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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DEFENCE LEGISLATION AMENDMENT (APPLICATION OF *CRIMINAL CODE*) BILL 2001

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Veterans Affairs,
The Honourable Bruce Scott, MP)

DEFENCE LEGISLATION AMENDMENT

(APPLICATION OF *CRIMINAL CODE*)

BILL 2001

OUTLINE

This Bill is one of a number which have been, or are being, prepared in relation to offences under Acts administered by other Ministers. The Bill gives effect to the requirements of the Commonwealth *Criminal Code Act 1995 (the Criminal Code)*. Chapter 2 of the *Criminal Code* comes into effect on 15 December 2001 and codifies the general principles of criminal responsibility applicable to all Commonwealth offences. The Bill seeks to amend all Defence portfolio legislation so that it will operate harmoniously with the *Criminal Code*.

Broadly speaking, the Bill contains two sets of amendments:

- First, extensive amendments are proposed for the *Defence Force Discipline Act 1982* (DFD Act). These include amendments to harmonise the offence-creating and related provisions within the Act with the general principles of criminal responsibility as codified in Chapter 2 of the *Criminal Code*, whilst at the same time ensuring that the offences continue to operate as intended by Parliament.

- Secondly, amendments are also proposed for the balance of portfolio legislation. These will ensure that there is a smooth transition to the application of the *Criminal Code*. Many involve repealing unnecessary offences in accordance with the Government's objective of rationalising the number of statutory offences on the Commonwealth statute book. Many of the amendments seek to re-formulate offences into the *Criminal Code* drafting format in order that their physical and fault elements are readily apparent, and any ambiguity with respect to their interpretation is removed.

FINANCIAL IMPACT STATEMENT

As the Bill makes consequential amendments to the existing criminal and disciplinary law, there is no new financial impact.

Notes on Clauses

Items 1 and **2** deal with the short title and commencement.

Item 3 refers to the Schedule to be inserted to this Act. The Schedule contains the various Acts that will be amended or repealed as specified in the applicable items of the Schedule.

Item 4 concerns the application of amendments to acts or omissions that take place after the amendments in this Bill commence.

SCHEDULE 1

Part 1 – Amendments relating to the *Criminal Code*

Approved Defence Projects Protection Act 1947

Item 1 inserts new section 3A that applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 sets out the codified general principles of criminal responsibility.

Item 2 repeals and substitutes subsection 4(1) of the Act. This subsection provides that a person is guilty of an offence if the person boycotts or threatens to boycott any person, work or undertaking and in doing so prevents, hinders or obstructs (paragraph (1)(b)(i)) or endeavours to prevent, hinder or obstruct (paragraph (1)(b)(ii)), the carrying out of an approved defence project.

New subsection 4(1A) is inserted which provides that a person is guilty of an offence if the person publishes a declaration of a boycott or threat of a boycott (paragraph 4(1A)(a)) and as a result, the carrying out of an approved defence project is prevented, hindered or obstructed (paragraph 4(1A)(b).

New subsection 4(1B) is inserted which makes it an offence for a person to advocate or encourage the prevention, hindrance or obstruction of the carrying out of an approved defence project either by speech or in writing.

New subsection 4(1C) is inserted which restates the existing defence of reasonable cause or excuse in relation to a charge under subsections 4(1), (1A) or (1B). A note is added after the new subsection referring to the fact that, under subsection 13.3(3) of the *Criminal Code*, a defendant seeking to rely on this statutory defence of reasonable cause or excuse bears an evidential burden.

New subsection 4(1D) is inserted which provides that a person is guilty of an offence if the person uses violence or a threat of violence to a person or property, or engages in any other unlawful conduct (paragraph 4(1D)(a) refers) and in doing so prevents, hinders or obstructs the carrying out of an approved defence project (paragraph (1D)(b)(i) refers), or endeavours to prevent, hinder or obstruct the carrying out of an approved defence project (paragraph (1D)(b)(ii) refers).

Control of Naval Waters 1918

Item 3 inserts new section 3AA that applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 sets out the codified general principles of criminal responsibility.

Item 4 repeals and substitutes subsection 6(2). The master of a vessel is guilty of an offence if the master is given a direction under subsection (1) and he or she fails to comply with that direction. Subsection (2) restates the existing penalty of $1,000 for an offence under that subsection. New subsection (2A) provides that this offence is one of strict liability. Where strict liability applies to an offence, the prosecution does not have to prove fault on the part of the defendant. The prosecution need only prove that the physical elements of the offence occurred. Under the *Criminal Code*, any legislative provision that attracts strict liability must expressly state that it is an offence of strict liability (see section 6.1 of the *Criminal Code).*

Defence Act 1903

Item 5 inserts new section 6 that applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 sets out the codified general principles of criminal responsibility.

Item 6 repeals subsection 51S(3). Subsection 51S(3) currently applies Chapter 2 of the *Criminal Code* to an offence against section 51S. Subsection 51S(3) will be unnecessary when Chapter 2 of the *Criminal Code* applies to the Act generally on 15 December 2001.

Item 7 repeals and substitutes section 61CY and section 61CZ.

Section 61CY relates to the failure of a witness to attend before the Conscientious Objection Tribunal. New subsection 61CY(1) provides that a person is guilty of an offence if a person fails to attend or appear before the Conscientious Objection Tribunal to give evidence after being served with a summons under paragraph 61CQ(b). The existing penalty of 6 months imprisonment is restated in the subsection. New subsection (2) provides that reasonable excuse is a defence to a charge under subsection (1). A note is added after the subsection (2) referring to the fact that under subsection 13.3(3) of the *Criminal Code* a defendant seeking to rely on the statutory defence bears an evidential burden.

New subsection 61CY(3) provides that strict liability applies to the physical element of circumstance at paragraph (1)(a), that is, that the summons is under paragraph 61CQ(b). Where strict liability applies to an element, the prosecution does not have to prove fault on the part of the defendant in relation to that element. In this case, the application of strict liability to paragraph (1)(a) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse.

New section 61CZ relates to the refusal of a person to, among other things, be sworn or to answer a question when appearing before the Conscientious Objection Tribunal. Subsection (1) provides that a person who is required to produce a document in accordance with a summons under paragraph 61CQ(c) and refuses or fails to do so is guilty of an offence. The existing penalty of 6 months imprisonment is restated in subsection (1).

New subsection 61CZ(2) provides that strict liability applies to the physical element of circumstance at paragraph (1)(a), that is, that the summons is under paragraph 61CQ(c). Where strict liability applies to an element, the prosecution does not have to prove fault on the part of

the defendant in relation to that element. In this case, the application of strict liability to paragraph (1)(a) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse.

New subsection 61CZ(3) provides that a person who refuses or fails to take an oath or affirmation as required under paragraph 61CQ(d) when giving evidence before the Conscientious Objection Tribunal is guilty of an offence. The existing penalty of penalty of 6 months imprisonment is restated in subsection (3).

New subsection 61CZ (4) provides that strict liability applies to the physical element of circumstance at paragraph (3)(b), that is, that the requirement (to either take an oath or make an affirmation) is under paragraph 61CQ(d). Where strict liability applies to an element, the prosecution does not have to prove fault on the part of the defendant in relation to that element. In this case, the application of strict liability to paragraph (3)(b) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse.

New subsection 61CZ(5) provides that a person appearing before the Conscientious Objection Tribunal who refuses or fails to answer a question put to him or her by the presiding member is guilty of an offence. The existing penalty of 6 months imprisonment is restated in subsection (5).

New subsection 61CZ(6) provides that an offence will not be committed under subsections (1), (3) or (5) where the person has a reasonable excuse. A note is added referring to the fact that under subsection 13.3(3) of the *Criminal Code* a defendant seeking to rely on this statutory defence bears an evidential burden.

New subsection 61CZ(7) provides that a person will be guilty of an offence if he or she gives false or misleading evidence to the Conscientious Objections Tribunal knowing that it is false or misleading in a material particular. The existing penalty of 6 months imprisonment is restated in subsection (7).

Item 8 repeals and substitutes sections 73 to 73 E. These provisions are contained within Part VII relating to offences generally under the *Defence Act 1903.*

New section 73A relates to the unlawful communication or obtaining of information in relation to the defences of the Commonwealth. It is an offence under subsection 73A(1) for a member of the Defence Force or a person engaged under the *Public Service Act 1999* to –

- communicate to another person any plan, document or information relating to any fort, battery, field, work, fortification, or defence work, or to any defences of the Commonwealth, or to any factory or air force aerodrome or establishment or any other naval, military or air force information (paragraph (1)(a)); and

- the communication is not in the course of that person's official duty (paragraph (1)(b)).

Subsection (2) makes it an offence to unlawfully obtain any of the information or material contained in subsection (1).

Item 9 omits from subsections 73F(1) and (2) the reference to "73C, 73D or 73E" because sections 73C, 73D and 73E will be repealed by this Bill as noted above in Item 8.

Item 10 omits the words "except for lawful cause (the proof of which shall lie upon him" from paragraph 79(1)(c) which relates to the unlawful possession of arms or military articles belonging to the Commonwealth. These words are made unnecessary by proposed subsections (1AA) and (1AB) noted in Item 11 below.

Item 11 inserts new subsections 79(1AA) and (1AB). New subsection 79(1AA) provides that an offence under subsection 79(1) is one of strict liability subject to the statutory defence noted below. Where strict liability applies to an offence, the prosecution does not have to prove fault on the part of the defendant. The prosecution need only prove that the physical elements of the offence occurred. Under the *Criminal Code*, any legislative provision that attracts strict liability must expressly state that it is an offence of strict liability (see section 6.1 of the *Criminal Code*).

New subsection 79(1AB) restates the existing statutory defence that an offence is not committed under paragraph 79(1)(c) if the person proves that he or she had a lawful cause for possessing any of the articles mentioned in subsection (1). The statutory defence at subsection 79(1AB) retains the existing legal burden of proof. The note after subsection 79(1AB) refers to the fact that, under subsection 13.4 of the *Criminal Code*, a defendant seeking to rely on this statutory defence carries a legal burden.

Item 12 adds a note after subsection 79(1A) to the effect that under subsection 13.4 of the *Criminal Code* a defendant seeking to rely on the defence set out in paragraph 79(1A)(b) carries a legal burden. The existing legal burden of proof for the statutory defence in paragraph 79(1A)(b) has been retained.

Item 13 repeals and substitutes subsection 80A(1). It will be an offence under subsection 80A(1) if a person falsely represents himself or herself to be a returned soldier, sailor or airman. The existing penalty of $200 or 6 months imprisonment has been restated.

Item 14 repeals subsection 80A(3). At present, subsection 80A(3) permits the prosecution to aver that the defendant is not a returned soldier, sailor or airman and such an averment is deemed to be proved in the absence of evidence to the contrary. This provision will not operate in the same manner after Chapter 2 of the *Criminal Code* takes effect. In particular, the prosecution will be required to prove each element of the offence beyond reasonable doubt (see sections 13.1 and 13.2 of the *Criminal Code*). In addition, section 13.6 limits the effect of an averment provision to the extent that the prosecution will be unable to aver any fault elements of an offence or to make an averment in prosecuting an offence that is punishable by imprisonment. The existing penalties for an offence against section 80A of $200 or imprisonment for six months, or both have been retained.

Item 15 repeals and substitutes subsection 80B(1) which makes it an offence for a person to wear a service decoration that has not been conferred on him or her. The existing penalty of $200 has been restated.

Item 16 inserts a note after subsection 80B(2) referring to the fact that, by virtue of subsection 13.3(3) of the *Criminal Code*, a defendant bears an evidential burden in respect of a matter under subsection 80B(2).

Item 17 inserts a note after subsection 80B(3) referring to the fact that, by virtue of subsection 13.3(3) of the *Criminal Code*, a defendant bears an evidential burden in respect of a matter under subsection 80B(3).

Item 18 restates the existing penalty of $200 in respect of an offence under subsection 80B(4) which relates to a person falsely representing that a service decoration has been conferred on him or her.

Item 19 repeals and substitutes subsections 82(1), (2) and (3). Section 82 prohibits the sketching, drawing, painting etc of any fort, fieldwork, fortification etc. New subsection 82(1) provides that if a person who has no lawful authority to do so, makes a sketch, drawing, photograph, picture or painting of any (or any part of) defence installation in Australia, he or she is guilty of an offence and all the sketches etc are to be confiscated and may be destroyed, sold or otherwise disposed of as the Governor-General directs.

New subsection 82(1A) restates the existing penalty of $200 or imprisonment for 6 months, or both in respect of an offence under subsection 82(1).

New subsection 82(2) provides that a person who, without lawful authority, enters or approaches a defence installation with materials or apparatus intending to contravene subsection (1) will be guilty of an offence and all tools and all materials or apparatus are to be confiscated and may be destroyed, sold or disposed of as the Governor-General directs.

New subsection 82(2A) restates the existing maximum penalty of $100 for an offence under subsection 82(2).

New subsection (3) provides that a person is guilty of an offence if he or she trespasses on, among other things, a defence installation, building or land used in connection with the administration, accommodation or training of the Defence Force or on an aircraft. Subsection (3) restates the existing penalty of $40 for an offence under this subsection.

Item 20 adds new subsection 82(5) which defines “defence installation” to mean any fort, battery, fieldwork, fortification, aircraft, air force establishment, aircraft material or any naval, military or airforce work of defence.

Item 21 repeals and substitutes subsections 83(1), (2) and (3). Subsection 83(1) deals with the unauthorised use of Defence emblems. A person who uses or wears a defence emblem (or something that can be mistaken for a defence emblem), without the written authority from the Minister or his or her delegate, is guilty of an offence. Subsection (1) restates the existing penalty of $200.

Subsection 83(2) makes it an offence for a person to make, supply or offer to supply a defence emblem (or something that can be mistaken for a defence emblem) without the written authority from the Minister or his or her delegate. Subsection (2) restates the existing penalty of $500.

Subsection 83(3) makes it an offence for a person to fly or display a defence flag without the written authority of the Minister or his or her delegate. An offence will only be committed if the person is not a member of the Defence Force acting in the course of his or her duties. Subsection (3) restates the existing penalty of $200.

Item 22 adds new subsection 83(4A) to make an offence under subsection 83(4) one of strict liability. Where strict liability applies to an offence, the prosecution does not have to prove fault on the part of the defendant. The prosecution need only prove that the physical elements of the offence occurred. Under the *Criminal Code*, any legislative provision that attracts strict liability must expressly state that it is an offence of strict liability (see section 6.1 of the *Criminal Code*). The existing penalty in subsection (4) of a fine not exceeding $200 remains unchanged.

Item 23 adds a note to subsection 83(5) that the defendant bears an evidential burden in relation to the matter in subsection (5). Subsection (5) creates the statutory defence of using or wearing a defence emblem or flying a defence flag in the course of a dramatic or visual representation (including a representation that is to be televised) or in the making of a cinematograph film.

Item 24 adds new subsection 84(2) making an offence under section 84 one of strict liability. The offence is one of bringing contempt on a uniform of the Defence Force etc. Where strict liability applies to an offence, the prosecution does not have to prove fault on the part of the defendant. The prosecution need only prove that the physical elements of the offence occurred. Under the *Criminal Code*, any legislative provision that attracts strict liability must expressly state that it is an offence of strict liability (see section 6.1 of the *Criminal Code*). Section 84 imposes a penalty of a fine not exceeding $200.

Item 25 repeals and substitutes sections 86 and 88.

New section 86 deals with the failure of a witness to appear before a service tribunal. Subsection 86(1) provides that a person is guilty of an offence if he or she has been served with a summons under the *Defence Force Discipline Act 1982* to appear as a witness and fails to appear or has not been excused by the tribunal from further attendance. Subsection 86(1) restates the existing penalty of $1,000 or 6 months imprisonment, or both.

Subsection 86(2) provides that an offence under subsection (1) is one of strict liability subject to the statutory defence noted below. Where strict liability applies to an offence, the prosecution does not have to prove fault on the part of the defendant. The prosecution need only prove that the physical elements of the offence occurred. Under the *Criminal Code*, any legislative provision that attracts strict liability must expressly state that it is an offence of strict liability (see section 6.1 of the *Criminal Code*).

Subsection 86(3) sets out the defence of reasonable excuse to a charge laid under subsection (1). A note is added after the new subsection referring to the fact that, under subsection 13.3(3) of the *Criminal Code,* a defendant seeking to rely on this statutory defence bears an evidential burden.

New section 88 relates to false or misleading evidence. If a person knowingly gives false or misleading evidence as a witness before a service tribunal, then he or she is guilty of an offence. The section restates the existing penalty of $1,000 or 6 months imprisonment, or both.

Item 26 inserts new subsection 89(1A) to make it clear that an offence under section 89(1) (contempt of service tribunal) is one of strict liability. Where strict liability applies to an offence, the prosecution does not have to prove fault on the part of the defendant. The prosecution need only prove that the physical elements of the offence occurred. Under the *Criminal Code*, any legislative provision that attracts strict liability must expressly state that it is an offence of strict liability (see section 6.1 of the *Criminal Code*).

Item 27 repeals and substitutes section 90 that relates to the failure to comply with an order under section 140 of the *Defence Force Discipline Act 1982*. New subsection 90(1) provides that a person who fails to comply with, or contravenes, such an order is guilty of an offence. The section restates the existing penalty of $1,000 or 6 months imprisonment, or both.

New subsection 90(2) provides that strict liability applies to the physical element of circumstance at paragraph (1)(a), that is, that the order is under section 140 of the *Defence Force Discipline Act 1982*. Where strict liability applies to an element, the prosecution does not have to prove fault on the part of the defendant in relation to that element. In this case, the application of strict liability to paragraph (1)(a) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse.

Item 28 omits the reference to "intentionally" in paragraph 106(b).

Item 29 adds new paragraph 106(2) that provides that strict liability applies to the physical element of circumstance at paragraph 106(1)(a), that is, that the requirement (to provide a sample) is under section 94. Where strict liability applies to an element, the prosecution does not have to prove fault on the part of the defendant in relation to that element. In this case, the application of strict liability to paragraph (1)(a) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse.

Item 30 repeals and substitutes paragraphs 107(a) and 107(aa). Paragraph (a) contains the physical element of circumstance that a sample is provided by a member pursuant to a requirement under section 94. Paragraph (aa) contains the physical element of conduct, that the member interferes with or otherwise deals with a sample provided by a member under section 94. The existing paragraph (b) remains unchanged and contains the further physical element of circumstance that the member is not authorised, that is, not authorised to commit the conduct in the new paragraph (aa).

