

Serial 7

Criminal Code Amendment (Criminal Responsibility Reform) Bill (No. 2) 2005

Dr Toyne

**A BILL
for
AN ACT**

to amend the Criminal Code in relation to criminal responsibility and to make consequential amendments of other legislation

NORTHERN TERRITORY OF AUSTRALIA
CRIMINAL CODE AMENDMENT (CRIMINAL RESPONSIBILITY
REFORM) ACT 2005

Act No. [] of 2005

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NORTHERN TERRITORY OF AUSTRALIA

Act No. [] of 2005

AN ACT

to amend the Criminal Code in relation to criminal responsibility and to make consequential amendments of other legislation

[Assented to [] 2005]
[Second reading [] 2005]

The Legislative Assembly of the Northern Territory enacts as follows:

PART 1 – PRELIMINARY MATTERS

1. Short title

This Act may be cited as the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005*.

2. Commencement

This Act comes into operation on the date fixed by the Administrator by notice in the *Gazette*.

PART 2 – AMENDMENT OF CRIMINAL CODE

3. Principal Act amended

This Part amends the Criminal Code.

4. Amendment of section 1 (Definitions)

(1) Section 1, definitions of "bodily harm" and "grievous harm" –

omit

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(2) Section 1 –

insert (in alphabetical order)

"aggravated offence", for Part VI, Division 3A, means an offence against section 174C or 174D that is an aggravated offence under Subdivision 3 of that Division;

"conduct", for Part IIAA and Schedule 1 provisions, has the meaning in section 43AD(1);

"death" means –

- (a) the irreversible cessation of all function of a person's brain, including the brain stem; or
- (b) the irreversible cessation of circulation of blood in a person's body;

"declared offence" means an offence against a law of the Territory that, under an Act, is declared to be an offence to which this Part applies;

"engage in conduct", for Part IIAA and Schedule 1 provisions, has the meaning in section 43AD(2);

"evidential burden", for Part IIAA and Schedule 1 provisions, has the meaning in section 43BT;

"fault element", for Part IIAA and Schedule 1 provisions, has the meaning in section 43AH;

"fault element of basic intent", for Part IIAA and Schedule 1 provisions, means a fault element of intention for a physical element that consists only of conduct;

"harm" has the meaning in section 1A;

"intention", for Part IIAA and Schedule 1 provisions, has the meaning in section 43AI;

"intoxication", for Part IIAA and Schedule 1 provisions, means intoxication because of the influence of alcohol, a drug or any other substance;

"knowledge", for Part IIAA and Schedule 1 provisions, has the meaning in section 43AJ;

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"legal burden", for Part IIAA and Schedule 1 provisions, has the meaning in section 43BQ;

"negligent", for Part IIAA and Schedule 1 provisions, has the meaning in section 43AL;

"physical element", for Part IIAA and Schedule 1 provisions, has the meaning in section 43AE;

"reckless", for Part IIAA and Schedule 1 provisions, has the meaning in section 43AK;

"Schedule 1 offence" means an offence against a Schedule 1 provision;

"Schedule 1 provision" means a provision of this Code specified in Schedule 1;

"self-induced intoxication", for Part IIAA, has the meaning in section 43AR;

"serious harm" means any harm (including the cumulative effect of more than one harm) –

- (a) that endangers, or is likely to endanger, a person's life; or
- (b) that is or is likely to be significant and longstanding;

"special liability provision" means a provision providing that –

- (a) absolute liability applies to one or more (but not all) of the physical elements of an offence; or
- (b) in a prosecution for an offence, it is not necessary to prove that the defendant knew something; or
- (c) in a prosecution for an offence, it is not necessary to prove that the defendant knew or believed something;

5. New section 1A

After section 1 –

insert

1A. Harm

(1) Harm is physical harm or harm to a person's mental health, whether temporary or permanent.

(2) Physical harm includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that a person might reasonably object to in the circumstances, whether or not the person was aware of it at the time.

(3) Harm to a person's mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.

(4) Harm does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

6. Amendment of section 31 (Unwilled act etc. and accident)

Section 31(3) –

omit

154 or

7. New Part IIAA

After section 43 –

insert

**PART IIAA – CRIMINAL RESPONSIBILITY FOR SCHEDULE 1
OFFENCES AND DECLARED OFFENCES**

Division 1 – Preliminary matters

43AA. Application of this Part and relationship with Parts I and II

(1) This Part applies only in relation to Schedule 1 offences, and declared offences, committed on or after the commencement of the Part.

