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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CRIMINAL CODE (ADMINISTRATION OF JUSTICE OFFENCES) AMENDMENT BILL 2005

EXPLANATORY STATEMENT

Circulated by authority of
Katy Gallagher MLA
Acting Attorney General

Outline

The Criminal Code (Administration of Justice Offences) Amendment Bill 2005 (the Bill) amends the *Criminal Code 2002* (the Criminal Code) by inserting new chapter 7, which deals with offences directed to ensuring the proper administration of justice in the ACT.

This Bill represents the fifth stage in a process that began in September 2001 to progressively reform and codify the criminal law of the ACT. The reforms are primarily based on the Model Criminal Code (the MCC), developed by the national Model Criminal Code Officers Committee (MCCOC) and established by the Standing Committee of Attorneys-General. All governments committed themselves to the development of a uniform criminal code in 1991 and through the Standing Committee of Attorneys-General established MCCOC for that purpose. MCCOC is made up of Territory, State and Commonwealth criminal law advisers and since 1991 embarked on an extensive consultative program that saw the development of nine chapters of the MCC for implementation by all Australian jurisdictions.

Since September 2001 the Criminal Code has progressively grown in volume and to date it consists of five chapters, which deal with a broad and diverse range of matters. Chapters 1 and 2 deal with preliminary matters and, most importantly, with the general principles of criminal responsibility; chapter 3 contains the Criminal Code offences on theft, fraud, bribery and related matters; chapter 4 deals with property offences and computer crime; and the most recent addition, chapter 6, contains the ACT's serious drug offences.

The proposed new chapter 7 incorporates offences based on the MCCOC chapter 7 report, issued in July 1998 and titled "*Administration of Justice Offences"* (the MCCOC report) but also includes a number of related summary offences that have either been suggested by MCCOC or have been prepared by the department as generic offences to replace standard offences that commonly appear throughout the statute book. The Bill also contains some technical amendments to existing chapters of the Code, which are discussed more fully in the body of this Explanatory Statement.

At present, the law in the ACT that deals with the proper administration of justice is partly contained in the *Crimes Act 1900* ("the Crimes Act") and partly in the common law. The relevant Crimes Act offences appear mainly in Part 8 (Perjury and like offences) and Part 9 (Accessories after the fact) but they are far from comprehensive so that it is necessary to consult the common law in order to ascertain the full range of conduct that is proscribed in this area of the law. Also the Crimes Act offences that are included are generally not self-contained. For example, section 167 of the Crimes Act provides that "a person who commits the crime of perjury shall be liable to imprisonment for 7 years". However, the Act does not define perjury so that it is necessary to research the common law in order to determine the elements that must be proved in order to establish the offence.

The Bill will improve the accessibility and effectiveness of the law in this area by conveniently locating the offences in one discrete chapter of the Criminal Code and comprehensively setting out in clear language the elements, defences and other relevant qualifications that apply to each

offence. Essentially the Bill will replace the existing Crimes Act and common law offences with a range of specific offences that deal with the following:

- Perjury and aggravated perjury (division 7.2.1);
- Falsifying, destroying or concealing evidence (division 7.2.2);
- Interfering with witnesses, interpreters, jurors and court officers, including deceiving, corrupting, threatening or causing reprisals against witnesses etc (division 7.2.3);
- Perverting the course justice and related matters, including publications that cause a miscarriage of justice and false accusation of an offence (division 7.2.4);
- Accessories after the fact (clause 718);
- Summary offences related to the proper administration of legal proceedings (Part 7.2).

The indictable offences in chapter 7 will apply more broadly then is currently the case under ACT law (common law). At present, the relevant ACT law, such as perjury, requires the testimony to be given in or in connection to judicial proceedings. On the other hand, the chapter 7 offences refer to "legal proceedings", which has an extended meaning to include any "proceeding in which evidence may be taken on oath" (or affirmation). Accordingly, administrative proceedings, as well as judicial proceedings, will be caught by the offences provided that they include the power to take evidence on oath or affirmation. This is consistent with the current position in most Australian jurisdictions and will avoid a need for the courts to consider the often-complex question about whether a tribunal or other entity was exercising judicial powers in order to determine the applicability of the offences under this chapter.

Division 7.2.1 contains the perjury and aggravated perjury offences in the chapter. MCCOC did not recommend the inclusion of an aggravated perjury offence but one currently exists in the Crimes Act and given the mischief that it is directed against, it is appropriate to retain it. The Bill offences will clearly set out the elements that apply, including that the sworn statement must be false, in fact, and that the fault element that applies is recklessness about the falsity. This contrasts with the less clear common law formulation that the defendant "does not believe his or her statement to be true". Clause 704 in this division will clarify some important ancillary matters concerning perjury, including that it does not matter whether the sworn statement relates to something material in the proceedings or whether it is admitted into evidence (provided that it is made in or for legal proceedings) and that a statement of an opinion that is not genuinely held is a false statement for the purposes of the perjury offences. In accordance with the current law people who lack the capacity to understand the obligation to give truthful evidence (for example, children and the mentally impaired) will not to be subject to the perjury offences but other categories of "incompetent" witnesses (for example a juror who mistakenly gives evidence in proceedings about matters affecting the conduct of the proceeding) will be liable if they give false sworn evidence. Further, the old common law rule that a person cannot be convicted for perjury on the uncorroborated evidence of one witness will no longer apply, essentially because the rule is largely ineffective in practice and there are no sufficient reasons to justify a distinction in this regard between perjury and other serious offences. The division will also clarify the application of the law of perjury with respect to interpreters in legal proceedings by including specific offences for interpreters who give false or misleading interpretations and are reckless about that fact.

Divisions 7.2.2 and 7.2.3 relate to conduct that generally falls under the common law offence of perverting or attempting to pervert the course of justice. Although the Bill also includes a general offence of perverting the course of justice (clause 714) it is important to clearly identify and define the conduct proscribed so that there can be no doubt about the seriousness with which the law views these matters. Also, delineating the ways in which justice can be perverted in the form of separate statutory offences will enhance the community's understanding of the offences concerned. The division includes offences of making or using false evidence (clause 705), destroying or concealing evidence (clause 706), corruption (bribery) of or by witnesses, interpreters, jurors and others involved in legal proceedings (clause 707), preventing the production of evidence in legal proceedings and the attendance of witnesses, interpreters, jurors and others (clauses 711 and 710) and deceiving, threatening or taking reprisals against witnesses, interpreters, jurors and others (clauses 708, 709, 712 and 713).

Division 7.2.4 includes the general offence of perverting the course of justice. It is important to include this general offence to cover criminal behaviour that may not be caught by the specific offences so that there are no gaps in this very important area of the law. The Bill offence will clarify some matters that are not clear under the corresponding common law offence, including the fault element, which under the Bill is an intention to pervert the course of justice. The division also includes the offence of being an accessory after the fact. That is, where a person assists someone who has committed an offence to either escape justice or realise the proceeds of his or her crime. The Bill offence closely follows the corresponding Crimes Act offence in section 181 although it has a wider scope in that it applies where a person assists someone he or she "believes" committed an offence, whereas the Crimes Act requires proof of knowledge.

Part 7.2 contains summary offences that have either been suggested in the MCCOC report or have been included to replace commonly repeated offences in the statute book that are related to the administration of justice. The summary offences suggested by MCCOC are the offences of pleading guilty in another name (clause 719) and obstructing or hindering an investigation (clause 726). The generic offences have generally been formulated in terms that are similar to the common offences that they are replacing. They include offences of failing to attend legal proceedings to give evidence (clause 720), failing to produce documents and other things (clause 721), failing to take the oath (clause 722), failing to answer questions (clause 723), a summary offence of giving false or misleading evidence (clause 724) and obstructing legal proceedings (clause 725). The inclusion of these offences will simplify and reduce the size of the statute book by eliminating unnecessary duplication and will also advance an important objective of the Criminal Code, which is to standardise and centralise offences so that they are more easily understood and accessible.

Part 7.4 contains procedural provisions that are related to the offences in chapter 7 and essentially follow the recommended provisions in the MCCOC report.

NOTES ON CLAUSES

Clause 1 Name of Act

This clause explains that the name of the Act is the *Criminal Code (Administration of Justice Offences) Amendment Act 2005*

Clause 2 Commencement

This clause explains that the Bill will commence 28 days after the day it is notified.

Clause 3 Legislation amended

This clause explains that the Bill will amend the *Criminal Code 2002* ("the Criminal Code") and the Acts and Regulations mentioned in Schedule 1 of the Bill.

Clause 4 Delayed application of chapter 2 to certain offences, sections 8(1) and (3)

Sections 8 and 10 of the Criminal Code refer to certain provisions of chapter 2 as "immediately applied provisions". They are the provisions that apply to all ACT offences, regardless of whether the offences were created before of after 1 January 2003. This clause simply changes the expression "immediately applied provisions" to "applied provisions". This will not alter the effect of sections 8 and 10. However, it is a more accurate expression now that part 2.5 of chapter 2 has been added to the list of "applied provisions" and did not "immediately" apply when chapter 2 was first enacted. See also the amendment in clause 5 below and the note with respect to part 2.5.

Clause 5 Section 10

The main purpose of this clause is to amend the "default application date" in section 10 from 1 January 2006 to 1 July 2007. Section 10 currently provides, in effect, that chapter 2 of the Criminal Code will generally apply to all ACT offences created after 1 January 2003 but that it will not apply to pre January 2003 offences until the "default application date". It has been necessary to delay the application of chapter 2 to pre January 2003 offences to allow time to "harmonise" them to conform to the general principles of criminal responsibility in chapter 2. Although good progress has been made harmonising the pre January 2003 offences, there is still some considerable work to be done and it is therefore necessary to change the default application date to 1 July 2007. New section 10 will also use the new expression "applied provisions" and not "immediately applied provisions". See the commentary to clause 4 above.

