

**AIJA MAGISTRATES' CONFERENCE**

**20-21 July 2001**

**Melbourne,**

**ELEMENTS OF LIABILITY IN THE  
COMMONWEALTH CRIMINAL CODE**

**IAN LEADER-ELLIOTT**

**Adelaide University Law School**

# ELEMENTS OF LIABILITY IN THE COMMONWEALTH CRIMINAL CODE

IAN LEADER-ELLIOTT  
Adelaide University Law School

## AN OVERVIEW OF THE COMMONWEALTH *CRIMINAL CODE*

The Commonwealth *Criminal Code* now extends to five chapters, ranging in subject matter from a codified version of the UK *Theft Act* 1967<sup>1</sup> to a code of offences dealing with slavery, sexual slavery and sexual servitude.<sup>2</sup> The next addition to the canon is likely to be a codification of the computer offences proposed in the *Cybercrime Bill* 2001.<sup>3</sup> The provisions of the Commonwealth *Code* are largely derived from the *Model Criminal Code* [MCC] - a project, now substantially complete,<sup>4</sup> to develop a national model for a uniform criminal code. [Appendix 1].

The project to develop a *Model Criminal Code* had its origins in the Review of Commonwealth Criminal Law, under the leadership of Sir Harry Gibbs, which commenced in 1987. At this early stage the object was to codify Commonwealth criminal law, leaving the states and territories to go their own ways. An Interim Report, with a draft Bill to codify the fundamental principles of criminal responsibility appeared in 1990.<sup>5</sup> The Bill was never introduced. But the work of the Gibbs Committee did inspire the ambitious proposal to develop a uniform criminal code for all Australian jurisdictions. In 1991, the Standing Committee of Attorneys General established a committee of representatives from each jurisdiction, which eventually came to be known as the Model Criminal Code

---

<sup>1</sup> See: CC - Ch7: *The Proper Administration of Government*.

<sup>2</sup> See: CC - Ch8: *Offences Against Humanity*.

<sup>3</sup> If enacted, this will be included in CC - Ch10: *National infrastructure*; Part 10.7 *Computer offences*.

<sup>4</sup> MCC - Ch4: *Damage and Computer Offences* (2001) is the most recent. The Model Code awaits a final Report resolving issues raised in Ch5: *Fatal Offences Against the Person* (1998).

<sup>5</sup> Review of Commonwealth Criminal Law, *Interim Report: Principles of Criminal Responsibility and Other Matters*, AGPS July 1990. The Interim report was preceded by Discussion Paper No21, *General Principles Relating to Criminal Responsibility*, AGPS, May 1989;.

Officers' Committee [MCCOC], to prepare a model code of criminal laws.<sup>6</sup> The first MCCOC Report, *General Principles of Criminal Responsibility*, appeared at the end of 1992.<sup>7</sup> Like all MCCOC reports, it included a draft of the proposed legislation. With the exception of the provisions on intoxication and criminal liability, which were substantially altered, the MCCOC draft was enacted without significant amendment as Chs1 and 2 of the *Criminal Code Act 1995*. Chapter 1 of the *Code* is stark in its brevity, a solitary provision which declares that the only offences against laws of the Commonwealth are those created by Commonwealth statute. Chapter 2, entitled *General Principles of Criminal Responsibility*, applies to all *Code* offences. There is, in addition, a host of Commonwealth offences, mostly minor and specialised, which do not appear in the *Code*. The Chapter 2 general principles will apply to these from 15<sup>th</sup> December 2001.<sup>8</sup>

The fact that Chapter 2 of the Commonwealth *Code* draws on the *Model Criminal Code* for its statement of general principles is significant. As one might expect of a general code for the states and territories, the substantive provisions and general principles of the *MCC* were largely concerned with the articulation of prohibitions against personal injury or death.<sup>9</sup> That orientation towards area of criminal liability which are of no more marginal importance in federal jurisdiction, has some interesting implications for federal criminal jurisprudence. I shall return to these, briefly, at the conclusion of this paper.