(2) The following provisions of Part I do not apply in relation to Schedule 1 offences, or declared offences, committed on or after the commencement of this Part:

- (a) section 1 (Definitions), definitions of "act", "duress", "knowingly" and "involuntary intoxication";
- (b) section 2 (Commission of offence);
- (c) section 3 (Division of offences);
- (d) section 4 (Attempts to commit offences);

- (e) section 7 (Intoxication);
- (f) section 8 (Offences committed in prosecution of common purpose);
- (g) section 9 (Mode of execution different from that counselled);
- (h) section 12 (Abettors and accessories before the fact);
- (i) section 15 (Application of criminal laws);
- (j) section 16 (Offences counselled or procured in the Territory to be committed out of the Territory).

(3) Part II does not apply in relation to Schedule 1 offences, or declared offences, committed on or after the commencement of this Part.

Note –

Because of the limited application of this Part, terms defined in this Part have the meaning given to them only in this Part and in the Schedule 1 provisions. For example, the meaning given to the term "conduct" in section 43AD(1) applies only in this Part and the Schedule 1 provisions – see the signposted definition of that term in section 1.

Division 2 – Elements of offence

Subdivision 1 – General matters

43AB. Elements

- (1) An offence consists of physical elements and fault elements.
- (2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
- (3) The law that creates the offence may provide different fault elements for different physical elements.

43AC. Establishing guilt of offences

A person must not be found guilty of committing an offence unless the following is proved:

- (a) the existence of the physical elements of the offence that are, under the law creating the offence, relevant to establishing guilt;
- (b) for each of the physical elements for which a fault element is required, one of the fault elements for the physical element.

Subdivision 2 – Physical elements

43AD. Conduct and engaging in conduct

(1) Conduct is an act, an omission to perform an act or a state of affairs.

(2) Engage in conduct is to –

(a) perform an act; or

(b) omit to perform an act.

43AE. Physical elements

A physical element of an offence may be –

(a) conduct; or

(b) a result of conduct; or

(c) a circumstance in which conduct, or a result of conduct, happens.

43AF. Voluntariness

(1) Conduct can only be a physical element if it is voluntary.

(2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.

Examples of conduct that is not voluntary –

1. *A spasm, convulsion or other unwilled bodily movement.*

2. *An act performed during sleep or unconsciousness.*

3. *An act performed during impaired consciousness depriving the person of the will to act.*

(3) An omission to perform an act is only voluntary if the act omitted is an act the person can perform.

(4) If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.

(5) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.

43AG. Omissions

(1) An omission to perform an act can only be a physical element if the law creating the offence –

- (a) makes it a physical element; or
- (b) impliedly provides that the offence is committed by an omission to perform an act that, by law, there is a duty to perform.

(2) However, an omission to perform an act can be a physical element of an offence against a Schedule 1 provision if it is a person's omission to perform any of the duties referred to in Part VI, Division 1.

(3) The fault element for an omission to perform an act referred to in subsection (2) that causes, or that gives rise to danger of, death or harm is, if not otherwise specified in the Schedule 1 provision, the same as the fault element for the result of the omission.

Note for section 43AG(3) –

In the absence of subsection (3), the fault element for the conduct consisting of an omission to perform an act would be intention under the default provision in section 43AM(1). Generally in relation to Schedule 1 offences, the fault element for acts that cause etc. death or harm is not specified but the fault element for the result concerned is specified as either intention, recklessness or negligence.

Subdivision 3 – Fault elements

43AH. Fault elements

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent the law that creates an offence from specifying other fault elements for a physical element of the offence.

43AI. Intention

(1) A person has intention in relation to conduct if the person means to engage in that conduct.

(2) A person has intention in relation to a result if the person means to bring it about or is aware that it will happen in the ordinary course of events.

(3) A person has intention in relation to a circumstance if the person believes that it exists or will exist.

43AJ. Knowledge

A person has knowledge of a result or circumstance if the person is aware that it exists or will exist in the ordinary course of events.

43AK. Recklessness

- (1) A person is reckless in relation to a result if –
 - (a) the person is aware of a substantial risk that the result will happen; and
 - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
- (2) A person is reckless in relation to a circumstance if –
 - (a) the person is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to the person, 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 satisfies the fault element.

43AL. Negligence

A person is negligent in relation to a physical element of an offence if the person's 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.

43AM. Offences that do not provide fault elements

(1) If a law that creates an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.

