

2001

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Attorney-General)

Criminal Code 2001

Contents

	Page	
Chapter 1	Preliminary	
1	Name of Act	2
2	Commencement	2
3	Dictionary	2
4	Notes	3
Chapter 2	General principles of criminal responsibility	
Part 2.1	Purpose and application	
5	Purpose of ch 2	4
6	Application of ch 2	4

2001 066B

		Page
Part 2.2	The elements of an offence	
Division 2.2.1	General	
7	Elements	5
8	Establishing guilt of offences	5
Division 2.2.2	Physical elements	
9	Physical elements	5
10	Voluntariness	6
11	Omissions	6
Division 2.2.3	Fault elements	
12	Fault elements	7
13	Intention	7
14	Knowledge	7
15	Recklessness	7
16	Negligence	8
Division 2.2.4	Cases where fault elements are not required	
17	Strict liability	8
18	Absolute liability	9
Part 2.3	Circumstances where there is no criminal responsibility	
19	Mistake or ignorance of fact—fault elements other than negligence	10
20	Mistake of fact—strict liability	10
21	Mistake or ignorance of statute law	11
22	Claim of right	11
Part 2.6	Proof of criminal responsibility	
23	Legal burden of proof—prosecution	13
24	Standard of proof—prosecution	13
25	Evidential burden of proof—defence	13
26	Legal burden of proof—defence	14
27	Standard of proof—defence	14
28	Use of averments	14

		Contents
		Page
Chapter 3	Miscellaneous	
29	Regulation-making power	16
30	Consequential amendments—sch 1	16
Schedule 1	Consequential amendments	17
Part 1	Interpretation Act 1967	17
Part 2	Magistrates Court Act 1930	17
Dictionary		18

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(Attorney-General)

Criminal Code 2001

A Bill for

An Act relating to the criminal law

The Legislative Assembly for the Australian Capital Territory enacts as follows:

2001 066B

1

2 **Chapter 1 Preliminary**

3

4

5 **1 Name of Act**

6 This Act is the *Criminal Code 2001*.

7 **2 Commencement**

8 This Act commences on a day fixed by the Minister by notice in the
9 Gazette.

10 *Note 1* The naming and commencement provisions automatically commence on
11 the notification day (see *Legislation Act 2001*, s 75).

12 *Note 2* A single day or time may be fixed, or different days or times may be
13 fixed, for the commencement of different provisions (see *Legislation*
14 *Act 2001*, s 77 (1)).

15 *Note 3* If a provision has not commenced within 6 months beginning on the
16 notification day, it automatically commences on the first day after that
17 period (see *Legislation Act 2000*, s 79).

18 **3 Dictionary**

19 The dictionary at the end of this Act is part of this Act.

20 *Note 1* The dictionary at the end of this Act defines certain words and
21 expressions used in this Act, and includes references (*signpost*
22 *definitions*) to other words and expressions defined elsewhere in this
23 Act.

24 For example, the signpost definition '*conduct*—see section 9(2)
25 (Physical elements).' means that the expression 'conduct' is defined in
26 that section.

27 *Note 2* A definition in the dictionary (including a signpost definition) applies to
28 the entire Act unless the definition, or another provision of the Act,
29 provides otherwise or the contrary intention otherwise appears (see
30 *Interpretation Act 1967*, s 11F and s 11G).

1 **4 Notes**

2 A note included in this Act is explanatory and is not part of this Act.

3 *Note* See *Interpretation Act 1967*, s 12 (1), (4) and (5) for the legal status of
4 notes.

1

2 **Part 2.2 The elements of an offence**

3 **Division 2.2.1 General**

4 **7 Elements**

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

10 **8 Establishing guilt of offences**

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

- 13 (a) the existence of the physical elements that are, under the law
14 creating the offence, relevant to establishing guilt;
15 (b) for each of the physical elements for which a fault element is
16 required, 1 of the fault elements for the physical element.

17 *Note* See pt 2.6 on proof of criminal responsibility.

18 **Division 2.2.2 Physical elements**

19 **9 Physical elements**

- 20 (1) A physical element of an offence may be—
21 (a) conduct; or
22 (b) a circumstance in which conduct happens; or
23 (c) a result of conduct.
24 (2) In this Act:

1 *conduct* means an act, an omission to perform an act or a state of
2 affairs.