Item 31 adds new subsection 107(2) that applies strict liability to the physical element of circumstance at paragraph (1)(a), that is, that the requirement to provide a sample is under section 94. Where strict liability applies to an element, the prosecution does not have to prove fault on the part of the defendant in relation to that element. In this case, the application of strict liability to paragraph (1)(a) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse.

Item 32 repeals and substitutes subsection 116W(5) that relates to the general powers of rangers. New subsection (5) makes it an offence for a person to fail to comply with a requirement made by a ranger under this section. Subsection (5) restates the existing penalty of $1,000. New subsection (6) makes an offence under subsection (5) one of strict liability subject to the statutory defence at subsection (7) of reasonable excuse. A note is added after the new subsection (7) referring to the fact that, under subsection 13.3(3) of the *Criminal Code*, a defendant seeking to rely on this statutory defence bears an evidential burden.

Item 33 repeals and substitutes section 116Y. New subsection (1) provides that a person is guilty of an offence if he or she threatens or assaults a ranger who is performing his or her duties under the Part or the by-laws. The subsection restates the existing penalty of $5,000 or 2 years imprisonment, or both.

Item 33 adds new subsection 116Y(2) that provides that strict liability applies to the physical element of circumstance at paragraph (1)(b), that is, that the performance of the duties is under this Part or the by-laws. Where strict liability applies to an element, the prosecution does not have to prove fault on the part of the defendant in relation to that element. In this case, the application of strict liability to paragraph (1)(b) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse.

Item 34 repeals and substitutes section 118 that relates to the raising of forces without authority. A person is guilty of an offence for the unauthorised inducement of another person to enlist or engage to serve in any naval, military or air force. The section restates the existing penalty of 6 months imprisonment.

Item 35 repeals and substitutes section 123AA relating to the sale or supply of intoxicating liquor to cadets. New subsection (1) provides that it is an offence for a person to sell or supply intoxicating liquor to a member of the Australian Cadet Corps who is under the prescribed age and is in uniform. The section restates the existing penalty of $40.

New subsection 123AA(2) creates a statutory defence where the liquor was sold or supplied at the direction of a duly qualified medical practitioner. A note is added after this subsection referring to the fact that, under subsection 13.3(3) of the *Criminal Code*, a defendant bears an evidential burden where he or she seeks to rely on this statutory defence.

New subsection 123AA(3) provides that an offence under subsection 123AA(1) is an offence of strict liability subject to the statutory defence at subsection (2). Where strict liability applies to an offence, the prosecution does not have to prove fault on the part of the defendant.

Item 36 preserves Regulations that were in effect under section 123AA of the Act immediately before the commencement of this Item. Those Regulations continue to have effect as if they had been made under new section 123AA.

Defence Force Discipline Act 1982

Item 37 inserts a new definition, "engage in conduct", into subsection 3(1) of the Act. "Engage in conduct" is defined as doing an act or omitting to perform an act. Offence provisions in the Act have been harmonised using this term.

Item 38 amends the existing definition of "property" so that it mirrors the definition in section 130.1 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. The definition is widely cast, covering real and personal property, money, intangible property such as the right to recover funds, electricity and wild creatures. This definition, together with the definition of "service property" in subsection 3(1), will be particularly relevant to the new Division 5A – Property offences which contains the harmonised *Criminal Code* offence provisions pertaining to property and service property currently in sections 43, 44, 45, 46, 47 and 48.

Item 39 repeals the existing subsection 3(13) and inserts a new subsection 3(13) defining "ancillary offences" into the Act. The existing subsection provides that offences against sections 6, 7, 7A and subsection 86(1) of the *Crimes Act 1914* are ancillary offences. With the exception of section 6, these *Crimes Act* provisions have been replaced by provisions in Part 2.4 of the *Criminal Code*.

Item 40 repeals the existing section 10 and substitutes a new section 10 which provides that the principles of criminal responsibility set out in Chapter 2 of the *Criminal Code* now apply to all service offences other than "old system offences". In relation to a service offence against section 61, Chapter 2 of the *Criminal Code* applies to the content of section 61, but it may not necessarily apply to the content of the law in force in the Jervis Bay Territory. Section 61 is concerned with "Territory offences" as defined in subsection 3(1) of the Act. To determine for the purposes of section 61, whether Chapter 2 of the *Criminal Code* also applies to Jervis Bay Territory law, it is necessary to consult Jervis Bay Territory law. For example, where a law of the Commonwealth is in force in the Jervis Bay Territory, Chapter 2 will apply to that law (see section 61).

As the Act has been in force for over 15 years, it is unlikely that any "old system offences", for which time limits have not expired, will be charged in the future. As a precaution, however, the reference to old system offences in this section has been retained.

Items 41 and **42** amend section 11 of the Act.

Item 41 amends subsection 11(3) by substituting the words "the application of Chapter 2 of the *Criminal Code* to" for the existing phrase "principles of common law that apply in relation to".

Item 42 inserts additional provisions after subsection 11(3) to aid in the interpretation of the concepts of "recklessness" and "negligence". These amendments are designed to clarify the application of section 11 in view of the application of sections 5.4 and 5.5 of the *Criminal Code* to the Act. New subsection (3A) provides that service tribunals will continue to have regard to existing subsections 11(1) and 11(2) when determining whether a member was "reckless" or "negligent", but that these matters do not alter the definitions of "recklessness" and "negligence" in sections 5.4 and 5.5 of the *Criminal Code*. New subsection (3B) provides that subsections 11(1) and 11(2) do not limit the matters to which a service tribunal may have regard when determining whether a member was "reckless" or "negligent".

At present, when an issue of "recklessness" is before a service tribunal, the meaning attributed will be its common law meaning qualified by subsection 11(1). Subsection 11(1) provides:

"Where a member of the Defence Force is charged with a service offence arising out of activities (in this subsection referred to as "the relevant activities") upon which the member was engaged in the course of the member's duty or in accordance with the requirements of the Defence Force, a service tribunal, in deciding whether the member, by act or omission, behaved recklessly shall have regard to the fact that the member was engaged in the relevant activities in the course of the member's duty or in accordance with the requirements of the Defence Force, as the case may be."

"Recklessness" arises for consideration in the context of the service offences in sections 36, 39, 41 and 43. A person is considered to have acted recklessly if he or she is aware of the particular kind of harm that might be done and yet has taken the risk that it will occur. Hence, "recklessness" involves foresight of or, as it is sometimes said, advertence to, the consequences of the contemplated act and a willingness to run the risk of the likelihood, or even perhaps the possibility, of those consequences maturing into actuality.

The amendments to section 10 and subsection 11(3) make it clear that the legal definition of "recklessness" in section 5.4 now applies to the Act in place of the common law definition. Under the *Criminal Code* "recklessness" is defined in section 5.4 as:

(1) A person is reckless with respect to a circumstance if:
  (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
  (b) having regard to the circumstances known to him or her, it is unjustifiable to take that risk.

(2) A person is reckless with respect to a result if:
  (a) he or she is aware of a substantial risk that the result will occur; and
  (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

Under the *Criminal Code*, the definition of "recklessness" has undergone significant change aimed at ensuring a more rigorous and structured approach to its interpretation. "Recklessness" has been defined using "substantial" and "unjustifiable" as the two key words. The definition follows the United States Model Penal Code definition. It uses "substantial" risk rather than a definition phrased in terms of possibility or probability because those latter terms are considered to invite speculation about mathematical chances and ignore the link between the acceptable degree of risk and the unjustifiability of running that risk in any given situation.

"Unjustifiably" is used as the evaluative element of the recklessness rather than "unreasonably". This is intended to avoid confusion between recklessness and criminal negligence. The "unjustifiability" of the risk is to be assessed on the facts as the defendant believes them to be. The question of whether the risk taken is "unjustifiable" that is, in the case of service tribunals, either the summary authority, defence force magistrate or court martial members.

When an issue of "negligence" arises, the meaning attributed by the service tribunal is the common law meaning qualified by subsection 11(2). The issue arises for consideration in the context of the service offences in sections 35, 36, 36A, 39, 41, and 43, and subsections 40(5) and 40(6). In general terms, a person is considered to have acted negligently when he or she acts without advertence to the certainty, probability or possibility of injury that a reasonable person would have adverted to.

The common law concept of "negligence" presently applied to negligence-based service offences was considered by the Federal Court in *Re Lamperd* (1983) 63 FLR 470; 46 ALR 371. The Court said:

"It is clear from the cases referred to that there is no absolute rule that where negligence is the basic element of a statutory offence, the degree of negligence to be proved is that required to found a charge of manslaughter. It is a question of construing the statute in each case."

The Court recognised that it was not necessary to show gross negligence such as would be necessary for a manslaughter charge for all negligence-based service offences when their

statutory context and maximum punishment are properly considered. *Re Lamperd* also stressed the need to focus on the standard of care, departure from which will be negligent, rather than to nominate a degree of departure from which is necessary to make the negligence an offence. Accordingly, a small deviation from the standard of care would be sufficient to prove a charge of negligence.

Subsection 11(2) operates so as to require a service tribunal, in giving consideration to the standard of care of a reasonable person in this context, to have regard to the standard of care that would have been exercised:

(a) by a reasonable person who was a member of the Defence Force with the same training and experience as the member; and

(b) where the member was engaged at the time of the offence on activities carried out in the course of his or her duty or in accordance with the requirements of the Defence Force – by a reasonable person who was so engaged.

Under the *Criminal Code* "negligence" is defined in section 5.5 as:

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

"Negligence" under the *Criminal Code* is criminal negligence, based closely on the definition in *Nydam* [1977] VR 430. The phrase "merits criminal punishment" is intended to specifically exclude civil negligence. However, "negligence" under the *Criminal Code* is designed to deal with different levels of criminal negligence for some offences (for example, a different level of negligence would apply to a manslaughter charge than the level applicable for a charge of negligent driving, see *Buttsworth* [1983] 1 NSWLR 658). The definition is intended to apply in such a way that the degree of negligence required for conviction must always be related to the nature of the offence. The definition includes specifically the words "for the offence" to achieve that purpose. This definition differs from the present interpretation of "negligence" under the DFD Act.

Despite the change affected by the application of the definitions in sections 5.4 and 5.5, new subsection (3A) confirms that their operation continues to be affected by subsections 11(1) and 11(2) for the purposes of the DFD Act. This recognises that notwithstanding the application of the *Criminal Code*, service offences must continue to be considered in their unique disciplinary context. When a service tribunal is determining whether a member was in fact "reckless" or "negligent" in the circumstances of the actual case, the tribunal will have regard to the matters in subsections 11(1) and 11(2) so that the service context of the defendant's acts or omissions is adequately assessed. This achieves harmonisation of these concepts with Chapter 2 of the *Criminal Code* but does so in a way that recognises the military context of offences in the Act.

Item 43 repeals sections 12 and 13. The general principles of criminal responsibility in Chapter 2 of the *Criminal Code* now apply with respect to onus and standard of proof. The current operation of subsection 12(2) was to put a legal burden on a defendant. The effect of repealing section 12 is to permit legal and evidential standards of proof to apply to defences in particular circumstances. The amendment of the wording of each statutory defence in the Act that enables the defence creating sections to comply with section 13.4 of the *Criminal Code*, thereby preserving the existing position of applying a legal standard to statutory defences.

The effect of repealing section 13 is to remove the availability of a defence of diminished responsibility. This defence is not available under the *Criminal Code* but is largely subsumed by the correlative *Criminal Code* defences based on lack of voluntariness (section 4.2) or mental impairment (section 7.3).

Item 44 repeals Divisions 1 to 6 of Part III of the Act which are the offence-creating provisions, and substitutes re-drafted offence provisions as follows:

Division 1 – Offences relating to operations against the enemy

Section 15

The offences relating to operations against the enemy or involving the provision of assistance to the enemy contained in the present section 15 have been separated into individual offence provisions in sections 15, 15A, 15B, 15C, 15D, 15E, 15F and 15G.

A new subsection (2) has been inserted into each of the proposed offence creating provisions which preserves the present defence in subsection 15(2). The defence has been reformulated so that the phrase "engaging in conduct" is used in place of the present phrase of "engaging in behaviour" because the former is defined in the *Criminal Code* to include an act or omission. This provision enables the existing position to remain unchanged, that is, the defendant bears a legal burden of proof in relation to the statutory defence.

At present, subsection 15(3) provides for a maximum penalty of life imprisonment when the conduct in any one of the offences under subsection 15(1) is committed with the "intent to assist the enemy". The proposed section 16B would replace the existing subsection 15(3). The proposed section 16B has been created to apply to sections 15 to 16A with the exception of sections 15B and 15C. Sections 15B and 15C are not included in the section 16B offence because they can only be committed in circumstances where the relevant conduct "intentionally assists the enemy". Hence, there is no need for an additional formulation of these sections 15B and 15C in section 16B.

Section 15 - Abandoning or surrendering a post etc.

The proposed subsection 15(1) replaces the present paragraph 15(1)(a) of the Act. The outcome of applying Chapter 2 of the *Criminal Code* to this paragraph would result in the physical element of circumstance in paragraph 1(a), that is the duty to defend etc, attracting the fault element of "recklessness" by default. The fault element of "knowledge" has been applied to this element in paragraph 1(b) so that fault element in the present section is preserved. The fault element of "intention" applies by default to the conduct described in paragraph 1(c).

The proposed subsection 15(2) preserves the existing defence of "reasonable excuse" at subsection (3).

Section 15A – Causing the capture or destruction of a service ship, aircraft or vehicle

The proposed section 15A substitutes for the present paragraph 15(1)(b) of the Act. The fault element of "intention" applies by default to paragraph 1(a). The fault element of "intention" has been specified in paragraph 1(c) as applying to the physical element of conduct in paragraph 1(b). This preserves the present operation of the offence.

The proposed subsection 15A(2) preserves the existing defence of "reasonable excuse" at subsection (3).

Section 15B – Aiding the enemy while captured

Proposed section 15B is substituted for the present paragraph 15(1)(c) of the Act. Paragraph 1(a) contains the physical element of circumstance, which attracts the fault element of "recklessness" by default under the *Criminal Code*. Paragraph 1(b) contains the physical elements of conduct, comprising three different forms, which attract the fault element of "intention" by default under the *Criminal Code*. The word "knowingly" has been deleted because it means "intentionally" in the context of this offence.

The maximum punishment for this offence is now life imprisonment. The maximum punishment of life imprisonment applies to the present section by virtue of subsection 15(3) when it is established that the conduct constituting the offence is shown to have been committed with the "intent to assist the enemy". The outcome of applying Chapter 2 of the *Criminal Code* to paragraph 1(b) results in the fault element of "intention" to the conduct in paragraph 1(b) of assisting the enemy in one of three alternative ways: first, serving with the enemy; secondly, aiding the enemy in the prosecution of hostilities or measures likely to influence morale; and thirdly, aiding the enemy in any other manner that is not authorised by international law. This offence can only be committed in circumstances where the conduct intentionally assists the enemy. Consequently, application of the *Criminal Code* has made the distinction redundant, in terms of applicable fault element, between the present paragraph 15(1)(c) offence and the more aggravated offence where subsection 15(3) applies. In view of this outcome, section 15B is specifically excluded from the ambit of section 16B.

The proposed subsection 15B(2) preserves the existing defence of "reasonable excuse" at subsection (3).

Section 15C – Providing the enemy with material assistance

The proposed section 15C replaces paragraph 15(1)(d) of the Act. The word "intentionally" in paragraph 15(1)(b) has been deleted because it will be applied by default by the *Criminal Code* in relation to the conduct that constitutes this offence.

The maximum punishment for this offence is now life imprisonment. The maximum punishment of life imprisonment applies to the present section by virtue of subsection 15(3) when it is established that the conduct constituting the offence is shown to have been committed with the "intent to assist the enemy". The outcome of applying Chapter 2 of the *Criminal Code* to the existing paragraph results in the fault element of "intention" applying to the conduct of

"providing the enemy with, or permitting or enabling the enemy to have access to, arms, ammunition, vehicles, supplies or any other thing likely to assist the enemy". This offence can only be committed in circumstances where the defendant's conduct assists the enemy. Consequently the distinction, in terms of applicable fault element between the present paragraph 15(1)(d) offence and the more aggravated offence where subsection 15(3) applies, is redundant. In view of this outcome, section 15C is specifically excluded from the ambit of section 16B.

The proposed subsection 15C(2) preserves the existing defence of "reasonable excuse" at subsection (3).

Section 15D – Harbouring enemies

Proposed section 15D replaces paragraph 15(1)(e) of the Act. The fault element of "intention" will be applied by operation of the *Criminal Code* to the conduct in paragraph 1(a) of harbouring or protecting a person. The fault element of "knowledge" is specified in paragraph 1(d), in relation to the "circumstances" in paragraphs 1(b) and 1(c). Those "circumstances" are that the person being harboured or protected is an enemy person and is not a prisoner of war. This structure preserves the wording and intention of the present section.

The proposed subsection 15D(2) preserves the existing defence of "reasonable excuse" at subsection (3).

Section 15E – Offences relating to signals and messages

Proposed section 15E replaces paragraph 15(1)(f) of the Act. The physical element of circumstance in paragraph 1(a) attracts the fault element of "recklessness" on application of the *Criminal Code*. The outcome of applying Chapter 2 of the *Criminal Code* to the existing paragraph results in the physical elements of conduct being separately specified in paragraphs 1(b)(i), 1(b) (ii) and 1(b)(iii). The physical elements of the paragraphs attract the fault element of "intention" on application of the *Criminal Code*. The word "knowingly" in the present section has been deleted because it means "intentionally" in this context.

The proposed subsection 15E(2) preserves the existing defence of "reasonable excuse" at subsection (3).

Section 15F – Failing to carry out orders

Proposed section 15F replaces paragraph 15(1)(g) of the Act. The physical elements of circumstance for this offence are set out in paragraphs (1)(a)(i) and (ii) and attract the fault element of "recklessness" on application of the *Criminal Code*. The present section does not specify a fault element in relation to the conduct that constitutes this offence of failing to use utmost exertions to carry orders into effect, but "intention" may be implied from the wording of the section. In the proposed section, the fault element of "intention" will apply to the physical elements of conduct in paragraph 1(b) by default under the *Criminal Code*.

