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**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**HOUSE OF REPRESENTATIVES**

**HEALTH AND AGED CARE LEGISLATION AMENDMENT  
(APPLICATION OF CRIMINAL CODE) BILL 2001**

**EXPLANATORY MEMORANDUM**

(Circulated by authority of the Minister for Health and Aged Care,  
the Hon Dr Michael Wooldridge MP)

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## **Health and Aged Care Legislation Amendment (Application of Criminal Code) Bill 2001**

### **Outline and Financial Impact**

These amendments harmonise offence-creating and related provisions in Health and Aged Care portfolio legislation with the general principles of criminal responsibility as codified in Chapter 2 of the Criminal Code.

There is no financial impact.

### **NOTES ON CLAUSES**

#### **Short Title**

**Clause 1** sets out how the Act may be cited.

#### **Commencement**

**Clause 2** provides that the Act commences on the day on which it receives the Royal Assent.

#### **Schedule(s)**

**Clause 3** provides that each Act specified in a Schedule to this Act is amended or repealed as set out in that Schedule and any other item in a Schedule to this Act has effect according to its terms.

#### **Application of amendments**

**Subclause 4(1)** provides that each amendment made by this Act applies to acts and omissions that take place after the amendment commences. The amendments will not operate retrospectively.

**Subclause 4(2)** provides that, for the purposes of this section, if an act or omission is alleged to have taken place between two dates, one before and one on or after the day on which a particular amendment commences, the act or omission is alleged to have taken place before the amendment commences.

## SCHEDULE 1 - Amendment of Acts

### Overview

These amendments to Health and Aged Care portfolio legislation harmonise a number of offence-creating and related provisions with the general principles of criminal responsibility as codified in Chapter 2 of the *Criminal Code* (the Code).

The Code, which is contained in the schedule to the *Criminal Code Act 1995* (Cth), will alter the way in which Commonwealth criminal offence provisions are interpreted, including offences contained in legislation in the Health & Aged Care portfolio. When the Code was passed in 1995, it commenced to apply to new offences from 1 January 1997, and all new offences are now drafted according to the requirements of the Code. Staggered implementation was considered necessary in relation to existing offences to provide departments with sufficient time to assess the effect of the Code on their offence provisions, and to make any amendments necessary to their legislation. The Code is scheduled to apply to pre-existing offences from 15 December 2001.

If legislation containing offence provisions is not amended to conform with Chapter 2 of the Code, the Code may alter the interpretation of existing offence provisions.

Chapter 2 of the Code contains subjective, fault-based principles of criminal responsibility. A defendant's guilt will depend on what he or she thought or intended at the time of the offence, rather than what a 'reasonable person' would have thought or intended in the defendant's circumstances. The changes to be brought about by Chapter 2 of the Code reflect the view that proof of a 'guilty mind' is generally necessary before a person can be found guilty of an offence.

The most significant effect of the Code is that it clarifies the traditional distinction between the *actus reus* (the physical act, now referred to as the 'physical element') and the *mens rea* (what the defendant thought or intended, now referred to as the 'fault element') and sets out this distinction.

The prosecution bears the onus of proving each of the physical elements of an offence. The physical elements provided in the Code are the conduct, the circumstance in which it occurs, and the result of the conduct. Each offence must contain at least one of these physical elements, but any combination of physical elements may be present in an offence provision. For every physical element of an offence, the prosecution must also prove a corresponding fault element. The Code does not prevent an offence from specifying an alternative fault element, but the Code establishes a "default fault" element that will apply in the absence of a specified fault element. The Code establishes two default fault elements: intention and recklessness. The Code provides that, for conduct, the default fault element is intention. For circumstance or result, the default fault element is recklessness.

## **Amendments arising from this Bill**

The Health and Aged Care Legislation (Application of Criminal Code) Bill 2001 amends the following Acts:

*Aged Care Act 1997*

*Aged or Disabled Persons Care Act 1954*

*Australia New Zealand Food Authority Act 1991*

*Australian Hearing Services Act 1991*

*Epidemiological Studies (Confidentiality) Act 1981*

*Health and Other Services (Compensation) Act 1995*

*Health Insurance Act 1973*

*Health Insurance Commission Act 1973*

*Hearing Services Administration Act 1997*

*Narcotic Drugs Act 1967*

*National Health Act 1953*

*National Health and Medical Research Council Act 1992*

*Nursing Homes Assistance Act 1974*

*Therapeutic Goods Act 1989*

*Tobacco Advertising Prohibition Act 1992*

Amendments made by the Bill include:

- specifying clearly the physical elements of an offence and corresponding fault elements (where these fault elements vary from those specified by the Code);
- specifying that an offence is one of strict liability; and
- converting penalties currently expressed as dollar amounts to penalty units, where appropriate.

## **Explanation of the Items**

### ***Aged Care Act 1997***

#### **Item 1**

Item 1 inserts a note at the end of section 96-9 of the *Aged Care Act 1997* which informs the reader that the Code creates offences which can apply in relation to the regulation of providers of aged care.