(2) If a law that creates an offence does not provide a fault element for a physical element that consists of a result or circumstance, recklessness is the fault element for the physical element.

Note for subsection (2) –

Under section 43AK(4), recklessness can be established by proving intention, knowledge or recklessness.

Subdivision 4 – Cases where fault elements are not required

43AN. Strict liability

(1) If a law that creates an offence provides that an offence is an offence of strict liability –

- (a) there are no fault elements for any of the physical elements of the offence; and
- (b) the defence of mistake of fact under section 43AX is available.

(2) If a law that creates an offence provides that strict liability applies to a particular physical element of an offence –

- (a) there are no fault elements for that physical element; and
- (b) the defence of mistake of fact under section 43AX is available in relation to that physical element.

(3) The existence of strict liability does not make any other defence unavailable.

43AO. Absolute liability

(1) If a law that creates an offence provides that an offence is an offence of absolute liability –

- (a) there are no fault elements for any of the physical elements of the offence; and
- (b) the defence of mistake of fact under section 43AX is unavailable.

(2) If a law that creates an offence provides that absolute liability applies to a particular physical element of an offence –

- (a) there are no fault elements for that physical element; and
- (b) the defence of mistake of fact under section 43AX is unavailable in relation to that physical element.

(3) The existence of absolute liability does not make any other defence unavailable.

Division 3 – Circumstances in which there is no criminal responsibility

Subdivision 1 – Lack of capacity of children

43AP. Children under 10

A child under 10 years old is not criminally responsible for an offence.

43AQ. Children over 10 but under 14

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

(2) The question whether a child knows that his or her conduct is wrong is one of fact.

(3) The burden of proving that a child knows that his or her conduct is wrong is on the prosecution.

Subdivision 2 – Intoxication

43AR. Self-induced intoxication

(1) Intoxication is self-induced unless it came about –

(a) involuntarily; or

(b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force; or

(c) from the use of a drug for which a prescription is required and that was used in accordance with the directions of the medical practitioner or dentist who prescribed it; or

(d) from the use of a drug for which no prescription is required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.

(2) However, intoxication is self-induced if a person using a drug as referred to in subsection (1)(c) or (d) knew, or had reason to believe, when the person took the drug that the drug would significantly impair the person's judgment or control.

43AS. Intoxication – offences involving basic intent

(1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.

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Note for subsection (1) –

A fault element of intention in relation to a result or circumstance is not a fault element of basic intent.

(2) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.

(3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.

(4) A person may be regarded as having considered whether or not facts existed if –

- (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
- (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

43AT. Intoxication – negligence as fault element

(1) If negligence is a fault element for a particular physical element of an offence, in determining whether that fault element existed in relation to a person who is intoxicated, regard must be had to the standard of a reasonable person who is not intoxicated.

(2) However, if intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

43AU. Intoxication – relevance to defences

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

(2) However, if –

- (a) each physical element of an offence has a fault element of basic intent; and
- (b) any part of a defence is based on actual knowledge or belief,

evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.

(3) If any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.

(4) If a person's intoxication is not self-induced, in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

43AV. Involuntary intoxication

A person is not criminally responsible for an offence if the person's conduct constituting the offence was as a result of intoxication that was not self-induced.

Subdivision 3 – Mistake or ignorance

43AW. Mistake or ignorance of fact – fault elements other than negligence

(1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if –

- (a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and
- (b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.

(2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.

43AX. Mistake of fact – strict liability

(1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if –

- (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed and was under a mistaken but reasonable belief about those facts; and
- (b) had those facts existed, the conduct would not have constituted an offence.

(2) A person may be regarded as having considered whether or not facts existed if –

- (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and

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

Note for section 43AX –

Section 43AO(2) prevents this section applying in situations of absolute liability.

43AY. Mistake or ignorance of law

(1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, the person is mistaken about, or ignorant of, the existence or content of a law that creates the offence.

(2) However, the person is not criminally responsible for the offence if –

- (a) the law creating the offence expressly or impliedly provides that a person is not criminally responsible for the offence in those circumstances; or
- (b) the person's ignorance or mistake negates a fault element applying to a physical element of the offence.

(3) In addition, if the law creating the offence is a statutory instrument, the person is not criminally responsible for the offence if, at the time of the conduct constituting the offence, the statutory instrument –

- (a) was not known to the person; and
- (b) had not been published in the *Gazette* or otherwise been made available to persons likely to be affected by it in such a way that the person would have become aware of its contents by exercising due diligence.

