of the criminal law are liable to interpretive drift as courts adapt statutory formulae to deal with issues that the authors of the *Code* failed to anticipate. Interpretive drift threatens the clarity of communication between the legislature and the officials who must interpret and apply the criminal law. In the United Kingdom, the distinguished committee that prepared the UK Draft Criminal Code, under the chairmanship of Professor Sir John Smith, warned that the

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109 See Chief Justice James Jacob Spigelman, above n 3. For a UK parallel, see *R v K* [2002] 1 AC 462, 477 (Lord Steyn): 'It is well established that there is a constitutional principle of general application that "whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea"', citing *Sweet v Parsley* [1970] AC 132, 148 (Lord Reid).

110 Chief Justice James Jacob Spigelman, 'The Principle of Legality and The Clear Statement Principle' (Speech delivered at the New South Wales Bar Association Conference, Sydney, 18 March 2005). See also *R v JS* (2007) 175 A Crim R 108, 133–7 (Spigelman CJ).

general principles might become 'a trap for the unwary or uninformed'[111] as a consequence of the erosions and accretions of judicial precedent. The various problems considered in the preceding pages are points of potential stress, where a novel set of facts might induce a court to choose a novel interpretation of Chapter 2 in order to avoid an apparent injustice to the defendant or to the polity. The 'clear statement principle' leaves considerable room for interpretive drift if only because the meaning of that principle is itself a subject for casuistry. After warning of the danger of interpretive drift in the introductory remarks to its report, Sir John Smith's Committee concluded with the suggestion that the Law Commission establish a permanent supervisory body to keep the general principles in good repair.[112] It is a suggestion that deserves serious consideration in Australia. For the moment, however, there is an immediate need for a reference of emerging problems in Chapter 2 jurisprudence to an expert committee for review.

APPENDIX: PROPOSALS FOR REFORM OF CHAPTER 2

The various proposals are listed in order of their likely appearance in an amended Chapter 2. Minor and consequential changes are listed separately, in conclusion.

1 Proposal: Extend the definition of 'fault elements' to include failure to meet a standard of conduct

The amendment would draw on the definition of 'fault element' in the UK Draft Criminal Code. The provision should declare that fault elements include a falling short of a standard of conduct defined by reference to reasonable persons or ordinary persons.[113] The suggested provision is equally applicable to fault elements that incorporate a requirement of *Ghosh* subjectivity and those that do not.

5.1 Fault elements

(1) …….

(2A) A fault element for a particular physical element may be:

(a) a failure to comply with the standards of ordinary persons or reasonable persons; or

(b) a failure to comply with one of those standards coupled with another fault element.

2 Proposal: Incorporate dishonesty in Division 5 *Fault elements*

The definition would follow the standard form of the definition of dishonesty, with the addition of the following claim of right provision:

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111 The Law Commission for England and Wales, *Criminal Law: Codification of the Criminal Law – A Report to the Law Commission*, Law Com No 143 (1985) [2.34].

112 Ibid.

113 The Law Commission for England and Wales, *Criminal Law: Codification of the Criminal Law – A Report to the Law Commission*, Law Com No 143 (1985) [2.34], UK Draft Criminal Code Bill s 5(1) 'fault element'.

A person is not dishonest if the person believed:

(a) that he or she (or another) had a proprietary or possessory right; *and*

(b) that the conduct undertaken in pursuance of that right was lawful.

Incorporation of dishonesty in Division 5 *Fault elements* with its claim of right extension would require consequential deletion of the definition of dishonesty in the various federal acts where it appears.[114]

3 Proposal: Reasonable mistake of law as a defence.

The proposal has two parts: first a special rule with respect to fault elements when mistake of law would bar proof of a fault element. Since this provision is concerned with fault, it is appropriately located in Part 2.2, Division 5 *Fault elements*. It will modify the effect of s 5.6 *Offences that do not specify fault elements* and for that reason should follow that section. Second, the proposal envisages a defence of reasonable mistake of law that would displace the existing provisions of ss 9.3 *Mistake or ignorance of statute law* and 9.4 *Mistake or ignorance of subordinate legislation*. So far as possible, the proposals utilise the language of existing provisions. The proposed defence, which is set out below, extends to reasonable mistakes as to the existence or content of a law that *creates* the offence or a law that *directly or indirectly affects the scope or operation* of the offence. A more conservative version of the defence might eliminate mistakes about the law that *creates* the offence. Similarly, a more conservative version might restrict the defence to offences that do not include, as an element, the use of force against a person. It is perhaps wise to emphasise that this defence only applies to mistakes that negate fault elements; it has no application to mistakes, whether reasonable or unreasonable, relating to the definition of defences and it has no application if fault elements are established.[115]

5.6A A mistake or ignorance of law relating to fault elements

(1) Ignorance or mistake;

(2) About the existence or content of a [Commonwealth] Act:

(a) that directly or indirectly creates [an] offence; or

(b) that directly or indirectly affects the scope or operation of [an] offence;

(3) Does not negative a fault element for that offence.

This provision does not apply if the provision that creates the offence contains an express provision that requires proof of fault with respect to the existence or content of a [Commonwealth] Act that directly or indirectly creates an offence or that directly or indirectly affects the scope or operation of an offence.

9.3 Mistake of statute law

(1) A person is not criminally responsible for an offence if:

(a) at or before the time of the conduct constituting the physical element/s;

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114 Elimination of the general defence in s 9.5 *Claim of right* is proposed in Ian Leader-Elliott, 'Cracking the Code: Emerging Stress Points in Chapter 2 Jurisprudence', above n 1.