### ***Aged or Disabled Persons Care Act 1954***

#### **Item 2**

This item inserts section 5A at the end of Part 1 of the *Aged or Disabled Persons Care Act 1954* which provides that Chapter 2 of the Code applies to all offences under the Act.

#### **Item 3**

This item repeals section 10JA(2) because the Code contains an equivalent provision.

#### **Item 4**

Section 10JB is amended by omitting the phrase “knowingly or recklessly”. Section 10JB currently applies the fault element of knowledge or recklessness in relation to the proscribed physical element of conduct, namely furnishing information or giving evidence that is false or misleading in a material particular.

Following application of the Code, the fault element of knowledge will be restricted to physical elements of circumstance or result, and intention will be the usual Code fault element that applies to a physical element of conduct: see Division 5 of the Code. Applying “knowingly” to a physical element of conduct in the pre-Code environment is equivalent to applying the Code fault element of intention. Accordingly this item proposes the omission of “knowingly or recklessly” in section 10JB so that the appropriate and equivalent Code fault element, namely, intention will apply. It is intended that subsection 10JB will continue to operate, following this amendment, in the same manner as at present.

### ***Australia New Zealand Food Authority Act 1991***

#### **Item 5**

This item inserts section 5A which provides that Chapter 2 of the Code applies to all offences under the Act.

#### **Item 6**

This item repeals section 65 which deals with corporate and employer criminal responsibility. Part 2.5 of the Code will apply instead.

### ***Australian Hearing Services Act 1991***

#### **Item 7**

This item inserts section 6A which provides that Chapter 2 of the Code applies to all offences under the Act.

## ***Epidemiological Studies (Confidentiality) Act 1981***

### **Item 8**

This item inserts section 3A which provides that Chapter 2 of the Code applies to all offences under the Act.

### **Items 9 and 10**

Section 4 of the *Epidemiological Studies (Confidentiality) Act 1981* creates an offence if a person divulges information or documents acquired in the course of a prescribed study under the Act. Section 5 enables the Minister to authorise a person to give access to documents prepared or obtained in the conduct of a prescribed study under the Act to persons assisting another prescribed study. These items amend section 5 to provide that the defendant bears an evidential burden of proof in relation to a defence that the giving of access to another person was authorised under this provision. The defendant will need to point to evidence that indicates a reasonable possibility that the access was authorised.

## ***Health and Other Services (Compensation) Act 1995***

### **Item 11**

This item inserts section 6A which provides that Chapter 2 of the Code applies to all offences under the Act.

### **Items 12, 13 and 15**

Subsection 26(1) provides that a person must not, “without reasonable excuse”, refuse or fail to comply with a requirement of section 11, 12, 13, 15 or 23 that the person give a notice to the Health Insurance Commission under that section. A penalty of 6 months imprisonment applies. Sections 11, 12, 13, 15 and 23 concern notice of compensation claims and related matters. Item 12 removes the reasonable excuse defence from subsection 26(1) and item 13 relocates it to new subsection 26(1A). The rationale for this amendment is to prevent any future interpretation that the reasonable excuse element of this provision is an element of the offence, which would have to be disproved in the negative by the prosecution, and puts it beyond doubt that it is a defence to the offence.

Item 13 also inserts new subsection 26(1B) which states that an offence under subsection 26(1) is an offence of strict liability.

Where strict liability applies to an offence the prosecution does not have to prove fault on the part of the defendant (see section 6.1 of the Code). The prosecution need only prove that the physical element of the offence did occur. However, there is a defence of mistake of fact under section 9.2 of the Code. Section 9.2 provides that the person is not criminally responsible for an offence of this nature if, at or before the time of the conduct, the person considered whether or not a relevant fact existed and is under a mistaken but reasonable belief about the fact and, had that fact existed, the conduct would not constitute an offence. If there is a mistake of fact, the evidential burden of proof is on the defence. This means that the defendant has to adduce or point to the evidence that suggests a reasonable possibility that the matter exists or does not exist. If the defendant is able to do this, the prosecution is required to prove beyond a reasonable doubt that there was no such mistake.

Item 15 makes a change consequential to the insertion of new subsection 26(1A).

**Item 14**

This item repeals subsection 26(2) of the Act because this provision is duplicated by section 137.1 of the Code. Subsection 26(2) relates to the provision of false or misleading information to the Health Insurance Commission in relation to a claim for compensation.

**Item 16**

Subsection 26(5) of the Act provides that evidence of information given under sections 11, 12, 13, 15, or 23 of the Act cannot be used against the person. However, the existing provision provides that this exclusion does not apply where the proceedings are in respect of an offence under subsection 26(1) or 26(2) of the Act. As subsection 26(2) is to be repealed by item 14, 26(5) is to be amended to refer to section 137.1 of the Code.

**Items 17, 18 and 19**

Item 17 and item 18 removes the defences of reasonable excuse and incapability. These defences are relocated by item 19 as subsections 44(1B) and (1A) respectively. The rationale for this is similar to that for item 12. Item 19 also inserts a new subsection 44(2) which states that an offence under subsection 44(1) is an offence of strict liability. See item 13 for an explanation of strict liability. The offence occurs in section 44(1) if a person who has been required by the Managing Director of the Health Insurance Commission to produce a document in relation to a claim for compensation before the Commission, fails to comply with the requirement.