43AZ. Claim of right

(1) A person is not criminally responsible for an offence that has a physical element relating to property if –

- (a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and
- (b) the existence of that right would negate a fault element for any physical element of the offence.

(2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that the person mistakenly believes to exist.

(3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

Subdivision 4 – External factors

43BA. Intervening conduct or event

A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if –

- (a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and
- (b) the person could not reasonably be expected to guard against the bringing about of that physical element.

43BB. Duress

(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence under duress.

(2) A person carries out conduct under duress only if the person reasonably believes that –

- (a) a threat has been made that will be carried out unless an offence is committed; and
- (b) there is no reasonable way that the threat can be rendered ineffective; and
- (c) the conduct is a reasonable response to the threat.

(3) However, the person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating to carry out conduct of the kind actually carried out.

43BC. Sudden or extraordinary emergency

(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.

(2) This section applies only if the person carrying out the conduct reasonably believes that –

- (a) circumstances of sudden or extraordinary emergency exist; and
- (b) committing the offence is the only reasonable way to deal with the emergency; and

- (c) the conduct is a reasonable response to the emergency.

43BD. Self-defence

(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.

- (2) A person carries out conduct in self-defence only if –

- (a) the person believes the conduct is necessary –

- (i) to defend himself or herself or another person; or
- (ii) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
- (iii) to protect property from unlawful appropriation, destruction, damage or interference; or
- (iv) to prevent criminal trespass to any land or premises; or
- (v) to remove from any land or premises a person who is committing criminal trespass; and

- (b) the conduct is a reasonable response in the circumstances as he or she perceives them.

- (3) However, the person does not carry out conduct in self-defence if –

- (a) the person uses force that involves the intentional infliction of death or serious harm –

- (i) to protect property; or
- (ii) to prevent criminal trespass; or
- (iii) to remove a person who is committing criminal trespass; or

- (b) the person is responding to lawful conduct that the person knew was lawful.

(4) Conduct is not lawful for subsection (3)(b) merely because the person carrying it out is not criminally responsible for it.

43BE. Lawful authority

A person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law.

Division 4 – Extensions of criminal responsibility

43BF. Attempt

(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and, unless otherwise provided, is punishable as if the offence attempted had been committed.

(2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence.

(3) The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

(4) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note for subsection (4) –

Under section 43AC, only one of the fault elements of intention or knowledge would need to be established in relation to each physical element of the offence attempted.

(5) Subsection (4) has effect subject to subsection (9).

(6) A person may be found guilty even if –

(a) committing the offence attempted is impossible; or

(b) the person actually committed the offence attempted.

(7) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.

(8) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(9) Any special liability provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(10) It is not an offence to attempt to commit an offence against section 43BG or 43BJ.

43BG. Complicity and common purpose

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

- (2) For the person to be guilty –
 - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
 - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that –
 - (a) the person's conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
 - (b) the person's conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (4) Subsection (3) has effect subject to subsection (7).
- (5) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person –
 - (a) terminated his or her involvement; and
 - (b) took all reasonable steps to prevent the commission of the offence.
- (6) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
- (7) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

43BH. Innocent agency

- (1) A person is taken to have committed an offence if –
 - (a) the person procures someone else to engage in conduct that (whether or not together with conduct engaged in by the person) makes up the physical elements of the offence consisting of conduct; and
 - (b) any physical element of the offence consisting of a circumstance exists; and

- (c) any physical element of the offence consisting of a result of the conduct happens; and
- (d) when the person procured the other person to engage in the conduct, the person had the fault element applying to each physical element of the offence.

(2) To remove any doubt, if a person is taken to have committed an offence because of this section, the offence is punishable as if, apart from the operation of this section, the person had committed the offence.

43BI. Incitement

(1) A person who urges the commission of an offence is guilty of the offence of incitement.

(2) For the person to be guilty, the person must intend that the offence incited be committed.

(3) Subsection (2) has effect subject to subsection (6).

(4) A person may be found guilty even if committing the offence incited is impossible.

(5) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in relation to that offence.

(6) Any special liability provisions that apply to an offence apply also to the offence of incitement in relation to that offence.

(7) It is not an offence to incite the commission of an offence against section 43BF, this section or section 43BJ.