Clause 6 Establishing guilt of offences, section 12

This is a minor technical amendment to section 12 of the Criminal Code and should be read with clauses 7 and 8 of the Bill. The clause will effectively identify the current provisions in section 12 as subsection (1), and clause 7 will insert a new provision that will be subsection (2).

Clause 7 New section 12(2)

This clause should be read with clauses 6 and 8 of the Bill, which together will amend section 12 and repeal section 37 of the Criminal Code. The amendments are technical in nature and are aimed at clarifying the intended effect of what is currently subsection 37(1) of the Criminal Code. Essentially the clauses will remove section 37 in its entirety and relocate a modified version to new subsection 12(2). The Commonwealth has recently made similar amendments to section 9.3 of its Criminal Code (which corresponds to section 37), however, it has not relocated its equivalent of subsection 37(1). See item 5 of schedule 4 of the Commonwealth *Crimes Legislation Amendment (Telecommunications Offences and other Measures) Act (No. 2) 2004*. It is considered, however, that the Commonwealth's new section 9.3 and new subsection 12(2) of the Criminal Code are to the same effect and will operate in the same way.

The purpose of these amendments is to deal with an issue commonly referred to as the "knowledge of law" issue. Subsection 37(1) of the Criminal Code provides that a person can be criminally responsible for an offence even though the person is mistaken about or ignorant of the existence or content of a law that creates the offence. However, subsection 37(2) qualifies this by positively asserting that a person is not criminally responsible if the offence is either (i) expressly or "impliedly" to the contrary effect or (ii) the person's ignorance or mistake negates a fault element for a physical element of the offence. This is problematic because subsection 37(2) (and section 22 of the Criminal Code) could operate to mean that a simple cross-reference in an offence to another provision impliedly displaces the general rule in subsection 37(1) and requires the prosecution to prove that the person knew or was aware of the existence (or content) of the provision referred to. For example, it may be an offence for a person to contravene a direction given under "section 5 of the Act". Generally the prosecution is not required to establish that the person knew or was aware that the direction was given under a particular section of an Act – only that the person was given a direction. If the offence were read to imply that the person needed to have knowledge that the direction was made pursuant to "section 5 of the Act", the prosecution would be required to prove that element. In most cases this would be difficult or impossible.

Cross-referencing in legislation is a common drafting device and, in most cases, such an interpretation would be contrary to the intended effect of the particular offence provision. To date, this problem has been overcome by applying "absolute liability" to the cross referencing element but this makes drafting more complex and involves over-use of a term that should be used sparingly. A longer-term solution is required. Accordingly, these amendments will clarify the operation of the general principle (currently in subsection 37(1)) and ensure that the court is not compelled to require proof of knowledge of the law or the content of a law unless the relevant offence provision expressly requires it. "Expressly" will be evidenced where a fault element (such as "knowledge", "recklessness" or "intention" etc) is stated with respect to the relevant physical element of the offence to require awareness about the law. For example, the relevant provision could state that a person commits an offence "if the person intentionally contravenes a direction made under section 5 and the person knows that the direction was made under section 5". Unless subsection 12(2) is expressly excluded the general principle in that

provision will operate and the court will not be compelled to require proof of an awareness of the law or the content of a law.

Clause 8 Mistake or ignorance of law creating offence, section 37

This clause repeals section 37 of the Criminal Code but a modified form of the section will be reinserted by clause 7 of the Bill as new subsection 12 (2) of the Criminal Code (see the commentary to clause 7). It is considered preferable to relocate the general principle in subsection 37(1) because it is an important rule about proof of fault and therefore more relevantly placed in part 2.2 of the Code.

Clause 9 Complicity and common purpose, new section 45(8) to (11)

The purpose of this amendment is to clarify the operation of section 45 of the Criminal Code. Subsection (1) of that section provides that a person is taken to have committed an offence if the person aids, abets, counsels or procures the commission of the offence "by someone else". In cases such as bar room brawls it is often unclear who committed the relevant offence and who aided or abetted etc that offence (that is, who struck the blow that caused grievous bodily harm). Since section 45 requires proof of aiding or abetting etc someone else's offence a prosecution under that provision can fail if the matter is unclear. The proposed amendment will ensure that in such cases a person can be convicted under section 45 of the Criminal Code provided that the jury is satisfied beyond a reasonable doubt that the defendant either committed the offence or aided or abetted etc the offence but can't determine which. It is important to note that proposed new subsection 45(8) is not an alternative verdict provision. The effect of the subsection - that a person can be found to have committed an offence on a different basis - is contemplated by subsection 45(1).

New subsection (9) is a transitional provision that provides that new subsection (8) will only apply to prosecutions started after the commencement of the subsection (which is 28 days after notification). The amendment will not apply to prosecutions already commenced, but could apply to an offence committed before the provision commences (if the prosecution is not brought until after commencement).

New subsections (10) and (11) are mechanical provisions that provide, in effect, that the transitional provision in subsection (9) will expire after 1 year, but that it will continue to have legal effect after it has expired.

Clause 10 Obtaining financial advantage from the Territory, section 335(1)(a)

Section 335 of the Criminal Code contains two offences of obtaining a financial advantage. There is some concern that, as currently drafted, section 335 does not make it clear that "obtains a financial advantage" in paragraphs (1)(a) consists of a conduct element and a result element. Accordingly, this provision inserts a new paragraph (a) that makes it clear that there is a conduct and a result element in the offence. Although clarified, the substance and effect of the offence is not changed by this amendment.

Clause 11 Section 335(3)(a)

Like clause 10 and for the same reasons this provision will insert a new paragraph 335(3)(a) to make it clear that there is a conduct and a result element in the offence in subsection 335(3).

Clause 12 New section 336A

This clause will insert a new offence in chapter 3 of the Criminal Code relating to the making of false statements on oath or in a statutory declaration. Since the offence does not require the false statement to be made in relation to legal proceedings it is more appropriate for inclusion in chapter 3 then chapter 7.

The clause provides that a person commits an offence if he or she makes a false statement on oath or in a statutory declaration and the person knows that the statement is false. The maximum penalty is five years imprisonment or 500 penalty units ($50,000) or both, which accords with the maximum penalty for the similar offence in section 170 of the *Crimes Act 1900* ("the Crimes Act"), which this offence will replace.

The dictionary of the *Legislation Act 2001* ("the Legislation Act") defines "oath" to include an affirmation and also defines "statutory declaration" as a statutory declaration made under the Commonwealth *Statutory Declarations Act 1959*. Although that Act currently operates in the ACT and will continue to do so, it is appropriate for the ACT to have its own offence for making a false statutory declaration. However, this offence will apply to any false statement on oath, whether or not it is made in a statutory declaration.

Clause 13 New chapter 7

This clause will insert new chapter 7 in the Criminal Code

Chapter 7 Administration of Justice Offences

Part 7.1 Interpretation for chapter 7

Clause 700 Definitions for chapter 7

This part contains definitions that apply throughout the whole of chapter 7.

Cause –This definition explains that where an offence refers to "causes" a detriment or another result, such as in the offence of causing a detriment in clause 712, the person will be taken to cause the detriment etc if his or her conduct substantially contributes to the detriment or other result.

Evidence – this clause gives an extended meaning to the terms "evidence" and is intended to ensure that the term encompasses the statements and things etc that could be used as evidence in legal proceedings as well as anything that has been admitted into evidence. The term is used extensively throughout chapter 7, including sections 705 (making or using false

evidence), 706 (destroying or concealing evidence), 707 (corruption in relation to legal proceedings), 708 (deceiving witnesses etc), 709 (threatening witnesses etc), 711 (preventing production of thing in evidence), 719 (failing to attend) and 721 (failing to take oath).

Interpreter – This clause clarifies the meaning of the term "interpreter" for the purposes of the offences in this chapter. It provides, in effect, that in addition to the plain English meaning of that term, the expression also includes a person who interprets signs or other things made or done by someone who cannot speak adequately for the purpose of giving evidence in legal proceedings. For example, a person who interprets sign language in legal proceedings for someone who is unable to speak. A number of offences in part 7.2 of this chapter apply with respect to interpreters, including perjury and aggravated perjury (clauses 702(2) and 703(2)), corruption in relation to legal proceedings (clauses 707(1) and (2)) and the offences of deceiving, threatening, taking reprisals against and preventing the attendance of witnesses, interpreters or jurors (clauses 708, 709, 710 and 712).

Law enforcement officer – This definition is important for the offences in clauses 715 (false accusation and false charges), 716 (compounding) and 725 (obstructing or hindering an investigation), which apply with respect to "law enforcement officers". The term is defined broadly so that in addition to the ACT police the term also means the police of another Australian or foreign jurisdiction; a person exercising a law enforcement function for the Australian Customs Service or the Australian Crime Commission; the Attorneys-General of the ACT and another Australian jurisdiction; the director of public prosecutions ("the DPP"), or a person performing a similar function under a law of another Australian jurisdiction; a person employed in the office of the DPP or a similar entity established under a law of another Australian jurisdiction; any other person responsible for the investigation or prosecution of offences against a territory law, or a law under another Australian jurisdiction; and a lawyer to the extent that she or he is engaged to prosecute offences against a territory law, or a law of another Australian jurisdiction.