The principles set out in Chapter 2 of the *Code* are primarily concerned with issues of fault rather than punishment. They are conservative or traditional in the

---

<sup>6</sup> The early history of the project is recounted in the Preface to Model Criminal Code: *Chapter 2 - General Principles of Criminal Responsibility*, Final Report December 1992, AGPS 1993.

<sup>7</sup> *MCC - Ch2: General Principles of Criminal Responsibility* (Final Report 1992).

<sup>8</sup> The provisions on intoxication and criminal responsibility in *CC - Ch2: s4.2(6) & (7)* and Division 8 - *Intoxication* came into general effect ??????

<sup>9</sup> *MCC - Ch5: Offences Against the Person* is the largest section by far of the Model Criminal Code. It comprises two reports and a discussion paper, with accompanying draft legislation: *Non Fatal Offences Against the Person* (Report 1998); *Sexual Offences Against the Person* (Report 1999); *Fatal Offences Against the Person* (Discussion Paper 1998, report pending).

sense that their topical coverage of criminal responsibility is typical of 20th century codifications of the criminal law.<sup>10</sup>

- **Part 2.2: *Elements of an Offence*:** The Code distinguishes between physical elements and fault elements - a distinction which displaces the traditional terminology of *actus reus* and *mens rea*. Physical elements include conduct, circumstances and results; fault elements include intention, knowledge, recklessness and negligence. Most *Code* offences are a compound of physical elements and fault elements. Outside the confines of the Code, some minor offences dispense entirely with any requirement of fault.<sup>11</sup>
- **Part 2.3: *Circumstances in which there is no criminal responsibility*:** Proof of fault does not, of itself, establish guilt. Though all elements of an offence are established against a defendant, guilt may be defeated by reliance on a defence. The *Code* adopts a tripartite structure in which criminal responsibility only attaches if the physical and fault elements of the offence are proved and possible defences disproved. Part 2.3 sets out all the familiar general defences to criminal liability.
- **Part 2.4: *Extensions of liability*:** Though the physical and fault elements of an offence cannot be proved, criminal liability is still imposed if the offender attempted to commit the offence, incited or conspired with another to do so or lent support or assistance to another who did commit the offence.
- **Part 2.5 *Corporate criminal responsibility*:** The provisions which extend criminal liability to corporations use the same conceptual vocabulary to do so. Depending on the definition of the offence, corporate crime may require proof of intention, knowledge, recklessness or negligence. Since the primary and familiar applications of the fault elements involve personal rather than

---

<sup>10</sup> Queensland *Criminal Code* 1899: Part 1 - Introductory: Interpretation: Application: General Principles; United States, *Model Penal Code* ALI POD 1962, Article 2 - General Principles of Liability, Article 3 - General Principles of Justification, Article 4 - Responsibility, Article 5 - Inchoate Crimes; England, *A Criminal Code for England and Wales* (1989): Part 1 *General Principles of Liability*; Australia Model Criminal Code - Chapter 2: *General Principles of Criminal Responsibility* (1992, implemented Criminal Code Act 1995 (Cth)). Compare Macaulay's *Indian Penal Code* of 1860, in which the concept of a general part is still emerging. See Chapter 1 - General Explanations; Chapter 2 - Of Punishments; Chapter 3 - General Exceptions; Chapter 4 - Of Abetment; Chapter 23 - Of Attempts to Commit Offences.

<sup>11</sup> Liability without fault is far from uncommon. See, for example, s197 *Customs Act* 1901 (Cth), which confers power on Customs officials to stop vehicles in certain circumstances. Failure to stop is an offence of strict liability, punishable by fine.

corporate agency, the Code translates these concepts into forms of corporate fault. So also when liability is strict or absolute: Chapter 2 provides corporate equivalents to individual liability without fault.

- **Part 2.6: *Proof of criminal responsibility*:** The prosecution bears both the evidential burden and persuasive burdens of proving physical elements and fault elements. With the usual exception of the mental impairment defence, the defendant does not bear the persuasive burden of proving a defence but does bear the evidential burden.