Penalty:

- (a) if the offence incited is punishable by life imprisonment – imprisonment for 10 years; or
- (b) if the offence incited is punishable by imprisonment for 14 years or more, but is not punishable by life imprisonment – imprisonment for 7 years; or
- (c) if the offence incited is punishable by imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more – imprisonment for 5 years; or

- (d) if the offence is otherwise punishable by imprisonment – imprisonment for 3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser; or
- (e) if the offence incited is not punishable by imprisonment – the number of penalty units equal to the maximum number of penalty units applicable to the offence incited.

43BJ. Conspiracy

(1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

(2) For the person to be guilty –

- (a) the person must have entered into an agreement with one or more other persons; and
- (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
- (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

(3) Subsection (2) has effect subject to subsection (8).

(4) A person may be found guilty of conspiracy to commit an offence even if –

- (a) committing the offence is impossible; or
- (b) the only other party to the agreement is a body corporate; or
- (c) each other party to the agreement is at least one of the following:
 - (i) a person who is not criminally responsible;
 - (ii) a person for whose benefit or protection the offence exists;
or
- (d) subject to subsection (5)(a), all other parties to the agreement have been acquitted of the conspiracy.

(5) A person cannot be found guilty of conspiracy to commit an offence if –

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- (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
 - (b) he or she is a person for whose benefit or protection the offence exists.
- (6) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person –
- (a) withdrew from the agreement; and
 - (b) took all reasonable steps to prevent the commission of the offence.
- (7) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (8) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (9) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (10) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions.
- (11) However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

Division 5 – Corporate criminal responsibility

43BK. General principles

- (1) This Code applies to bodies corporate as well as natural persons.
- (2) This Code applies to bodies corporate in the same way as it applies to natural persons, but subject to the changes made by this Part and any other changes necessary because criminal liability is being imposed on a body corporate rather than a natural person.
- (3) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

43BL. Physical elements

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

43BM. Fault elements other than negligence

(1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The ways in which authorisation or permission may be established include –

- (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; and
- (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; and
- (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; and
- (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Subsection (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct or the authorisation or permission.

(4) Factors relevant to the application of subsection (2)(c) and (d) include –

- (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
- (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent

of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section –

"board of directors" means the body (by whatever name called) exercising the executive authority of the body corporate;

"corporate culture", for a body corporate, means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant conduct happens;

"high managerial agent", of a body corporate, means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

43BN. Negligence

(1) The test of negligence for a body corporate is that set out in section 43AL.

(2) Subsection (3) applies if –

(a) negligence is a fault element in relation to a physical element of an offence; and

(b) no individual employee, agent or officer of the body corporate has that fault element.

(3) The fault element of negligence may exist on the part of the body corporate if its conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(4) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to –

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

43BO. Mistake of fact – strict liability

(1) A body corporate can only rely on section 43AX in relation to conduct that would, apart from this section, constitute an offence on its part if –

- (a) the employee, agent or officer of the body corporate who engaged in the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
- (b) the body corporate proves that it exercised due diligence to prevent the conduct.

(2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to –

- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

43BP. Intervening conduct or event

A body corporate cannot rely on section 43BA in relation to a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

Division 6 – Proof of criminal responsibility

43BQ. Legal burden of proof

The legal burden, in relation to a matter, is the burden of proving the existence of the matter.

43BR. Legal burden of proof – prosecution

(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof.

43BS. Standard of proof – prosecution

(1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

(2) Subsection (1) does not apply if a law specifies a different standard of proof.

43BT. Evidential burden of proof

The evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

43BU. Evidential burden of proof – defence

(1) Subject to section 43BV, a burden of proof that a law imposes on a defendant is an evidential burden only.

(2) A defendant who wishes to deny criminal responsibility by relying on a provision of Division 3 or Part IIA bears an evidential burden in relation to that matter.

(3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence (whether or not it accompanies the description of the offence) bears an evidential burden in relation to the matter.

(4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.

(5) The question whether an evidential burden has been discharged is a question of law.

43BV. Legal burden of proof – defence

A burden of proof that a law imposes on the defendant is a legal burden only if the law expressly –

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove the matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.

43BW. Standard of proof – defence

A legal burden of proof on the defendant must be discharged on the balance of probabilities.

43BX. Use of averments

A law that allows the prosecution to make an averment does not allow the prosecution to aver any fault element of an offence.

Division 7 – Geographical application

43BY. Application and effect of Division

(1) This Division extends the application of a law of the Territory that creates an offence beyond the territorial limits of the Territory (and Australia) if the required geographical nexus exists for the offence.

(2) If a law that creates an offence provides for any geographical consideration for an offence, the provision prevails over any inconsistent provision of this Division.