Statement - This term appears in the context of the expression "sworn statement" in clauses 702 (aggravated perjury), 703 (perjury), 704 (ancillary provisions relating to perjury and aggravated perjury) and 723 (giving false or misleading evidence) and also in the context of the expression "unsworn statement" in clause 723. The provision explains that the term means any statement made orally, in a document or in any other way. A person who states something using sign language, for example, would be caught by this definition.

Sworn statement – This expression appears in clauses 702 (aggravated perjury), 703 (perjury), 704 (ancillary provisions relating to perjury and aggravated perjury) and 723 (giving false or misleading evidence). The provision explains that the term "sworn statement" means a statement that is made or verified on oath (such as oral testimony or a statement made in an affidavit). It is important in this context to have regard to the dictionary definition of "oath" in the Legislation Act, which provides that that term includes an affirmation, a declaration and a promise.

Subpoena - This definition is relevant to the offences in clauses 719 (failing to attend a legal proceeding) and 720 (failing to produce document or other thing) of part 7.2 of chapter 7.

The offences in part 7.2 (including sections 719 and 720) are intended to operate as generic offences to replace the numerous similar offences in the statute book. Since the existing offences apply to summonses and notices as well as subpoenas the term "subpoena" has been defined to include a summons or notice (however described) issued by an entity for a legal proceeding before the entity.

Witness – This definition makes it clear that the term "witness" can include a person who has not been subpoenaed as a witness. The definition has been included primarily for the purposes of the offence in clause 710(a). The definition is not directly relevant to the offences in clauses 707 to 709 because they will apply if the defendant has the relevant intention, even if, for example, the person he or she bribes not to attend as a witness, is not yet a witness in the formal sense. However, this definition has been included in the general definitions for chapter 7 so that if for some reason the status of a person as a witness is put in issue this extended definition will apply.

Dictionary definitions – clauses 14 to 21 of the Bill insert a number of definitions in the dictionary of the Criminal Code that are relevant to the offences in this chapter and it is convenient to discuss them at this stage of the Explanatory Statement.

Create – This definition will replace the existing definition of that term in the dictionary of the Criminal Code and although it is substantially to the same effect, it will bring new subsection 12(2) of the Criminal Code (see the commentary to clause 7) more closely into line with the Commonwealth equivalent of that provision (that is, section 9.3).

Benefit – This term is an element in the offences in clauses 707 (corruption in relation to legal proceedings) and 716 (compounding of offence). Because these offences are similar to the bribery and other corrupt benefit offences in division 3.7.2 of the Criminal Code (which employ the same definition), it is appropriate that the same meaning for the term "benefit" should apply. Accordingly, the term is defined to include any advantage and is not limited to property or money. This is appropriate since bribes can be paid by many different means.

Detriment - This term is broadly defined to include any disadvantage and is not limited to personal injury or to loss or damage to property. This term appears in clauses 709 (threatening witnesses, interpreters or jurors) and 712 (reprisal against person involved in proceeding).

Threat – This definition is relevant to the offences in clauses 709 (threatening witnesses, interpreters or jurors) and 712 (reprisal against person involved in proceeding). The clause explains that a threat can be made by any conduct, not just speech, and can be explicit or implied, conditional or unconditional.

Clause 701 Meaning of legal proceeding for chapter 7

This is probably the most important definition in the Bill because most of the offences in chapter 7 will only apply if the conduct relates to "legal proceedings". Subclause (1) sets out three categories of proceedings that are legal proceedings for this chapter. They are (a) proceedings in which evidence may be taken on oath; (b) proceedings in which judicial power

is exercised; and (c) a proceeding or anything else that a law declares to be a legal proceeding for this chapter. In contrast to category (c) the concluding words of subclause (1) provide, in effect, that a law may declare that a proceeding (or other thing) is not a legal proceeding for chapter 7, even if it otherwise satisfies the words in paragraphs (a), (b) or (c). Although, category (c) and these concluding words may not be strictly necessary, they make it clear that there is always the legislative option to apply or disapply chapter 7 to proceedings etc when it is considered appropriate. The provisions also identify an important option for clarifying the application of chapter 7 in circumstances where that may not be entirely clear.

It is important to bear in mind, with regard to category (a) of the definition of legal proceedings, that there may be a power to take evidence on oath in certain proceedings, even if there is no express power to do so. This is because of section 178 of the Legislation Act, which provides that a court, tribunal or other entity (including a natural person) authorised by law to hear and decide a matter has the power to receive evidence and administer the oath.

Subclauses (2) and (3) add important clarifications to the definition of "legal proceeding" in subclause (1). Subclause (2) provides that a reference to legal proceedings in chapter 7 is not only a reference to proceedings that have started but also to proceedings that may start in the future. Similarly, subclause (3) provides that "in" a legal proceeding includes for the purposes of a legal proceeding. These provisions will ensure that people who perpetrate abuses of the legal system, whether it is done outside of the actual proceedings or before they have commenced, will be caught by the offences in chapter 7.

Currently in the ACT the law relating to the administration of justice is generally governed by the common law, which in the case of perjury, for example, requires the relevant testimony to be given in or in connection to judicial proceedings (in the ordinary sense of that term) before a competent tribunal. The central notion of "judicial proceedings" in that sense is that they are proceedings by a body authorised to conduct a hearing for the purpose of determining any matter or thing. This notion is incorporated in paragraph (b) of the definition of legal proceedings in subclause (1). However, paragraph (a) has also been included because it would be rare for proceedings that are essentially judicial in nature not to also include the capacity to take evidence on oath. A major advantage of this is that it will generally make it unnecessary for the courts to go into the comparatively more complex question about whether the tribunal or other entity was exercising judicial powers in order to determine the applicability of the offences under this chapter. On the other hand this will extend the reach of these offences (in comparison to their equivalents at common law and in comparison to the ACT law) to administrative/quasi judicial proceedings as well as judicial proceedings. However this extension is consistent with most other Australian jurisdictions and the relevant MCCOC recommendation.

Subclause (4) has been inserted to make it clear that although declarations under subclause (1) will appear in some legislation but not all, the absence of a declaration does not imply that the proceedings under the relevant legislation are or are not "legal proceedings" for chapter 7.

Part 7.2 Indictable offences for chapter 7

Division 7.2.1 Perjury

This division will codify the law of perjury and aggravated perjury in the ACT.

Clause 702 Aggravated perjury

This clause sets out the elements for the offences of aggravated perjury. The MCC does not include an aggravated perjury offence but the Crimes Act does (section 168) and it is considered appropriate to retain it especially given the particularly serious nature of the conduct section 168 is directed against. The Bill offences are based on the MCC perjury offence in section 7.2.1 and section 168 of the Crimes Act.

Subclause (1) provides that a person commits the aggravated perjury offence if the person makes a false sworn statement in a legal proceeding with the intention of procuring his, her or someone else's conviction or acquittal for an offence that is punishable by imprisonment and the person is reckless about whether the statement is false. The maximum penalty is 14 years imprisonment or 1400 penalty units ($140,000) or both. This offence and the offence in subclause (2) will replace the aggravated perjury offence in section 168 of the Crimes Act, which also applies a maximum prison term of 14 years.

At present the law of perjury in the ACT is primarily governed by the common law. Although the Crimes Act includes statutory offences of perjury (section 167) and aggravated perjury (section 168) neither define what perjury is. Under current ACT law (common law) a person commits perjury or aggravated perjury if, amongst other things, he or she makes a statement on oath (or affirmation etc) in connection with a judicial proceeding. The perjury offences in the Bill are similar, though the term "legal proceedings" is wider then "judicial proceedings" under the common law. Accordingly, for the Bill offences to apply the relevant statement must be a "sworn statement" made "in a legal proceeding", in the sense in which those terms are defined in clauses 700 and 701. That is, the statement (which can be oral, written or communicated in some other way, such as sign language) must be made or verified on oath (which includes an affirmation, a declaration and a promise) for the purposes of legal proceedings, including proceedings that have started, as well as proceedings that may be started (see subclause (2)). Thus the chapter 7 perjury offences can apply to false sworn affidavits and statutory declarations even if they are not put into evidence (which is also consistent with current ACT law) provided that they are made in or for the purposes of legal proceedings (this is also confirmed by clause 704(1)(b) of the Bill).

To commit perjury at common law it is also necessary to prove, amongst other things, that when the defendant made the relevant statement he or she either knew that it was false or did not believe it to be true and it is no defence that the statement was in fact true. In contrast, the perjury offences in the Bill will require the prosecution to prove that the defendant's statement was in fact false (see, for example, clause 702(1)(c)) and that he or she was reckless about whether it was false. This is consistent with the current law of perjury in almost every Australian jurisdiction (including the Commonwealth) and given the seriousness of the

offences concerned and the level of the prison terms that can be imposed the alternative position is considered inappropriate.

Even if a person makes a sworn statement in legal proceedings that is false a person will not be liable for the perjury offences in the Bill unless he or she was reckless about whether the statement was false. It is important to note in this context that although clause 702(1)(d) (and its equivalents in this and clause 703) only refers expressly to "recklessness", section 20(4) of the Criminal Code provides that if recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element. Accordingly, like the present ACT position, if the defendant "knows" that the statement is false, instead of just being reckless about whether it is false, he or she will be caught by the perjury offences in the Bill.