The proposed subsection 15F(2) preserves the existing defence of "reasonable excuse" at subsection (3).

Section 15G – Imperilling the success of operations

Proposed section 15G replaces paragraph 15(1)(h) of the Act. Paragraph 1(a) sets out the physical element "engages in conduct" to which the fault element of "intention" applies by application of the *Criminal Code*. The physical element of result of (that) conduct is that the success of operations against the enemy is imperilled by that conduct. This element is set out in paragraph 1(b) and attracts the fault element of "recklessness" on application of the *Criminal Code*.

The term "otherwise" that appears in the present paragraph 15(1)(h) has been omitted. Its presence in paragraph 15(1)(h) acknowledged that the conduct prohibited by paragraphs 15(1)(a) to (g) is also capable of "imperilling the success of operations against the enemy".

The proposed subsection 15G(2) preserves the existing defence of "reasonable excuse" at subsection (3).

Section 16

The present subsection 16(1) has been re-drafted into two separate offence provisions in the proposed sections 16 and 16A. Section 16 contains the offence of unlawful communication with or giving intelligence to the enemy and section 16A contains the offence of failure to pass on enemy intelligence received.

Proposed subsections 16(2) and 16A(2) have been inserted to create individualised versions of the present defence in subsection 16(2). The defence has been reformulated so that the phrase "engaging in conduct" is used in place of the present phrase of "engaging in behaviour" because the former is defined in the *Criminal Code* to include an act or omission. This provision enables the existing position to remain unchanged whereby the defendant bears a legal burden of proof in relation to the statutory defence.

Section 16 – Communicating with the enemy

The proposed section 16 replaces paragraph 16(1)(a). The statement of offence has been amended from "Communication with enemy" to "Communicating with the enemy" for section 16 and "Failing to report information received from the enemy" for the new section 16A offence in the present paragraph 16(1)(b). This reflects the *Criminal Code* drafting style.

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The fault element of "intention" applies by default under the *Criminal Code* to the conduct of communicating with or giving intelligence to the enemy.

The proposed subsection 16(2) preserves the existing defence of "reasonable excuse" at subsection (2).

Section 16A – Failing to report information received from the enemy

In the proposed paragraph (1)(b) the fault element of "intention" applies under the *Criminal Code* to the conduct specified in paragraph 1(a) of not making known to proper authority any information received by the person from the enemy. To ensure the section operates effectively under the *Criminal Code*, it is necessary to include the physical element in paragraph 1(c), namely, that the information received is likely to be directly or indirectly useful to the enemy in

conducting operations. To this physical element the fault element of "knowledge" is then applied by paragraph 1(d).

The proposed subsection 16A(2) preserves the existing defence of "reasonable excuse" at subsection (2).

Section 16B – Offence committed with intent to assist the enemy

A proposed section 16B has been inserted in place of the existing subsections 15(3) and 16(3). Existing subsections 15(3) and 16(3) created aggravated forms of offences at section 15 and 16 where the offences are committed with the additional specific intention of assisting the enemy (paragraph 16B(1)(b) refers). Section 16B duplicates the effect of subsections 15(3) and 16(3) and creates a separate offence with a maximum penalty of life imprisonment where conduct amounts to an offence against proposed sections 15 to 15G and 16A (excluding sections 15B and 15C).

New subsection 16B(2) provides that strict liability applies to the physical element of circumstance at paragraph (1)(a), that is, the conduct constitutes an offence against sections 15 to 16A (excluding sections 15B and 15C). Where strict liability applies to an element, the prosecution does not have to prove fault on the part of the defendant in relation to that element. In this case, the application of strict liability to paragraph (1)(a) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse.

Section 17 – Leaving a post, abandoning equipment or otherwise failing to perform duty

The proposed section 17 statement of offence has been re-drafted so that it more precisely reflects the nature of an offence. Subsection (1) and paragraph (1)(a)(i) now specify the physical element of circumstance that the member must be engaged on service in connection with operations against the enemy and has a duty to be at a post position or other place to commit the offence. The fault element of "recklessness" applies by default under the *Criminal Code* to this physical element of circumstance. Paragraphs (a)(ii) and paragraphs (b) and (c) specify the physical elements of conduct to which the fault element of "intention" applies by default.

The term "post" in this section can be interpreted as including, according to orders or circumstances, such surrounding area as may be necessary for the proper performance of the duties for which the person was posted.

The defence of "reasonable excuse" has been retained in subsection (2) in order to conform to the present section but the words "engaging in conduct" are substituted for the phrase "engaging in behaviour". The defendant bears a legal burden in relation to this defence.

Section 18 - Endangering morale

The outcome of applying Chapter 2 of the *Criminal Code* to the existing Subsection 18(1) results in the physical element of conduct – (1)(a) "spreads reports" and circumstance – (1)(b) "those reports relate to operations against the enemy". The additional fault element of "intention to create despondency or unnecessary alarm" is created in paragraph (1)(c).

Paragraph (2)(a) contains the physical element of circumstance – "engaged on service in connection with operations against the enemy". The fault element of "recklessness" applies to

this paragraph by default under the *Criminal Code*. The physical element of circumstance in paragraph (c) attracts the fault element of recklessness. The fault element of "intention to create despondency or unnecessary alarm" in paragraph (d) applies to the physical element of conduct in paragraph (b) that would otherwise attract the fault element of "intention" upon application of the *Criminal Code*.

Section 19 - Conduct after capture by the enemy

The proposed amendment is a deconstruction of the physical and fault elements in accordance with the *Criminal Code*. The present subsections 19(1) and 19(2) have both been re-drafted so that section 19 now consists of four separate offences.

In the proposed subsections (1) and (2) the physical elements of circumstance set out in paragraphs 1(a) and 2(a), and 1(b) and 2(b) attract the fault element of "recklessness" on application of the *Criminal Code*. For both subsections (1) and (2), the conduct that constitutes the offence is set out in paragraph 1(c) and attracts the fault element of "intention" under the *Criminal Code*.

In subsection (3) the physical element of circumstance in paragraph 3(a) attracts the fault element of "recklessness" on application of the *Criminal Code*. Paragraph 3(b) applies the fault element of "intention to secure favourable treatment for the member" to the physical element of "engages in conduct". Paragraph 3(c) sets out a further physical element of result of conduct attracting the fault element of "recklessness".

In subsection (4) the physical element of circumstance in paragraph 4(a) attracts the fault element of "recklessness" on application of the *Criminal Code*. Paragraph 4(b) is a physical element of circumstance to which the fault element of "recklessness" applies. Paragraph 4(c) sets out the fault element of conduct – "ill-treats those other persons". "Intention" applies to this element on application of the *Criminal Code*.

Division 2 –Mutiny, desertion and unauthorised absence

Section 20 - Mutiny

Subsection (1) replaces subsection 20(1) of the Act. Subsection 3(1) of the DFD Act defines two types of mutiny:

- A combination between persons to overthrow lawful authority in the Defence Force or an allied force; or

- A combination between persons to resist lawful authority in the Defence Force or in an allied force in such a manner as to prejudice substantially the operational efficiency of the Defence Force or of, or a part of, an allied force.

In either case, at least two persons who are members of the Defence Force must engage in the relevant conduct. The definition is intended to exclude those forms of collective insubordination which, while amounting to resistance to a lawful authority, are not formed to overthrow the authority or to substantially prejudice operational efficiency, but are directed at such matters as poor food or living conditions, or at delays in repatriation or demobilisation after the conclusion of hostilities.

The proposed offence omits the word "intentionally" from subsection 20(1). This has been done because the fault element of "intention" automatically applies to the conduct of taking part in a mutiny by default under the *Criminal Code*.

Subsection (2) replaces subsection 20(2) of the Act. Similarly, the word "intention" has been omitted because this is the fault element that will apply by default to the conduct of taking part in a mutiny. Under the *Criminal Code*, the fault element of "recklessness" will apply to the physical element of circumstance set out in paragraph (2)(b) relating to the object of the mutiny, the refusal of the various kinds of important service described in the subsection. The present section does not give any indication as to the fault element intended to apply to this physical element. Upon application of the *Criminal Code*, the application of the fault element of "recklessness" to this physical element is now explicit.

Section 21 - Failure to suppress mutiny

Subsection (1) replaces subsection 21(1) of the Act. The fact that a mutiny is taking place or is intended has to be implied in the present section. As this is the physical element that must exist before the fault element of "knowledge" can be applied, it has been stated expressly in paragraph (1)(a). Paragraph (1)(c) contains the physical element of conduct of either failing to take reasonable steps to suppress or prevent the mutiny or to report the mutiny to the proper authority.

Subsection (2) replaces subsection 21(2) of the Act. The fact that a mutiny is taking place in order for the offence to be committed has been expressly stated in paragraph (2)(a). Paragraph 2(b) applies the fault element of "knowledge" to the physical element of circumstance at paragraph 2(a). Paragraph (2)(c) applies the further fault element of "knowledge" in terms of the mutiny's objects in paragraphs (c)(i) and (ii). For additional clarity, the re-drafted provision has amended the reference to paragraph 21(2)(b) to "subsection 20(2)" by setting out the relevant words of that subsection in paragraphs 2(c)(i) and (ii). Paragraph (2)(d) contains the physical element of conduct of either failing to take reasonable steps to suppress or prevent the mutiny or report it to the proper authority without delay. "Intention" applies to this physical element by default under the *Criminal Code.*

Section 22 - Desertion

The existing section 22 has been re-drafted to create separate offences in subsection (1) and (2). Paragraph (1)(a) sets out the physical element of circumstance in which the offence of desertion arises, namely, where a member is on active service or has been warned for active service. Paragraph (1)(b) sets out the conduct that constitutes the offence which is "departing from or not attending at place of duty" and the fault element which has to be applied to that conduct, "the intention to avoid active service".

Paragraph (2)(a) sets out the physical element of circumstance, "is absent without leave", to which the fault element of "recklessness" applies under the *Criminal Code*. In paragraph (2)(b) the phrase "engages in conduct" is the physical element of conduct that constitutes the offence. Accordingly, the fault element of "intention" applies to this element by operation of the *Criminal Code*. Paragraph (1)(c) then sets out the physical element of result of conduct, that the conduct manifests an intention by the defendant to avoid active service. To this element the fault element of "recklessness" applies under the *Criminal Code*.

Section 23 - Absence from duty

Section 23 has been re-drafted so that it separates the two forms of conduct presently contained in subsection 23(1) into two separate offences in subsections (1) and (2). The section is intended to apply to the circumstances where a member is absent from duty without necessarily being absent from his or her unit. This section is usually used where the member has attended for initial duty and is then later absent from a particular duty but has not left the barrack or unit etc. Where the member has left the barrack or unit etc at the time he or she was required to attend for the later, particular duty, the charge of section 24 absence without leave is used. Likewise, where a member fails to report for initial duty, the charge of section 24 is used.

Section 23 is a commonly charged offence within the Defence Force and is considered to be one of the fundamental service offences essential for the maintenance of service discipline. Section 23 offences are usually dealt with by summary authorities and generally attract relatively minor punishments. Custodial sentences for these offences are extremely rare, especially in peacetime.

Subsection 23(3) makes an offence under subsection 23(1) an offence of strict liability subject to the statutory defence of reasonable excuse set out in subsection 23(4). If strict liability is not so specified, it would be necessary to prove the fault element of "recklessness" in relation to the requirement to perform a duty (paragraphs 23(1)(a) and (2)(a) refer) and "intention" in relation to the physical element of not attending for duty, or ceasing to perform duty before being permitted to do so (paragraphs 23(1)(b) and (2)(b) refer). The application of these fault elements will substantially alter the current operation of the provision. Ministerial approval was therefore granted to retain the offence as one of strict liability.

The existing statutory defence of reasonable excuse has been retained in subsection 23(4). Subsection 23(4) mitigates the effect of the application of strict liability to subsections 23(1) and (2) by permitting the charge to be defeated by proof of reasonable excuse for the relevant conduct. The defendant bears a legal burden of proof in relation to the statutory defence.

Section 24 - Absence without leave

Section 24 has been re-drafted so that strict liability has been applied by subsection (2) to the offence.

The interpretation of the present section 24 involves similar considerations as those that apply to section 23. Section 24 involves similar conduct, carries a maximum penalty of 12 months imprisonment and provides a defence of circumstances not reasonably within the member's control. The expression "absent without leave" is not statutorily defined but is interpreted as applying when a member is absent, without authority or acceptable excuse, from his or her unit, ship, establishment, barrack, camp, air force base etc.

Subsection 24(2) makes an offence under subsection 24(1) an offence of strict liability subject to the statutory defence of "circumstances not reasonably within the member's control" set out in subsection 24(3). If strict liability is not specified, it would be necessary to prove the fault element of "intention" in relation to the physical element of conduct, that is, "absence without leave". The application of this fault element will substantially alter the current operation of the provision. Ministerial approval was therefore granted to retain the offence as one of strict liability.

The existing statutory defence of circumstances not reasonably within the member's control has been retained in subsection 24(3). Subsection 24(3) mitigates the effect of the application of strict liability to subsections 24(1) by permitting the charge to be defeated by proof of circumstances not reasonably within the member's control. The defendant bears a legal burden of proof in relation to the statutory defence. Ministerial approval was granted to retain the offence as one of strict liability.

Division 3 –Insubordination and violence

Section 25 – Assaulting a superior officer

The statement of offence for section 25 has been amended to the present tense where it was previously "Assault on superior officer". The term "superior officer" is defined in subsection 3(1) of the Act.

Application of the *Criminal Code* to DFD Act assault-based offences will not prevent the term 'assault' from continuing to be interpreted in accordance with its common law meaning. Whilst not made explicit in each of the re-drafted assault-based offences, the application of the common law position in relation to the definition and interpretation of "assault" has been preserved albeit within *Criminal Code* constraints.

Section 25 has been re-drafted so that an offence now has the two physical elements set out in paragraphs (1)(a) and (b) respectively. The first physical element is the physical element of conduct "assault" which attracts the fault element of "intention" under the *Criminal Code*. The second physical element is the physical element of circumstance, that is, the victim was a superior officer.

Default application of Chapter 2 of the *Criminal Code* would require the fault element of "recklessness" to be proven in relation to the physical element of circumstance paragraph (1)(b) that the victim was a superior officer. The application of this fault element would change the current operation of the offence and hence subsection 25(2) specifies the application of strict liability to paragraph (1)(b) subject to a statutory defence noted below. Ministerial approval was granted to retain the offence as one of strict liability.

The existing statutory defence of actual or imputed knowledge has been retained in subsection 25(3) and mitigates the effect of the application of strict liability to paragraph (1)(b). The defendant bears a legal burden of proof in relation to the statutory defence.

Section 26 - Insubordinate conduct

Section 26 has been re-drafted so that subsection (1) covers conduct that is threatening, insubordinate or insulting to a superior officer; and subsection (2) covers the use of language that is threatening, insubordinate or insulting about a person who is a superior officer. The statement of this offence has been amended to "Insubordinate conduct" where previously it was "Insubordinate behaviour with respect to a superior officer".

In the proposed subsection (1) the term "engages in conduct that is threatening" is substituted for the words "behaves in a threatening manner". "Engages in conduct" is preferred because it is defined in the *Criminal Code* to mean to do an act or to omit to perform an act. The expression "to a person" in paragraph (1)(a) is interpreted to mean the conduct is directed to a person and

intended to come to that person's notice. Ordinarily, the conduct will occur within sight or earshot of the superior but nevertheless encompassed by this offence would also be instances where the conduct occurs in a telephone conversation with a superior or in a letter sent to a superior couched in insubordinate language.

In the proposed subsection (2) the combined effect of paragraphs (2)(a), (b) and (c) means that the language complained of need not be heard by the superior about whom the language was used but the use must occur in the person's presence.

The section has been re-drafted so that the proposed subsection 26(3) expressly applies strict liability to the two forms of the offence at subsection (1) and (2), subject to the statutory defence at subsection (4). The relatively low maximum penalty for this offence and the statutory defence provided in subsection (4) are indicators of legislative intent to apply strict liability to section 26. Furthermore, if strict liability is not applied to the offence, the fault element of "intention" would have to be applied to the defendant's insubordinate, threatening or insulting conduct (subsection (1) refers) or to the defendant's insubordinate, threatening or insulting language (subsection (2) refers). The application of these fault elements would change the operation of the section and would be inconsistent with the disciplinary, as opposed to criminal, nature of the offence. Ministerial authority was obtained for the application of strict liability to an offence against this section.

The existing statutory defence of actual or imputed knowledge has been retained in subsection 26(4). The statutory defence affords the defendant protection against the application of strict liability to the offence. The defendant bears a legal burden in relation to that defence.

Section 27 – Disobeying a lawful command

In the amended section 27, paragraph (1)(a) is a physical element of circumstance that attracts the fault element of "recklessness" under the *Criminal Code*. Paragraph (1)(b), a further physical element of circumstance, and paragraph (1)(c), the physical element of conduct, have both been specified as attracting strict liability. It is recognised that application of Chapter 2 of the *Criminal Code* means that fault elements attach by default to all physical elements. If this were to occur in relation to section 27, the current operation of the section would change. The fault element of "recklessness" would apply by default to the physical element of circumstance "the person giving the command is a superior officer", and the fault element of "intention" would apply to the conduct element of "disobeying the command". This would be inconsistent with the disciplinary, as opposed to criminal, nature of the offence.

Notwithstanding the position that applies by virtue of Chapter 2, another important feature of the *Criminal Code* is that it allows a law that creates an offence to provide there is no fault element for one or more of its physical elements. To do this, however, the provision must specify that those elements are of strict liability. Ministerial approval was granted to specify the application of strict liability in subsection (2) to the physical elements in paragraphs (1)(b) and (1)(c) so that the operation of the provision remains unchanged. Consequently, it will not be necessary to prove that the defendant intended to engage in the proscribed conduct or did so with any other particular state of mind.

The statement of offence has been amended from "Disobedience of command" to "Disobeying a lawful command" to conform to the *Criminal Code* drafting style and to express the statement of offence in the present tense. The expression "lawful command" means a command given by a

superior officer who has the authority in the circumstances to give such a command where the command relates to military duty. A command which has for its sole object the attainment of some private end or which is otherwise unconnected with military duty would not be lawful.

The existing statutory defence has been retained in subsection (3). This provision mitigates the application of strict liability to the physical element in paragraph (1)(b). The defendant bears a legal burden in relation to the defence.