Examples for subsection (2) –

1. *A law creating an offence may provide that the place of commission of the offence is (explicitly or by necessary implication) an element of the offence.*
2. *A law creating an offence may provide for its application outside the Territory and exclude (explicitly or by necessary implication) the requirement for a geographical nexus between the Territory and an element of the offence.*

43BZ. Interpretation for Division

(1) For this Division, the required geographical nexus is the geographical nexus referred to in section 43CA(2).

(2) For this Division, the place where an offence is committed is the place where any of the physical elements of the offence happen.

(3) For this Division, the place where an offence has an effect includes –

- (a) any place whose peace, welfare or good government is threatened by the offence; and
- (b) any place where the offence would have an effect (or would cause such a threat) if the offence were committed.

43CA. Extension of offences if required geographical nexus exists

(1) An offence against a law is committed if –

- (a) disregarding any geographical considerations, all elements of the offence exist; and
- (b) a geographical nexus exists between the Territory and the offence.

(2) A geographical nexus exists between the Territory and an offence if –

- (a) the offence is committed completely or partly in the Territory, whether or not the offence has any effect in the Territory; or

- (b) the offence is committed completely outside the Territory (whether or not outside Australia) but has an effect in the Territory.

43CB. Geographical application – double criminality

(1) This Division applies to an offence committed partly in the Territory and partly in a place outside the Territory (whether or not outside Australia), even if it is not also an offence in that place.

(2) This Division applies to an offence committed completely outside the Territory (whether or not outside Australia) only if –

- (a) it is also an offence in the place where it is committed; or
- (b) it is not also an offence in that place, but the tribunal of fact is satisfied the offence is such a threat to the peace, welfare or good government of the Territory that it justifies criminal punishment in the Territory.

43CC. Geographical application – procedure

(1) The required geographical nexus is conclusively presumed for an offence unless rebutted under subsection (2) or (4).

(2) If a person charged with an offence disputes the existence of the required geographical nexus for the offence, the following provisions apply:

- (a) the court must proceed with the trial of the offence in the usual way;
- (b) if, at the end of the trial, the tribunal of fact is satisfied on the balance of probabilities that the required geographical nexus does not exist, it must make or return a finding to that effect, and the court must dismiss the charge;
- (c) however, if, disregarding any geographical considerations, the tribunal of fact would find the person not guilty of the offence (other than because of mental impairment), it must make or return a verdict of not guilty;
- (d) also, if, disregarding any geographical considerations, the tribunal of fact would find the person not guilty of the offence only because of mental impairment, it must make or return a verdict that the person is not guilty of the offence because of mental impairment.

(3) This section applies to any alternative verdict available by law to the tribunal of fact in relation to another offence with which the person was not charged.

(4) The tribunal of fact may make or return a finding of guilty in relation to the other offence (referred to in subsection (3)) unless satisfied on the balance of probabilities the required geographical nexus does not exist for the other offence.

(5) If the issue of whether the required geographical nexus exists for an offence is raised before the trial, the issue must be reserved for consideration at the trial.

43CD. Geographical application – suspicion etc. that offence committed

(1) This section applies if a person may exercise a power or perform a function under a law on reasonable suspicion or belief that an offence has been committed.

(2) The person may exercise the power or perform the function if the person suspects or believes, as the case requires, on reasonable grounds that all the elements required for the offence exist.

(3) Subsection (2) applies whether or not the person suspects or believes, or has any ground to suspect or believe, that the required geographical nexus exists for the offence.

8. Repeal and substitution of Part VI, Division 2 heading

Part VI, Division 2 heading –

repeal, substitute

Division 2 – Provision of rescue, medical treatment and other aid

9. Repeal of section 154

Section 154

repeal

10. Repeal and substitution of section 163 (Manslaughter)

Section 163 –

repeal, substitute

163. Manslaughter

A person is guilty of the crime of manslaughter if –

- (a) the person engages in conduct; and
- (b) that conduct causes the death of another person; and

- (c) the person is reckless or negligent as to causing the death of that or any other person by the conduct.

Penalty: Imprisonment for life.

11. Repeal of section 167

Section 167 –

repeal

12. New Part VI, Division 3A

After section 174 –

insert

Division 3A – Recklessly endangering life and serious harm, negligently causing serious harm and death or serious harm involving motor vehicles

Subdivision 1 – Interpretation

174A. Causing death or harm

For an offence under this Division, a person's conduct causes death or harm if it substantially contributes to the death or harm.

