

Defence Legislation Amendment (Application of Criminal Code) Regulations 2001 (No. 1) 2001 No. 278

EXPLANATORY STATEMENT

Statutory Rule 2001 No. 278

Issued by the authority of the Minister for Veterans' Affairs

Air Force Act 1923

Defence Act 1903

Defence Force Discipline Act 1982

Naval Defence Act 1910

Defence Legislation Amendment (Application of Criminal Code) Regulations 2001 (No. 1)

The *Air Force Act 1923* section 9, *Defence Act 1903* section 124, *Defence Force Discipline Act 1982* section 197 and *Naval Defence Act 1910* section 45 empower the Governor-General to make regulations prescribing matters that are required or permitted by those Acts to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to those Acts.

In particular, the *Air Force Act 1923* section 8(7), *Defence Act 1903* section 62(7) and the *Naval Defence Act 1910* section 38(7) empower the Governor-General to make regulations relating to the organisation, maintenance, regulation, control and discipline of the Air Training Corps, the Australian Cadet Corps and the Naval Reserve Cadets respectively.

The Regulations harmonise the offence-creating and related provisions within Defence portfolio regulations with the general principles of criminal responsibility as codified in Chapter 2 of the *Criminal Code Act 1995* (the *Criminal Code*) whilst at the same time ensuring that the offences continue to operate as intended by Parliament.

Chapter 2 of the *Criminal Code* will take effect on 15 December 2001. The purpose of Chapter 2 is to codify principles of criminal responsibility applicable to offences created by Commonwealth legislation and regulations. The effect of Chapter 2 may be summarised as follows:

- Chapter 2 of the *Criminal Code* will replace common law notions of a criminal act and a guilty mind with physical and fault elements respectively.
- One key effect of Chapter 2 is that offences of strict liability, that is offences in respect of which a fault element need not be proven at present, will gain fault elements by force of Chapter 2 after 15 December 2001. On the other hand, the *Criminal Code* permits the regulations to specify certain offences to be offences of strict liability, to maintain their current operation.
- Chapter 2 of the *Criminal Code* requires proof of defences at an 'evidential' standard unless the law creating the offence expressly imposes proof at the higher, 'legal', standard. An evidential burden means the burden of adducing or pointing to evidence that suggests a reasonable possibility that a matter exists or does not exist. By contrast, a legal burden is more onerous than an evidential burden and is defined in the *Criminal Code* to mean the burden of (positively) proving the existence of a matter.

The Regulations amend Defence portfolio regulations to comply with the scheme set out in Chapter 2 of the *Criminal Code* with regard to physical and fault elements. A number of

regulations have been specified as strict liability offences to preserve their current operation. The Regulations also provide that defences set out in Defence portfolio regulations are subject to proof at the evidential standard. In addition, the Regulations update pecuniary penalties by converting them into penalty units rather than dollar amounts.

Details of the Regulations are set out in the Attachment. The Regulations affected are the Air Force Regulations 1927, the Australian Military Regulations 1927, the Cadet Forces Regulations 1977, the Defence (Inquiry) Regulations 1985 and the Defence Force Discipline Regulations 1985.

The Regulations commence on the day on which Chapter 2 of the *Criminal Code* commences, that is, on 15 December 2001. The commencement date will allow time for the Department of Defence to conduct necessary staff training and to amend internal publications to conform to the requirements of the Schedules.

ATTACHMENT

Item 1 contains the name of the proposed Regulations.

Item 2 provides for the Regulations to commence on the day on which Chapter 2 of the *Criminal Code* commences.

Items 3 to 7 inclusive refer to Schedules 1 to 5 respectively of the proposed Regulations which list the various amendments to the Principal Regulations.

Schedule 1: Amendments to Air Force Regulations 1927

Authority. Air Force Act 1923 section 9

Item 1 inserts new regulation 5 that applies Chapter 2 of the *Criminal Code* to all offences under the Principal Regulations.

Item 2 repeals subregulation 437(3) and the penalty of the Principal Regulations dealing with flying an aircraft or causing or permitting an aircraft to be flown in a prohibited area and substitutes a new regulation 473(3). New subregulation 437(3) updates the existing subregulation in terms of drafting style and legal concepts. For example, the reference to a fine in subregulation 437(3) is replaced by a reference to penalty units. One penalty unit is equivalent to \$110.

Item 2 also adds a new subregulation 473(4) that applies strict liability to the physical element in paragraphs 437(3)(a) and (b) that the area is a prohibited area. The application of strict liability to subregulation 437(3) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse. The inclusion of subregulation 437(4) maintains the current operation of subregulation 437(3) after Chapter 2 of the *Criminal Code* takes effect.