Section 28 - Failure to comply with direction by the commander of a ship, aircraft or vehicle

The proposed section 28 statement of offence has been amended to "Failure to comply with direction by the commander of a ship, aircraft or vehicle" where previously it was "Failure to comply with direction of person in command". This has been done in order to more clearly distinguish this offence from sections 27 and 29, and to emphasise its particular application to situations involving lawful directions given by persons in command of service ships, aircraft and vehicles in relation to their sailing, flying or handling.

Paragraphs (1)(a), (1)(b) and (1)(c) of the re-drafted section are all physical elements of circumstance and have been set out separately for clarity and convenience. The fault element of "recklessness" applies by default under the *Criminal Code* to each of these physical elements.

The physical element of conduct is that the person does not comply with the lawful direction by the person in command of the ship, aircraft or vehicle. This element is set out in paragraph (1)(d). Strict liability has been applied to this physical element. The present section does not require that a person know of the direction given by the person in command of the ship, aircraft, nor is the person's actual or imputed knowledge of the direction specified in the defence in subsection 28(2). By applying strict liability, the current operation of the offence has been preserved. Under the *Criminal Code*, any legislative provision that attracts strict liability must expressly state that it is an offence of strict liability (see section 6.1 of the *Criminal Code*). Ministerial approval was granted for this to occur.

The expression "lawful direction" obviates any pre-requisite for a Service command relationship between the person giving the direction and the recipient. The offence itself is directed at members who are passengers or bystanders in relation to service ships, service aircraft or service vehicles. A lawful direction may be given by a member to a passenger who is senior in rank to the member.

The proposed subsection (3) preserves the statutory defence of "reasonable excuse" found in the existing subsection 28(2). The provision is unchanged except for the substitution of the word "conduct" for the word behaviour. As noted earlier, "engages in conduct" is defined in the *Criminal Code* to include an act and an omission. The defendant bears a legal burden in relation to the defence. The presence of the defence provision mitigates the operation of strict liability in subsection (2).

Section 29 – Failing to comply with a general order

The statement of offence has been amended from "Failure to comply with general order" to "Failing to comply with a general order" to conform to the *Criminal Code* drafting style of putting the statement of offence in the present tense. In the re-drafted offence, paragraph (1)(a) sets out the physical element of circumstance that "a lawful general order applies to the person".

The expressions “order” and “general order” are defined in subsection 3(1) of the Act. Paragraph (1)(b) is the physical element of conduct that “a person does not comply with the order”.

An offence under subsection 29(1) is an offence of strict liability (subsection 29(2) refers). Where strict liability applies to an offence, the prosecution does not have to prove fault on the part of the defendant in relation to that offence. In this case, the application of strict liability to paragraph (1)(a) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse. Strict liability is applied to paragraph (1)(b) to reflect current usage of the provision and the retention of the pre-existing statutory defence of actual or imputed knowledge. Defence obtained Ministerial approval to specify the application of strict liability to this offence.

Section 30 – Assaulting a guard

The statement of offence has been amended from “Assault on a guard” to “Assaulting a guard” to conform to the *Criminal Code* drafting style of putting the statement of offence in the present tense. Paragraph 30 (1)(a) is the physical element of conduct that is an assault, and attracts the fault element of “intention” upon application of the *Criminal Code*. Paragraph (1)(b) and (c) are physical elements of circumstance, that is, the person was a defence member and was a guard, to which the fault element of “recklessness” applies under the *Criminal Code*. No other fault element is suggested by the present wording of the section for these elements of the offence.

The proposed subsection 30(2) comprises the physical element of circumstance, “being engaged on service in connection with operations against the enemy”, and repeats the other elements in subsection 30(1).

As with section 25, the proposed amendment to section 30 does not define “assault”. Application of the *Criminal Code* to DFD Act assault-based offences will not prevent the term ‘assault’ from continuing to be interpreted in accordance with its common law meaning. Whilst not referred to explicitly in each of the re-drafted assault-based offences in the DFD Act, the common law position on the definition and interpretation of “assault” has been preserved.

Section 31 – Obstructing a police member

The proposed statement of offence has been amended from “Obstruction of police member” to “Obstructing a police member” to conform to the *Criminal Code* drafting style of putting the statement of offence in the present tense. The words “acting in the performance of his or her duty” in the provision are intended to ensure it accords with offences in the ordinary law with regard to obstruction of police officers.

The present section 31 is separated into two proposed offences. Subsection (1) applies to a defence member or a defence civilian and is constituted by obstructing a police member or a person lawfully exercising authority on behalf of a service police officer. Subsection (2) applies to a defence member who, when called upon to assist a police member or a person lawfully exercising authority on behalf of a service police officer, refuses to do so.

In section 31 the fault element of “intention” applies by default under the *Criminal Code* to the conduct described in paragraph (1)(a), that is, “obstructs another person”, and in paragraph (2)(c)

"refuses to assist the other person". The fault element of "recklessness" applies to the physical element of circumstance in paragraph (2)(a).

In both subsections 31(1) and (2) the physical element of circumstance is that the other person is a police member acting in the performance of duty or is another person lawfully exercising authority under or on behalf of a service police officer (paragraphs (1)(b) and (2)(b) refer).

New subsection 31(3) provides that strict liability applies to the physical element of circumstance at paragraphs (1)(b) and (2)(b), that is, that the person was a police member, or a person lawfully exercising authority under or on behalf of a service police officer. Where strict liability applies to an element, the prosecution does not have to prove fault on the part of the defendant in relation to that element. In this case, the application of strict liability to paragraphs (1)(b) and (2)(b) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse. Defence obtained Ministerial approval for the application of strict liability in subsection (3) to paragraphs (1)(b) and (2)(b) subject to the statutory defence noted below.

The existing statutory defence of actual or imputed knowledge has been retained in subsection 31(4). The defendant bears a legal burden in relation to that defence. The presence of this defence mitigates the application of strict liability in subsection (3).

Section 32 - Person on guard or watch

Section 32 deals with a range of offences that may be committed by a defence member who is on guard duty or on watch. The efficient performance of guard duties and watches is critical to ensuring the safety and the operational efficiency of the Defence Force. This is especially the case during operations against the enemy.

The term "on watch" can mean any member of the Defence Force who is placed on watch, in the sense of being a sentinel or look out. It also has a particular nautical meaning. A ship's company is divided into watches and the members of a watch together attend to the working of the ship during their watch. A member of the ship's company on watch is such a member on duty during his or her watch whatever the nature of his or her duty may be. In paragraph (1)(c) and subsection (5) the word "drunk" has been replaced with "intoxicated" so as to more accurately encompass the definition in the present subsection 32(3) which applies to intoxication by liquor or drugs.

The proposed provision has the following structure. Subsection 32(1) sets out the non-aggravated form of the offences and imposes a maximum penalty of 12 months imprisonment. Subsection 32(2) applies strict liability to the physical elements of conduct set out in paragraphs (1)(a) to (1)(d), subject to the statutory defence of reasonable excuse contained in subsection (6) and referred to below. Ministerial approval has been granted for the application of strict liability to these elements.

Subsection 32(3) sets out the aggravated form of the offence with a maximum penalty of 5 years imprisonment in the following manner. Paragraph (3)(a) introduces an additional physical element of circumstance, that, at the relevant time, the defence member is "engaged on service in connection with operations against the enemy." Paragraph (3)(b) repeats the physical element of circumstance that the defence member is on guard duty or on watch. The fault element of "recklessness" applies to paragraphs (3)(a) and (3)(b) by default under the *Criminal Code*.

Paragraph 32(3)(c) sets out the physical element of circumstance, that the conduct constitutes an offence against subsection (1). Subsection 32(4) applies strict liability to (3)(c), that is, to those elements which are already strict liability elements under subsection (2), subject to the statutory defence of reasonable excuse set out in subsection (6) and noted below. Furthermore, the application of strict liability to paragraph (3)(c) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse. Ministerial approval was granted for the application of strict liability to paragraph (3)(c).

The statutory defence of "reasonable excuse" has been retained in subsection (6). For the reasons given in the notes to earlier sections, the phrase "engages in conduct" has been used in subsection 32(6) in place of the words "engaging in the behaviour" in present subsection 32(4). The defendant bears a legal burden in relation to the defence. The presence of the statutory defence mitigates the imposition of strict liability by affording the defendant a degree of protection.

Section 33 - Assault, insulting or provocative words, etc

In the proposed section 33 the preface contains the physical element of circumstance – being on service land, in a service ship, service aircraft or service vehicle, or being in a public place. Application of the *Criminal Code* will mean that "recklessness" will have to be proved in relation to this physical element. Paragraphs (a) to (d) contain the physical elements of conduct to which the fault element of "intention" will have to be proved.

Similarly with sections 25 and 30, the proposed amendment to paragraph 33(a) does not define "assault". Application of the *Criminal Code* to DFD Act assault-based offences will not prevent the term 'assault' from continuing to be interpreted in accordance with its common law meaning. Whilst not made explicit in each of the re-drafted assault-based offences, the application of the common law position in relation to the definition and interpretation of "assault" has been preserved albeit within *Criminal Code* constraints.

Section 34 - Assaulting an inferior

The proposed statement of offence of section 34 has been amended to conform to the *Criminal Code* drafting style of putting the statement of offence in the present tense. The deconstructed section sets the physical element of conduct – in paragraph (1)(a) - and circumstance – in paragraph (1)(b). On application of the *Criminal Code* the fault element of "intention" applies by default to the conduct of assault or ill-treatment, described in paragraph (1)(a). Strict liability has been applied to the physical element of "circumstance" set out in paragraph (1)(b) that the person is a member of the Defence Force who is of inferior rank. The *Criminal Code* permits a law that creates an offence to provide that there is no fault element for a physical element. If this is not done in the case of paragraph (1)(b) the current operation of the offence would substantially altered. Hence, subsection (2) specifies the application of strict liability to paragraph (1)(b). Ministerial approval was given for this to occur.

The term "inferior" means a member of the Defence Force of lower rank. The term "ill-treat" must be interpreted in a military context and, in general, can be considered to encompass all forms of neglect not constituting an assault, for example, the unlawful imposition of a punishment or the deliberate and improper withholding of benefits.

Similarly with sections 25, 30, and paragraph 33(a), the proposed amendment to section 34 does not define "assault". Application of the *Criminal Code* to DFD Act assault-based offences will not prevent the term 'assault' from continuing to be interpreted in accordance with its common law meaning. Whilst not explicit expressed in each of the re-drafted assault-based offences, the application of the common law position in relation to the definition and interpretation of "assault" has been preserved.

The defence in the present subsection 34(2) has been retained in subsection (3). The defendant bears a legal burden in relation to the defence. The presence of the defence mitigates the application of strict liability in subsection (2) to paragraph (1)(b).

Division 4 – Offences relating to performance of duty

Section 35 - Negligent performance of duty

The proposed section 35 has been formulated from the existing section 35. Paragraph (a) is a physical element of circumstance and attracts the fault element of "recklessness" when the *Criminal Code* is applied. Although the present section does not specify a fault element in relation to the requirement to perform a duty, its wording implies that the member must know of the requirement to perform the duty or be reckless as to that fact. Application of the *Criminal Code* will therefore not change the operation of this element of the offence.

Paragraph (b) is the physical element of conduct to which the fault element of "negligence" has been applied. This preserves the current operation of the offence. "Negligence" is defined in section 5.5 of the *Criminal Code*. In applying the *Criminal Code* definition of "negligence", the service tribunal will have regard to the matters referred to in subsection 11(2) in accordance with proposed subsection 11(3A).

The terms "office" and "appointment" used in paragraph (a) are not defined. The ordinary meaning of "office" is a position to which certain duties are attached, especially a place of trust, authority of service under constituted authority. The ordinary meaning of "appointment" is the action of nominating to, or placing in, an office, and it can also mean the office itself. The office or appointment may be one that the member holds on a continuous basis, or it could be one that the member occupies for a particular occasion.

Section 36 - Dangerous conduct

The proposed statement of offence has been amended from "Dangerous behaviour" to "Dangerous conduct"

Paragraphs (1)(a), (2)(a) and 3(a) contain the physical elements of conduct to which the fault element of "intention" applies. The phrase "engages in conduct" replaces the words "…by act or omission, behaves in a manner…" in each of those subsections because, as noted earlier, it is defined in the *Criminal Code* to include an act or omission.

Paragraphs (1)(b), (2)(b) and (3)(b) contain the physical element of circumstance to which the fault element of "recklessness" applies. Paragraphs (1)(c), (2)(c) and 3(c) contain the physical element of result of the conduct to which the fault elements of "knowledge", "recklessness" and "negligence" in paragraphs (1)(d), (2)(d) and (3)(d) apply. It is necessary to specify the different fault elements for the offences created by the section because of the different maximum

punishments which apply to them. In applying the *Criminal Code* definitions of "recklessness" and "negligence" (sections 5.4 and 5.5 of the *Criminal Code*), the service tribunal will have regard to the matters referred to in subsections 11(1) and 11(2) in accordance with proposed subsection 11(3A).

Paragraphs (1)(e), (2)(e) and 3(e) replace the provision contained in subsection 36(4) which applies to all three variations of this offence. This means that the service tribunal must consider whether the victim was an enemy and whether the injury was occasioned in the course of the defendant's duty.

Section 36A - Unauthorised or negligent discharge of weapon

The existing subsection 36A(1) has been re-drafted in proposed subsection (1) into two elements, the physical element of conduct - discharge of a weapon - and the physical element of circumstance – that in the circumstances in which the discharge takes place it is unauthorised. The fault element of "intention" applies to the element of conduct upon application of the *Criminal Code*. The fault element of "recklessness" applies to the element of circumstance upon application of the *Criminal Code*.

The existing subsection 36A(2) has been re-drafted in the proposed subsection (2) retaining the fault element of "negligently". "Negligence" is defined in section 5.5 of the *Criminal Code*. In applying the *Criminal Code* definition of "negligence", the service tribunal will have regard to the matters referred to in subsection 11(2) in accordance with proposed subsection 11(3A).

Section 37 – Intoxicated while on duty etc

The proposed section 37 has been re-drafted as an offence of strict liability. If strict liability was not applied, it would be necessary for the prosecution to show "recklessness" to paragraph (1)(a) that the member is on duty, or reports, or should report for duty, and "intention" in relation to paragraph (1)(b) that the member is intoxicated. The present section does not specify any fault element in relation to the physical elements of the offence and, because of the nature of this offence, it is assumed that this was intentional. The maximum penalty of 6 months imprisonment has also been considered as an indication of an intention that this offence be one of strict liability. Ministerial approval for this to occur has been granted.

The word "drunk" has been replaced with "intoxicated" in the statement of the offence and in paragraph (1)(b) so as to more accurately encompass the definition in the present subsection 37(3) which applies to intoxication by liquor or drugs.

Section 38 - Malingering

The existing section 38 has been re-drafted so that the preface in subsection 38(1) contains the fault element of "intention", as expressed in the existing section, to the conduct that constitutes the offence. That intention is "to render or keep himself or herself unfit for duty or service". The conduct to which this fault element applies is contained in paragraphs (1)(a) and (1)(b).

The proposed subsection 38(2) applies the fault element of "intent to avoid service or duty" [in paragraph (2)(b)] to the conduct of making a representation [in paragraph (2)(a)]. The further requirement that the representation be false is a physical element of circumstance that is included in paragraph (2)(c). The fault element of "knowledge" is then applied by paragraph (2)(d) to this

physical element. The present section implies that the defendant must know that the representation was false. It is therefore inappropriate to allow the element of "recklessness" to be applied by default under the *Criminal Code*.

Division 5 – Offences relating to ships, vehicles, aircraft and weapons

Section 39 - Loss of, or hazard to, service ship

Minimal changes have been made to the three variations of the section 39 offence. The proposed paragraphs (1)(a), (2)(a) and (3)(a) contain the physical element of conduct. Paragraphs (1)(b), (2)(b) and (3)(b) contain the physical element of result of conduct. Paragraphs (1)(c), (2)(c) and (3)(c) apply the requisite fault element for each of the three variations of this offence – "intention", "recklessness" and "negligence". In applying the *Criminal Code* definitions of "recklessness" and "negligence" (sections 5.4 and 5.5 of the *Criminal Code*), the service tribunal will have regard to the matters referred to in subsections 11(1) and 11(2) in accordance with proposed subsection 11(3A).

The term "loss" means total loss, however a surface ship can be lost without necessarily being lost to view. The term "stranded" is not defined. It would normally be sufficient to show that the ship ran aground or into some object affixed to the ground and remained fast for a time, rather than momentarily. The term "hazarded" has its ordinary meaning of "being exposed to danger".

Section 40

The offences relating to use of vehicles contained in the present section 40 have been separated into individual offence provisions in the proposed sections 40, 40A, 40B, 40C and 40D. A statement of offence that appropriately describes each of the present offences contained in section 40 has been inserted in each section.

The offences created by section 40 are generally the counterparts of driving offences in State and Territory legislation. These offences generally contain strict and absolute liability elements, particularly driving offences such as driving under the influence of alcohol or drugs. The offences in the existing section 40 have been deconstructed so that their strict and absolute liability elements are now explicit in accordance with the *Criminal Code* objects. Defence obtained Ministerial authorisation for the specification of strict and absolutely liability to these offences.

Section 40 – Driving while intoxicated

The offence of driving while under the influence of alcohol or drugs created by subsection 40(1) has been specified as an offence of absolute liability. The proposed amendment will maintain the intended operation of the present sub-section and corresponds to the civilian counterpart of this offence in almost all States and Territories. Ministerial authorisation was obtained for this. Proposed subsection (1) applies to driving a service vehicle in any place, and subsection (2) applies to driving a service vehicle on service land.

Section 40A – Dangerous driving

The offence created by the present subsection 40(3) does not require proof of any fault element. In the proposed amendment, no fault element will be applied to the physical elements set out in paragraphs (1)(a) – drives in any place, whether or not a public place, and (2)(a) – drives on service land. These physical elements have been specified as absolute liability. Defences of involuntariness or sudden emergency will continue to be available.

Strict liability has been applied to proposed paragraphs (1)(b) and (2)(b) which both appear as "the person does so at a speed, or in a manner, dangerous to another person in that place or on that land". This means that an objective test will be applied to the question of whether the defendant drove "at a speed or in a manner dangerous…." and in applying that test, the defendant's state of mind will be irrelevant. This preserves the current operation of the offence and ensures the offence provision is drafted consistently with its civilian counterparts. Ministerial authorisation was obtained for this to occur.