**Item 20**

This item inserts a reference to the provisions of the Code which are to operate in place of existing subsection 44(2), which is to be repealed by item 19. Existing subsection 44(2) penalises a person for giving false or misleading information in complying with a requirement to provide information under section 42; the Code contains equivalent provisions.

***Health Insurance Act 1973*****Item 21**

This item inserts section 7B which provides that Chapter 2 of the Code applies to all offences under the Act.

**Item 22**

Item 22 omits the words “without reasonable excuse” from subsection 19CB(4). The defence is recreated in new subsection 19CB(5), by item 23. The rationale for this amendment is the same as for item 12. The offence occurs if a medical practitioner fails to comply with a notice in writing from the Minister directing the practitioner not to render a service, where the medical practitioner is not authorised to provide that service under a practitioner’s licence in a particular State or Territory.

**Item 23**

Item 23 provides a defence to an offence under subsection 19CB(4) and includes the standard note that the defendant bears an evidential burden of proof under section 13.3(3) of the Code if a defendant relies on the “reasonable excuse” defence established by the new subsection 19CB(5).

Item 23 also inserts subsection 19CB(6) which provides that an offence under subsection 19CB(4) is an offence of strict liability. See item 13 for an explanation of strict liability.



**Item 24**

Item 24 amends subsection 19CC by providing that an offence under subsection (1) is an offence of strict liability. See item 13 for an explanation of strict liability.

Section 19CC creates an offence where a medical practitioner renders a service for which a medicare benefit is not payable and fails to take reasonable steps, before rendering the service, to inform the person that a medicare benefit would not be payable.

**Item 25**

Item 25 omits the words “without reasonable excuse” from subsection 19D(2). The defence is recreated in new subsection 19D(2)A, by item 26. The rationale for this amendment is the same as for item 12.

**Item 26**

Item 26 provides a defence to an offence under subsection 19D(2) and includes the standard note that the defendant bears an evidential burden of proof under section 13.3(3) of the Code if a defendant relies on the reasonable excuse defence established by 19D(2A).

Item 26 also inserts subsection 19D(2B) which provides that an offence under subsection 19D(2) is an offence of strict liability. See item 13 for an explanation of strict liability.

Section 19D creates an offence where a medical practitioner who is disqualified from providing a particular service fails to comply with a notice issued by the Minister directing that practitioner to provide a notice to the recipient of the service explaining the effects of that disqualification.

**Item 27**

Item 27 omits the words “without reasonable excuse” from subsection 19D(7). It removes the defence of reasonable excuse from subsection 19D(7). The defence is recreated in new subsection 19D(7A) by item 28. The rationale for this amendment is the same as for item 12.

**Item 28**

Item 28 provides a defence to an offence under subsection 19D(7).

Item 28 also inserts subsection 19D(7B) which provides that an offence under subsection 19D(7B) is an offence of strict liability. See item 13 for an explanation of strict liability.

**Item 29**

Item 29 omits the words “without reasonable excuse” from subsection 20BA(2). It removes the defence of reasonable excuse from subsection 20BA(2). The defence is recreated in new subsection 20BA(2A), by item 30. The rationale for this amendment is the same as for item 12. The offence occurs where a physician or specialist fails to comply with a request of the Managing Director of the Health Insurance Commission to produce a referral which resulted in the provision of a specialist service.

**Item 30**

Item 30 provides a defence to an offence under subsection 20BA(2).

**Item 31**

Item 31 omits the words “without reasonable excuse” from subsection 20BA(4). It removes the defence of reasonable excuse from subsection 20BA(4). The defence is recreated in new subsection 20BA(4), by item 32. The rationale for this amendment is the same as for item 12.

The offence occurs where a consultant physician or specialist fails to produce information to the Health Insurance Commission when requested, in relation to a service provided in an emergency situation without a referral, or where the referral is retained by the hospital.

### **Item 32**

Item 32 provides a defence to an offence under subsection 20BA(4)

### **Item 33**

Item 33 inserts a new subsection 20BA(6A) which provides that an offence under subsections 20BA(2) or (4) is an offence of strict liability. See item 13 for an explanation of strict liability.

### **Item 34**

Item 34 omits the words “without reasonable excuse” from subsection 23DKA(6). It removes the defence of reasonable excuse from subsection 23DKA(6). The defence is recreated in new subsection 23DKA(6A), by item 35. The rationale for this amendment is the same as for item 12. The offence occurs where an approved pathology authority fails to comply with record keeping requirements imposed by the Act or regulations, or fails to produce records for the Health Insurance Commission when requested.

### **Item 35**

Item 35 provides a defence to an offence under subsection 23DKA(6).

Item 35 also inserts subsection 23DKA(6B) which provides that an offence under subsection 23DKA(6) is an offence of strict liability. See item 13 for an explanation of strict liability.

### **Item 36**

Item 36 clarifies that a defendant bears an evidential burden of proof in relation to an offence involving a failure to display a notice indicating that a pathology collection centre is licensed.