Schedule 2: Amendments to Australian Military Regulations 1927

Authority. Defence Act 1903 section 124

Item 1 inserts new regulation 4 that applies Chapter 2 of the *Criminal Code* to all offences under the Principal Regulations.

Item 2 repeals subregulation 770(6) of the Principal Regulations dealing with making of untrue statements and failure to comply with a condition. New subregulation 770(6) updates the existing subregulation in terms of drafting style and legal concepts. For example, the reference to a fine in subregulation 770(6) is replaced by a reference to penalty units. One penalty unit is equivalent to \$110. New subregulation 770(6) has two limbs: making of untrue statements (paragraph 770(6)(a) refers) and failing to comply with conditions (paragraph 770(6)(b) refers). Item 2 also adds a new subregulation 770(6A) that applies strict liability to the offence created by paragraph 770(6)(b). The inclusion of subregulation 770(6A) maintains the current operation of subregulation 770(6) after Chapter 2 of the *Criminal Code* takes effect.

Item 3 repeals regulation 801 and the penalty of the Principal Regulations relating to possession, sale and supply of intoxicants in military hospitals and substitutes a new regulation 801. New subregulation 801(1) updates the existing regulation in terms of drafting style and legal concepts. For example, the reference to a fine in subregulation 801(1) is replaced by a reference to penalty units. One penalty unit is equivalent to \$110. New subregulation 801(2) restates the existing defence of permission. In order to avoid the possibility that these words might be unintentionally interpreted as an element of the offence, they will be removed from the offence provision and redrafted as a stand-alone defence. A note is inserted to the effect that a defendant who seeks to rely on this defence bears an evidential burden.

Item 4 amends subregulation 802(a) of the Principal Regulations relating to false representation of authority. The item substitutes the words "himself or herself" for the word "himself".

Item 5 amends regulation 802 and the penalty of the Principal Regulations relating to false representation of authority to update the language of the provision. For example, the reference to a fine in subregulation 802 is replaced by a reference to penalty units. One penalty unit is equivalent to \$110. The words "...an offence, and on conviction shall be liable to a penalty not exceeding \$40 or imprisonment not exceeding 3 months..." is replaced by the words "... an offence. Penalty: 1 penalty unit or imprisonment for 3 months."

Item 6 repeals subregulation 803(1) and the penalty of the Principal Regulations relating to personation, false representation and assumption of title of rank in relation to Military Forces. New subregulation 803(1) updates the existing regulation in terms of drafting style and legal concepts. For example, the reference to a fine in subregulation 803(1) is replaced by a reference to penalty units. One penalty unit is equivalent to \$110. The words "...without lawful authority..." have been replaced by "...and does not have the authority to do so..." to avoid the possibility that these words might be unintentionally interpreted as a defence.

Item 7 repeals regulation 804 and the penalty of the Principal Regulations relating to defacing posters etc. New subregulation 804(1) updates the existing regulation in terms of drafting style and legal concepts. For example, the reference to a fine in subregulation 804(1) is replaced by a reference to penalty units. One penalty unit is equivalent to \$110.

New subregulation 804(2) applies strict liability to the physical elements in paragraphs 804(1)(a) and (b). The application of strict liability to paragraphs 804(1)(a) and (b) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse. The inclusion of subregulation 804(2) maintains the current operation of subregulation 804(1) after Chapter 2 of the *Criminal Code* takes effect. Item 7 repeals the averment contained in the existing subregulation 804(2) because it is of a kind prohibited by paragraph 13.6(b) of the *Criminal Code* being an averment made in prosecuting an offence that is punishable by imprisonment.

Schedule 3: Amendments to Cadet Forces Regulations 1977

Authority. Naval Defence Act 1910 subsection 38(7), Defence Act 1903 subsection 62(7) and Air Force Act subsection 8(7)

Item 1 inserts new regulation 3A that applies Chapter 2 of the *Criminal Code* to all offences under the Principal Regulations.

Item 2 repeals subregulation 23(2) and the penalty of the Principal Regulations relating to the sale or supply of intoxicating liquor to Air Training Corps members who are under 18 years of age and in uniform. Item 2 updates the existing regulation in terms of drafting style and legal concepts. For example, the reference to a fine in subregulation 23(2) is replaced by a reference to penalty units. One penalty unit is equivalent to \$110.

New subregulation 23(3) restates the existing defence of sale and supply of intoxicating liquor by direction of a duly qualified medical practitioner to Air Training Corps members who are under 18 years of age and in uniform. In order to avoid the possibility that these words might be unintentionally interpreted as an element of the offence, they have been removed from the offence provision and redrafted as a stand-alone defence. A note is added to the effect that a defendant seeking to rely on this defence bears an evidential burden.

Item 2 also adds a new subregulation 23(4) that applies strict liability to the offence created by subregulation 23(2). The inclusion of subregulation 23(4) maintains the current operation of subregulation 23(1) after Chapter 2 of the *Criminal Code* takes effect.