Section 40B – Negligent conduct in driving

The proposed provisions apply the fault element of "negligence" to the physical element of conduct in paragraphs 40B(1)(b) and 40B(2)(b), described as "behaves negligently" in the existing section. The fault element of "negligence" is applied to the defendant's conduct while he or she is driving a service vehicle rather than to the driving *per se*. "Negligence" is defined in section 5.5 of the *Criminal Code*. In applying the *Criminal Code* definition of "negligence", the service tribunal will have regard to the matters referred to in subsection 11(2) in accordance with proposed subsection 11(3A).

Additionally, the physical element of driving the service vehicle is specified as absolute liability - with the result that the fault element of "intention" is not applied to paragraphs (1)(a) and (2)(a) on application of the *Criminal Code*. Ministerial authorisation was obtained in relation to the application of absolute liability.

Section 40C – Driving a service vehicle for unauthorised purpose

The nature of this offence, the language of the section, the relatively low maximum penalty, and the presence of the statutory defence of "reasonable excuse" indicate a legislative intent that strict liability applies to this offence. The proposed provision accords with that intent. For both variations of the offence under the present subsection 40(7), paragraph (1)(a) - driving without authorisation and paragraph (1)(b) - using a service vehicle for an unauthorised purpose, strict liability has been applied. Ministerial authorisation was obtained for the application of strict liability.

The statutory defence of "reasonable excuse" has been retained in subsection (3). The defendant bears a legal burden in relation to that defence. Defence obtained specific Ministerial authorisation to enable the existing position to remain unchanged whereby the defendant bears a legal burden of proof in relation to the statutory defence.

Section 40D - Driving without due care and attention etc.

The longstanding interpretation of the civilian equivalent of the offence in subsection 40(8) is that an objective test is applicable to the assessment of whether the defendant was driving without due care and attention.

The applicable test is generally regarded as being whether the defendant exercised that degree of care and attention that a reasonable and prudent driver would exercise in the circumstances (per Lord Goddard CJ in *Simpson v Peat* [1952] 1 All ER 447). Further guidance on this test can be found in the comments of Lord Hewitt LCJ in *McCrone v Riding* [1938] 1 All ER 157 where he said:

"The standard is an objective standard, impersonal and universal, fixed in relation to the safety of other users of the highway… Due care and attention is something not related to the proficiency of the driver, but governed by the essential needs of the public on the highway."

Consequently, in the proposed provision, absolute liability has been applied to an offence under section 40D. Ministerial authorisation was obtained for this to occur. Subsection (1) applies to driving a service vehicle in any place, and subsection (2) applies when driving a service vehicle on service land.

Section 41 - Low Flying

Section 41 has been deconstructed in accordance with *Criminal Code* requirements.

The proposed paragraph (1)(a) contains the physical element of conduct "…the member flies a service aircraft…" to which the fault element of "intention" applies upon application of the *Criminal Code*.

Proposed paragraph (1)(b) contains the physical element of circumstance "by or in accordance with a lawful general order, there is a minimum height at which the member is authorised to fly". Proposed subsection 41(2) applies strict liability to the physical element of circumstance in paragraph (1)(b). The application of strict liability to paragraph (1)(b) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse. The application of strict liability to paragraph (1)(b) is also subject to the statutory defence contained in subsection (3) as noted below. Ministerial approval was obtained for the application of strict liability to paragraph (1)(b).

Proposed paragraph (1)(c) contains a further physical element of circumstance that "the height at which the member flies is less than the minimum height".

Proposed paragraph (1)(d) applies the fault element of either "recklessness" or "negligence" to the physical element of circumstance in paragraph (1)(c). In applying the *Criminal Code* definitions of "recklessness" and "negligence" (sections 5.4 and 5.5 of the *Criminal Code*), the service tribunal will have regard to the matters referred to in DFD Act subsections 11(1) and 11(2) in accordance with proposed subsection 11(3A).

The existing statutory defence of actual or imputed knowledge has been retained in proposed subsection 41(3). The statutory defence affords the defendant a degree of protection by

mitigating the effect of the application of strict liability to subsection (1)(b). The defendant bears a legal burden in relation to the statutory defence.

Section 42 - Inaccurate certification in relation to ships, aircraft, vehicles etc.

The proposed section 42 makes minimal changes to the present section. Paragraph (a) of the proposed section 42 is a physical element of conduct. To this element the fault element of "intention" is applied under the *Criminal Code* by default. Paragraph (b) is physical element of circumstance to which the fault element of "recklessness" applies under the *Criminal Code*, by default. Paragraph (c) is a physical element of conduct to which the fault element of "intention" applies by default.

Division 5A – Property offences

Subdivision A – Service property offences

Section 43 – Destroying or damaging service property

The proposed provisions in section 43 make minimal changes to the present section. The statement of the proposed offence has been amended from "Destruction of, or damage to, service property" to conform to the *Criminal Code* drafting style of putting the statement of offence in the present tense.

Proposed paragraphs (1)(a), (2)(a) and (3)(a) are the physical elements of conduct to which the fault element of "intention" applies by default upon application of the *Criminal Code*. Paragraphs (1)(b), (2)(b) and (3)(b) are the physical elements of result of conduct – "results in the destruction of, or damage to, service property". Paragraphs (1)(c), (2)(c) and (3)(c) specify the particular fault element that applies to the result of conduct element in paragraph (b). For subsection (1) it is "intends the result", for subsection (2) it is "reckless to the result", and for subsection (3) it is "negligent as to the result". This achieves drafting consistency with the present provision. In applying the *Criminal Code* definitions of "recklessness" and "negligence" (sections 5.4 and 5.5 of the *Criminal Code*), the service tribunal will have regard to the matters referred to in subsections 11(1) and 11(2) in accordance with proposed subsection 11(3A).

The statutory defence in subsection (4) has been retained unaltered save for use of the word "conduct" instead of "behaviour". The defendant bears a legal burden in relation to the defence. Defence obtained specific Ministerial authorisation to enable the existing position to remain unchanged whereby the defendant bears a legal burden of proof in relation to the statutory defence.

Section 44 - Losing service property

The proposed statement of offence has been amended from "Loss of service property" to conform to the *Criminal Code* drafting style of putting the statement of offence in the present tense. The section has been deconstructed into separate physical elements of conduct and circumstance. The act of losing service property for the purposes of this offence has been found by the Full Court of the Federal Court of Australia to attract absolute liability (see *Chief of General Staff v Stuart* (1995) A Crim R 529; (1995) 133 ALR 513), subsection (2) specifies that absolute liability applies to paragraph (1)(a). Ministerial authorisation for the application of absolute liability to this element was obtained.

The further physical element of this offence, set out in paragraph (1)(b), attracts the fault element of "recklessness" on application of the *Criminal Code*. This is consistent with the decision in *Stuart*, that *mens rea* is applicable to every element of the offence save that of losing service property.

The proposed amendment retains the defence of "reasonable excuse" in order to preserve the intended purpose of the section. The defendant bears a legal burden in relation to the defence. Defence obtained specific Ministerial authorisation to enable the existing position to remain unchanged whereby the defendant bears a legal burden of proof in relation to the statutory defence.

Section 45 - Unlawful possession of service property

The proposed offence provision has been re-drafted so that the application of strict liability has been made express. Strict liability applies to paragraph (1)(a) – possession of service property, and to paragraph (1)(b) – absence of lawful authority for possession. Under the *Criminal Code*, any legislative provision that attracts strict liability must expressly state that it is an offence of strict liability (see section 6.1 of the *Criminal Code*). Ministerial authorisation was obtained by Defence for the application of strict liability to these elements.

The defendant is protected against the application of strict liability by the defence in subsection (3) that is unchanged from the statutory defence in the present section. A defendant will be entitled to be found not guilty if there is evidence which suggests that the defendant was either not aware that he or she was not in possession of property; not aware that the property was service property; or had a reasonable excuse for possession of the property without authority.

Subdivision B – Possession of property suspected of having been unlawfully obtained

Section 46 - Possession of property suspected of having been unlawfully obtained

Section 46 is structured in similar terms to section 45 and bears the indicators of strict liability in that the maximum penalty is relatively low and the wording used gives no indication of any fault elements having to be proved. The existing offence has been deconstructed in an identical manner to section 45. Again, Ministerial authorisation was obtained by Defence for the application of strict liability to the proposed offence. The proposed section specifies that both of the physical elements are strict liability and the existing statutory defences have been retained. The prosecution is required to prove only that the property was in the possession of the defendant and that a reasonable person would have suspected the property was stolen. If the defendant denies the charge, he or she has a legal burden of proving either of the defences in subsection (3) or (4). The existing position whereby the defendant bears a legal burden of proof in relation to the statutory defence remains unchanged.

Subdivision C – Fraudulent conduct

Section 47 – Stealing and receiving

The existing offences in section 47 are to be replaced by offences closely modelled on the theft and receiving offences contained in Chapter 7 of the *Criminal Code* which was inserted into the *Criminal Code* by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. The DFD Act theft and receiving offences will now be almost identical to the section

131.1 theft offence and the section 132.1 receiving offence save for several minor amendments designed to ensure they can operate cohesively with the remainder of the DFD Act. New interpretative provisions relevant to sections 131.1 and 132.1 have replaced the interpretative provisions in subsection (3) of existing section 47. These are preferred because they reflect the current status of the Commonwealth criminal law in relation to theft. Specific Ministerial approval was obtained for this change to the existing stealing and receiving offences in the DFD Act.

Section 47 – When property belongs to a person

A new section 47 will contain the definition of "when property belongs to a person". This definition provides that property belongs to any person who owns it, or has any other proprietary right or interest in it, or who has possession or control of the property. One effect of the section is that co-owners or people with different rights to a piece of property can be guilty of theft from one another. For example, one owner of property can be guilty of theft from another owner (eg theft by one business partner from another), or an owner can be guilty of theft by taking his or her property away from someone who has possession or control of it (eg an owner who dishonestly took back his or her own goods from a pawnbroker). The owner cannot deny appropriation by relying on his or her own consent to the appropriation. Proposed subsection 47E(1) and section 47L requires the consent of all those to whom it belongs. In the example, the owner of the pawn shop has not consented to the appropriation of his or her right to possession. This section can also apply to the Commonwealth where it is a co-owner of property.

The definition in proposed subsection 47(1) also provides that property also belongs to people who have any proprietary right or interest (not being an equitable interest arising either from an agreement to transfer or grant an interest, or from a constructive trust). Equitable interests arising from agreements to transfer or grant an interest (for example, to sell land or shares) are excluded. These equitable interests arise by the operation of legal rules but only in relation to contracts that are specifically enforceable. Civil remedies are considered adequate to protect these interests.

The definition of property belonging to another does not include constructive trusts or equitable interests arising from constructive trusts. The rationale here is that, constructive trusts - based on equitable notions of unconscionability - may be appropriate for recovery in civil actions, but they stray too far from the common conception of theft and the much more culpable sort of dishonesty involved in theft to form part of the definition of the offence of theft. Their ambit is uncertain and likely to expand. To attach the boundaries of theft to such an uncertain concept would offend the important principle that the criminal law should be knowable in advance. (see *Attorney-General's Reference (No 1 of 1985)* [1986] 1 QB 491at 503).

Proposed subsection 47(2) provides that the definition in subsection (1) is subject to *Criminal Code* subsections 134.1(9) and (10) regarding money transfers.

The definition of property belonging to another contained in proposed section 47 is supplemented for the purposes of the offence of theft by sections 47G to 47L.

Section 47A – Dishonesty

Proposed section 47A will insert a definition of the fault element of "dishonesty" into the Act. The proposed section is identical to the definition of "dishonesty" found in section 130.3 and is

based on the test of "dishonesty" formulated by the Court of Appeal in *Ghosh* [1982] 3 WLR 110, 118-9:

"a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

If what was done was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest."

The *Ghosh* test is a familiar concept in Australia because until February 1998, it had been used in all jurisdictions, both common law and *Criminal Code*, in relation to conspiracy to defraud. In *Peters v R* (1998) 151 ALR 51 the High Court held that the *Ghosh* test was no longer appropriate and developed a new test which did not include a subjective component. The *Peters v R* test was not followed in the *Criminal Code* because it was considered necessary for offences like theft to retain a broad concept of dishonesty to reflect the characteristic of moral wrongdoing. Paragraph (a) of the definition does this by linking the definition of dishonesty to community standards. Paragraph (b) requires knowledge on the part of the defendant that he or she is being dishonest according to the standards of ordinary people.

Section 47B – Determination of dishonesty to be a matter for the trier of fact

Proposed section 47B provides that the question of whether a person is "dishonest" must be determined by the trier of fact. For service tribunals, this means that the summary authority, defence force magistrate or court martial members will make this determination having regard to community standards.

47C – Theft

Proposed section 47C contains the elements of the offence of theft and is virtually identical to the existing subsection 47(1). A person is guilty if the person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property.

Proposed section 47C differs from the theft offence in section 131.1 of the *Criminal Code* by omitting the physical element that the property belongs to the Commonwealth. This is not an element of the offence created by the present section 47 of the Act. Subsections 131.1(3) and (4) of the *Criminal Code* have also been omitted because they are not relevant. In all other respects, the proposed section 47C is identical to the *Criminal Code* theft offence.

Section 47D – Special rules about the meaning of dishonesty

Section 47D contains interpretative provisions that qualify the *Criminal Code* concept of "dishonesty" at proposed section 47A. Section 47D is identical to section 131.3 of the *Criminal Code*. The defences in the present paragraphs 47(4)(b) and (c) are now subsumed in proposed section 47D.

Proposed subsection 47D(1) negates dishonesty where a property owner cannot be discovered, for example, in relation to abandoned property. Proposed subsection 47D(2) provides an exception to the rule in relation to trustees or personal representatives. Proposed subsection 47D(3) provides that an appropriation may be dishonest notwithstanding preparedness to pay.

Section 9.5 of the *Criminal Code* contains a general claim of right defence. The defence will apply in relation to any property offences if at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right and the existence of that right would have negated any fault element. The "claim of right" defence in the existing paragraph 47(4)(a) has not been included in the new sections.

Section 47E – Appropriation of property

Proposed section 47E is a critical interpretative provision for the theft offence. The definition of "appropriation" in the *Criminal Code* modifies the UK *Theft Act* model which treats "any assumption of the rights of the owner" as an appropriation so that it is not as broad. The common law required a taking and carrying away without the consent of the owner. The *Criminal Code* definition is designed to confine the broader interpretation of the concept since the House of Lords decision of *Gomez* [1992] 3 WLR 1067 (which adopted the approach in *Lawrence* [1972] AC 626). *Gomez* effectively collapsed the distinction between theft and fraud because consent was considered irrelevant to the issue of appropriation. The Model Criminal Code Officers Committee concluded that this went too far from the central and commonly-understood meaning of theft as involving non-consensual takings and therefore adopted a narrower concept of "appropriation". Hence, the *Morris* approach was adopted.

The definition of "appropriation" in subsection 47E(1) is also intended to enable an appropriation to occur in a case where property is subject to multiple ownership and the consent of any one of the owners is missing at the time of the assumption of their rights.

Proposed subsection 47E(1) also addresses the nature of the rights of the owner that are protected - ownership, possession or control of property.

Proposed subsection 47E(2) protects bona fide purchasers who discover after purchase that the property was stolen but decide to keep the property. Proposed subsection 47E(2) prevents this from being theft by providing that it is not an appropriation. The subsection also protects the bona fide recipient of a gift, which is a departure from the UK *Theft Act*. However, the protection is limited and would not apply to a subsequent fraudulent transfer (see *Criminal Code* fraud offences in sections 134.1 and 134.2).

Section 47F – Theft of land or things forming part of land

Proposed section 47F maintains the existing common law position that it is not possible to commit theft of land or things forming part of land and severed from it except where:

(a) a trustee appropriates land by dealing with it in breach of trust; or

(b) a person who is not in possession of the land severs something forming part of it; or

(c) a tenant steals a fixture.

Under the *Criminal Code* land can be the subject of a separate fraud offence.

Section 47G – Trust property

Proposed subsection 47G(1) and (2) are almost identical to existing subsection 47(3)(b). Proposed subsection 47G(1) provides that property also belongs to people who have any proprietary right or interest (not being an equitable interest arising either from an agreement to transfer or grant an interest, or from a constructive trust).

Equitable interests arising from agreements to transfer or grant an interest (eg to sell land or shares) are excluded because of the definitions of "property" (proposed amendment to subsection 3(1)) and what is meant by "property belonging to a person" (proposed section 47). These equitable interests arise by the operation of legal rules but only in relation to contracts that are specifically enforceable. The qualification in proposed subsection 47(1) means that this is not property belonging to another and therefore not theft.

Similar considerations arise in relation to constructive trusts that are also excluded. Proposed subsection 47(1) extends the qualification contained in the UK *Theft Act* so that equitable interests arising from constructive trusts do not fall within the definition of "property belonging to another". Constructive trusts - based on equitable notions of unconscionability - may be appropriate for recovery in civil actions, but they stray too far from the common conception of theft and the much more culpable sort of dishonesty involved in theft to form part of the definition of the offence of theft.

Proposed subsection 47G(2) makes it clear that an intention to defeat a trust is an intention to permanently deprive for the purposes of the offence.

Section 47H – Obligation to deal with property in a particular way

The general definition of property belonging to another contained in proposed section 47 is supplemented for the purposes of the offence of theft by proposed section 47H. This proposed section is similar to the existing paragraph 47(3)(d) except that the proposed subsection explicitly provides that the obligation to deal with the money or property in a particular way must be a 'legal' obligation. So, for example, if the defendant receives money from another person and is under an obligation (this must be a legal obligation) to retain and deal with that money in a particular way but the defendant deals with it another way, the money is said to belong to the victim. The cases have held that the obligation must be legal rather than moral. The application of this provision will depend very much on the facts of the transaction. The most difficult cases involve cash deposits. The section only applies if the particular cash is to be used. If the cash is to be mixed with the general cash of the organisation and there is a liability to provide something or to provide a refund at a later time, then the cash ceases to belong to another. There is a debt to the depositor and the situation is dealt with on the normal principles relating to debtors and creditors.