### **Item 37**

Item 37 repeals subsection 23DNK(3) as the note inserted by item 36 covers the same ground. The substituted subsection makes the failure to display a notice an offence of strict liability. See item 13 for an explanation of strict liability.

### **Item 38**

Item 38 omits the phrase “without reasonable excuse” from subsections 23DP(1), (1A), (2) and (3). This amendment removes the defence of “without reasonable excuse” from the offence in those subsections. The defence is recreated consistently with the Code in subsection 23DP(3A). The rationale for this is the same as for item 12. The offence relates to the requirement of an approved pathology provider to retain a request for a service by a medical practitioner for record keeping purposes.

### **Item 39**

Item 39 inserts subsection 23DP(3A) which recreates the defence of reasonable excuse.

Subsection 23DP(3B) provides that an offence in section 23DP is an offence of strict liability. See item 13 for an explanation of strict liability.

### **Items 40 to 43**

Section 23DQ creates an offence in relation to compliance with requirements for the making of a request to an approved pathology provider by a practitioner. Items 40 and 42 remove the words “without reasonable excuse” and items 41 and 43 insert new subsections (2A) and

(3A) which carry the appropriate defence consistently with the Code. The rationale for this amendment is the same as for item 12.

Item 43 also provides that an offence in section 23DQ is an offence of strict liability. See item 13 for an explanation of strict liability.

#### **Items 44 to 47**

Subsections 23DR(4) and 23DS(6) each create offences in relation to compliance with requirements that medical practitioners retain records in relation to the provision of R type diagnostic imaging services.

Items 44 and 46 remove the words “without reasonable excuse” and items 45 and 47 insert new subsections which carry the appropriate defence consistently with the Code. The rationale for this is the same as for item 12.

Subsections 23DR(6) and 23DS(6B) provide that offences under subsections 23DR(4) and 23DS(6) respectively are offences of strict liability. See item 13 for an explanation of strict liability.

#### **Items 48 and 49**

Section 106D creates an offence in relation to the failure of a person to appear before a Committee appointed under the Act. Item 48 omits the words without “reasonable excuse” and item 49 inserts the appropriate defence consistently with the Code. The rationale for this is the same as for item 12. Item 49 inserts subsection 106D(3) which provides that the offence is an offence of strict liability. See item 13 for an explanation of strict liability.

#### **Items 50 and 51**

Subsection 106E(1) creates offences where a witness to a Committee refuses to be sworn or make an affirmation, refuses or fails to answer a question, or refuses or fails to produce a document, where required to do so. Further, subsection 106E(2) provides that a person must not give an answer or produce a document which is false or misleading in a material particular.

Item 50 removes the defence of reasonable excuse and item 51 relocates it in subsection 106(1A). Item 51 also provides that an offence under subsection 106E(1) is an offence of strict liability. See item 13 for an explanation of strict liability.

#### **Item 52**

This item recasts subsection 106E(2) so that it is consistent with the principles in Chapter 2 of the Code.

#### **Items 53 and 54**

Item 53 omits the reference in subsection 106E(6) to “it is proved that”, as the reference is unclear. Item 54 provides that the defendant bears an evidential burden.

#### **Items 55 and 56**

Items 55 and 56 amend the definition of “relevant offence” in subsection 124B(1) to refer to relevant offences of the Code and insert a further reference to those offences.

### **Items 57 and 58**

Section 124L enables a Committee to summons a person to appear at a hearing and produce documents. A person commits an offence if he or she fails to appear as required by the summons, or fails to appear and report from day to day until released from further attendance.

Items 57 and 58 remove the reference to “without reasonable excuse” and substitute the appropriate defence consistently with the Code. The rationale for this is the same as for item 12.

Item 58 also provides that the offence in section 124L is an offence of strict liability. See item 13 for an explanation of strict liability.

### **Items 59 to 62**

Section 124M creates an offence where a person refuses to be sworn for the purposes of appearance before a Committee. Items 59 and 60 omit the phrase “without reasonable excuse”, and substitute the appropriate defence under the Code. The rationale for this is the same as for item 12. They also add a note stating that the defendant bears an evidential burden in relation to the reasonable excuse. Item 62 provides that subsection 124M(1) is an offence of strict liability. See item 13 for an explanation of strict liability.

### **Items 63 and 64**

Section 127 creates an offence in relation to the assignment of a Medicare benefit unless particulars of the service to be provided are set out in the agreement before the patient signs.

Item 63 omits the reference to “without reasonable excuse” and item 64 substitutes the appropriate defence consistently with the Code. The rationale for this is the same as for item 12. Item 64 also provides that the offence in section 127 is an offence of strict liability. See the item 13 for an explanation of strict liability.

### **Item 65**

Section 128 creates an offence in relation to the failing to furnish a return of information required under the Act. Item 65 provides that the offence is an offence of strict liability. See item 13 for an explanation of strict liability.

### **Item 66**

Section 128A creates offences in relation to false or misleading statements in connection with the making of a claim for Medicare benefit. Item 66 provides that the offences are offences of strict liability. See item 13 for an explanation of strict liability.