## ELEMENTS OF A CRIMINAL OFFENCE

Chapter 2 of the *Code* is eclectic. It draws on the results of half a century of American, English and Australian criminal law scholarship; on draft codes from other jurisdictions, including the American *Model Penal Code*<sup>12</sup> and on the English draft *Criminal Code Bill* of 1989.<sup>13</sup> The language of the central provisions in *CCA* - Ch2: Part 2.2 - *The Elements of an Offence*, draws heavily on Brennan J's extended consideration of the fundamental elements of criminal responsibility in *He Kaw Teh*,<sup>14</sup> though there are departures from Brennan J's outline at several points. The most significant of these departures involves the concept of recklessness. Recklessness and intention always tended to merge into a single concept in Brennan J's account of criminal responsibility.<sup>15</sup> In the *Code*, where recklessness plays a fundamental role in the delineation of criminal responsibility, it is sharply distinguished from intention.

The central assumptions of the *Code* are familiar in their orthodoxy. It is assumed that criminal liability should not be imposed unless the accused was aware of the circumstances which made the conduct criminal or aware of a substantial risk that

---

<sup>12</sup> *Model Penal Code: Proposed Official Draft*, American Law Institute 1962.

<sup>13</sup> See *Criminal Law: A Criminal Code for England and Wales* (1989) Law Com No177.

<sup>14</sup> (1957) 157 CLR 523.

<sup>15</sup> The merger of intention and recklessness is apparent at a number of points in the judgement of Brennan J in *He Kaw Teh* (1985) 15 A Crim R 203, in particular, at 236-237. For a particularly striking example, see his remarks in the transcript of argument in *Douglas Crabbe*, No8 of 1984, Wednesday 13 February, 1985, 56.

a prohibited harm might result from that conduct.<sup>16</sup> Though the *Code* accepts that criminal liability can be imposed for negligence, it is assumed that instances in which this is done will be exceptional. In practice, federal criminal law has made little use of the concept of negligence to date. Strict liability, which is quite distinct from negligence, is more common. It is assumed however, and practice so far has followed that assumption, that strict liability will be limited to minor offences. Imposition of absolute liability for substantive elements of an offence will be exceedingly rare.<sup>17</sup> These assumptions - this orthodoxy - is expressed, for the most part, in an antiseptic style of exemplary technical clarity.

### Physical Elements, Fault Elements and the Modes of Criminal Culpability

The *physical elements* of an offence must include an element of *conduct* involving the offender. Conduct may be an act, an omission, a state of affairs or some combination of those elements. “Acts” and “omissions” are familiar: the myriad possession offences are the most common instances in which liability is imposed for involvement in a “state of affairs”. The *fault elements* are a more diverse group than physical elements. Chapter 2 of the *Code* defines four distinct fault elements: intention, knowledge, recklessness and negligence. Unlike the exhaustive list of physical elements in Chapter 2, the list of fault elements is open ended. The Chapter 2 fault elements are supplemented, elsewhere in the *Code*, by fault elements of more specialised meaning or application. Dishonesty, which is central to most of the offences of theft, fraud and bribery in the *Code* - Ch7, is the most common of these specialised forms of fault.

---

<sup>16</sup> See, for example, Jerome Hall, *General Principles of Criminal Law* (1947) and subsequent publications; Glanville Williams, *Criminal Law: The General Part* (1ed 1953, 2ed 1961). Glanville Williams’ work provided the theoretical foundation for Professor Colin Howard’s *Australian Criminal Law* (1965). The text went through five editions, in the course of which its title was shortened to *Criminal Law*. In 1990, it was revised by Professor Brent Fisse and republished in its last edition as *Howard’s Criminal Law*.

<sup>17</sup> Absolute liability is commonly imposed in the *Code* for those physical elements of an offence which provide the basis for Commonwealth jurisdiction. So, for example, CC - Ch7: Division 147 - *Causing harm to Commonwealth officials*, imposes absolute liability with respect to the requirement that the public official be a *Commonwealth*, rather than a state or territorial official.