Section 47J – Property obtained because of fundamental mistake

Proposed section 47J deals with the problem when the victim makes a fundamental mistake and gives the defendant some property, and the defendant does nothing to induce the mistake. It essentially covers the same ground as existing paragraph 47(3)(c). Insofar as the use of the law of mistake is concerned, the *Criminal Code* adopts the existing Australian law as stated by the High Court in *Ilich* (1987) 162 CLR 110 subject to the qualifications discussed below.

Fundamental mistakes are mistakes about the identity of the defendant, the essential nature of the property, or the quantity of the goods (but not the amount of money). The problem is whether the victim's mistake is so fundamental that it vitiates the consent to the defendant appropriating the property and the victim's intention to transfer ownership of the property to the defendant. Non-fundamental mistakes do not vitiate consent or intent to pass ownership and the defendant does not incur any criminal liability. However, in the case of fundamental mistakes, if the defendant decides to keep the goods the question is whether he or she should be guilty of theft.

There are two situations relating to fundamental mistakes:

(i) where the defendant knows of the mistake at the time ("T1") of transfer and decides to keep the goods; and
(ii) where the defendant does not know of the mistake at T1 but discovers it later ("T2") and then decides to keep the goods.

At common law in England, the defendant was guilty of theft in both T1 and T2 situations (*Middleton* (1873) LR 2 CCR 38).

The more difficult cases arise when the defendant only finds out about the mistake later at T2 and then the defendant decides to keep the property. This was at issue in the case of *Ashwell* (1885) 16 QBD 190. The prevailing view was that the taking did not occur at T1 when a valuable coin was handed over. The appropriation did not occur until T2, when the defendant discovered what the coin really was, namely a sovereign. At T2, on the authority of *Middleton,* the mistake as to the nature of the subject matter meant that there was no consent to the taking and that ownership had not passed (eg it was still property belonging to another). The opposing view was as follows. The taking occurred at T1, was with consent and occurred at a time when the defendant lacked fraudulent intent. At T2, when the intent became fraudulent, there was no taking without consent and ownership of the property had passed to the defendant.

In Australia, the majority judges in the High Court decision of *Ilich* expressed their disapproval of the reasoning in *Middleton* and *Ashwell*. *Ilich* was a decision on the WA Code but in the course of the decision, the majority indicated its agreement with the reasoning in *Potisk* (1973) 6 SASR 389 (a SA Full Court decision on common law larceny which had also rejected the English cases). In *Ilich*, the High Court ruled that cases where property passes because of a non-fundamental mistake are not theft under the WA Code because at the time of the conversion (eg T2) the property belongs to the defendant. The reasoning of the High Court was that at T1, the owner knew the identity of the payee and the nature of what he was transferring, namely money. The normal presumption with money is that ownership passes with possession. Consent to the taking is not required under the WA Code, so that issue did not arise. At T2, the time of the "conversion", ownership of the $500 in question had passed to Ilich and therefore it was not property belonging to another.

Under the UK *Theft Act*, fundamental and non-fundamental mistakes can count as theft, even at T2. The *Theft Act* approach in this type of case is to say that the appropriation occurs at the time the defendant dishonestly decides to keep the money. The question is whether the property belongs to another at this point. There are a variety of routes to the conclusion that it does. This is because the UK *Theft Act* has such a wide definition of property belonging to another: it includes any case where the victim has a proprietary right or interest or is under a legal obligation to return the property.

First, in cases of fundamental mistakes as to the identity of the transferee, the nature of the subject matter or the quantity of the goods, the intent to pass ownership is vitiated by the mistake and hence the property still belongs to the victim. If the defendant is aware of the mistake at either T1 or T2 and dishonestly decides to appropriate the property, he or she will be guilty of theft.

Second, English cases have held that where certain sorts of mistakes are made, although legal ownership of the property passes, there is a constructive trust and the transferor retains an equitable proprietary interest in the property transferred. Thus, the property still belongs to another under subsection 5(1) of the UK *Theft Act* because the person has a "proprietary right or interest" in it. The type of mistake here is not so fundamental as to prevent ownership passing but must be serious enough that it would be unconscionable for the defendant to retain the property; hence he or she becomes a constructive trustee for the victim who, as beneficiary, has an equitable proprietary interest in the property. Exactly when this is so will vary according to the essentials of the transaction, but it is wider than mistakes as to the identity of the transferee or the nature of the subject matter. In England, the Court of Appeal has cast doubt on the notion of using constructive trusts as a basis for the law of theft. For the reasons outlined above, the *Criminal Code* specifically excludes constructive trusts from the ambit of property belonging to another and hence from the ambit of theft. Hence, this route to a conviction for theft is not open under the proposed provisions.

The third category of cases produces the most difficult problem. These are cases of non-fundamental mistake where the ownership does pass - such as in a case where a $200 debt is mistakenly paid twice. Under the *Theft Act,* this will be theft if the defendant is under a legal obligation to repay the money. This is because subsection 5(4) of the UK *Theft Act* deems the property to belong to the victim if the defendant receives the money by another's mistake and is under a legal obligation to make restoration in whole or in part of the property or its proceeds.

Whether the defendant is under such an obligation is a matter of civil law and may include, among other things, decisions about the law of quasi-contract and whether a contract is void or voidable. If the contract is voidable, it may be argued that the defendant is not under a legal obligation to return the property until the contract is avoided. In many of these cases, the intricacies of the civil law are such that the defendant may be able to argue that he or she is not dishonest because he or she did not know that keeping the property was dishonest. However, defendants who take advantage of other's mistakes or who make secret profits may be regarded as dishonest. But that does not necessarily mean that such people are guilty of theft. Dishonesty is an important element of the law of theft and fraud but it is not the only element. Leaving such cases to be determined solely by reference to the concept of dishonesty avoids the basic question about whether the intricacies of the civil law appropriately mark out the boundary of the physical elements of theft.

Proposed section 47J is therefore a rejection of the uncertain ambit of constructive trusts for the purpose of extending the boundaries of when property belongs to another for the purposes of the law of theft.

There are strong arguments that the mistake cases - particularly the T2 cases - should not be treated as theft but as matters involving civil liability. The victim has brought about his or her own misfortune and it is unduly harsh to cast the onus of rectifying the situation onto the defendant on pain of committing theft. Thus, while the victim in *Ilich* is certainly entitled to sue to recover his money, he should not be able to have the other person arrested and prosecuted for

theft, any more than any other creditor could if the debtor spent money on a holiday rather than paying the creditor's account. In some cases these overpayments will arise because the victim has chosen to set up business arrangements which are prone to error because this is cheaper than setting up a less error-prone system. Although the defendant may be under an obligation to return the property, the culpability is of a much less serious sort than theft or fraud where the defendant initiates a dishonest transaction. In these cases, the defendant has had temptation thrust upon him or her. To make a defendant like Ilich, or the recipient of a social security overpayment, guilty of theft in these T2 cases is to cast a duty to act in relation to innocently acquired property on pain of committing theft.

The potential width of this sort of liability is also of concern. In theory, it turns civil obligations into criminal ones where hitherto that has not been the case. It may be that all sorts of business transactions involving mistakes would now carry potential criminal liability. The 1995 Model Criminal Code report mentions the following examples of cases which now would be brought within the law of theft:

(1) A purchaser pays a vendor for goods; neither realised that the purchaser already owned them. The vendor refuses to repay the money.

(2) An insurer pays money to an insured for goods that both believed to have been destroyed by fire. Subsequently the defendant finds the goods but does not tell the victim.

(3) An employer pays a manager a lump sum to terminate her contract. It turns out that breaches of the contract would have entitled the employer to terminate the contract without payment. Neither knew of the breaches at the time of the contract. They subsequently discover this but the employee refuses to repay. The House of Lords and the Court of Appeal in England differed on whether the defendant was under an obligation to repay in the employment case.

In (1) and (2) the defendant would be civilly liable to give back the money or goods mistakenly given to him or her. The question is whether it is justifiable to impose criminal liability for the offence of theft as well.

While the consultation on the Model Criminal Code revealed that opinion was divided on this issue, for the reasons advanced in relation to constructive trusts, it has been concluded that the civil law distinctions - while appropriate to the context of determining civil recovery - are too obscure on the whole to define the boundaries of an offence as serious as theft. It is therefore proposed that it is appropriate to limit the use of the law of mistake to the existing Australian law as stated by the High Court in *Ilich*, subject to the qualifications outlined below. This involves the following rules:

(a) Mistakes as to the nature of the subject matter or the identity of the transferee will continue to negate the intent to confer ownership (subsections 47J(1) and (3)). If the defendant knows of this sort of mistake either at T1 or T2, the property still belongs to the victim and the victim will be deemed not to have consented to its appropriation and the defendant will commit theft. (Mistakes as to quantity are not included on the basis that they are not sufficiently fundamental: the person intends to hand over goods of that sort and there is no mistake about the identity of the transferee).

(b) Other mistakes do not vitiate either the consent to the appropriation or the intention to pass ownership. The defendant does not commit theft if he or she knows of the mistake either at T1 or T2 because the property no longer belongs to another.

(c) Mistaken overpayments by cash, cheque or direct credit are a special case (subsection 47J(1) and paragraph (3)(b)). Where the defendant is aware of the mistake at the point of transfer (T1), the absence of what may be termed the inertia factor makes this case sufficiently like the finding cases to warrant the offence of theft. This raises a question about when the relevant time is. In a supermarket if the defendant immediately knows the overpayment at the register, this is clearly a T1 situation. On the other hand, in a case like *Ilich*, where the defendant does not become aware of the mistake until some time after transfer, it is clearly a T2 situation. The defendant will not be guilty of theft but the victim would be able to recover the money civilly. Cases where the defendant receives a cheque in the mail are more difficult. In accordance with the reasoning of Kriewaldt J in *Wauchope* that this would not be theft because the defendant did not become aware of the mistake until some time after the drawer intended to convey ownership (eg it is a T2 situation). Mistaken direct credits to bank accounts are similar to cheques. If a bank customer saw the teller mistakenly credit his or her account with $2000 rather than $200, and said nothing, that would be theft. In practice, direct credits will overwhelmingly be T2 cases because the defendant will only find out about the mistake some time after the transfer. If there was a fundamental mistake (eg wrong account because of a mistaken identity), the defendant would be liable for theft at T2. If it was a non-fundamental mistake (eg the correct account but the wrong amount), the defendant would not be guilty of theft. The victim would have civil remedies to recover what is in effect a debt.

Section 47K – Property of a corporation sole

Proposed section 47K preserves ownership for a corporation sole where there is a vacancy in the corporation.

Section 47L – Property belonging to 2 or more persons

Proposed section 47L provides that the person to whom property belongs includes all the owners.

Section 47M – Intention of permanently depriving a person of property

The proposed theft offence (section 47C) retains the longstanding common law element of intention to permanently deprive. Proposed section 47M provides guidance as to the meaning of intention to permanently deprive. The concept of permanent deprivation is expanded by including an intention to treat the property as one's own to dispose of regardless of the rights of the other person. This is a helpful crystallisation of the common law position and judicial interpretations seem to favour that view. "Disposals" and "borrowings" will need to have a quality of permanence about them before the section can be satisfied (eg the defendant melts down the victim's antique bracelet intending to give back the melted silver). Similar points apply to proposed subsection 47M(2) relating to parting with property under conditions which the person may not be able to fulfil. This is treated as an example of disposing of property regardless of the other's rights in terms of proposed subsection 47M(1).

Section 47N – General deficiency

Proposed section 47N is an evidentiary provision which allows the prosecution to prove the defendant guilty of theft even though the prosecution cannot identify the particular sums of money or property taken if the prosecution can prove a general deficiency in the victim's money or property referable to the defendant's conduct. A typical example is where the defendant is an employee and takes small amounts of money from the till over a period of time.

Section 47P - Receiving

Proposed section 47P is based on the offence of receiving in section 132.1 of the *Criminal Code.* Proposed subsection 47P provides that a person is guilty if the person dishonestly receives stolen property, knowing or believing the property to be stolen. The proposed section also incorporates all of the interpretative provisions in section 132.1 except subsections (9) and (10) which are not relevant to the DFD Act. In some of these provisions reference is made to section 134.1 of the *Criminal Code,* which creates the offence of obtaining property by deception. Although a counterpart of this section is not contained in the DFD Act, it is open to service authorities to charge a person under section 134.1 of the *Criminal Code,* as a Territory offence under section 61 of the DFD Act. Accordingly, effect could be given to the references to section 134.1, if necessary, in relation to a charge under section 47P.

The defences in existing paragraphs 47(4)(b) and (c) are not included in the proposed section because they are subsumed by the "special rules about the meaning of dishonesty" in proposed subsections 47D(3) and (4) which applies to section 47P. The only defence retained in the section is "claim of right" (paragraph 4(a) of the existing section) but the wording of this defence has been amended to reflect subsection 9.5(1) of the *Criminal Code*.

Proposed 47P(3) provides that property is stolen whether it is "original stolen property" (subsection 47P(5)), "previously received property" (subsections 47P(6) and (7)), or "tainted property" (subsections 47P(8)). The definition of "previously received property" makes it clear that no matter how the property was received in the first place (whether by theft or fraud), subsequent receiving will also be caught by the offence.

Proposed section 47P is a much less complex form of the offence than that contained in the UK *Theft Act*. The *Theft Act* attempts to graft a variety of complicity provisions into the basic receiving offence. It produces a complex and unwieldy offence with overlaps into the law of complicity. Section 47P confines itself to receiving. The normal rules of complicity and accessory after the fact apply to those who assist a thief or a receiver.

The definition of "original stolen property" in subsection 47P(5) covers property, or part of property, appropriated in the course of theft and in the possession and custody of the person who appropriated it.

Proposed subsection 47P(6) makes it clear that after the property is restored it ceases to be original stolen property for the purposes of the proposed offence. The same is also the case where the person who previously had it ceases to have a right to its restitution. This follows similar provisions in Victoria and the ACT. This provision has been included in recognition of the public interest in encouraging people to return stolen property or to regularise ownership where there is a dispute over the property.

Proposed subsection 47P(7) deals with "tainted property". The definition ensures that the offence of receiving still attaches to the receiver where stolen property is sold or exchanged. The "proceeds" of the transaction is defined as "tainted property" if the receiver still has possession or custody of them whether it derived from theft or property fraud. The aim here is not to make receiving an offence that can continue down a chain of people. To do so would make the offence too open ended.

Proposed subsection 47P(8) expands the offence to make it clear that it covers the receipt of funds credited into an account. This additional provision is as a consequence of changes to the property fraud offence (see subsections 134.1(9) and (10) of the *Criminal Code*) which clarify the position with respect to money transfers.

Proposed subsection 47P(10) is a transitional provision designed to ensure that property illegally appropriated or obtained contrary to Commonwealth law before the commencement of the legislation will be caught by the proposed offence. The amendment recognises that the existing offences vary from the proposed offences and is therefore carefully drafted to ensure there is no retrospectivity.

Subdivision D - Looting

Section 48 - Looting

In the proposed section 48 the fault element of "recklessness" applies by default under the *Criminal Code* to the physical element of circumstance in subsection (1). The fault element of "intention" applies by default to the physical elements of conduct in paragraph (a) "taking any property left exposed or unprotected", paragraph (b) "taking property from the body of a person killed, wounded, injured or captured", and paragraph (c) "taking any vehicle, equipment or stores captured or abandoned by the enemy".

In the deconstruction of the existing subsection 48(2), the proposed paragraph (b) provides the physical element of circumstance that has to be implied in the existing section. The fault element of "knowledge" specified in paragraph (c) applies to (b) and accords with the present wording of the subsection.

The proposed defence in subsection 48(3) is retained unaltered save for substitution of the word "conduct" for the word "behaviour" in subsection 48(3). As noted earlier "engaging in conduct" is defined in the *Criminal Code* to include acts and omissions.

Division 6 - Arrest, custody and proceedings before service tribunals

Section 49

The existing section 49(1) creates the separate offences of: "refuses to obey a lawful order…" and "assaults..". These two offences have been re-drafted in separate proposed provisions 49 and 49A for enhanced clarity. The statement of the proposed offence has been amended to "Refusing to submit to arrest" for section 49, and "Assault against arresting person" for section 49A to more precisely reflect the nature of the offences.

Section 49 – Refusing to submit to arrest

The existing section 49 refers to a refusal to obey a lawful order ordering the person into arrest. Defence obtained specific Ministerial approval to replace the words "refuses to obey" in the current version of subsection (1)(a) with the word "disobeys" proposed for insertion into subsection (1)(c). The word "disobeys" is wider than the existing term and will permit the application of the section to omissions and sheer insolence and the like by defendants, rather than limiting the section to situations where there is an outright refusal to obey. This complies with the original intent of this offence.

The proposed offence at subsection 49(1) has been re-drafted as follows. A physical element of circumstance is set out in paragraph (1)(a) "person is ordered into arrest". Paragraph (1)(b) contains the further physical element of circumstance that "the order is lawful". Paragraph (1)(c) contains the physical element of conduct "the person disobeys the order."

Proposed subsection 49(2) applies strict liability to the physical element of circumstance in paragraphs (1)(b) and (1)(c). The application of strict liability to paragraph (1)(b) reflects subsection 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse. The application of strict liability to paragraph (1)(c) is subject to the statutory defence contained in subsection (3) as noted below. Ministerial approval was obtained for the application of strict liability to paragraphs (1)(b) and (1)(c).

The existing statutory defence of actual or imputed knowledge that the other person was acting lawfully has been retained in the proposed subsection 49(3). The statutory defence mitigates the application of strict liability and affords the defendant some protection. The defendant bears a legal burden in relation to that defence.

Section 49A – Assault against arresting person

The proposed section 49A deals with assault against arresting person but does not define "assault". Application of the *Criminal Code* to DFD Act assault-based offences will not prevent the term 'assault' from continuing to be interpreted in accordance with the common law. Whilst not referred to explicitly in each of the re-drafted assault-based offences, the application of the common law to the definition and interpretation of "assault" has been preserved albeit within *Criminal Code* constraints.

Paragraph 49A(1)(a) sets out the physical element of conduct "assault" of another person. This physical element attracts the fault element of "intention" on application of the *Criminal Code*.

Paragraphs (1)(b)(i) to (iv) contain physical elements of circumstance, each of which pertain to the lawfulness of the conduct referred to in those paragraphs. Subject to the statutory defence noted below, subsection 49A(2) applies strict liability to the physical elements of circumstance set out in paragraphs 49A(1)(b)(i), (1)(b)(ii), (1)(b)(iii) and (1)(b)(iv), that the conduct is lawful. The application of strict liability to paragraphs 49A(1)(b)(i), (1)(b)(ii), (1)(b)(iii) and (1)(b)(iv) reflects section 9.3(1) of the *Criminal Code* (and the common law position) that ignorance of the law is no excuse. Ministerial approval was obtained for the application of strict liability as described above.