### **Item 67**

This item repeals section 129(2A) as it is duplicated by the Code.

### **Items 68-71**

Section 129 relates to the provision of false and misleading information. Section 129AA relates to the offering of an inducement by a pathology provider. These items omit the phrase “the person proves that” in sections 129(3) and 129AA(5) and provide that the burden of proof imposed on the defendant is evidential rather than legal.

### **Item 72**

Paragraphs 129AAB(2)(a) and (b) refer to offences which are to be repealed by this Bill and item 72 inserts references to the relevant equivalent provisions of the *Crimes Act 1914* and the Code.

**Item 73**

Subsection 130(3F) creates an offence where a prescribed body to whom information is disclosed, fails to ensure that the information is protected by reasonable safeguards against unauthorised access, use, modification or disclosure. Item 73 provides that this provision is an offence of strict liability. See item 13 for an explanation of strict liability.

**Item 74 and 75**

Subparagraph 130(6)(a)(i) refers to section 129. Section 129 is to be repealed by this Bill. Item 75 substitutes references to the relevant equivalent provisions of the *Crimes Act 1914* and the Code.

**Item 76**

Item 76 repeals subsection 130(16) because the defence of lawful authority is provided in the Code.

**Item 77**

Item 77 provides that the offence in subsection 130(17) is an offence of strict liability. See item 13 for an explanation of strict liability.

**Items 78 and 79**

Item 78 deletes the phrase “it is established that” in subsection 130(18) because it imposes a legal burden of proof on the defendant. Item 79 provides that the defendant bears an evidential burden in relation to this provision. Subsection 130(18) relates to an offence where an employee or agent is acting outside of the scope of their authority, in soliciting the disclosure of information.

**Item 80**

Subsection 130(19) provides that where a person is acting as an employee or agent of another person when soliciting information, that other person is guilty of an offence. Item 80 provides that this offence is an offence of strict liability. See item 13 for an explanation of strict liability.

**Items 81 and 82**

Item 81 deletes the phrase “it is established that” in subsection 130(20) because it imposes a legal burden of proof on the defendant. Item 82 provides that the defendant bears an evidential burden in relation to this provision. Subsection 130(20) relates to an offence where an employee or agent is acting outside of the scope of their authority, in soliciting the disclosure of information.

**Item 83**

Item 83 omits the phrase “without lawful excuse” because that defence is provided in the Code. This ensures that the defendant will bear the evidential burden of establishing that defence, rather than the prosecution having to disprove it as an element of the offence.

***Health Insurance Commission Act 1973*****Items 84 and 85**

Paragraph 3A(1)(c) and paragraph 3A(2A)(d) define certain relevant offences for the purposes of the Act. However, this Bill replaces those offences with relevant equivalent offences from the *Crimes Act 1914* and the Code. The amendment inserts references to those equivalent offences.

**Item 86**

Item 86 inserts section 3B which provides that Chapter 2 of the Code applies to all offences under this Act.

**Items 87 and 88**

Section 8N creates an offence where a person ceases to be an authorised officer of the Health Insurance Commission and fails to return an identity card. Items 87 and 88 remove the phrase “without reasonable excuse” and insert the appropriate defence consistent with the Code. The rationale for this is the same as for item 12. Item 88 also inserts subsection 8N(6) which provides that an offence under subsection 8N(4) is an offence of strict liability. See item 13 for an explanation of strict liability.

**Items 89 and 90**

Section 8R creates an offence where a person fails to comply with a notice to produce information. Item 89 removes the phrase “without reasonable excuse” and item 91 inserts the same defence consistently with the Code. The rationale for this is the same as for item 12.

**Items 91 and 92**

Subsection 8R(2) creates an offence in relation to the giving of false or misleading information or the production of a document which is false or misleading, unless the person identifies the respects in which the information is false or misleading.

Item 91 repeals this subsection because its content is covered by the Code and inserts defences consistent with the Code. The rationale for the relocation of defences is the same as for item 12.

Item 91 also provides that the offence in subsection 8R(1) is an offence of strict liability. See item 13 for an explanation. Item 92 is a consequential amendment.

**Item 93**

Section 8S provides that a person is not excused from producing a document on the grounds that it may tend to incriminate that person. Subsection 85(2) provides an exception in respect of particular offences under the Act. The amendment provides a reference to the relevant offence under the Code.

**Item 94**

Paragraph 41C(2)(c) creates an offence where an association uses the name “medicare” or a prescribed symbol in a manner which implies that the association is associated with the Commonwealth. The amendment clarifies the provision.

***Hearing Services Administration Act 1997*****Item 95**

Item 95 inserts section 6A which provides that Chapter 2 of the Code applies to all offences under the Act.

**Item 96**

The amendment to paragraph 19(6)(a) substitutes references to existing offence provisions with a reference to the equivalent provisions in the Code.

### **Items 97 and 98**

Section 22 of the Act is to be repealed as the Code applies an appropriate provision. The amendment to section 47 then omits the reference to section 22 which is no longer required.