However, in cases where the defendant does not know that the statement is false, the fault element that applies, "recklessness", is conceptually different to the fault element that applies at common law; namely that the defendant "did not believe his or her statement to be true". This, of course is not to say that the common law requires a positive belief that the statement is false but rather that a lack of belief in the truth of the statement will suffice. In comparison, for recklessness to apply in the relevant context of these offences the defendant must be aware of a substantial risk that the circumstance exists (namely that the statement is false) and having regard to the circumstances known to him or her, it is unjustifiable to take the risk. It is important to note that the term "substantial risk" in the definition of "recklessness" is not synonymous with "greatest risk" in the sense that it is more probable or likely that the statement is false but rather the term is more closely linked to the notion of a significant risk that the statement is false. Therefore, if the defendant lacks a belief in the truth of the statement (either because he or she has not enquired about the truth or because his or her conviction falls short of a belief that it is true) it is open to find that the defendant was aware of a substantial risk that the statement was false.

In addition to the elements discussed above (which are common to all the perjury offences in the Bill) the aggravated perjury offence in subclause (1) also requires proof that the defendant made the false sworn statement with the intention of procuring his, her or someone else's conviction or acquittal for an offence that was punishable by imprisonment. Provided that the defendant had that intention it is not necessary for someone to have actually been convicted or acquitted. However, the false sworn statement must have been made to procure a conviction etc for an offence that in fact allowed for punishment by imprisonment and the defendant must have been reckless about that circumstance.

Consistent with the recommended MCC perjury offences, subclause (2) contains an aggravated perjury offence (based on the general aggravated perjury offence) specifically directed at interpreters (defined in clause 700) in legal proceedings. It provides that an interpreter commits the offence if by a sworn statement he or she gives a false or misleading interpretation of a statement or other thing in a legal proceeding, with the intention of procuring someone else's conviction or acquittal for an offence that is punishable by imprisonment and the interpreter is reckless about whether his or her sworn statement is false or misleading. The maximum penalty is 14 years imprisonment or 1400 penalty units

($140,000) or both, which is the same as the maximum penalty for the aggravated perjury offence in subclause (1).

Although there is currently no specific ACT offence of perjury with respect to interpreters, the preferred view is that the common law of perjury applies to interpreters. MCCOC considered that the interests of justice require a specific offence for interpreters who knowingly or recklessly give misleading (as well as false) interpretations in a legal proceeding. This, therefore, will extend the current ACT law of perjury with respect to interpreters and is an important distinguishing feature of the interpreter related perjury offences in the Bill.

MCCOC gave the following reason (at page 33 of its Report) for extending the interpreter offences to misleading interpretations:-

> "The Discussion Paper expressed the view that an interpreter in judicial proceedings may provide an interpretation that, while literally correct, is nevertheless, in its context, significantly misleading ... The case of an interpreter giving a misleading interpretation can be distinguished from that of an ordinary witness who gives misleading evidence. The interpreter is ordinarily the only person in the court room who knows what the witness meant and the court, including opposing counsel, must rely on that interpretation. In the case of an ordinary witness giving misleading evidence, opposing counsel will have the opportunity in cross-examination to bring out the misleading nature of the evidence."

The Gibbs Committee in its Review of Commonwealth Criminal Law (4th interim Report, 1990) also favored an offence for interpreters that would extend to misleading interpretations and made the following remarks (at paragraph 6.25) in support of an interpreter specific perjury offence:-

> "All the submissions made to the Review Committee agreed that the proposed consolidating law should contain provisions of the kind suggested by the United Kingdom Law Commission. The Review Committee is not aware that the need for such a provision has yet manifested itself in Australia, but considers that since interpreters play a role of great importance in proceedings before courts and tribunals now that Australia is a society many of whose members do not speak English, or do not speak it fluently, some such provision ought to be made. The Review Committee accordingly recommends that the proposed consolidating law should contain provisions to the effect that an interpreter sworn in a judicial proceeding who intentionally or recklessly gives a misleading interpretation should be guilty of the offence of perjury."

The interpreter related perjury offences in the Bill only apply to interpretations made by "sworn statements" (as that term is defined in clause 700) in legal proceedings but importantly, the offences are not limited to interpretations of sworn statements because an interpreter may be called on to interpret a letter (for example), which, while admitted in evidence, has not been verified on oath or affirmation. However, like the other perjury offences in the Bill the prosecution is required to prove that the interpreter's sworn statement was in fact false or misleading (see, for example, clause 702(2)(c)) and that he or she was reckless about that fact. Also for the aggravated offence it must be established that the interpreter made the false or misleading sworn statement with the intention of procuring someone's conviction or acquittal for an offence that is punishable by imprisonment. Provided that the defendant has that intention it is not necessary for someone to have actually been convicted or acquitted. However, the false or misleading interpretation must have been made to procure a conviction etc for an offence that in fact allowed for punishment by imprisonment and the interpreter must have been reckless about that circumstance.

When considering the offences in this clause and clause 703 it is important to also have regard to the commentary to clause 704, which contains some important qualifications to the perjury and aggravated perjury offences in this Bill, and also the commentary to clauses 726 and 727, which contain related alternative verdict and procedural provisions.

Clause 703 Perjury

This clause contains the core perjury offences in the Bill, which conform to the model offences in the MCC. Subclause (1) provides that a person commits perjury if he or she makes a false sworn statement in a legal proceeding and is reckless about whether the statement is false. Similarly, subclause (2) provides that an interpreter commits perjury if by a sworn statement he or she gives a false or misleading interpretation of a statement or other thing in a legal proceeding and is reckless about whether the interpreter's sworn statement is false or misleading.

The elements of these offences have been explained above, however, it is worth noting that, like the offences in clause 702, the prosecution will be required to prove that the sworn statement was in fact false (in the case of the general perjury offence) or false or misleading (in the case of the interpreter offence). Also, these offences do not include the aggravating elements of intention to procure a conviction or acquittal and consequently the maximum penalties are lower. That is, for both the offences in this clause the maximum penalty is seven years imprisonment or 700 penalty units ($70,000) or both. Although this is lower than the recommended MCC penalty of 10 years it is the same as the maximum prison term that applies in section 167 of the Crimes Act (which these offences will replace). The lower penalty is justified because the MCC does not include aggravated perjury offences so that the more extreme cases of perjury (where the defendant seeks to procure someone's wrongful conviction or acquittal) are expected to be dealt with under the new aggravated offences, which apply a maximum prison term of 14 years.

Clause 704 Additional provisions about perjury and aggravated perjury

This clause contains some important qualifications to the perjury and aggravated perjury offences (hereinafter referred to as perjury) in this Bill.

Paragraph 1(a) of this clause provides that to establish perjury under chapter 7 it does not matter whether the false sworn statement relates to something material in the proceedings. In contrast, the current ACT law of perjury requires that the sworn statement must be material to the proceedings. In MCCOC's view the materiality rule is not appropriate because it is important for witnesses to tell the truth without reservation, even with regard to matters they consider immaterial and, in any case, the materiality of a matter is often not apparent until late in the proceedings. Also, if the falsehood was about something relatively insignificant, the prosecutor can decline to prosecute (see clause 726) but if he or she considers it serious enough to proceed, the court can take the materiality of the false statement into account on sentencing.

Paragraph 1(b) explains that to establish perjury under chapter 7 it does not matter whether the sworn statement was admitted into evidence in the proceedings. This is consistent with current ACT law and with the terms of the perjury offences in the Bill. That is, the perjury offences apply to sworn statements made "in legal proceedings", which is defined to include proceedings that have not yet started and "for the purposes of the legal proceedings" (see clause 701). Therefore if a false statement in an affidavit comes to notice before the affidavit is admitted into evidence the perjury offences will apply to it.

Paragraph 1(c) explains that to establish perjury under chapter 7 it does not matter that the court or other entity that dealt with the legal proceedings in which the sworn statement was made did not have jurisdiction to deal with the matter or was not properly constituted or was not sitting in the proper place. Under current ACT law perjury cannot be committed if the court or tribunal lacks jurisdiction, however, the position with regard to the proper constitution and venue of the court etc is less clear. In MCCOC's view paragraph 1(c) is justified because the substance of perjury is the deliberate telling of lies for the purpose of legal proceedings. If a witness considers that the tribunal is not properly constituted or lacks jurisdiction the remedy is to object to the proceedings. Also, one of the more important features of chapter 7 is that it will apply perjury to evidence taken by entities that are not courts and whose jurisdiction might be narrowly defined. In such cases a person's culpability ought not to turn on issues about whether the tribunal etc was technically acting within power, or properly constituted or sitting in the proper place.

Paragraph 1(d) provides that it is immaterial to the perjury offences in chapter 7 that the person who made the false sworn statement was not competent to give evidence in the legal proceedings. However, this provision should be read with subclause (2), which provides that a person does not commit perjury if he or she is not competent to give evidence under section 13 of the *Commonwealth Evidence Act 1995* ("the CEA").

The CEA (which applies in the ACT) distinguishes between two groups of people who are not competent to give evidence. The first group is covered by section 13 of the CEA and concerns those who lack the capacity to give sworn evidence because they are incapable of understanding the obligation to give truthful evidence (essentially children and the mentally impaired). The second group concerns those who are not competent to give evidence on other grounds. Sections 16 and 17 of the CEA cover the second group. They provide that a judge or juror in a proceeding is not competent to give evidence in the proceeding about matters affecting conduct of the proceeding and that a defendant in a criminal proceeding is not competent to give evidence as a witness for the prosecution. In the past a person was generally considered incompetent to give evidence for or against his or her spouse but this is no longer the law in the ACT (section 12 of the CEA).

The combined effect of paragraph 1(d) and subclause (2) of this provision is that a person who is not competent to give evidence because of lack of capacity is not liable to perjury under chapter 7 but a person who is not competent on other grounds is liable. In contrast the current law in the ACT is that any incompetent witness (whether because of incapacity or otherwise) who gives sworn evidence by mistake cannot be indicted for perjury.