3 **10 Voluntariness**

- 4 (1) Conduct can only be a physical element if it is voluntary.
5 (2) Conduct is voluntary only if it is a product of the will of the person
6 whose conduct it is.
7 (3) The following are examples of conduct that is not voluntary:
8 (a) a spasm, convulsion or other unwilld bodily movement;
9 (b) an act performed during sleep or unconsciousness;
10 (c) an act performed during impaired consciousness depriving the
11 person of the will to act.
12 (4) An omission to perform an act is voluntary only if the act omitted is
13 an act that the person can perform.
14 (5) If the conduct constituting an offence consists only of a state of
15 affairs, the state of affairs is voluntary only if it is a state of affairs
16 over which the person can exercise control.

17 *Note* The *Crimes Act 1900*, part 11B deals with intoxication.

18 **11 Omissions**

- 19 An omission to perform an act can only be a physical element if—
20 (a) the law creating the offence makes it a physical element; or
21 (b) the law creating the offence impliedly provides that the offence
22 is committed by an omission to perform an act that, by law,
23 there is a duty to perform.

1 **Division 2.2.3** **Fault elements**

2 **12** **Fault elements**

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

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

7 **13** **Intention**

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

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

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

15 **14** **Knowledge**

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

18 **15** **Recklessness**

19 (1) A person is reckless in relation to a circumstance if—

20 (a) the person is aware of a substantial risk that the circumstance
21 exists or will exist; and

22 (b) having regard to the circumstances known to the person, it is
23 unjustifiable to take the risk.

24 (2) A person is reckless in relation to a result if—

25 (a) the person is aware of a substantial risk that the result will
26 happen; and

- 1 (b) having regard to the circumstances known to the person, it is
2 unjustifiable to take the risk.
- 3 (3) The question whether taking a risk is unjustifiable is a question of
4 fact.
- 5 (4) If recklessness is a fault element for a physical element of an
6 offence, proof of intention, knowledge or recklessness satisfies the
7 fault element.

8 **16 Negligence**

9 A person is negligent in relation to a physical element of an offence
10 if the person's conduct merits criminal punishment for the offence
11 because it involves—

- 12 (a) such a great falling short of the standard of care that a
13 reasonable person would exercise in the circumstances; and
14 (b) such a high risk that the physical element exists or will exist.

15 **Division 2.2.4 Cases where fault elements are not**
16 **required**

17 **17 Strict liability**

- 18 (1) If a law that creates an offence provides that the offence is an
19 offence of strict liability—
- 20 (a) there are no fault elements for any of the physical elements of
21 the offence; and
- 22 (b) the defence of mistake of fact under section 20 (Mistake of
23 fact—strict liability) is available.
- 24 (2) If a law that creates an offence provides that strict liability applies to
25 a particular physical element of the offence—
- 26 (a) there are no fault elements for that physical element; and
27 (b) the defence of mistake of fact under section 20 is available in
28 relation to that physical element.

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

3 **18 Absolute liability**

- 4 (1) If a law that creates an offence provides that the offence is an
5 offence of absolute liability—
6 (a) there are no fault elements for any of the physical elements of
7 the offence; and
8 (b) the defence of mistake of fact under section 20 (Mistake of
9 fact—strict liability) is not available.
10 (2) If a law that creates an offence provides that absolute liability
11 applies to a particular physical element of the offence—
12 (a) there are no fault elements for that physical element; and
13 (b) the defence of mistake of fact under section 20 is not available
14 in relation to that physical element.
15 (3) The existence of absolute liability does not make any other defence
16 unavailable.

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2 **Part 2.3** **Circumstances where there is**
3 **no criminal responsibility**
4

5 **19 Mistake or ignorance of fact—fault elements other than**
6 **negligence**

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

10 (a) at the time of the conduct constituting the physical element, the
11 person is under a mistaken belief about, or is ignorant of, facts;
12 and

13 (b) the existence of the mistaken belief or ignorance negates any
14 fault element applying to that physical element.

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

18 **20 Mistake of fact—strict liability**

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

21 (a) at or before the time of the conduct constituting the physical
22 element, the person considered whether or not facts existed,
23 and was under a mistaken but reasonable belief about those
24 facts; and

25 (b) had those facts existed, the conduct would not have constituted
26 an offence.

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

- 1 (a) the person had considered, on a previous occasion, whether
2 those facts existed in the circumstances surrounding that
3 occasion; and
- 4 (b) the person honestly and reasonably believed that the
5 circumstances surrounding the present occasion were the same,
6 or substantially the same, as those surrounding the previous
7 occasion.

8 *Note* Section 18 (Absolute liability) prevents this section applying to offences
9 of absolute liability.