The existing statutory defence of actual or imputed knowledge that the other person was acting lawfully has been retained in the proposed subsection 49A(3). The presence of the statutory defence mitigates the application of strict liability and affords the defendant some protection**.**

Section 50 – Delaying or denying justice

The proposed statement of offence has been amended from "Delay or denial of justice" to conform to the *Criminal Code* drafting style of putting the statement of offence in the present tense. In section 50 there are two physical elements of circumstance for each of the offences and these are set out in the proposed paragraphs (1) and (2)(a) and (b). The fault element of "recklessness" applies to each of these elements by default under the *Criminal Code*. In each of subsections (1) and (2) the physical element is that the member does not take such action as is required. The fault element of "intention" applies in each case by default under the *Criminal Code*. The defence of "reasonable excuse" in the proposed subsection (3) is retained, unaltered.

Section 51 – Escaping from custody

As this section has only one physical element –"escapes from custody" – and the fault element of "intention" has to be applied by default under the *Criminal Code* to this element - the only amendment proposed is to re-format it in accordance with the other re-drafted provisions. The statement of offence has been amended from "Escape from custody" to conform to the *Criminal Code* drafting style of putting the statement of offence in the present tense.

"Custody" is defined in subsection 3(1) of the DFD Act. What constitutes an "escape" is a question of fact but before a person can be said to have escaped, it must be proved that the person was out of the control and reach of the person's escort or guards.

Section 52 – Giving false evidence

The proposed statement of offence has been amended from "False evidence" to conform to the *Criminal Code* drafting style of putting the statement of offence in the present tense. The physical element of circumstance in paragraph (1)(a) attracts the fault element of "recklessness" by default under the *Criminal Code*. The fault element of "knows or believes" is applied by paragraph (c) to the physical element of conduct is in paragraph (1)(b) "makes a false statement in those proceedings". This fault element conforms to the present wording of the section. Paragraph (d) is a further physical element of the offence – that the statement is material in the proceedings – and attracts the fault element of "recklessness" on application of the *Criminal Code*. The defence in present subsection (2) is retained, unaltered.

Section 53 - Contempt etc of service tribunal

The proposed offences have been reformulated into the *Criminal Code* drafting style with minimal change.

The powers given to service tribunals by this section are similar to those granted to State and Territory courts by the Acts that create the court, or in the Rules of Court. The powers given by these Acts or Rules are intended to enable the court to protect itself and its proceedings from disturbance, in order to enable justice to be done with decorum: *R v McIndoe* [1938] VLR 277. The maximum penalty for contempt of court provided by section 133 of the *Magistrates Court*

Act 1989 (Vic) is 6 months imprisonment or a fine of $2500 which is very similar to the maximum penalty for the present section 53.

The present subsection 53(7) empowers a court martial or Defence Force magistrate to deal with contempt summarily, in the same way that magistrates and judges can in the civilian arena. It should be noted that this power is not conferred on any summary authority under the Act. Contempt against a summary authority must be dealt with by laying a charge outside the hearing and proceeding in accordance with the usual requirements of the Act. This provides a safeguard against misuse of the contempt provisions by summary authorities, who are not usually legally trained.

The application of strict liability to the three categories of offence in the present section 53 has been made explicit. Defence obtained Ministerial authorisation for this to occur. The current offences are considered to be ones of strict liability in view of their nature, the relatively low maximum penalty, and in the case of subsections 53(1) and (3) the availability of a statutory defence of "without reasonable excuse". If the offences created by section 53 are not specified as strict liability, fault elements will be applied by the *Criminal Code* when the present section gives no indication that proof of any fault element is required.

To prove an offence in subsection (1) it will be sufficient to show that the defendant was summonsed or ordered to appear and without reasonable excuse (or as a result of a mistake of fact, within the meaning of section 6.1 of the *Criminal Code*) failed to do so.

To prove an offence in subsection (2) it will be sufficient to show that a person is appearing as a witness before a service tribunal and without reasonable excuse (or as a result of a mistake of fact, within the meaning of section 6.1 of the *Criminal Code*) refused or failed to either take an oath or make an affirmation; or answer a question; or produce a document required to be produced under summons or an order.

To prove an offence in subsection (4) - insulting a member of a service tribunal, interrupting proceedings, creating a disturbance near a service tribunal or engages in any other conduct that would constitute a contempt - proof of a fault element is also not necessary. The defendant's rights are adequately protected by the requirement in subsection (5) to show cause why he or she should not be convicted of an offence against subsection (4) and by the availability of the defence of mistake of fact which applies to all offences of strict liability.

Section 54 - Unlawful release etc. of person in custody

For convenience and clarity of application, existing subsection 54(1) has been re-drafted into two proposed separate offence subsections. Paragraphs (1)(a) and (2)(a) contain the physical element of circumstance – "a person is delivered into the member's custody" or "the member has a duty to guard the person". A further physical element of circumstance is in paragraph (2)(c): "the member has no authority to release the person". The fault element of "recklessness" applies to these physical elements by default under the *Criminal Code*.

The physical elements of conduct for the offences against this section are set out in paragraphs (1)(b) and (2)(b): "allows the person to escape" and "releases the person". The fault element of "intention" applies by default to each of these elements and does not need to be expressed in the section.

The existing subsections 54(2) and (3) are replaced respectively by subsections (3) and (4). Both of these subsections have only one physical element (conduct) and clearly express the fault element of "intention" in relation to that conduct. Deconstruction of the subsections into fault elements and physical elements is therefore unnecessary.

Items 45 to **49** concern amendments to section 54A. The offences created by section 54A apply to persons undergoing a punishment of detention in a detention centre. A detention centre is defined in section 4 of the DFD Act.

Item 45 creates a proposed subsection 54A(2A) which provides that an offence under section 54A is a strict liability offence. On consideration of the wording of section 54A, its intended purpose, the relatively low maximum penalty and the availability of the defence of "reasonable excuse" in the present subsection (3), it is clearly intended to create offences of strict liability. Ministerial authorisation for the continued application of strict liability to these offences was obtained.

Item 46 seeks to insert in subsection 54A(3) after "custodial offences" the words "proves that he or she". This amendment provides certainty in relation to the existing defence.

Item 47 adds the standard note that a defendant bears a legal burden of proof in relation to the statutory defence in subsection 54A(3).

Item 48 repeals and substitutes subsection 54A(6) so that references to *Crimes Act 1914* and section 73 of the *Defence Act 1903* are removed and updated upon application of the *Criminal Code*.

Item 49 repeals Division 7 and 8 of Part III of the Act and substitutes re-drafted offence provisions as follows:

Division 7 – Miscellaneous offences

Section 55 – Falsifying service documents

The statement of offence has been amended from "Falsification of service documents" to conform to the *Criminal Code* drafting style of putting the statement of offence in the present tense.

In the preface to this offence in subsection (1) the word "intent" has been substituted for the phrase "with a view to" which is used in the present subsection 55(1) preface. The preface then applies the two separate fault elements of "intention" to the various physical elements of conduct set out in paragraphs (a) to (e).

In place of "suppresses, defaces, makes away with or destroys a service document…" in paragraph (1)(d) the words "engages in conduct that results in the suppression of, the defacing or, the making away with or the destruction of a service document" for consistency with the *Criminal Code*.

Section 56 - False statement in relation to application for benefit

The proposed section 56 has been re-drafted in a manner that is consistent with the provisions of section 136.1 of the *Criminal Code*: relating to "False or misleading statements in applications". One of the objectives of introducing the section 136.1 offence was to create a generic offence that would replace over 130 variations of false or misleading statement offences that currently appear on the Commonwealth statute books. By re-drafting the present section 56 into the form of section 136.1, this objective is being fulfilled insofar as the DFD Act variant of a "false or misleading statement in application" offence is concerned.

The re-drafted provision differs from section 136.1 in that it retains the existing categories of "applications for benefit" in the present paragraphs 56(a) to (c) – "grants, payments or allotments or money or allowances, applications for leave of absence or any other benefit or advantage". This will have the effect of properly confining the offence to its service context because it will only pertain to an application for benefit that arises out of, or is based on, membership of, or service in or in connection with, the Defence Force. False or misleading statements arising outside of those categories will lack the necessary service nexus and should be prosecuted using section 136.1. The proposed section now has two offence provisions, one in subsection (1) and the other in subsection (4).

The proposed section omits s.136.7 of the *Criminal Code*, relating to alternative verdicts, for the sake of drafting consistency within the Act. The intended effect of this provision has been achieved by an amendment to the Table of Alternative Offences in Schedule 6 of the Act.

Subsection (1) contains the first offence-provision. Paragraph 56(1)(a) contains the physical element of conduct, "the person makes a statement" to which the fault element of "intention" applies by default upon application of the *Criminal Code*. Paragraph (b) contains the physical elements of result of conduct, paragraph (i) "that the statement is false or misleading", or paragraph (ii) "that the statement omits any matter or think without which the statement is misleading". The fault element of "knowledge" applies to the elements in paragraph (b) by virtue of paragraph (c). Paragraph (d) contains the physical elements of circumstance that the statement is made in, or in connection with, an application of the type specified in paragraphs (i), (ii) and (iii); and paragraph (e) contains the further physical element of circumstance that the application arises out of or is based on membership or service in connection with the Defence Force.

It will also be noted that subsections (2) and (3) provide that a defendant bears an evidential burden in relation to the matters in paragraphs (1)(b)(i) and (1)(b)(ii). This changes the existing situation that applies as a consequence of the present subsection 12(2).

A consequence of adopting the *Criminal Code* section is that the maximum punishment for the offence in subsection (1) will be 12 months imprisonment instead of 2 years, in the present section.

Subsection 56(4) contains the second offence-provision in this section. Paragraph (4)(a) contains the physical element of conduct, "the person makes a statement" to which the fault element of "intention" applies by default upon application of the *Criminal Code*. Paragraph (b) contains the physical elements of result of conduct, paragraph (i) "that the statement is false or misleading", or paragraph (ii) "that the statement omits any matter or thing without which the statement is misleading". The fault element of "recklessness" applies to the elements in paragraph (b) by

virtue of paragraph (c). The remainder of the offence is identical to the subsection (1) offence. Subsections (5) and (6) make the same provision in relation to paragraphs (4)(b)(i) and (4)(b)(ii).

A consequence of adopting the *Criminal Code* section is that the maximum punishment for the offence in subsection (4) will be 6 months imprisonment.

Section 57 - False statement in relation to appointment or enlistment

Re-drafting of section 57 in the drafting style of the *Criminal Code* has resulted in minimal change to the existing provision. The separate offences in section 57 whereby the offence in section 57(1) can be committed by "any person" but the offence in subsection 57(2) can only be committed by a "defence member", have been retained in subsections (1) and (2).

Subsection (1) contains the physical element of circumstance "in or in connection with an application for the person's appointment or enlistment in the Defence Force" which attracts the fault element of "recklessness" under the *Criminal Code*. Paragraphs (a), (b) and (c) contain the physical elements of conduct to which the fault element of "intent to deceive" has been expressly stated to apply to that conduct.

Paragraphs (2)(a), (b) and (c) the fault element of "intent to deceive" applies to the three forms of conduct that can give rise to an offence under this subsection.

Although the offences created by this section cover similar ground to the offences of false or misleading information or false or misleading documents in sections 137.1 and 137.2 of the *Criminal Code*, there are some significant differences in their respective physical elements and fault elements. The *Criminal Code* provisions also carry a higher maximum penalty of 12 months imprisonment rather than a 3 month maximum as is found in section 57. Accordingly, the section has been retained as a separate offence.

Section 58 - Unauthorised disclosure of information

Proposed paragraph 58(1)(a) sets out the physical element of conduct necessary to constitute this offence, "person discloses information". The fault element of "intention" applies to this physical element by default under the *Criminal Code*. Proposed paragraph 58(1)(b) is the physical element of circumstance that attracts the fault element of "recklessness" upon application of the *Criminal Code*. Paragraph (c) contains the physical element of result of conduct that would attract the fault element of "recklessness" if the *Criminal Code* were to apply by default. However, as the present subsection 58(2) provides a defence based on actual or imputed knowledge by a defendant person (that disclosure of the information is likely to be prejudicial to the security or defence of Australia), strict liability has been expressed to apply to paragraph (c) by subsection (2). Ministerial approval was obtained for this to occur.

The existing statutory defence in subsection 58(2) has been retained in order to protect the accused against the application of strict liability. The defendant bears a legal burden in relation to the defence.

Section 59 – Dealing in or possession of narcotic goods

The existing division of offences in section 59 has been retained in the re-drafted section 59. The offence is existing 59(1) is now found in subsection (1). The offence in existing subsection

59(2) is now in subsection (3). The offence in existing subsection 59(3) is now in subsection (5). The offence in subsection 59(4) is now in subsection (6). Finally, the offence in subsection 59(5) is now in subsection (7).

Paragraph (1)(a) sets out the physical element of circumstance for this offence, "that the person is outside Australia". Although this element might be specified as strict or absolute liability, there may be situations in which there is doubt as to whether a defendant person is in Australia at the relevant time - for example, a sale of narcotics on board a ship at sea. Accordingly, the fault element of "recklessness" has been applied to this element by default under the *Criminal Code.* Paragraph (b) sets out the physical element of conduct that constitutes the offence and paragraph (c) applies the fault element of "knows the nature of those goods" to that conduct. This accords with the present wording of subsection 59(1).

A new statutory defence of "lawful authority" has been created in proposed subsection (2) in place of the existing reference to "without lawful authority" in the present section 59(1). It is considered that the presence of that term essentially amounts to a defence, and the requirement to adhere to *Criminal Code* objectives means that this term should be re-formulated into a separate statutory defence provision. A person who traffics in narcotics can now raise a defence of lawful authority.

Paragraph (3)(a) sets out the physical element of circumstance for this offence, "that the person is outside Australia", which attracts the fault element of "recklessness" by default under the *Criminal Code*. The physical element of conduct "possession of narcotic goods" is set out in paragraph (b) and, attracts the fault element specified in paragraph (c) that the defendant knew that he or she was in possession of narcotic goods, and their nature. A new statutory defence of "lawful authority" has been created in subsection (4) in place of the existing reference to "without lawful authority" in the present subsection 59(2) offence.

Paragraph (5)(a) sets out the fault element of circumstance – that the person is outside Australia – which attracts the fault element of "recklessness" under the *Criminal Code*. The physical element of conduct – administering to himself or herself narcotic goods (other than cannabis) – is set out in paragraph (b) and attracts the fault element of "intention" by default upon application of the *Criminal Code.*

Subsection (6) makes it an offence if a defence member or defence civilian uses cannabis "whether within or outside Australia". This phrase could be replaced by the word "anywhere", but to maintain consistency with other provisions in section 59 it is retained in subsection 59(6). The physical element of conduct – "uses cannabis" - attracts the fault element of "intention" under the *Criminal Code.*

The proposed subsection 59(7), although relating to small amount of cannabis, is not specified as strict liability because the present section applies the fault element of "knowledge" to the conduct of possession of the cannabis. The proposed section sets out the physical element of circumstance in paragraph (a) "being in Australia". The physical element of conduct "being in possession of a quantity of cannabis not exceeding 25 grams in mass" to which the fault element of "knowledge" in paragraph (c) applies. A new statutory defence of "lawful authority" has been created in subsection (8) in place of the existing reference to "without lawful authority" in the present subsection 59(5) offence.

Section 60 - Prejudicial behaviour

The re-drafted section 60 differs from the present section 60. Because of the unique nature of the offence, it was not possible to re-formulate it so as to accord with the *Criminal Code* philosophy for fault elements without effecting a fundamental change to the nature of the offence. Consequently, Defence obtained specific Ministerial authorisation to amend section 60 in the proposed manner. This represents the best balance between maintaining the current operation of the provision and adhering to the *Criminal Code* philosophy.

The present section 60 is used in connection with breaches of discipline that fall outside the ambit of specific offence provisions. Charges of a similar nature to section 60 have been present in the military codes of Australia, the United Kingdom and the United States for many years (see, for example, in the United Kingdom, section 69 of the Army Act 1955, as amended by the Armed Forces Act 1971 and the Armed Forces Act 1986; and, in the United States, Article 134 (General Article) of the United States Uniform Code of Military Justice). The offence also has a very long history. The present section is the successor to the old charge of engaging in conduct to the prejudice of good order and military discipline found in section 40 of the Army Act (44 and 45 Victoria C. 58) which provided:

"Conduct to Prejudice of Military Discipline Every person subject to military law who commits any of the following offences: that is to say:- is guilty of any act, conduct, disorder or neglect to the prejudice of good order and military discipline, shall be guilty of an offence and liable to suffer a term of imprisonment or other less punishment"

The conduct that can constitute the offence can take many forms. So much so, that Lockhart J commented in *Chief of the General Staff v Stuart* (1995) 133 ALR 513 that: "It is impossible, indeed unwise, to attempt any exhaustive definition of the words employed in s. 60." The provision carries a maximum penalty of three months imprisonment and permits charges to be preferred against a Defence member for an act or omission that is likely to bring discredit on the Defence Force or that is likely to be prejudicial to the discipline of the Defence Force. The nature of the charge is such that its use within the Defence Force is particularly widespread.

Traditionally, a range of fault elements are permitted to attach to the conduct specified for the purposes of a section 60 offence. The requisite fault element depends entirely on the nature of the conduct being alleged. In *Chief of the General Staff v Stuart* Lockhart J said:

"The kind of mens rea which it is necessary for the prosecution to prove in a prosecution under s. 60, relevant to the present case, is that the respondent must be shown to have known all the facts constituting the ingredients necessary to make the act criminal that were involved in the charge. Generally it is not necessary that the accused must think that what he was doing was wrong, although in some cases this knowledge may be necessary. It all depends on the facts of the case, and there is a multifarious range of situations that may attract the operation of s. 60."

The requirement of the *Criminal Code* that the fault element of intention must attach to the physical element of conduct in a statutory offence would have made a fundamental change to the operation of this provision. Such a change runs contrary to the policy of the *Criminal Code* that is intended to minimise changes to the current operation of provisions to the extent consistent with harmonisation requirements.