Subclause (2) is consistent with the current law in the ACT and in any case it is clearly inappropriate for a person who lacks the capacity to understand the obligation to give truthful evidence to be exposed to the possibility of prosecution for perjury. On the other hand, the witnesses in the second group of incompetence are aware of the seriousness of their conduct and should not escape liability for untruthful testimony on a technicality of this kind.

Paragraph 1(e) is similar to paragraph 1(c) in that it makes it clear that it is immaterial to the perjury offences that there is a "formal defect" in the documentary evidence on which the charge is based (e.g. an affidavit that does not comply with the court rules). For this provision "formal defect" is defined in subclause (7) to include any formal error, any irregularity and any non compliance with a rule of court, approved form or rule of practice. Paragraph 1(e) is similar in effect to section 172 of the Crimes Act, which it will replace.

Subclause (3) provides that if the trier of fact in a perjury trial is satisfied beyond reasonable doubt that the defendant has made two sworn statements that are irreconcilably in conflict but cannot decide which statement is false it can find the person guilty of perjury. This provision is essentially the same as section 171 of the Crimes Act, which it will replace. The provision is important otherwise in cases where a witness makes two sworn contradictory statements the prosecution would have to prove which statement was false. Subclause (4) explains that it does not matter whether the two statements were made in the same proceedings or different proceedings, however, both statements must have been sworn statements.

Subclause (5) explains that a statement of an opinion that is not genuinely held is a false statement for perjury in chapter 7. This is currently the law in the ACT.

Subclause (6) explains that to establish perjury under chapter 7 it is not necessary for the evidence of the perjury to be corroborated. Currently the law in the ACT is that a person cannot be convicted for perjury on the uncorroborated evidence of one witness. In support of its recommendation not to include the requirement for corroboration MCCOC quoted (at page 55 of its report) the following passage from the 1988 Murray Report (The Criminal Code: A General Review):

> 'It is also to be noted that the requirement of law can work with great artificiality, and does not really achieve the end which would appear to be sought. We may take the requirement in cases of perjury or false statements on affidavit, as example. In such cases, which are concerned with the deleterious effect on the administration of justice caused by the telling of a relevant lie, it is apparently thought necessary to take care that the accused is not convicted upon such an allegation made by a single witness who may himself be telling a lie, and certainly it is clear that in practical terms, care would need to be taken in that area to examine the motives of such an accuser, and consider whether that might in fact be the case. However, the requirement for corroboration does not achieve that result. Perjury cases are usually proved either by ample independent evidence demonstrating the falsity of the witness's account on oath, or by evidence of admissions made by the accused out of Court to the effect that his former evidence was indeed a lie. In the latter case the requirement for corroboration is satisfied by the simple expedient of calling two police officers to testify as to those admissions, the one to corroborate the other. That satisfies the requirement of law, but it may leave the Court no nearer to determining where the truth of the matter lies and in no way assisted in that exercise.'

In MCCOC's view there are no sufficient reasons to justify a distinction between perjury and other serious offences and in any case the requirement that the Director of Public Prosecutions must consent for perjury to be prosecuted, provides an adequate safeguard (see clause 726).

Division 7.2.2 Falsifying, destroying or concealing evidence

The offences in this division are generally covered by the ACT (common law) offences of perverting or attempting to pervert the course of justice. In MCCOC's view it is important to have specific offences of the kind that appear in this division so that there is not the slightest doubt about how seriously the law considers these matters.

Clause 705 Making or using false evidence

This clause sets out the elements of two offences directed at those who make or use false evidence. The ACT and Victoria are the only two jurisdictions in Australia that do not have specific offences of this kind.

The offence in subclause (1) relates to the making of false evidence. It provides that a person commits an offence if he or she makes false evidence with the intention of either influencing a decision about starting a legal proceeding or influencing the outcome of a legal proceeding. Both of the offences in this provision and in subclause (2) apply a maximum penalty of seven years imprisonment and/or 700 penalty units ($70,000) or both, which is the same as the maximum prison term recommended by MCCOC.

As in the case of the perjury offences the evidence that the person makes must in fact be false. The term "make" evidence in this offence is defined in subclause (3) to include "change" evidence but does not include perjury or aggravated perjury, since the making of evidence in that sense is already covered by clauses 702 and 703. Although MCCOC recommended the word "alter" instead of "change", the latter is considered to be a better plain English alternative but is otherwise to the same effect.

MCCOC preferred the word "make" to the more usual, "fabricate", for this offence because the latter expression has a dual meaning (as revealed in *R. v Love* (1983) 9 A Crim R 1 at p5) so that it does not necessarily mean devised or contrived in the pejorative sense but can also mean "make up" or "get together" without any dishonest connotation. Given that police officers and prosecutors put together true evidence for the purpose of influencing a decision whether to institute proceedings or their outcome, MCCOC considered that the term "fabricate" should be avoided.

In addition to proving that the defendant made the false evidence the prosecution must also establish that he or she did so with the intention of influencing a decision about starting a legal proceeding or influencing the outcome of a legal proceeding. This formula is not inconsistent with the High Court decision in *R v Rogerson* ((1992) 174 CLR) and will clarify the law for these matters. As to the fault element of "intention" in that context, subsection 18(2) of the Criminal Code provides that 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.

However, once the person makes the false evidence with the relevant intention the offence is complete and it is not necessary for the prosecution to also establish that the defendant's conduct in fact influenced a decision about starting a legal proceeding or influenced the outcome of legal proceedings.

The offence in subclause (2) relates to the use of false evidence. It provides that a person commits an offence if the person uses false evidence that he or she knows or believes is false and the person is reckless about whether using the evidence could either influence a decision to start a legal proceeding or influence the outcome of a legal proceedings. As in the case of the perjury offences the evidence that the person uses must in fact be false.

As to the fault elements that apply to this offence, it is important to note that whereas subclause (1) requires an "intention" to influence the starting etc of legal proceedings, paragraph 2(b) requires "recklessness" (an awareness of a substantial risk that using the false evidence could have the relevant influence etc – see section 20(1) of the Criminal Code). Given that a person is closer to the mischief that these offences are directed against (the admission of false evidence in legal proceedings) when he or she is considering using false evidence as opposed to making it, the lower fault element of "recklessness" in paragraph 2(b) is justified.

As to the falsity of the evidence, subclause 2(a) requires "knowledge or belief" that the evidence that is being used is false. Section 19 of the Criminal Code provides that a person has knowledge of a circumstance (that the evidence is false) if he or she is aware that it exists. Although the fault element of "belief" is not defined in the Criminal Code it involves a state of mind that is less than actual knowledge.

Although the requirement to prove knowledge or belief is consistent with the corresponding MCC provision (7.3.1(2)), the Bill provision includes a range of defences in subclauses (3), (4) and (5) to ensure that the offence does not apply to legitimate uses of evidence that a person knows or believes to be false. First, paragraph 3(a) provides that the offence does not apply to a lawyer or person assisting a lawyer who does not know that the evidence is false and who uses the evidence on instructions from a client. An important principle of the adversarial judicial system is that clients are entitled to have their case put to the court even though their legal representatives may not believe their evidence. Ultimately it is for the court and not the lawyer to decide where the truth lies. However it is not appropriate for legal representatives to knowingly mislead the court. Accordingly, the defence in paragraph 3(a) will not apply if the lawyer knows that his or her client's evidence is false. Secondly, paragraph 3(b) allows a defence to a person who is, or may be, involved in a legal proceeding as a law enforcement officer, lawyer, or party (or those assisting them) and who uses the evidence for a "legitimate forensic purpose" in relation to the proceeding. The term "legitimate forensic purpose" is defined in subclause (6) to include for the purpose of demonstrating that the evidence is false or misleading. Accordingly a police officer who, for example, uses evidence he or she knows or believes to be false to compile a brief of evidence or to test the story of a suspect would be covered by the defence. Similarly, a lawyer might tender false evidence to prove that it is false in a perjury trial or might use the evidence in cross examination to test a witnesses credit or might show the evidence to opposing lawyers

outside the court in negotiations about the case. It is important to note that these are only examples and that there will be other instances where a lawyer, law enforcement officer or party may use evidence they know or believe to be false for a "legitimate forensic purpose". Thirdly, subclause (4) allows a defence to a person who uses evidence he or she knows is false if when or before using the evidence the person discloses that it is false. The defence in subclause (5) is similar, except that it applies in cases where the person believes (but does not know) that the evidence is false. For the defence to apply in such cases the person must disclose or must have disclosed that he or she believes that the evidence is false. The defences in subclauses (4) and (5) will cover cases were, for example, a person uses evidence that he or she knows or believes to be false, to disclose a crime to police. He or she may use false accounts to demonstrate a fraud or may be admitting to a crime.

Clause 706 Destroying or concealing evidence

The offence in this clause is similar to the offence in subclause 705(1) except that it relates to the destruction and concealment of evidence. The ACT and Victoria are the only two jurisdictions in Australia that do not have specific offences of this kind. The Bill offence provides that a person commits an offence if he or she "destroys or conceals" evidence with the intention of either influencing a decision about starting a legal proceeding or influencing the outcome of a legal proceedings. The term "conceal" has its natural meaning but the word "destroy" is given an extended definition in subclause (2) so that if a person with the relevant intent mutilates or changes evidence or makes it illegible, indecipherable or otherwise unable to be identified, he or she will be caught by the offence. The commentary to subclause 705(1) is relevant to a consideration of the other elements of this offence. Consistent with the offences in clause 705, the maximum penalty that applies is seven years imprisonment and/or 700 penalty units ($70,000), which is the same as the maximum prison term recommended by MCCOC.