10 **21 Mistake or ignorance of statute law**

- 11 (1) A person can be criminally responsible for an offence even if, at the
12 time of the conduct constituting the offence, the person is mistaken
13 about, or ignorant of, the existence or content of a law that directly
14 or indirectly creates the offence or affects its scope or operation.
- 15 (2) Subsection (1) does not apply, and the person is not criminally
16 responsible for the offence in those circumstances, if—
- 17 (a) a law expressly or impliedly provides that the person is not
18 criminally responsible; or
- 19 (b) the ignorance or mistake negates a fault element applying to a
20 physical element of the offence.
- 21 (3) In this section:
22 *law* means an Act or subordinate law.

23 **22 Claim of right**

- 24 (1) A person is not criminally responsible for an offence that has a
25 physical element relating to property if—
- 26 (a) at the time of the conduct constituting the offence, the person is
27 under a mistaken belief about a proprietary or possessory right;
28 and

Section 22

- 1 (b) the existence of the right would negate a fault element for any
2 physical element of the offence.
- 3 (2) A person is not criminally responsible for any other offence arising
4 necessarily out of the exercise of a proprietary or possessory right
5 that the person mistakenly believes to exist.
- 6 (3) This section does not negate criminal responsibility for an offence
7 relating to the use of force against a person.

1

2 **Part 2.6** **Proof of criminal responsibility**

3

4 *Note* The part numbering is out of sequence because it follows the part
5 numbering in the *Criminal Code Act 1995*, sch (Cwlth).

6 **23 Legal burden of proof—prosecution**

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

9 *Note* See s 7 (Elements) on what elements are relevant to a person's guilt.

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

13 (3) In this Act:

14 *legal burden*, in relation to a matter, means the burden of proving
15 the existence of the matter.

16 **24 Standard of proof—prosecution**

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

19 (2) Subsection (1) does not apply if an Act or subordinate law provides
20 for a different standard of proof.

21 **25 Evidential burden of proof—defence**

22 (1) Subject to section 26 (Legal burden of proof—defence), a burden of
23 proof that a law imposes on a defendant is an evidential burden
24 only.

25 (2) A defendant who wishes to deny criminal responsibility by relying
26 on a provision of part 2.3 (Circumstances where there is no criminal
27 responsibility) has an evidential burden in relation to the matter.

Section 26

- 1 (3) Subject to section 26, a defendant who wishes to rely on any
2 exception, exemption, excuse, qualification or justification provided
3 by the law creating an offence (whether or not it accompanies the
4 description of the offence) has an evidential burden in relation to the
5 matter.
- 6 (4) The defendant no longer has the evidential burden in relation to a
7 matter if evidence sufficient to discharge the burden is presented by
8 the prosecution.
- 9 (5) The question whether an evidential burden has been discharged is a
10 question of law.
- 11 (6) In this Act:

12 *evidential burden*, in relation to a matter, means the burden of
13 presenting or pointing to evidence that suggests a reasonable
14 possibility that the matter exists or does not exist.

15 **26 Legal burden of proof—defence**

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

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

23 **27 Standard of proof—defence**

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

26 **28 Use of averments**

27 A law that allows the prosecution to make an averment (however
28 expressed) does not allow the prosecution—

- 1 (a) to aver any fault element of an offence; or
- 2 (b) to make an averment in prosecuting for an offence that is
- 3 directly punishable by imprisonment.

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Chapter 3 Miscellaneous

29 Regulation-making power

The Executive may make regulations for this Act.

Note Regulations must be notified, and presented to the Legislative
Assembly, under the *Legislation Act 2001*.

30 Consequential amendments—sch 1

Schedule 1 amends the Acts mentioned in it.

1

2 **Schedule 1** **Consequential amendments**
3 (see s 30)

4 **Part 1** **Interpretation Act 1967**

5 **[1.1] Section 33G**

6 *omit*

7 14,

8 **Part 2** **Magistrates Court Act 1930**

9 **[1.2] Section 59**

10 *omit*

1

2 **Dictionary**

3 (see s 3)

4 *conduct*—see section 9 (2) (Physical elements).

5 *evidential burden*—see section 25 (6) (Evidential burden of proof—
6 defence).

7 *fault element*—see section 12.

8 *intention*—see section 13.

9 *knowledge*—see section 14.

10 *law* means a law of the Territory, and includes this Act.

11 *legal burden*—see section 23 (Legal burden of proof—prosecution).

12 *negligence*—see section 16.

13 *offence* means an offence against a law of the Territory.

14 *physical element*—see section 9.

15 *recklessness*—see section 15.