### ***Narcotic Drugs Act 1967***

#### **Item 99**

Item 99 inserts section 8A which provides that Chapter 2 of the Code applies to all offences against the Act.

#### **Item 100**

Provides that the offence in section 23 is an offence of strict liability. See item 13 for an explanation of strict liability.

#### **Item 101**

The offences in section 24(3) relate to the obstruction or hindering of an authorised inspector and the provision, by the owner or occupier of premises, or reasonable facilities and assistance, to the inspector.

Item 101 repeals those offences and restates them, consistently with the Code. New subsection 24(3D) provides that, in relation to the offences in subsection 24(3) and (3B), strict liability applies to the physical element of circumstance, namely that the inspector is acting in accordance with the authority. See item 13 for an explanation of strict liability.

### ***National Health Act 1953***

#### **Item 102**

This item inserts section 7A which provides that Chapter 2 (other than part 2.5) of the Code applies to all offences under the Act. Part 2.5 deals with the corporate criminal responsibility. Section 134E of the *National Health Act* deals with that matter and also non-corporate (eg employer) criminal liability. Because of its greater breadth, section 134E is retained.

#### **Item 103**

Section 61B(3) relates to the provision of information which is false or misleading in a material particular. The provision is repealed because the Code provides an equivalent provision.

#### **Items 104 and 105**

Section 61E(1) relates to the requirement that a person attend before an authorised officer to take an oath or affirmation, answer questions and produce documents.

The amendment removes the phrase “without reasonable excuse” and inserts the appropriate defence consistent with the Code. The rationale for this is the same as for item 12.

#### **Item 106**

Section 62 relates to the making of a statement or the presentation of a document which is false or misleading in a material particular and which is capable of being used in connection with certain applications under the Act in relation to nursing homes.

The provision is to be repealed because the Code contains equivalent relevant offences.

**Item 107**

Subsection 62(3) provides a defence where a person establishes that he or she did not know that a document or statement, to which a prosecution relates, was false or misleading. The amendment provides that the person bears an evidential burden in relation to the defence.

**Item 108**

Section 74 creates offences in relation to the duties of a public officer of a registered organisation. A registered organisation is an organisation involved in the provision of private health insurance. The amendment clarifies that the offences are offences of strict liability. See item 13 for an explanation of strict liability.

**Item 109**

Section 74BA relates to the offering of inducements to, or imposition of penalties on, a contributor for the purposes of persuading a contributor to transfer to another health benefits fund, or to cease contributing to a health benefits fund.

The amendment deletes “for the purpose of” and inserts the appropriate text “if doing so has the result”. This amendment clarifies that the prosecution has to prove the result rather than the intent of the organisation in offering the inducement or imposing the penalty.

**Item 110**

Subsection 75(5) relates to the failure of a person who is or has been an officer of a registered organisation, to furnish information, to attend and give evidence, or to produce books and records.

The amendment provides that this offence is an offence of strict liability. See item 13 for an explanation of strict liability.

**Item 111**

Subsection 82(1) relates to the making of a statement which is false or misleading in a material particular. The provision is to be repealed because the Code provides an equivalent offence.

**Item 112**

Section 82K relates to the failure of a person to comply with a notice to furnish information, to attend and give evidence, or to produce books and records. The amendment provides that this offence is an offence of strict liability. See item 13 for an explanation of strict liability.

**Item 113**

Section 82L(2) relates to the provision of accounts and statements to the Private Health Insurance Advisory Council. The amendment provides that the offence is an offence of strict liability. See item 13 for an explanation of strict liability.

**Item 114**

Subsection 82U(1) relates to the failure of a person to comply with a requirement of an inspector that the person furnish information; or the provision of false or misleading information where the person knows that information to be false or misleading; and the making of a false or misleading statement, which the person knows to be false or misleading. The amendment repeals subsection 82U(1) because offences relating to the provision of false and misleading statements are incorporated in the Code. The offence of failing to comply with a reasonable requirement of an inspector is redrafted to include relevant defences consistent with the Code. The rationale for this is similar to that for item 12. Strict liability



applies to a limited aspect of the offence, namely that of the physical element of circumstance. The amendment provides that the offences are offences of strict liability, and inserts a defence which is consistent with the Code. See item 13 for an explanation of strict liability.

#### **Items 115 and 116**

Section 82V(5) provides that a person shall not, without reasonable excuse, hinder or obstruct an inspector. The amendment removes the phrase “without reasonable excuse” and inserts the appropriate defence consistent with the Code. The rationale for this is the same as for item 12.

#### **Item 117, 118 and 119**

Subsection 82WC(1) relates to the concealment, destruction, mutilation or alteration of records of a private health organisation where that organisation is under investigation.

The amendment to subsection 82WC(1) repeals the existing subsection and rewords the offence consistently with the Code. The amendment to subsection 82WC(2) removes the requirement that a defendant prove the elements of the defence. The amendment provides that the defendant bears an evidential burden in relation to the defence.

#### **Items 120**

Subsection 82XR(4) relates to the failure, without reasonable excuse, of a director to deliver records to the administrator of a health benefits fund.