174B. Danger of death or serious harm

(1) For this Division, conduct that may give rise to a danger of death or serious harm includes exposing a person to the risk of catching a disease that may give rise to a danger of death or serious harm.

(2) For this Division, conduct gives rise to a danger of death or serious harm if it is ordinarily capable of creating a real, and not merely a theoretical, danger of death or serious harm.

(3) Conduct may give rise to a danger of death or serious harm whatever the statistical or arithmetical calculation of the degree of risk of death or serious harm involved.

(4) In the prosecution of an offence under Subdivision 2, it is not necessary to prove that a person was actually placed in danger of death or serious harm by the conduct concerned.

Subdivision 2 – Offences

174C. Recklessly endangering life

A person is guilty of a crime if –

- (a) the person engages in conduct; and
- (b) that conduct gives rise to a danger of death to any person; and
- (c) the person is reckless as to the danger of death to any person that arises from the conduct.

Penalty: Imprisonment for 10 years or, for an aggravated offence, 14 years.

174D. Recklessly endangering serious harm

A person is guilty of a crime if –

- (a) the person engages in conduct; and
- (b) that conduct gives rise to a danger of serious harm to any person; and
- (c) the person is reckless as to the danger of serious harm to any person that arises from the conduct.

Penalty: Imprisonment for 7 years or, for an aggravated offence, 10 years.

174E. Negligently causing serious harm

A person is guilty of a crime if –

- (a) the person engages in conduct; and
- (b) that conduct causes serious harm to another person; and
- (c) the person is negligent as to causing serious harm to the other person or any other person by the conduct.

Penalty: Imprisonment for 10 years.

174F. Driving motor vehicle causing death or serious harm

(1) A person is guilty of a crime if –

- (a) the person drives a motor vehicle dangerously; and
- (b) that conduct causes the death of any person.

Penalty: Imprisonment for 10 years.

(2) A person is guilty of a crime if –

- (a) the person drives a motor vehicle dangerously; and

- (b) that conduct causes serious harm to any person.

Penalty: Imprisonment for 7 years.

(3) For subsections (1)(a) and (2)(a), a person drives a motor vehicle dangerously if the person drives the vehicle –

- (a) while under the influence of alcohol or a drug to such an extent as to be incapable of having proper control of the vehicle; or

- (b) at a speed that is dangerous to another person; or

- (c) in a manner that is dangerous to another person.

(4) An offence against subsection (1) or (2) is an offence of strict liability.

(5) A person who is convicted or acquitted of an offence against subsection (1) or (2) is not liable to be convicted of another offence against this Code on the same facts or substantially the same facts.

Subdivision 3 – Aggravated offences

174G. Increased penalty for aggravated offence

The following are circumstances of aggravation for an offence committed against section 174C or 174D and a maximum penalty specified in the section for an aggravated offence applies if any such circumstance of aggravation applies to the offence:

- (a) the offence was committed by the use or threatened use of an offensive weapon;

- (b) the offence was committed against a public officer who was, at the time of the offence, acting in the course of his or her duty as a police officer, prison officer or other law enforcement officer;

- (c) the offence was committed against a person who was involved in any capacity in legal proceedings in connection with any conduct or future conduct of the person in respect of those proceedings;

- (d) the offence was committed against a child under the age of 10 years;

- (e) the offence was committed against a person in abuse of a position of trust;

- (f) the offence was committed against a person in abuse of a position of authority.

174H. Procedure for proving aggravated offence

(1) If the prosecution intends to prove an aggravated offence, the relevant circumstances of aggravation must be contained in the charge.

(2) In order to prove an aggravated offence, the prosecution must prove that the person who committed the offence intended or was reckless as to the circumstances of aggravation.

13. Repeal and substitution of Part VI, Division 4 heading

Part VI, Division 4 heading –

repeal, substitute

Division 4 – Other offences endangering life or health

14. Amendment of section 192 (Sexual intercourse and gross indecency without consent)

(1) Section 192(1) –

omit, substitute

(1) For this section, consent means free and voluntary agreement.

(2) Section 192(2) –

omit

freely agree

substitute

consent

(3) Section 192(3) and (4) –

omit, substitute

(3) A person is guilty of a crime if the person has sexual intercourse with another person –

(a) without the other person's consent; and

(b) knowing about or being reckless as to the lack of consent.

Penalty: Imprisonment for life.

(4) A person is guilty of a crime if the person performs an act of gross indecency on another person –

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- (a) without the other person's consent; and
- (b) knowing about or being reckless as to the lack of consent.