115 It could have no application, for example, in *R v Tang* (2008) 236 CLR 1 or in *DPP (Cth) Reference No 1 of 2008* (2008) 220 FLR 345, where the court dismissed an untenable contention that the elements of an offence under the *Trade Marks Act 1995* (Cth) included a requirement of proof that the defendant had knowledge, awareness or belief that the conduct was unlawful in a criminal sense or wrong according to ordinary standards.

(b) the person considered whether the conduct would constitute that offence;[116]

(c) the person was under a mistaken but reasonable belief;

(d) about the existence or content of a [Commonwealth] Act that directly or indirectly:

(i) creates the offence; or

(ii) affects the scope or operation of the offence; and

(2) Had that mistaken belief been true, the conduct would not have constituted an offence against:[117]

(a) Commonwealth law;

(b) the law of a state or territory; or

(c) foreign law.

(3) A person may be regarded as having considered whether or not conduct would constitute an offence if:

(a) he or she had considered, on a previous occasion, whether the same conduct would constitute an offence in the circumstances; and

(b) he or she honestly and reasonably believed that the conduct and circumstances were the same, or substantially the same, as those surrounding the previous occasion.

(4) This defence is not available [specify any exclusions — for example, an offence that includes an element involving the use of force against a person].

116 The defence of reasonable mistake of law does not extend to include mistakes about the law defining a *defence*. It is limited to a mistaken belief that the conduct (with its accompanying fault elements, circumstances and results) would not constitute an 'offence'.

117 The proposed provision follows s 9.2 *Mistake of fact (strict liability)* in its requirement that D would be *innocent* of any criminal offence. It is more restrictive in its application than the mistake of fact provision by requiring innocence in relation to state, territorial and foreign law. It is arguable, in the case of reasonable mistake of fact, that the defence is too generous in its potential applications. Amendment is proposed below. Note – Partial Defences of Mistaken Belief: The *Queensland Criminal Code* s 24 provides that the defence ensures that D 'is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist'. The *Model Penal Code* — Proposed Official Draft (American Law Institute, May 4, 1962) s 2.04(3) also recognises a partial defence of mistake of fact. There are several particular instances where the *Criminal Code* (Cth) recognises such partial defences: see ch 9 *Serious drug offences* and ch 10, pt 10.3 *Money laundering*, where offences are graded in tiers of seriousness by quantitative measures. Though the argument for a partial defence of reasonable mistake of *fact* has considerable persuasive force, provision for a partial defence of reasonable mistake of law would be unsustainable. Defendants who act in the knowledge that their conduct is a criminal offence should not escape liability for a more serious offence than they contemplated, no matter how reasonable their error.

Minor and consequential amendments

1. Amend ss 6.1 *Strict liability* and 6.2 *Absolute liability: Minor amendments* would be necessary if the proposals for a defence of reasonable mistake of law were implemented. As follows:

   6.1 Strict liability

   The defences of mistake of statute law and mistake of subordinate legislation under ss 9.3 *Mistake or ignorance of statute law* and 9.4 *Mistake or ignorance of subordinate legislation* are available.

   6.2 Absolute liability

   The defences of mistake of statute law and mistake of subordinate legislation under ss 9.3 *Mistake or ignorance of statute law* and 9.4 *Mistake or ignorance of subordinate legislation* are *not* available.

2. Repeal s 9.1 *Mistake or ignorance of fact (fault elements other than negligence)*: There are two reasons for repeal of the provision. The first is that a special provision for mistake or ignorance is unnecessary when the prosecution must prove fault. Unnecessary provisions are likely to attract error because courts, and counsel, will attempt to find some application for a provision that has, in fact, no application at all. The danger of that happening is all too apparent in s 9.1 for the provision is not limited to a statement of the obvious truth that the prosecution must disprove mistake or ignorance when that is required to prove fault. The provision adds an evidentiary provision permitting the 'tribunal of fact' to consider 'whether the mistaken belief or ignorance was reasonable in the circumstances'. That invites recourse to objective tests for the determination of fault elements that has been generally avoided because of the risk of jury confusion.
3. Amend s 9.2 *Mistake of fact (strict liability)*: In its present form, the provision would permit a defendant to escape liability for an offence of strict liability when the mistake of fact, had it been true, would mean that the defendant would not be guilty of a federal offence but guilty instead of an offence against a state, territorial or applicable foreign law. Whatever may be thought of foreign laws, it should not be possible for a defendant to slip unscathed between Australian criminal laws in this way.
4. Extend the categories of fault in Part 2.5 *Corporate criminal responsibility*: In their present form, the provisions of Part 2.5 provide no rules for the imputation of non standard fault elements to corporations. Attribution of dishonesty or ulterior intention to a corporation requires recourse to 12.1 *General principles*, which is inherently uncertain in its operation. If dishonesty is recognised as a fault element and included in Part 2.2 *The elements of an offence*, it should be specifically mentioned in the corporate liability provision: s 12.3 *Fault elements other than negligence*. Consideration should be given to the question whether other, non standard fault elements should be specified in Part 2.5 *Corporate criminal responsibility*.[118]

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118 The obvious example here is 'ulterior [intention]', discussed in Leader-Elliott, 'Benthamite Reflections on Codification of the General Principles of Criminal Liability: Towards the Panopticon', above n 8, 429–32.