The amendment to subsection 82WC(1) omits the phrase “without reasonable excuse” and inserts the appropriate defence consistent with the Code. The rationale for this is the same as for item 12.

#### **Items 122, 123 and 124**

Section 84L creates offences in relation to the issuing by a pharmacist of a concession card to a person who is not entitled to receive such a card. Item 119 deletes the word “knowingly” because that defence is applied by the Code.

Items 123 and 124 omit the phrase “without reasonable excuse” from subsections 84L(3) and (4) and substitute the appropriate defence, consistently with the Code. The rationale for this is the same as for item 12.

#### **Item 125**

Paragraphs 103(5)(a) and (aa) relate to the making of false or misleading statements in relation to concession cards. The provisions are repealed because the Code contains equivalent provisions.

#### **Items 126 and 127**

Subsection 128(1) relates to the failure of a person to appear before a Committee and produce documents required by summons. The amendment omits the phrase “without reasonable excuse” and inserts the appropriate defence, consistently with the Code. The rationale for this is the same as for item 12.

#### **Items 128 and 129**

Subsection 128(2) provides a defence for the purposes of subsection 128(1). The defence relates to the relevance of the documents subpoenaed. The amendment rewords the defence

to be consistent with the Code. The amendment also provides that the offence is one of strict liability. See item 13 for an explanation of strict liability.

### **Items 130 and 131**

Section 134C provides a defence for certain prosecutions under the Act relating to the provision of false or misleading statements.

The amendment omits the phrase “the person shows that” and clarifies that the defendant bears an evidential burden in relation to the matter.

### **Item 132**

Subparagraph 135A(6)(a)(ii) refers to the conviction of a person of an offence under the Act or the *Crimes Act 1914*. The amendment substitutes references to the relevant equivalent offences in the Code and the Crimes Act.

### **Item 133**

Subsection 135A(14) makes it an offence to disclose, or solicit the disclosure of, protected information in certain circumstances. Subsection 135A(15) provides that it is a defence to a prosecution for an offence against subsection 135A(14) if it is established that the person had lawful authority for his or her action. The defence of lawful authority is contained in the Code. Accordingly, subsection 135A(15) is no longer necessary and is to be repealed.

### **Item 134**

Subsection 135A(16) relates to the commission of an offence by an employee or agent of another person and applies that offence to that other person.

The amendment provides that this offence is an offence of strict liability. See item 13 for an explanation of strict liability.

### **Items 135 and 136**

Subsection 135A(17) provides a defence where a person establishes that that person’s employee or agent acted outside of authority when committing an offence. The amendment omits “it is established that” as it is unclear as to whether the prosecution would have to disprove the availability of the defence. The amendment provides that the defendant has an evidential burden in relation to the defence.

### **Item 137**

Subsection 135(18) provides that where a person is convicted of an offence and acted as the employee or agent of another in obtaining the information concerned, that other person is guilty of an offence. The amendment provides that the latter offence is an offence of strict liability. See item 13 for an explanation of strict liability.

### **Items 138 and 139**

Subsection 135(A)(19) provides a defence where a person establishes that that person’s employee or agent acted outside of authority in committing an offence. The amendment omits “it is established that” as it is unclear as to whether the prosecution would have to disprove the availability of the defence. The amendment provides that the defendant has an evidential burden in relation to the defence.

## *National Health and Medical Research Council Act 1992*

### **Item 140**

The amendment inserts section 5A which provides that Chapter 2 of the Code applies to all offences under the Act.

## *Nursing Homes Assistance Act 1974*

### **Item 141**

The amendment inserts section 3AA which provides that Chapter 2 of the Code applies to all offences under the Act.

### **Item 142**

Section 8 creates offences in relation to failing to display certificates of approval of nursing homes and failing to return to the Minister the certificates where they have been revoked or have expired. This item adds subsection 8(7) which provides that an offence under section 8 is an offence of strict liability. See item 13 for an explanation of strict liability.

### **Item 143**

Subsection 9(3) obliges a proprietor of a nursing home to return to the Minister certificates of approval in certain circumstances. This item adds subsection 9(4) which provides that an offence under subsection 9(3) is an offence of strict liability. See item 13 for an explanation of strict liability.

### **Items 144, 145 and 146**

Subsection 30(1) relates to the requirement that the Minister be notified within a particular time period where a nursing home is to be sold, or if the proprietor dies.

The amendments clarify that the penalty applies to each of the offences in the section and provides that the offences are offences of strict liability. See item 13 for an explanation of strict liability.

### **Items 147 and 148**

Subsection 30A(3) provides a defence where a person did not know or had no reason to suspect that a statement or document to be used in respect of certain applications under the Act could be false or misleading. The amendment provides that the defendant has an evidential burden in relation to this defence.

## *Therapeutic Goods Act 1989*

### **Item 149**

Paragraph 3(7)(b) of the Act defines further offences other than those specified in the Act which apply in relation to the Therapeutic Goods Act. The amendment repeals part of the definition and substitutes references to relevant equivalent offences in the Code.

### **Item 150**

This amendment inserts section 5A which applies Chapter 2 (other than Part 2.5) of the Code to the Act.