Division 7.2.3 Protection of people involved in legal proceedings

The offences in this division are generally covered by the ACT (common law) offences of perverting or attempting to pervert the course of justice or the law of contempt. Again, it is important to have offences of the kind in this division so that there is not the slightest doubt about how seriously the law considers these matters.

Clause 707 Corruption in relation to legal proceedings

This clause sets out the elements of two offences relating to the corruption of witnesses, interpreters and jurors in legal proceedings. Although the ACT currently has an offence of corrupting a juror (*Juries Act 1967*) there are no similar offences with respect to witnesses and interpreters.

Subclause 707(1) essentially concerns the giving of bribes. It provides that it is an offence for a person to give, offer or promise to give a benefit to another person, with the intention that that other person (or a third person) will do or not do any of the things listed in paragraph (b). That is, that a person will not attend as a witness, interpreter or juror in a legal proceeding; or

will give false or misleading evidence or withhold true evidence in a legal proceeding; or that an interpreter will give a false or misleading interpretation in a legal proceeding; or a juror will improperly make a decision in a legal proceedings; or that someone will improperly influence a juror in a legal proceeding. In addition to giving, offering or promising to give a benefit, the offence also covers cases where a person (with the relevant intention) causes a benefit to be given or causes an offer or promise of a benefit to be made to someone else. The term "benefit" is defined to include any advantage and is not limited to property or money (see the commentary on clause 700).

This offence is based on section 7.4.2 of the MCC but since it is essentially a bribery offence it has been expanded to more closely follow sections 356 and 357 of the Code. The Bill offence has also been expanded to apply to those who corrupt jurors (as well as witnesses and interpreters).

In accordance with the recommendation by MCCOC, the maximum penalty for this offence is seven years imprisonment or 700 penalty units ($70,000) or both. This is the same as the penalty for the general perjury offence in clause 703 and the falsifying, destroying or concealing offences in clauses 705 and 706. Given that the mischief that these offences are directed against is essentially the same, the same penalty is considered appropriate.

As indicated above the offence in subclause (1) applies not only if a person actually gives a benefit (with the relevant intention) but also if he or she only offers or promises to give a benefit. It also applies where someone causes a benefit to be given or causes an offer or a promise of a benefit to be made. Thus if, for example, a government employee improperly adds the name of a witness on a list of prospective recipients for a government grant, the employee would be causing a benefit (the witnesses' name on the list of prospective recipients) to be given to the witness. Also the benefit need not be a benefit to the witness or juror etc. It could be a benefit to a third person (eg the witnesses' mother) in order to persuade the witness to withhold true evidence.

As indicated above, in addition to proving that the defendant gave or offered etc a benefit to another person, the prosecution must also establish that the defendant did so with the intention that the other person (or a third person) would do or not do any of the things listed in paragraph (b). This does not mean that the prosecution has to show that there was an actual agreement between the defendant and the other person but only that (by giving the benefit to the witness) the defendant intended the witness, for example, not to attend the legal proceedings. Therefore, a person is liable even if, for example, the witness does not "take" the bribe. As to the fault element of "intention" in this context, subsection 18(2) of the Criminal Code provides that 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.

Subclause (2) concerns the taking of bribes. It provides that it is an offence for a person to ask for a benefit, obtain a benefit or agree to obtain a benefit for himself, herself or someone else, with the intention that the person he or she asks etc (or a third person) will do or not do any of the things listed in paragraph (b) or with the intention of <u>inducing, fostering or sustaining a belief</u> that he or she will do or not do any of the things listed in paragraph (b). The underlined

words have been added to this offence (compare subclause (1)) to make it clear that the offence will apply in cases where, for example, a witness takes a bribe but with no intention of acting upon it.

Subclause (3) makes it clear that a person is taken to have obtained a benefit for another if the person induces a third person to give that other person a benefit.

A proceeding for an offence under this clause cannot be commenced without the consent of the Attorney General or the Director of Public Prosecutions (see clause 726).

Clause 708 Deceiving witness, interpreter or juror

This clause makes it an offence for a person to deceive someone with the intention that the other person or a third person will not attend as a witness, interpreter or juror in a legal proceeding or that the other person (or a third person) will give false ormisleading evidence or withhold true evidence in a legal proceeding. The offence is based on sections 7.4.1 and 7.4.4 of the MCC but paragraph 708(a) has been expanded so that the offence also applies in cases where a person deceives someone to achieve the non-attendance of an interpreter or juror as well as a witness. Again, the ACT does not have a specific offence of this kind although most Australian jurisdictions do, including the Commonwealth. The maximum penalty is five years imprisonment or 500 penalty units ($50,000) or both. This accords with the maximum penalty in the recommended MCC offence and is commensurate with the penalties that apply for the comparatively more serious offences in clauses 703 (perjury), 705 (making or using false evidence) and 706 (destroying or concealing evidence).

To make out this offence it is sufficient for the prosecution to prove that the defendant deceived the other person with the relevant intention. In other words, the offence is complete at that point and it is not necessary for the prosecution to also establish that the interpreter or juror etc in fact failed to attend the legal proceedings or that the witness in fact gave false evidence or withheld true evidence. For paragraphs (b) and (c) the intention must be for the witness to give false evidence or withhold true evidence. The offence will not apply if the witness is deceived in order to ensure that he or she tells the truth. Also it is not necessary for the witness or interpreter etc to be deceived. It can be a third person, such as a spouse or an alleged accomplice. As long as the defendant deceives someone with the intention of achieving one of the results enumerated in paragraphs (a) to (c) the offence applies. As to the fault element of "intention" in this context, subsection 18(2) of the Criminal Code provides that 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.

A proceeding for an offence under this clause cannot be commenced without the consent of the Attorney General or the Director of Public Prosecutions (see clause 726).

Clause 709 Threatening etc witness, interpreter or juror

This clause makes it an offence for a person to cause a "detriment" or "threaten" to cause a detriment to someone else with the intention that the other person or a third person will do or

not do any of the things listed in paragraphs (a) to (f) of the clause. That is, that a person will not attend as a witness, interpreter or juror in a legal proceeding; or will give false or misleading evidence or withhold true evidence in a legal proceeding; or that an interpreter will give a false or misleading interpretation in a legal proceeding; or a juror will improperly make a decision in a legal proceedings; or that someone will improperly influence a juror in a legal proceeding. The offence is based on the recommended offences in section 7.4.3 of the MCC but has been extended to also apply with respect to jurors and persons who improperly influence jurors, as well as witnesses and interpreters. The maximum penalty is five years imprisonment or 500 penalty units ($50,000) or both, which accords with the maximum penalty recommended by MCCOC and the maximum penalty in clause 708.

In considering the ambit of this offence it is important to have regard to the proposed dictionary definitions of "detriment" and "threat", which will be inserted by clause 19 of the Bill and "causes" a detriment or result, which is defined in clause 700. The term "detriment" is defined widely to include any disadvantage and is not limited to personal injury or to loss or damage to property (see clause 700). Therefore, a person who (with the relevant intention) threatens to have a witness expelled from the local tennis club could be caught by this offence. Given the role of witnesses, interpreters and jurors to the administration of justice, it is important to ensure that they have the protection that the wide definition of "detriment" will afford to them. Similarly "causes" a detriment will catch conduct that substantially contributes to the detriment and "threat" includes a threat "made by any conduct, whether explicit or implied and whether conditional or unconditional". Therefore a person who threatens someone with gestures rather than speech would be caught, such as where a person stalks a witness or the witnesses' family to pressure him or her into not giving evidence. This is a particularly important definition in cases of a sexual nature where dominance of the victim is a common feature and pressure can be brought to bear with little outward appearance of a threat.

Again, to establish this offence it is sufficient for the prosecution to prove that the defendant caused or threatened to cause the detriment to someone else with the relevant intention. That is, the offence is complete at that point and it is not necessary for the prosecution to also establish that the interpreter or juror etc in fact failed to attend the legal proceedings or that the witness in fact gave false evidence or withheld true evidence or that the juror made an improper decision. Also it is not necessary for the defendant to cause or threaten to cause detriment to the witness or juror etc. It can be detriment or a threat of detriment to a third person, such as a spouse or an alleged accomplice. As long as the defendant causes or threatens to cause detriment to someone with the intention of achieving one of the results listed in paragraphs (a) to (f) the offence applies. As to the fault element of "intention" in this context, subsection 18(2) of the Criminal Code provides that 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.

A proceeding for an offence under this clause cannot be commenced without the consent of the Attorney General or the Director of Public Prosecutions (see clause 726).

Clause 710 Preventing attendance etc of witness, interpreter or juror

This offence is directed at those who would prevent witnesses, interpreters or jurors from attending or answering a question in legal proceedings. It provides that a person commits an offence if by his or her conduct the person intentionally prevents someone else from (a) attending as a witness, interpreter or juror in a legal proceeding or (b) answering a question the person is required by law to answer in a legal proceeding. The offence is based on section 7.4.4 of the MCC but has been expanded to apply with respect to jurors (as well as witnesses and interpreters) and also includes additional paragraph (b), which appears in similar offences in the ACT statute book (see, for example, existing section 85(b) of the *Coroners Act 1997*, which will be repealed by this Bill – schedule 1, part 1.5, item 1.36). The maximum penalty is five years imprisonment or 500 penalty units ($50,000) or both, which accords with the maximum penalty recommended by MCCOC and the maximum penalty for the related offences in clauses 708 and 709. All Australian jurisdictions, except the ACT and Victoria have specific offences of this kind.