THE COMMONWEALTH <i>CRIMINAL CODE</i> : ELEMENTS OF A CRIMINAL OFFENCE			
PHYSICAL ELEMENTS	CCA	FAULT ELEMENTS	CCA
<b>Conduct:</b> (a) act (b) omission (c) state of affairs <b>Circumstances</b> <b>Results</b>	4.1	<b>Fault</b> (a) Intention (b) Knowledge (c) Recklessness (d) Negligence (e) Dishonesty or other specific forms of fault	5.2 5.3 5.4 5.5 5.1
	4.1		
	4.1	<b>Liability without fault</b> (a) Strict liability (b) Absolute liability	6.1 6.2

### Fault Elements and Uncertainty in Statutory Interpretation

Variations on the principal offence in issue in *He Kaw Teh* - importing a narcotic drug - will serve to illustrate the range of common law fault elements which were codified in Chapter 2. The offence itself is proscribed with extreme and deceptive simplicity: it is an offence “to import any prohibited import”.<sup>18</sup> *He Kaw Teh* was charged with importing a large quantity of heroin, sufficient to expose him to liability for a maximum penalty of life imprisonment.<sup>19</sup> The case was typical of its kind. *He Kaw Teh* takes his place in a long procession of offenders and occasional innocents who are caught in possession of heroin on entering Australia. An international passenger arrives with a suitcase which has a secret compartment in which heroin is found. When charged with the offence the passenger professes surprise and maintains ignorance of the existence of the secret compartment and its contents. The question at issue in 1985, when *He Kaw Teh* sought leave to appeal to the High Court against his conviction, was whether the prosecution was required to disprove that profession of ignorance. There are five possible ways in which courts might respond to the plea of ignorance:

- ***The offence requires proof of intention or knowledge:*** The prosecution must prove that the defendant intended to import heroin or knew that the substance

<sup>18</sup> *Customs Act* 1901 (Cth) s233B(1)(b).

<sup>19</sup> There were also charges of possession, contrary to s233B(1)(c), which involved additional complications, unnecessary for consideration here.

imported was heroin. Though intention and knowledge are distinct fault elements, the distinction between them would have no application here. In the event, of course, the High Court held that the prosecution was indeed required to prove intention or knowledge. The prohibited act was importing heroin and that, said the majority, must be intentional if the accused was to be found guilty.

- ***The offence requires proof of recklessness:*** The prosecution must prove that the defendant was aware that there was a substantial risk that the suitcase contained heroin;
- ***The offence requires proof of negligence:*** The prosecution must prove that the defendant fell grossly short of the standard of care which a reasonable person would take of their baggage to ensure that prohibited imports had not been planted there;<sup>20</sup>
- ***The offence imposes strict liability:*** The prosecution is not required to prove intention, knowledge, recklessness or negligence with respect to the heroin in the baggage. So long as it is established that there was heroin in the baggage, the defendant will be convicted unless the jury is left in a reasonable doubt on the question whether the passenger believed, on reasonable grounds, that the baggage was free of any kind of contraband;<sup>21</sup>
- ***The offence imposes absolute liability:*** Once again, the prosecution is not required to prove intention, knowledge, recklessness or negligence with respect to the heroin in the secret compartment. Unlike the case where strict liability is imposed, however, there is no escape from conviction for a defendant who held a reasonable but mistaken belief that the baggage was free of contraband. Absolute liability is something of a misnomer however. The general defences remain open; in particular, the defence of act of a stranger, or unexpected intervention.<sup>22</sup> Later, I shall have a little more to say of this defence.

---

<sup>20</sup> Since *He Kaw Teh* it has become apparent that courts will not discover a requirement that the prosecution prove negligence in the absence of an express statutory requirement. Prior to *He Kaw Teh*, it had been argued that liability for negligence and strict liability were, in reality, identical forms of culpability. The controversy is summarised WB Fisse, *Howard's Criminal Law* (1990) 512, 521, 616.

<sup>21</sup> The Code defence of reasonable mistake of fact in s9.2 provides no protection to an offender who is mistaken about facts which merely alter the nature or grade of the offence committed.