Schedule 4: Amendments to Defence (Inquiry) Regulations 1985

Authority. Defence Act 1903 section 124

Item 1 inserts new regulation 3B that applies Chapter 2 of the *Criminal Code* to all offences under the Principal Regulations.

Item 2 repeals subregulations 14(1), (2), (3) and (4) and the penalties of the Principal Regulations relating to duties of witnesses in connection with Courts of Inquiry. Item 2 substitutes new subregulations that update the existing regulation in terms of drafting style and legal concepts. For example, references to fines are replaced by references to penalty units. One penalty unit is equivalent to \$110.

Existing subregulation 14(1) has been redrafted as subregulations 14(1) and 14(1AA). New subregulation 14(1) creates the offence of failing to appear and report at the time and place specified in a summons. New subregulation 14(1AA) creates the offence of failing to appear and report from day to day. Item 2, however, splits offences of refusing or failing to do an act into two separate offences. Existing subregulation 14(2) has been split into subregulation 14(2) and 14(2A). New subregulation 14(2) creates the offence of refusing to be sworn or to make an affirmation. New subregulation 14(2A) creates the offence of failing to be sworn or to make an affirmation. Existing subregulation 14(3) has been divided into subregulation 14(3) and 14(3A). New subregulation 14(3) creates the offence of refusing to answer a question. New subregulation 14(3A) creates the offence of failing to answer a question. Existing subregulation 14(4) becomes subregulation 14(4) and 14(4A). New subregulation 14(4) creates the offence of refusing to produce a document or article. New subregulation 14(4A) creates the offence of failing to produce a document or article.

To maintain the current operation of the subregulations, new subregulation 14(1A) applies strict liability to the offences under subregulations 14(1) and 14(1AA). New subregulations 14(2B), (3B) and (4B) apply strict liability to offences under subregulations (2A), (3A) and (4A) respectively.

New paragraph 14(1B)(a) retains an existing defence of being excused by the President of the Court. The further existing defence of reasonable excuse is retained in new paragraph 14(1B)(b) and new subregulations 14(2C), (3C) and (4C). In order to avoid the possibility that these words might be unintentionally interpreted as elements of the offences, they have been removed from the offence provisions and redrafted as stand-alone defences. Notes are included to the effect that a defendant seeking to rely on these defences bears an evidential burden.

Item 3 amends subregulation 14(6) by substituting a reference to subregulation 14(3C) for the existing reference to subregulation 14(3).

Item 4 amends subregulation 14(7) by substituting a reference to subregulation 14(4C) for the existing reference to subregulation 14(4).

Item 5 repeals subregulations 32(1), (2), (3) and (4) and the penalties of the Principal Regulations relating to duties of witnesses in connection with Boards of Inquiry. Item 5 substitutes new subregulations that update the existing subregulations in terms of drafting style and legal concepts. For example, references to fines are replaced by references to penalty units. One penalty unit is equivalent to \$110.

Existing subregulation 32(1) has been redrafted as subregulations 32(1) and 32(1AA). New subregulation 32(1) creates the offence of failing to appear and report at the time and place specified in a summons. New subregulation 32(1AA) creates the offence of failing to appear and report from day to day. Item 5, however, splits offences of refusing for failing to do an act into two separate offences. Existing subregulation 32(2) has been split into subregulation 32(2) and 32(2A). New subregulation 32(2) creates the offence of refusing to be sworn or to make an

affirmation. New subregulation 32(2A) creates the offence of failing to be sworn or to make an affirmation. Existing subregulation 32(3) has been divided into subregulation 32(3) and 32(3A). New subregulation 32(3) creates the offence of refusing to answer a question. New subregulation 32(3A) creates the offence of failing to answer a question. Existing subregulation 32(4) becomes subregulation 32(4) and 32(4A). New subregulation 32(4) creates the offence of refusing to produce a document or article. New subregulation 32(4A) creates the offence of failing to produce a document or article.

To maintain the current operation of the regulation, new subregulation 32(1A) applies strict liability to the offences under subregulations 32(1) and 32(1AA). New subregulations 32(2B), (3B) and (4B) apply strict liability to offences under subregulations 32(2A), (3A) and (4A) respectively.

New paragraph 32(1B)(a) retains an existing defence of being excused by the President of Board. The further existing defence of reasonable excuse is retained in new paragraph 32(1B)(b) and new subregulations 32(2C), (3C) and (4C). In order to avoid the possibility that these words might be unintentionally interpreted as elements of the offences, they have been removed from the offence provision and redrafted as stand-alone defences. Notes are included to the effect that a defendant seeking to rely on these defences bears an evidential burden.

Item 6 amends subregulation 32(6) by substituting a reference to subregulation 32(3C) for the existing reference to subregulation 32(3).