Although the ground that this offence covers will overlap considerably with the ground covered by the offences in clauses 707 (corruption in relation to proceedings), 708 (deceiving witnesses etc) and 709 (causing or threatening detriment to witnesses etc), it is appropriate to include it so that there are no gaps in the protection afforded to witnesses, interpreters and jurors. In contrast with the offences in clauses 707, 708 and 709, the defendant's conduct must in fact prevent the witness etc attending or answering a question in legal proceedings. However, section 44 of the Criminal Code will apply to attempts to prevent the attendance etc. It is also important to note that although this offence does not specifically refer to third persons, if the defendant's conduct with respect to a third person is such that it has the intended effect of preventing a witness etc from attending the proceedings or answering a question, the offence will apply. It is important in the context of this offence to note the defintion of "witness" in clause 700, which provides that that term includes a witness not subpoened as a witness in the proceedings.

Clause 711 Preventing production of thing in evidence

This is similar to the offence in clause 710, except that it is directed at those who would prevent documentary evidence and other things from being produced in legal proceedings. It provides that a person commits an offence if by his or her conduct the person intentionally prevents someone else from producing in evidence in a legal proceeding a document or other thing that is required by law to be produced. The offence is based on section 7.4.4 of the MCC and applies a maximum penalty of five years imprisonment or 500 penalty units ($50,000) or both, which accords with the maximum penalty recommended by MCCOC and the maximum penalty for the related offences in clauses 708, 709 and 710. It is important to note however, that the offence only applies to documents or things that the other person has a legal obligation to produce, such as an obligation to produce under a subpoena or a lawful direction of a court or other entity. This limitation is appropriate, since there can be perfectly legitimate reasons for wanting to prevent a person from producing a document or thing that is not legally required to be produced. The document could be privileged and the thing could be subject to commercial in confidence.

Clause 712 Reprisal against person involved in proceeding

Whereas the offence in clause 709 relates to detriments and threats of detriment to prevent the proper participation of a person in legal proceedings, the offence in this clause is directed at those who would punish or threaten to punish a person for something that has been done in a legal proceeding. Although most Australian jurisdictions have specific offences of this kind, the ACT does not.

This clause makes it an offence for a person to "cause" or "threaten" to cause a "detriment" to a "person involved" in a legal proceeding (a) because of something done by the involved person in the proceeding and (b) in the belief that the involved person was an involved person who had done that thing. The offence is based on section 7.4.6 of the MCC but unlike the MCC provision, which limits the protection to witnesses and interpreters,this offence has been expanded to afford protection to a broader range of participants in legal proceedings. The maximum penalty for this offence is five years imprisonment or 500 penalty units ($50,000) or both, which accords with the maximum penalty recommended by MCCOC and the maximum penalty for the related offence in clause 709.

The terms "cause", "threaten" to cause and "detriment" are discussed in the commentary to clause 709. Also, for this offence to apply the reprisal or threat of reprisal must be taken or made against a "person involved" in a legal proceeding. That term is broadly defined in subclause (2) to mean (a) a judge, magistrate or member of a tribunal or other entity the proceeding is before; (b) a registrar, deputy registrar or other official of the court, tribunal or other entity the proceeding is before; (c) a witness, interpreter, juror or lawyer involved in the proceeding; or (d) where the proceedings are criminal proceedings, a complainant, informant or party to the proceeding. Also, subclause (2) makes it clear that a witness or interpreter includes a person who attends in the proceeding as a witness or interpreter but is not called. It is appropriate to extend the protection of this offence to involved persons and not just witnesses or interpreters, since reprisals and threats of reprisals against anyone connected with the system of justice can have the potential to seriously damage that system. However, it is not considered appropriate to extend the coverage of this offence to parties involved in a civil proceeding since its not unusual for opponents in litigation to refuse to continue to do business with each other or make or threaten to make counterclaims, which are "detriments", as that word is defined in the Bill.

To establish this offence the prosecution must prove that the defendant caused or threatened to cause a detriment to someone who was in fact a person involved in a legal proceeding and also that the defendant caused etc the detriment because of something that the other person did in the proceeding and in the belief that the involved person was an involved person who had done that thing. Therefore, if the defendant takes reprisals against an involved person wrongly believing that that person did the relevant thing the offence will still apply.

Division 7.2.4 Perverting the course of justice and related offences

Clause 713 Perverting the course of justice

Although MCCOC's broad approach for chapter 7 was to develop specific offences to cover conduct that is otherwise covered by the common law offence of perverting the course of justice, it nevertheless saw an important need to retain a general offence (in statutory form) of perverting the course of justice. It's reasons for recommending the general offence are stated at page 115 of its report, as follows:-

> "[T]he Discussion Paper accepted the desirability in broad principle of minimising the use of general offences of wide and imprecise ambit such as perverting the course of justice. However, no matter how many different specific offences are created, the Discussion Paper concluded that the possibility could not be removed that, in circumstances not now foreseeable, conduct that amounts to perversion or attempted perversion of the course of justice but falling outside the specific offences, will come to notice".

The only Australian jurisdictions that do not currently have a statutory offence of perverting the course of justice are the ACT and Victoria, which apply the common law offence.

The proposed general offence in this clause provides that a person commits an offence if by his or her conduct the person intentionally perverts the course of justice. The maximum penalty for this offence is seven years imprisonment or 700 penalty units ($70,000) or both. Although this is slightly higher then the maximum penalty MCCOC recommended (five years imprisonment), it's considered appropriate given the broad range of conduct that the offence can catch and the need to discourage the development of new and novel approaches for defeating the course of justice.

For the purposes of this offence, subclause (2) defines the term "perverts" in broad terms to include "obstructs", "prevents", and "defeats", which, in turn, will have their usual natural meaning. Accordingly the offence is committed if a person's conduct in fact perverts, obstructs, prevents or defeats the course of justice and the person intends by his or her conduct to pervert, obstruct, prevent or defeat the course of justice. That is, the person must mean to bring about the obstruction of justice, or the prevention of justice or the defeat or perversion of justice (say by "planting" false evidence) or be aware that the obstruction to justice etc will, because of his or her conduct, happen in the ordinary course of events (subsection 18(2) of the Criminal Code). However, if the person does not in fact succeed in perverting the course of justice but his or her efforts are sufficiently proximate to constitute an "attempt", section 44 of the Criminal Code will apply. Similarly, a person who conspires with another or incites another to pervert the course of justice is liable for conspiracy or incitement under sections 48 and 47 of the Criminal Code.

As to what is meant by the "course of justice", the High Court of Australia explained the term in *R v Rogerson* at page 280 as follows:

> "The course of justice consists in the due exercise by a court or competent judicial authority of its jurisdiction to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of the case […]. The course of justice is perverted (or obstructed) by impairing (or preventing the exercise of) the capacity of a court or competent judicial authority to do justice.

According to the Judges in *R v Rogerson* the course of justice does not commence until the "jurisdiction of some court or competent judicial authority is invoked." and that "neither the police nor other investigative agencies administer justice in any relevant sense." However, the High Court held in that case that, although police investigations into possible offences against the criminal law or a disciplinary code do not form part of the course of justice, "an act calculated to mislead the police during investigations may amount to an attempt to pervert the course of justice."

Clause 714 Publication that could cause miscarriage of justice

This clause contains two offences related to the publication of material that could cause a miscarriage of justice in legal proceedings. The first offence appears in subclause (1). It provides that a person commits an offence if he or she publishes something that could cause a miscarriage of justice in a legal proceeding and the person does so with the intention of causing a miscarriage of justice in the proceedings. The maximum penalty for this offence is 10 years imprisonment or 1000 penalty units ($100,000) or both. The offence in subclause (2) is similar, except that the fault requirement is reduced from intention to being reckless about whether the publication could cause a miscarriage of justice and accordingly, the maximum penalty is also reduced from 10 to seven years imprisonment or 700 penalty units ($70,000) or both. This accords with the recommended penalties in the MCC.

To establish these offences it is not necessary to prove that the publication in fact caused a miscarriage of justice. In the case of the offence in subclause (1), provided that that is the person's intention and his or her publication could cause that result, the offence is made out even if the miscarriage does not eventuate. However, there must be a potential for that result to occur (the term "could" will have its natural meaning) and as for the fault element of intention in this context, the prosecution must establish that the defendant meant to bring about a miscarriage of justice or was aware that it would happen in the ordinary course of events (subsection 18(2) of the Criminal Code). For the offence in subsection (2) the fault element is "recklessness" which in this context requires proof that the defendant was aware of a substantial risk that his or her publication would cause a miscarriage of justice and having regard to the circumstances know to him or her it was unjustifiable to take the risk (subclause 20(1) of the Criminal Code).

Clause 715 False accusation of offence

This clause contains two offences directed at those who falsely accuse or charge innocent people of crimes. Although the ACT currently has a similar offence in section 179 of the Crimes Act, this provision will clarify the elements that apply and will replace the Crimes Act offence.

The first of these offences appears in subclause (1). It makes it an offence for a person to accuse someone else of a crime to a law enforcement officer if the person knows or believes that the other person is innocent and with the intention that the other person will be charged with the crime or that the law enforcement officer will be deflected from prosecuting the

actual offender. The maximum penalty is five years imprisonment or 500 penalty units ($50,000) or both, which is the same as the recommended maximum penalty in the MCC. Although this is less than the maximum penalty in section 179 of the Crimes Act (10 years imprisonment) and the maximum penalty for the offence in subsection (2), it is considered appropriate because the fault element for the subclause (1) offence is lower (belief in innocence is sufficient) and also because of the heavier responsibility on law enforcement officers to uphold the law.