<sup>22</sup> See *Mayer v Marchant* (1973) 5 SASR 567 for the common law defence of "act of a stranger." Section 10.1 *Intervening conduct or event* is the *Criminal Code* counterpart.

The High Court decision that the prosecution must prove that He Kaw Teh intended to import heroin was of seminal importance. It overturned the hard won consensus reached among State and Territorial courts some years before that a conviction for importing narcotics did *not* require proof that the accused knew anything of the prohibited drug.<sup>23</sup> The decision remains of fundamental importance for its reaffirmation of the presumption that statutory offences require proof of fault. It did little, however, to remove uncertainty on the question when the presumption might be displaced. In *Howard's Criminal Law*, Professor Fisse lamented the absence of a “canon of strict construction” which would require courts to infer that fault is an element of the offence when legislation is inscrutable. Of the decision in *He Kaw Teh*, he remarked:

Assiduous as this commitment to the discovery of legislative intention undoubtedly was, it failed to provide a model for determining the mental element of statutory offences in a consistent manner.

Chapter 2 of the Commonwealth *Code* codifies that “canon of strict construction.” The implications of the change effected by the *Code* are profound. Unless the legislature says otherwise, the prosecution must prove intention or recklessness with respect to each physical element of the offence.

## **FAULT AND GRADES OF CULPABILITY: THRESHOLD AND STAIRCASE**

The fault elements of Chapter 2 and the two forms of liability without fault resemble an ascending ladder or staircase of culpability. Absolute liability stands at the foot of the ladder. Intentional wrongdoing is the highest and most blameworthy form of fault. Offences can be arranged or graded on this ladder of culpability according to the fault required. So, for example, it is a more serious offence in the *Code* to make a statement which is *known* to be false in an application for a permit than to make the same false statement *recklessly*.<sup>24</sup> Here the legislature has distinguished between two relatively minor offences in terms of

---

<sup>23</sup> Decisions effectively overturned by the High Court included: *Gardiner* (1979) 1 A Crim R 265; *Parsons* [1983] 2 VR 499; *Bush* [1975] 1 NSWLR 298; *Rawcliffe* [1977] 1 NSWLR 219; *Kennedy* (1979) 37 FLR 356; *Ditroia v Tucci* [1981] VR 247.

<sup>24</sup> See *Criminal Code* - Ch7: Division 136 - *False or misleading statements in applications*, discussed Appendix 2.

the degree of fault required. If the legislature does not specify fault or culpability, the *Code* will do so by presumption. The most important of the presumptions is s5.6(2), which requires proof that the defendant was reckless, at the least, with respect to incriminating circumstances or results of conduct.<sup>25</sup> If that prohibition against making a false statements in an application had made no reference to fault, the *Code* would require proof of recklessness anyway. Proof, that is to say, that the person who made the statement was aware of a substantial risk that it was false. The other presumptions follow, as a logical consequence from the fact that recklessness sets the threshold for liability in the absence of provision to the contrary. Liability for negligence, strict liability and absolute liability can only be imposed if the presumption in favour of recklessness is displaced:

- **Presumption: 5.6(1) *Intention for acts, omissions or states of affairs***
- **Presumption: 5.6(2): *Recklessness for incriminating circumstances or results***
- **Presumption: s5.6: *Negligence only by specific provision***
- **Presumption: s6.1: *Strict liability only by specific provision***

## **CRIMINAL JURISPRUDENCE AND ELEMENT ANALYSIS IN THE *CRIMINAL CODE***

The *Code* provisions which define the elements of criminal responsibility are addressed to legislators no less than courts. They have the dual function of providing rules both for drafting offences and to govern the interpretation of those offences. When Chapter 2 was enacted it had the immediate consequence that the entirety of Commonwealth criminal law required overhaul, to ensure that it conformed to the *Code* conventions. The process of overhaul - “harmonisation” as it is known - is complete for all of the offences included in the *Code* itself. Harmonisation of the many offences which fall outside the *Code* is nearing completion, in time for the

---

<sup>25</sup> Compare *Model Penal Code*, American Law Institute, POD 1962, s2.02(3)

December 15 deadline at the end of the year. Part 2.2 is akin to interpretation legislation which similarly addresses legislators and courts alike. The conventions which govern criminal responsibility have a deeper level of significance however. These provisions are imbued with a quasi-constitutional status because they articulate principles of common law which are generally taken to embody fundamental principles of criminal justice. The effects on the formulation of federal criminal law have been profound.