Penalty: Imprisonment for 14 years.

(4A) For subsections (3) and (4), being reckless as to a lack of consent to sexual intercourse or an act of gross indecency includes not giving any thought to whether or not the other person is consenting to the sexual intercourse or act of gross indecency.

- (4) Section 192(7) –

omit

bodily

- (5) Section 192(8) –

omit

grievous

substitute

serious

15. Amendment of section 316 (Indictment containing count of murder or manslaughter)

Section 316(2) –

omit, substitute

(2) On an indictment charging a person with manslaughter, the person may alternatively be found guilty of the offence defined by section 174F(1).

16. Amendment of section 318 (Charge of offence against the person where section 31 or intoxication is a defence)

- (1) Section 318 –

omit

murder, manslaughter or any other offence against the person

substitute

an offence against the person other than murder or manslaughter

- (2) Section 318 –

omit

all the words after "alternatively of"

substitute

an offence defined by Part VI, Division 3A, Subdivision 2

17. New Part XI

After section 443 –

insert

**PART XI – TRANSITIONAL MATTERS FOR CRIMINAL CODE
AMENDMENT (CRIMINAL RESPONSIBILITY REFORM) ACT 2005**

444. Application of Code to pre-commencement offences

This Code, as in force immediately before the commencement of this section, continues to apply in relation to offences committed before that commencement.

18. New Schedule 1

Before Schedule 4 –

insert

SCHEDULE 1

Section 1, definition "Schedule 1 provision"

PROVISIONS TO WHICH PART IIAA APPLIES

Section 163 (Manslaughter)

Part VI, Division 3A (Recklessly endangering life and serious harm, negligently causing serious harm and death or serious harm involving motor vehicles)

Section 192 (Sexual intercourse and gross indecency without consent)

19. Further amendments

Schedule 1 has effect.

PART 3 – AMENDMENT OF OTHER LEGISLATION

20. Amendment of *Dangerous Goods Act*

(1) This section amends the *Dangerous Goods Act*.

(2) Section 9(1), penalty provision –

omit

grievous harm

substitute

serious harm

(3) After section 9(3) –

insert

(4) In this section –

"serious harm" has the same meaning as in the Criminal Code.

21. Amendment of subordinate legislation

(1) This section amends the subordinate legislation specified in Schedule 2.

(2) Schedule 2 has effect.

SCHEDULE 1

Section 19

FURTHER AMENDMENTS OF CRIMINAL CODE

Provision	Amendment	
	omit	substitute
Sections 10, 19, 26(3) and 27	grievous harm (all references)	serious harm
Section 27(k)	bodily harm	harm
Sections 28, 29(3), 34(1)(e) and (f), 34(3)(c) and (d) and 40(2)	grievous harm (all references)	serious harm
Section 50		
– definition of "violence"	grievous harm	serious harm
Sections 70, 160, 162(1)(a), 177 and 181	grievous harm (all references)	serious harm
Section 182	bodily harm	harm
Section 185(1)	grievous harm (all references)	serious harm
Section 186	bodily harm	harm
Section 187		
– definition of "assault", paragraph (a)	bodily harm	harm
Sections 188(2)(a) and 189A(2)(a)	bodily harm	harm
Sections 189A(2)(b) and 194(3)	grievous harm (all references)	serious harm
Sections 211(2) and 212(2)	bodily harm	harm

SCHEDULE 2

Section 21

AMENDMENT OF SUBORDINATE LEGISLATION

Provision	Amendment	
	omit	substitute
<i>Private Security (Crowd Controllers) Regulations</i>		
Schedule		
– Form, note to item 5	grievous harm (all references)	serious harm
	bodily harm	harm
<i>Private Security (Security Firms) Regulations</i>		
Schedule		
– Form, note 2 to item 8	grievous harm (all references)	serious harm
	bodily harm	harm
<i>Private Security (Security Officers) Regulations</i>		
Schedule		
– Form, note to item 5	grievous harm (all references)	serious harm
	bodily harm	harm

ALTERATIONS TO PROVISION HEADINGS

On the day on which the Criminal Code is amended by this Act, in addition to any alteration to provision headings indicated in the text of this Act, the headings to the provisions specified in the table are altered as set out in the table.

Provision	Alteration	
	omit	substitute
Criminal Code		
Sections 10, 27, 28, 70, 177 and 181	grievous harm	serious harm
Section 186	bodily harm	harm
Justices Act		
Section 131A	bodily harm	harm