Item 7 amends subregulation 32(7) by substituting a reference to subregulation 32(4C) for the existing reference to subregulation 32(4).

Item 8 repeals regulation 56 and the penalty of the Principal Regulations relating to giving of false evidence to a Court of Inquiry. Item 8 substitutes a new subregulation that updates the existing regulation in terms of drafting style and legal concepts. For example, the reference to a fine is replaced with a reference to penalty units. One penalty unit is equivalent to \$110.

Item 9 repeals subregulation 57(1) and the penalty of the Principal Regulations relating to behaviour before or in respect of a Court of Inquiry. Item 9 substitutes a new subregulation that updates the existing regulation in terms of drafting style and legal concepts. For example, the reference to a fine in the subregulation is replaced by a reference to penalty units. One penalty unit is equivalent to \$110. Item 9 also clarifies the effect of paragraph 57(1)(e) by removing some circular language "...any manner guilty of..." from that paragraph.

Item 10 repeals subregulation 62(7) and the penalty of the Principal Regulations relating to contravention of a direction given by the President of a Court of Inquiry. Item 10 substitutes a new subregulation that updates the existing regulation in terms of drafting style and legal concepts. For example, the reference to a fine is replaced by a reference to penalty units. One penalty unit is equivalent to \$110.

To maintain the current operation of the subregulation, new subregulation 62(7A) applies strict liability to an offence under subregulation 62(7).

The existing defence of reasonable excuse is retained in new subregulation 62(7B). In order to avoid the possibility that these words might be unintentionally interpreted as an element of the offence, they have been removed from the offence provision and redrafted as a stand-alone defence. A note is included to the effect that a defendant seeking to rely on this defence bears an evidential burden.

Item 11 repeals subregulation 63(2) and the penalty of the Principal Regulations relating to disclosure of records or reports of Courts of Inquiry. Item 11 substitutes a new subregulation that updates the existing regulation in terms of drafting style and legal concepts. For example,

the reference to a fine is replaced by a reference to penalty units. One penalty unit is equivalent to \$110.

The existing defence of reasonable excuse is retained in new subregulation 63(2A). In order to avoid the possibility that these words might be unintentionally interpreted as elements of the offence, they have been removed from the offence provision and redrafted as a stand-alone defence. A note is included to the effect that a defendant seeking to rely on these defences bears an evidential burden.

Item 12 repeals regulation 74 of the Principal Regulations relating to refusal and failure to answer questions put to a member of the Defence Force by an investigating officer or an inquiry assistant. Existing subregulation 74(1) becomes subregulations 74(1) and 74(2). New subregulation 74(1) creates the offence of refusing to answer a question. New subregulation 74(2) creates the offence of failing to answer a question.

To maintain the current operation of the regulation, new subregulation 74(3) applies strict liability to the offence under new subregulation 74(2).

The existing defence of reasonable excuse is retained in new subregulation 74(4). New subregulation 74(5) retains a further existing defence of reasonable grounds for refusal or failure to answer questions. In order to avoid the possibility that these words might be unintentionally interpreted as elements of the offence, they have been removed from the offence provision and redrafted as stand-alone defences. Notes are included to the effect that a defendant seeking to rely on these defences bears an evidential burden.

Item 13 repeals regulation 74A of the Principal Regulations relating to refusal or failure, by a member of the Defence Force, to produce a document or an article when ordered to do so by an investigating officer or an inquiry assistant. Existing subregulation 74A(1) becomes subregulations 74A(1) and 74A(2). New subregulation 74A(1) creates the offence of refusing to produce a document or an article. New subregulation 74A(2) creates the offence of failing to produce a document or an article.

To maintain the current operation of the regulation, new subregulation 74A(3) applies strict liability to the offence under new subregulation 74A(2).

The existing defence of reasonable excuse is retained in new subregulation 74A(4). New subregulation 74A(5) retains a further existing defence of reasonable grounds for refusal or failure to answer questions. In order to avoid the possibility of an unintended interpretation that these words are elements of the offence, they have been removed from the offence provision and redrafted as stand-alone defences. Notes are included to the effect that a defendant seeking to rely on these defences bears an evidential burden.

Schedule 5: Amendments to Defence Force Discipline Regulations 1985

Authority. Defence Force Discipline Act 1982 section 197

Item 1 inserts new regulation 3A that applies Chapter 2 of the Criminal Code to all offences under the Principal Regulations.

Item 2 repeals subregulation 25B(2) and the penalty of the Principal Regulations relating to the offence of damaging, tampering or interfering with a sealed radar device or the seal of a radar device. New subregulation 25B(2) updates the existing regulation in terms of drafting style and legal concepts. For example, the reference to a fine is replaced by a reference to penalty units. One penalty unit is equivalent to \$110.