I would like to consider two challenges which will be encountered, I believe, as the general principles are subjected to the rigours of argument in the courts. Both involve significant issues in the jurisprudence of criminal responsibility. The first arises from that commitment to the principle that recklessness marks the threshold of criminal liability. The second arises from the sharp distinction which is drawn in the *Code* between negligence and strict liability.

#### RECKLESSNESS AND NEGLIGENCE IN THE *CODE*

I mentioned at the outset that the definitions of fault in the *Code* bear the imprint of their origins in the law relating to offences against the person. None more so than negligence, which is defined in terms drawn from the common law of manslaughter so as to require a gross or shocking departure from acceptable standards of behaviour. That may be of small moment in federal jurisdiction, where few offences require proof of negligence. The relationship of recklessness to the law of offences against the person is more interesting, however, in its implications. Recklessness is the universal fault element. Recklessness as to death is sufficient fault for murder, the most serious of crimes; recklessness is also the presumptive fault element for the most trivial of offences, unless the legislature has made contrary provision. The Code definition of this ubiquitous fault element requires proof that the offender was *aware* of a substantial risk that their conduct might result in a proscribed harm or involve incriminating circumstances.<sup>26</sup> That requirement of *awareness* of risk marks the only real distinction between negligence and recklessness. Maintenance of that distinction will be a demanding task for courts, particularly in jurisdictions where the requirement of actual awareness of risk is not sustained by a constant diet of cases

---

<sup>26</sup> *Code* s5.4(1), (2): “aware of a substantial risk”.

involving the more serious offences against the person. In England, the distinction between recklessness and negligence notoriously collapsed, nearly twenty years ago, in *Caldwell's* case.<sup>27</sup> Recklessness and negligence have remained in a state of intermingled confusion in English law ever since. Though the Commonwealth *Code* and the *MCC* both take the distinction to be fundamental, the differences, in terms of fault, between a person who was actually aware of a risk and another who ought to have been aware, because the risk was obvious, are both contentious and subtle.<sup>28</sup> To maintain that distinction, across the broad range of criminal offences, is likely to prove a demanding challenge. All the more challenging, one might think, in view of the invitation in the *Code* for courts to test a profession of ignorance or mistake by asking the question whether mistake or ignorance was reasonable in the circumstances.<sup>29</sup>

### Strict Liability and Negligence in the *Code*

Provision of the defence of reasonable mistake of fact defines strict liability and distinguishes it both from absolute liability and from fault liability based on intention, knowledge, recklessness or negligence. The defence of reasonable mistake is restrictive in its definition. Ignorance, no matter how reasonable in the circumstances, is no excuse. The defendant must have considered the facts, before it can be said that there was any mistake to provide a basis for the defence. Common law tends to support that requirement of a mistake, though that view of the law is contested, notably by Professor Brent Fisse in *Howard's Criminal Law*. Fisse is an advocate of a more general defence of due diligence, recognized in Canadian and New Zealand law.<sup>30</sup> The due diligence defence treats ignorance and mistake alike, excusing defendants who can demonstrate that they took appropriate care. MCCOC recognised that the decision to exclude reasonable ignorance from the *Code* defence of mistake

---

<sup>27</sup> *Caldwell v Commissioner of Police* [1982] AC 341.

<sup>28</sup> *Simpson* (1998) [HCA] 46. An exploration of the difference, in the Tasmanian law of murder, between liability based on risks which the defendant knew and risks of which the offender "ought to have known": *Criminal Code Act 1924* (Tas) s157.

<sup>29</sup> *Criminal Code* s9.1(2) - *Mistake or ignorance of fact (fault elements other than negligence)*.