Under subsection 60(1) a defence member will be guilty of an offence if the member engages in conduct that is likely to prejudice the discipline of, or bring discredit on, the Defence Force. Subsection 60(2) provides that an offence under this section is one of strict liability. This has been done taking into account the relatively low penalty for this offence, and the need for the section to be used in a wide variety of circumstances to meet the disciplinary purposes of the Act. Subsection (3) creates the statutory defence of "reasonable excuse" to which a legal burden applies to the defendant. The new statutory defence counter-balances the effect of making the offence one of strict liability by providing appropriate protection for the accused against unjust conviction. This accords with contemporary notions of justice. The defendant bears a legal burden of proof in relation to the defence.

Division 8 – Offences based on Territory offences

Section 61 – Offences based on Territory offences

Section 61 creates certain offences triable by service tribunals that are offences against the ordinary criminal law. The offences relevant to this provision are acts or omissions which would be Territory offences if they took place in the Jervis Bay Territory. Subsection 3(1) defines a "Territory offence" for the purpose of the DFD Act. Hence, section 61 is essentially a mechanism for expanding the jurisdiction under the DFD Act to include Territory offences.

An explanatory note has been included in subsection 61(6) that clarifies the application of the *Criminal Code* to the law in force in the Jervis Bay Territory for the purpose of determining whether an offence against section 61 has been committed. This note is necessary to confirm that whilst the content of Chapter 2 of the *Criminal Code* applies to section 61, it may not apply to the content of the law in force in the Jervis Bay Territory. To determine, for the purposes of section 61, whether Chapter 2 of the *Criminal Code* also applies to Jervis Bay Territory law, it is necessary to consult Jervis Bay Territory law. For example, where a law of the Commonwealth is in force in the Jervis Bay Territory, Chapter 2 will apply to the Commonwealth law for the purposes of an offence under section 61.

The re-drafted provision makes minimal changes to the existing section 61. The proposed section utilises the phrase "engages in conduct" as the fault element for each of the offences set out in paragraphs (1)(a), (2)(a) and (3)(a). The phrase replaces the current wording "does or omits to do "an act or thing the doing or omission of which is." The fault element of "intention" applies to this conduct by default under the *Criminal Code*.

Paragraphs 61(1)(b), (2)(b) and (3)(b) are all physical elements of circumstance that engaging in particular conduct in the circumstances set out in those paragraphs constitutes a Territory offence. Subsection 61(5) applies strict liability to the physical elements of circumstance at paragraphs (1)(b), (2)(b) and (3)(b). In doing so, paragraph 61(5) reflects the position set out in subsection 9.3(1) of the *Criminal Code* (and the common law)**.**

Item 50 amends section 62 as follows:

Section 62 – Commanding or ordering a service offence to be committed

Section 62 deconstructs into two physical elements. The physical element of conduct, as set out in paragraph (1)(a), has the effect that the member commands or orders a person to do

something, or to omit to do something. The physical element of circumstance, as set out in paragraph (1)(b), is that the conduct would constitute a service offence.

The physical element of conduct at paragraph 62(1)(a) attracts the fault element of "intention" by default under the *Criminal Code*. Subsection 62(2) applies strict liability to the physical element of circumstance at paragraph (1)(b). In doing so, subsection (2) reflects the position set out in subsection 9.3(1) of the *Criminal Code* (and the common law) that ignorance of the law is no excuse.

There is no specific maximum penalty for this offence because the penalty will be the maximum penalty for the primary offence.

Items 51 to **54** are consequential amendments arising from the application of Chapter 2 of the *Criminal Code* to the DFD Act, and from the re-numbering of offence provisions.

Items 55 to **62** amend the present section 101QA. The existing provision has been re-drafted so that a statutory defence of "reasonable excuse" has been created for the two variations of offence contained in this section. The reference to "without reasonable excuse" in paragraphs 101QA(1)(e) and 101QA(2)(f) have been deleted, and new defence provisions have been created in subsections 101QA(1A) and 101QA(2A). The defendant bears a legal burden in relation to those defences. Defence obtained Ministerial authorisation for a legal burden to apply to these defences. A consequential amendment has been made to subsection 101QA(3) arising from the creation of new subsections (1A) and (2A).

In subsection 101QA(4) the term "the person proves that" has been inserted after the words "to the extent that", and in place of the term "is not reasonably necessary" the words "was not reasonably necessary" have been substituted. These amendments will enhance the clarity of the provision with respect to matters that the defendant can raise by way of defence. Because subsection 101QA(4) effectively operates as a statutory defence, a notation to that effect has been included at the end of the subsection.

Items 63 to **66** are a further series of consequential amendments arising from the application of Chapter 2 of the *Criminal Code* to the DFD Act, and from the re-numbering of offence provisions.

Items 67 to **88** concern the amendment of Schedule 6 to the DFD Act. Section 142 of the Act makes provision for the case in which a service tribunal convicts an accused of an offence other than that charged. Schedule 6 lists the allowable alternatives. These amendments ensure that this system of statutory alternatives is revised to take account of the re-numbered provisions following amendment to implement the *Criminal Code.*

Defence Force Retirement and Death Benefits Act 1973

Item 89 adds new section 6D which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 sets out the general principles of criminal responsibility.

Item 90 repeals and substitutes subsection 127(1). A recipient member, a person in receipt of a pension under previous legislation (being the *Defence Forces Retirement Benefits Act 1948*) other than sections 55 or 57 of that Act or a person to whom a deferred benefit is applicable under section 78 of the Act or under section 82ZB of the 1948 Act is guilty of an offence if the

person becomes an eligible member of the Defence Force and does not inform the (Defence Force Retirement and Death Benefits) Authority within 14 days of becoming an eligible member that he or she has become such a member. The subsection restates the existing penalty of a fine of $100.

Item 91 repeals and substitutes subsection 130(3). New subsection 130(3) provides that a person is guilty of an offence if he or she is given a notice under subsection 130(2) and does not comply with the requirements contained in that notice. The relevant notice under subsection 130(2) is a notice requiring the (Defence Force Retirement and Death Benefits) Authority to inform a judgement debtor of service of documents. The existing penalty of $40 is retained.

Item 92 repeals and substitutes subsection 130(8). The new subsection provides that a judgement creditor is guilty of an offence if he or she serves a copy of a judgement on the (Defence Force Retirement and Death Benefits) Authority under subsection 130(1) and he or she does not notify the Authority immediately that the judgement debt is satisfied. The subsection retains existing penalties of $100 or a term of 3 months imprisonment for natural persons or a maximum penalty of $500 in the case of a body corporate.

Defence Forces Retirement Benefits Act 1948

Item 93 adds new section 26 to this Act to provide that Chapter 2 of the *Criminal Code* applies to all offences under the Act. Chapter 2 sets out the codified general principles of criminal responsibility.

Item 94 repeals and substitutes subsection 69(7) of this Act. Subsection (7) provides that a pensioner (other than a pensioner under sections 55 or 57) is guilty of an offence if he or she becomes a member for the purposes of the Act and does not notify the board in the prescribed manner within 14 days after becoming a member again. The subsection retains the existing penalty of $40.

Item 95 saves Regulations that were in effect for the purposes of subsection 69(7) of the *Defence Forces Retirement Benefits Act 1948* immediately before the commencement of this item. Those Regulations continue to have effect as if they had been made under new subsection 69(7).

Item 96 repeals and substitutes subsection 85A(3). This subsection provides that a person is guilty of an offence if he or she does not comply with the requirements of a notice given to him or her under subsection 85A(2) by the Defence Force Retirement and Death Benefits Authority. A notice under subsection 85A(2) informs the person of the service of certain documents on the Authority and requires the person to notify the Authority of certain matters. Subsection (3) retains the existing penalty of $40.

Item 97 repeals and substitutes subsection 85A(8). Subsection 85A(8) provides that a judgement creditor will be guilty of an offence if he or she serves a copy of a judgement on the Defence Force Retirement and Death Benefits Authority under subsection (1) and does not notify the Authority immediately that the debt has been satisfied. The existing penalties set out in the subsection have been retained: in the case of a natural person a penalty of $100 or 3 months imprisonment and in the case of a body corporate, a penalty of $500.

Defence (Special Undertakings) Act 1952

Item 98 inserts new section 5 in the Act to provide that Chapter 2 of the *Criminal Code* applies to all offences under the Act. Chapter 2 sets out the codified general principles of criminal responsibility.

Item 99 repeals and substitutes section 9 of the Act that deals with the unlawful entry with regard to a prohibited area. New subsection 9(1) provides that a person will be guilty of an offence if the person is in, enters or flies over a prohibited area. Subsection (1) restates the existing penalty of 7 years imprisonment for an offence under this section.

New subsection 9(1A) restates the current statutory defence that subsection 9(1) does not apply if the person is the holder of a permit under section 11 in respect of the prohibited area. A note is added referring to the fact that under subsection 13.3(3) of the *Criminal Code* a defendant bears an evidential burden in respect of the matter in subsection 9(1A).

New subsection 9(1B) provides that where a permit under section 11 has been issued to a ships master or an aircraft pilot to enable a ship or aircraft to pass through or to be over a prohibited area, a person who is lawfully on the ship or aircraft does not commit an offence under subsection (1) by reason only of his or her presence on board the ship or aircraft. A note is added after the new subsection (1B) referring to the fact that under subsection 13.3(3) of the *Criminal Code* a defendant bears an evidential burden in relation to the matter at subsection 9(1B).

New subsection 9(2) provides that a person is guilty of an offence if:

- a person makes a photograph, sketch, plan, model, article, note or other document of or relating to an area or anything in an area that is a prohibited area; or

- obtains, collects, records, uses, has in his or her possession, publishes or communicates to another person a photograph, sketch, plan, model, article, note, or other document or information relating to or used in an area or relating to anything in an area that is a prohibited area.

Subsection 9(2) restates the existing penalty of 7 years imprisonment.

New subsection 9(3) sets out the existing defence of lawful authority or excuse for the conduct described in subsection (2). A note is added after subsection 9(3) that under subsection 13.3(3) of the *Criminal Code* a defendant seeking to raise a matter in subsection (3) bears an evidential burden in relation to that matter.

Item 100 repeals and substitutes subsections 11(4) and (5).

New subsection 11(4) refers to permits under section 11 authorising a person to be in, enter or to fly over a prohibited area. Subsection (4) makes it an offence if the holder of such a permit does not comply with the conditions and restrictions specified in the permit. The subsection restates the existing penalty of 7 years imprisonment.

New subsection 11(5) refers to permits under section 11 authorising a person to be in, enter or to fly over a prohibited area. Subsection (5) makes it an offence if the holder of such a permit, that

has been revoked or suspended, does not immediately deliver the permit to the officer in charge of the prohibited area, or to a person specified by the person revoking or suspending the permit. The subsection restates the existing penalty of 2 years imprisonment.

Item 101 repeals and substitutes sections 12 and 13.

New section 12 refers to a permit issued under section 11. Section 12 states that if the holder of such a permit enters or is in a prohibited area and does not comply with a direction given by the officer in charge of the prohibited area for regulating his or her (the permit holder's) conduct is guilty of an offence. The section restates the existing penalty of 2 years imprisonment.

New section 13 deals with sabotage. Subsection (1) provides that a person is guilty of an offence if he or she engages in conduct that results in damage to, destruction of, obstruction of or interference with any of the things listed in subsection 13(2). The person must intend to bring about that result and the thing must be used or occupied either wholly or in part for the purposes of a special defence undertaking. The section restates the existing penalty of 7 years.

New subsection 13(2) itemises the "listed things" referred to in subsection 13(1). These are:

- a railway, tramway, roadway, wharf, pier or jetty, or a work or structure that is part of or connected with a means of transport by land, water or air;

- a searchlight, lighthouse, buoy or other navigational aid;

- a public building, fire station, aerodrome, air station or runway for aircraft;

- a signal, telegraph, telephone, radar or wireless station or office;

- a place used for gas, water or electricity works or other works for the purposes of a public character.

Item 102 repeals and substitutes subsection 14(3). Paragraph 14(3)(a) refers to an order declaring an area to be a restricted area for the purposes of the Act. Paragraph 14(3)(b) then makes it an offence for a person to contravene or fail to comply with such an order. The subsection restates the existing penalty of 2 years imprisonment.

Item 103 repeals and substitutes sections 16 and 17.

New section 16 relates to the procedures to be adopted by the pilot of an aircraft which is over a prohibited area or a restricted area. Section 16 provides that a pilot is guilty of an offence if he or she knows that he or she is over a prohibited area or a restricted area without lawful authority and does not take the following actions:

- immediately cause the aircraft to be flown outside the area;

- as soon as possible, report the circumstances to the nearest air traffic control centre established under the Air Navigation Regulations; and

- cause the aircraft to land at a place designated by the air traffic control centre and, for that purpose, obey any instructions given by the centre in relation to the movement of the aircraft.

Section 16 restates the existing penalty of 7 years imprisonment.

New section 17 relates to the use of cameras. New subsection 17(1) provides that a person is guilty of an offence if he or she is in or passing over a prohibited area and has in his or her possession, carries or uses a camera or other photographic apparatus or material. The subsection restates the existing penalty of 2 years imprisonment.

New subsection 17(2) sets out a statutory defence where the person has the authority of the officer in charge of the prohibited area for the conduct mentioned in subsection (1). A note is added referring to the fact that under subsection 13.3(3) of the *Criminal Code* a defendant bears an evidential burden in relation to the matter in subsection (2).

Item 104 repeals and substitutes subsection 23(2). Section 23 deals with the arrest of suspected persons. New subsection (2) makes it an offence for a person who:

- is in, or in the neighbourhood of a prohibited area; and
- who is required, by the officer in charge of the prohibited area or a Commonwealth officer or constable, to give his or her name to that officer in charge, Commonwealth officer or constable;
- to refuse to do so.

Subsection 23(2) restates the existing penalty of 2 years.

Item 105 repeals and substitutes subsection 31(2). Section 31 relates to proceedings in respect of an offence under the Act. Section 31 has the effect that where it is considered in the interests of the defence of the Commonwealth, proceedings may be heard in camera. New subsection 31(2) makes it an offence for a person to fail to comply with an order or direction under the section. The section restates the existing penalty of 5 years imprisonment.

Military Superannuation and Benefits Act 1991

Item 106 inserts section 3A to the Act to provide that Chapter 2 of the *Criminal Code* applies to all offences under the Act. Chapter 2 sets out the codified general principles of criminal responsibility.

Naval Defence Act 1910

Item 107 inserts a new section 5B to the Act that applies Chapter 2 of the *Criminal Code* to all offences under the Act. Chapter 2 sets out the codified general principles of criminal responsibility.

Item 108 repeals and substitutes section 44E of the Act which relates to supplying intoxicating liquor to Naval Reserve Cadets. Subsection 44E(1) provides that it is an offence for a person to sell or supply intoxicating liquor to a Naval Reserve Cadet who is under the prescribed age and in uniform. The existing penalty of $40 has been restated.

New subsection 44E(2) retains the existing statutory defence that the sale or supply of the liquor is by direction of a duly qualified medical practitioner. A note is added that, pursuant to

subsection 13.3(3) of the *Criminal Code*, the defendant bears an evidential burden in relation to a matter under subsection (2).

Under new subsection 44E(3), this offence is one of strict liability subject to the statutory defence noted above. Where strict liability applies to an offence, the prosecution does not have to prove fault on the part of the defendant. The prosecution need only prove that the physical elements of the offence occurred. Under the *Criminal Code*, any legislative provision that attracts strict liability must expressly state that it is an offence of strict liability (see section 6.1 of the *Criminal Code*).

Item 109 preserves Regulations that were in effect for the purposes of section 44E of the Act immediately before the commencement of this item. These Regulations continue to have effect as if they had been made under new section 44E.

Weapons of Mass Destruction (Prevention of Proliferation) Act 1995

Item 110 inserts new section 8A which applies Chapter 2 of the *Criminal Code* (other than Part 2.5) to all offences under the Act. Chapter 2 sets out the codified general principles of criminal responsibility. Part 2.5 of Chapter 2 refers to corporate criminal responsibility and has been omitted because existing section 15 of the Act specifically deals with the conduct of directors, servants and agents.

Item 111 repeals and substitutes subsection 14(6). The subsection makes it an offence for a person to supply or export goods or to provide services in contravention of a notice or of a condition stated in a notice in force under section 14. The subsection retains the existing 8 year maximum penalty.

Part 2—Technical amendment

Defence Force Discipline Act 1982

Item 112 is a technical amendment to paragraph 3(1)(b)(i) - the definition of *defence member*. The amendment does not amount to a change in policy, and Ministerial approval was granted for this amendment to be included in this Bill. Whilst purely technical in nature, the amendment is critical in terms of DFD Act jurisdiction for members of the Reserves. It was considered to be of such importance that it be included within this Defence Legislation Amendment Bill.

The amendment to subsection 3(1) is aimed at rectifying an unintended error that occurred when consequential amendments were made in the *Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Act 2001* (the Modernisation Act). The Modernisation Act was part of a package of legislation that extended the options available to the Government for calling out members of the Reserves. The Modernisation Act overhauled and modernised the structure of the Defence Force, including terminology used to refer to various parts of the Defence Force.

One of its effects was to repeal outdated references to parts of the Defence Force in various portfolio Acts including the DFD Act. As part of this exercise the definition of “defence member” in subsection 3(1) was inadvertently amended in such a way that the conjunction “or” which separated paragraphs 3(1)(b)(i) and (ii) was replaced by “and” with the following result -

“defence member” means:

(a) a member of the Permanent Navy, the Regular Army or the Permanent Air Force; or

(b) a member of the Reserves who:
    (i) is rendering continuous full time service; ***and***
    (ii) is on duty or in uniform

Whilst this appears on its fact to be a relatively minor error, the effect is quite significant because it means that unless a member is rendering continuous full time service, he or she will not be a "defence member" for the purposes of the DFD Act. Bearing in mind that most Reservists do not render service on a continuous full time basis, the error is such that where a Reservist performs the normal part-time service in the form of training days, he or she would potentially be outside of the DFD Act disciplinary net.

It is arguable that by utilising common law statutory interpretation principles and the provisions of the *Acts Interpretation Act 1901* the "and" could be interpreted as an "or". However, replacement of the "and" with "or" will remove any doubt by restoring the definition to its original form and ensuring the continuity of DFD Act jurisdiction to Reservists.