### **Item 151**

Subsection 6AA(3) provides that it is an offence to breach a condition of approval to import restricted goods.

The amendment restates the offence consistent with the Code by setting out clearly the relevant elements of the offence.

### **Items 152 and 153**

Subsection 8(3) relates to the provision of information which is false or misleading in a material particular in response to a notice. Subsection 8(3) is repealed because the Code covers the same ground.

The amendment to subsection 8(2) omits the phrase “without reasonable excuse”. The defence is relocated in subsection 8(3). The rationale for this is the same as for item 12. Item 153 also provides that the offence in subsection 8(2) is an offence of strict liability. See item 13 for an explanation of strict liability.

### **Item 154**

Subsection 15(2) provides an offence where a person breaches a condition of consent in relation to section 14 of the Act. The amendment repeals subsection 15(2) and restates the offence in a manner consistent with the Code by setting out clearly the elements of the offence.

### **Items 155 and 156**

These amendments delete the words “intentionally” and “intentionally or recklessly” because “intention” is the ordinary fault element for conduct and is applied to the correct elements of the offence by the Code.

### **Item 157**

Subsection 20(1A) provides a defence if the defendant proves that the defendant was not the sponsor of particular goods. The amendment clarifies that the defendant bears a legal burden of proof in relation to this defence.

### **Items 158 to 161**

Sections 21 and 22 use the phrase “intentionally or recklessly”. The amendment omits this phrase because “intention” is the ordinary fault element for conduct and is applied to the correct elements of the offences by the Code.

Subsection 22(2) creates an offence in relation to making a false or misleading statement. As Division 136 of the Code covers the same ground as subsection 22(2), there is no need to retain subsection 22(2) and it is, accordingly, repealed.

### **Items 162 to 166**

Section 22 creates offences in relation to the registration or listing of therapeutic goods. The amendment to subsection 22(3) repeals the provision and restates the offence consistent with the Code by setting out clearly the various elements of the offence.

Subsections 22(4), (5) and (6) use the phrase “intentionally or recklessly”. The amendment omits this phrase because the fault element of intention is applied by the Code. For similar reasons, the amendment to subsection 22(7)(a) omits the word “intentionally”.

The amendment to paragraph 22(8) omits the references to intention or recklessness for the same reasons, namely that these concepts are applied by the Code.

### **Items 167 to 170**

For the reasons outlined in relation to items 162 to 166 the phrase “intentionally or recklessly” is omitted.

The offences in these items relate to false statements in relation to an application for registration (section 22A); the giving of false information where an application is withdrawn (section 29B); failure to comply with a requirement where registration of goods is cancelled (section 30(7)); and the failure to comply with a requirement where goods supplied are not registered (section 30A).

### **Items 171 to 173**

Subsection 31(4) relates to the failure by a person to comply with a notice in relation to therapeutic goods. The amendment deletes the phrase “without reasonable excuse” and inserts the appropriate defence consistent with the Code. The rationale for this is the same as for item 12.

The amendment also provides that an offence under subsection 31(4) is an offence of strict liability. See item 13 for an explanation of strict liability.

### **Item 174 and 175**

The amendments omit the phrase “intentionally or recklessly” for the reasons explained in relation to items 162 to 166 above.

### **Items 176**

The offences in subsections 35(2) and (3) relate to the breaching of a condition of licence of manufacture, and the making of false or misleading statements in relation to manufacture.

The amendment repeals the subsections and in the case of subsection 35(2), restates the offence consistent with the Code. The offence in subsection 35(3) is repealed because the Code covers the same ground.

### **Items 177 and 178**

Subsection 48(3) provides a defence in relation to failure to comply with a requirement that a person answer questions and produce records. The amendment omits the phrase “without reasonable excuse” and inserts the appropriate defence consistent with the Code. The rationale for this is the same as for item 12.

### **Item 179**

Section 52 creates an offence where a person ceases to be an officer but fails to return an identity card to the Secretary. The amendment provides that this offence is an offence of strict liability. See item 13 for an explanation of strict liability

### **Item 180**

Subsection 54AA(1) creates an offence where the holder of a licence or permission to import or export therapeutic goods contravenes a condition of the licence or permission.

The amendment repeals the existing provision and restates the offences consistent with the Code so that the elements of the offence are clear.

## ***Tobacco Advertising Prohibition Act 1992***

### **Item 181**

The amendment inserts section 5A which applies Chapter 2 (other than Part 2.5) of the Code to offences under the Act.

### **Items 182 to 184**

Sections 13 and 15 of the Act use the phrase “knowingly or recklessly”. The amendments omit this phrase in each case as the appropriate fault elements are applied by the Code.

Sections 13 and 15 create offences in relation to the broadcasting and publishing of tobacco advertisements respectively.

### **Items 185 and 186**

Subsection 31(3) relates to offences committed by partnerships and unincorporated bodies and provides a defence for a partner or controlling officer of an incorporated body where that person can show that the person did not aid, abet, counsel or procure the offence, and was not knowingly involved in the commission of the offence.

The amendment provides that the defendant has an evidential burden in relation to this offence.