<sup>30</sup> WB Fisse, *Howard's Criminal Law* (1990) 500-504, 521-522, 535-536, 560, 616. See also Orchard, "The defence of Absence of Fault in Australasia and Canada" in P Smith, *Criminal Law: Essays in Honour of JC Smith* (1987).

was contentious. It was, however, a calculated measure, meant to ensure that strict liability and negligence remain distinct forms of culpability.<sup>31</sup>

It is possible, however, that the *Code* - wittingly or unwittingly - has opened the door to the due diligence defence in another guise. The potential for injustice which might result from the restrictive definition of reasonable mistake is mitigated by the provision of a defence of *Intervening conduct or event*. No criminal responsibility is imposed for an offence, whether of strict or even absolute liability, if it resulted from events or the act of another, which it would be unreasonable to expect the defendant to guard against.<sup>32</sup> This is not a new defence, but a statutory formulation of South Australian common law,<sup>33</sup> which has long recognised the defence of “act of a stranger”. In the past it seems to have been rarely used and its potential significance has been eclipsed by reasonable mistake of fact.

It is likely that offences which impose strict liability will come to play a significant role in federal criminal law. There is already a substantial number of minor offences, outside the *Code* itself, which impose strict liability. Litigation on these offences may result in the hitherto disregarded defence of act of a stranger achieving a degree of significance in the *Code* which it has so far lacked in the common law.

\*\*\*

---

<sup>31</sup> *MCC - Ch2: General Principles of Criminal Responsibility* (1992), Report 55: “Ultimately the Committee decided ignorance should not be included because this would make strict liability more like negligence, thus eroding the higher standard of compliance set by strict responsibility.”

<sup>32</sup> *Code - Ch2: s10.1.*

<sup>33</sup> The decision in *Mayer v Marchant* (1973) 5 SASR 567 is generally taken as the first to articulate the defence of act of a stranger. It is, in fact, a reformulation of s23 of the Queensland Criminal Code, based explicitly on the brief remarks of Griffith CJ on willed acts and accident, in *Hardgrave* (1906) 4 CLR 232 at 237. See Fisse, *Howard's Criminal Law* 503-504 for an acute discussion of the distinction between the defences of reasonable mistake and act of a stranger culminating in a characteristic argument that each defence is a manifestation of the underlying concept of criminal negligence. .

<sup>33</sup>???

**APPENDIX 1: COMMONWEALTH *CRIMINAL CODE AND MODEL*  
CRIMINAL CODE - ADOPTION TO JULY 2001**

<b>CRIMINAL CODE ACT 1995 (CTH)</b>			<b>MODEL CRIMINAL CODE</b>		
<b>Date</b>	<b>Chapter</b>	<b>Legislation</b>	<b>Date</b>	<b>Chapter</b>	<b>Final Report</b>
1995	1 2	<b>Codification</b> <b>General Principles of Criminal Responsibility</b> <i>Criminal Code Act 1995</i>	1992	1 & 2	<b>General Principles of Criminal Responsibility</b>
1999  2000	4  7  10	<b>The Integrity and Security of the International Community and Foreign Governments</b> <i>CCA (Bribery of Foreign Public Officials) Act 1999</i> <b>The Proper Administration of Government</b> <i>CCA (Theft, Fraud, Bribery and Related Offences) Act 2000</i> <b>National Infrastructure</b> <i>CCA (Theft, Fraud, Bribery and Related Offences) Act 2000</i>	1995  1997	3	1. <b>Theft Fraud, Bribery and Related Offences</b> 2. <b>Conspiracy to Defraud</b>
2001	10	<b>National Infrastructure</b> <i>CCA (Cybercrime) Bill 2002</i>	2001	4	<b>Damage and Computer Offences</b>
1999	4  7	<b>The Integrity and Security of the International Community and Foreign Governments</b> <i>CCA (United Nations and Associated Personnel) Act 2000</i> <b>The Proper Administration of Government</b> <i>CCA (Theft, Fraud, Bribery and Related Offences) Act 2000</i>	1998  1998  1999	5	1. <b>Fatal Offences Against The Person (Discussion Paper)</b> 2. <b>Non Fatal Offences Against the Person</b> 3. <b>Sexual Offences Against The Person</b>
			1998	6	<b>Serious Drug Offences</b>
			1998	7	<b>Administration of Justice Offences</b>
			1998	8	<b>Public Order Offences - Contamination of Goods</b>
1999	8	<b>Offences Against Humanity</b> <i>CCA (Slavery and Sexual Servitude) Act 1999</i>	1998	9	<b>Offences Against Humanity - Slavery</b>

## APPENDIX 2: HOW ELEMENT ANALYSIS WORKS

As one might expect, Commonwealth criminal law is much concerned with offences involving the purveying of false information, suppression of information and failure to provide information. A subset of this very large field, which can be conveniently labelled as “making a false report”, will serve to illustrate the way in which element analysis works. The following illustration is based on the *Criminal Code* - Ch7: Division 136 - *False or misleading statements in applications*, though the provision has been simplified for brevity and clarity. The physical elements are as follows:

1. **A person shall not make a false statement**
2. **To a public official**
3. **Who is a Commonwealth public official**
4. **in an application for a licence**

In the first version, suppose the provision is enacted and the legislation says nothing of the necessary fault elements:

**A person shall not make a false statement to a Commonwealth public official in an application for a licence**

As a consequence, the default provisions of the *Code*, s5.6(1) and (2) will supply fault elements of intention or recklessness for each of the physical elements of the offence. In the second version, which approximates the existing *Code* provision s136.1, there are now two offences. The first, and more serious offence, requires proof that the offender *knew* the statement to be false; the second and lesser offence requires *recklessness* as to falsity. In each of these offences, *absolute liability* is imposed with respect to the requirement that the official be employed by the Commonwealth, rather than a state or territorial government.

<b>COMPARISON: APPLICATION AND DISPLACEMENT OF FAULT PRESUMPTIONS: MAKING FALSE STATEMENTS IN APPLICATIONS</b>			
<b>PHYSICAL ELEMENTS</b>		<b>CODE provision</b>	<b>FAULT ELEMENTS</b>
<b>1. FIRST VERSION: CRIMINAL CODE FAULT PRESUMPTIONS APPLY</b>			
<b>ACT</b>	Make a false statement to a person	s5.6(1)	<i>Intention</i> to make a false statement
<b>CIRCUMSTANCE</b>	In application for licence	s5.6(2)	<i>Reckless</i> (at least) as to the nature of transaction
<b>CIRCUMSTANCE</b>	To a public official	s5.6(2)	<i>Reckless</i> (at least) as to the status of the person to whom the statement was made
<b>CIRCUMSTANCE</b>	Who is a Commonwealth public official	s5.6(2)	<i>Reckless</i> (at least) as to the fact that this is a Commonwealth official.
<b>2. SECOND VERSION: FAULT PRESUMPTIONS DISPLACED BY SPECIFIC PROVISIONS</b> [Changes in bold]			
<b>ACT</b>	Make a statement	5.6(1)	<i>Intention</i> to make a statement
<b>CIRCUMSTANCE</b>	<b>Statement is false</b>	<b>Displaced</b>	<b>[OFFENCE 1] <i>knowing</i> the statement to be false [Penalty 12 months]</b>
<b>CIRCUMSTANCE</b>	<b>Statement is false</b>	<b>Displaced</b>	<b>[OFFENCE 2] <i>Reckless</i> (at least) as to the falsity of the statement [Penalty 6 months]</b>
<b>CIRCUMSTANCE</b>	In application for licence	s5.6(2)	<i>Reckless</i> (at least) as to the nature of transaction
<b>CIRCUMSTANCE</b>	To a public official	s5.6(2)	<i>Reckless</i> (at least) as to the fact that the person is a public official
<b>CIRCUMSTANCE</b>	Who is a Commonwealth public official	<b>Displaced</b>	<b><i>Absolute liability</i> as to the fact that the persons is a Commonwealth public official</b>