To establish this offence (subject to the defence in subclause (2)) it is again not necessary for the law enforcement officer to in fact charge the innocent person or to be deflected from prosecuting the actual offender. Provided that the person makes the accusation with one or both of the intentions listed in the clause (together with the knowledge or belief of the other's innocence) the offence will apply even if the officer does not act on the accusation. This is appropriate given the serious consequences that may be caused to a person falsely accused, even if the truth is discovered before he or she is charged.

As to the fault elements that apply, paragraph 1 (a) requires "knowledge or belief" that the accused person did not commit the offence. Section 19 of the Criminal Code provides that a person has knowledge of a circumstance (that the evidence is false) if he or she is aware that it exists. Although the fault element of "belief" is not defined in the Criminal Code it involves a state of mind that is less than actual knowledge. As for the fault element of intention in this context, the prosecution must establish that the defendant meant for the other person to be charged with the crime etc or was aware that it would happen in the ordinary course of events (subsection 18(2) of the Criminal Code).

Subclause (2) contains an important defence to the subclause (1) offence, to ensure that law enforcement officers who legitimately make accusations to other law enforcement officers are not technically caught by this offence. The defence provides that the offence in subsection (1) does not apply to a law enforcement officer exercising his or her functions as a law enforcement officer if he or she (a) makes the relevant accusation with the intention in paragraph (1)(b)(i); and (b) does not know that the other person did not commit the offence; and (c) believes that there are reasonable grounds for charging the other person with the offence. This defence is justified because often cases will arise where, a police officer, for example, may personally believe that a suspect is innocent but also be aware of evidence or other circumstances that justify accusing or charging the suspect. His colleagues and his supervisor may believe that the suspect is guilty; the circumstances may be such that he or she cannot take the risk that the suspect is guilty (e.g. a domestic violence case) or ought not take the risk (a sexual assault case where consent is in dispute) and ultimately, of course, the suspect may be guilty.

The offence in subclause (3) provides that a law enforcement officer commits an offence if the officer charges someone with an offence knowing that the person did not commit the offence. For the offence to apply the person much be formally charged. Also, for the reasons given in relation to the defence in subclause (2), it is not appropriate for this offence to apply to a law enforcement officer who simply believes that the person did not commit the offence.

The maximum penalty is 10 years imprisonment or 1000 penalty units ($100,000) or both, which is the same as the maximum term of imprisonment under section 179 of the Crimes Act. This is justified because of the higher fault element that applies (knowledge) and the heavier responsibility on law enforcement officers to uphold the law.

Clause 716 Compounding of offence

The offences in this clause are essentially bribery offences, similar to the offences in clause 707. However, whereas those offences can only occur "in legal proceedings" (in the sense in which that term is defined in clause 701), the offences in this clause relate more specifically to a crime that has been committed and the corrupt behavior that a person may engage in to prevent a prosecution for the crime. In effect, the person "compounds" an offence that has occurred with another offence; namely, an offence under this clause. Apart from the ACT, all other Australian jurisdictions have statutory offences that address varying aspects of this kind of conduct.

Subclause (1) essentially concerns the giving of bribes. It provides that it is an offence for a person to give, offer or promise to give a benefit to another person, with the intention that the other person (or a third person) will do or not do any of the things listed in paragraph (b). That is, that a person will conceal an offence; or not start, discontinue or delay a prosecution for an offence; or withhold information, or give false or misleading information in relation to an offence; or obstruct or hinder the investigation of an offence by the police or other law enforcement officer. In addition to giving, offering or promising to give a benefit, the offence also covers cases where a person (with the relevant intention) causes a benefit to be given or causes an offer or promise of a benefit to be made to someone else. The term "benefit" is defined to include any advantage and is not limited to property or money (see the commentary on clause 700). Although the offence is based on section 7.5.4 of the MCC, it has been expanded to more closely follow the bribery and related offences in sections 356 and 357 of the Criminal Code.

The maximum penalty for this offence is seven years imprisonment or 700 penalty units ($70,000) or both. Although this is slightly higher then the recommended penalty for the corresponding MCC offence (five years imprisonment), the increase is justified because the mischief that this offence is directed against correlates more closely to the mischief that the falsifying, destroying or concealing offences are aimed at in clauses 705 and 706.

Like the offence in subclause 707(1), this offence will apply not only if the person actually gives a benefit (with the relevant intention) but also if he or she simply offers or promises to give a benefit. It also applies where someone causes a benefit to be given or causes an offer or a promise of a benefit to be made, say by someone else. Also the benefit that is given etc could be a benefit to a third person.

In addition to proving that the defendant gave or offered etc a benefit to another person, the prosecution must also establish that the defendant did so with the intention that that other person (or a third person) would do or not do any of the things listed in paragraph (b). This does not mean that the prosecution has to show that there was an actual agreement between

the defendant and the other person but only that (by giving the benefit) the defendant intended the other person to say, conceal the offence. Therefore, the defendant will be liable even if the other person does not take the bribe. As to the fault element of "intention" in this context, subsection 18(2) of the Criminal Code provides that a person has intention in relation to a result (e.g. that the other person will discontinue the prosecution) if he or she means to bring it about or is aware that it will happen in the ordinary course of events.

Subclause (2) concerns the taking of bribes. It provides that it is an offence for a person to ask for a benefit, obtain a benefit or agree to obtain a benefit for himself, herself or someone else, with the intention that the person he or she asks etc (or a third person) will do or not do any of the things listed in paragraph (b) or with the intention of inducing, fostering or sustaining a belief that he or she will do or not do any of the things listed in paragraph (b). The underlined words have been added to this offence (compare subclause (1)) to make it clear that the offence will apply in cases where, for example, a person takes a bribe to conceal the offence but with no intention of acting upon it.

Subclause (3) makes it clear that a person is taken to have obtained a benefit for another if the person induces a third person to give that other person a benefit.

A proceeding for an offence under this clause cannot be commenced without the consent of the Attorney General or the Director of Public Prosecutions (see clause 726).

Clause 717 Accessory after the fact

This clause contains the elements of the offence of being an accessory after the fact. The offence is essentially aimed at those who help offenders to escape punishment or realise the proceeds of their crime. The elements of the offence are contained in subclause (1). It provides that a person commits an offence if he or she assist someone who has committed an offence, knowing that the offender committed the offence or believing that the offender committed the offence or a related offence, and with the intention of allowing the offender to escape apprehension or prosecution or to obtain, keep or dispose of the proceeds of the offence. The ACT has a similar offence in section 181 of the Crimes Act, which will be replaced by the offence in this clause.

Although the crime of accessory after the fact is separate from the offence committed by the principal offender, the accessory offence will not apply unless the principal in fact committed an offence. Any offence will suffice but wrongly believing that a person committed an offence and assisting him or her (with the relevant intention) will not constitute an offence under this clause. Also the person must do something to actually assist the offender. An attempt to assist will not suffice (subclause (4)). However, the assistance can be minor (e.g. buying clothes for the principal) or indirect and impersonal (e.g. repainting a stolen car or engaging the services of another to help the principal).

In addition to the physical elements, the prosecution must prove that the defendant knew that the principal committed the offence that was in fact committed or that the defendant believed that the principal committed that offence or "a related offence". Also the prosecution must

establish that in giving the assistance the defendant intended the principal to escape apprehension or prosecution etc. The Bill offence is wider than the existing Crimes Act offence because the latter only applies if the defendant "knows" that the principal committed an offence. Also the Bill offence extends to those who intend to help the principal to "obtain" or "keep" as well as "dispose" of the proceeds of the crime, whereas the Crimes Act offence is limited to disposing of the proceeds. Section 19 of the Criminal Code defines "knowledge" in this context as being aware that the circumstance (that is, the fact that the principal committed the offence) exists. "Belief" on the other hand requires a state of mind that is less than knowledge but more than mere suspicion that the principle committed an offence. As to "intention", subsection 18(2) of the Criminal Code provides that a person has intention in relation to a result (e.g. the offenders escape) if he or she means to bring it about or is aware that it will happen in the ordinary course of events. However, like a number of the other offences in this chapter, it is not necessary for the prosecution to prove that the principal in fact escaped or disposed of the proceeds etc.

The concept of a "related offence" is defined in subclause (3). It provides, in effect, that if the accessory believes that the principal committed a different offence and the circumstances in which the accessory believes the different offence occurred are the same, or partly the same as the circumstances of the actual offence, it is a related offence. This will ensure that an accessory cannot completely avoid liability on the ground that he or she thought that the offender had simply wounded and not murdered the victim (but see subsection (2)).

Because this offence applies to assisting a person who commits any offence it is not appropriate to have a global penalty, otherwise the accessory could conceivably be faced with a higher maximum penalty than the principal. Accordingly, this clause applies a gradation of maximum penalties ranging from 20 years imprisonment and/or 2000 penalty units ($200,000) if the principal offence is murder and three years imprisonment and/or 300 penalty units ($30,000) if the principal offence applies a maximum penalty of less than 10 years imprisonment. This is broadly similar to the penalty regime under the Crimes Act, however, whereas the current law applies a maximum penalty of life imprisonment for both murder (section 12) and being an accessory after the fact to murder (section 181), the Bill offence applies a maximum of 20 years imprisonment for the accessory offence. This is considered appropriate given the lower level of culpability involved in being an accessory after the fact to murder.

Subsection (2) is also an important provision in relation to the penalties that apply. It provides, in effect, that where the offence actually committed is different to the offence that the defendant believes was committed, the maximum penalty that applies is the one that relates to the offence that carries the lower maximum penalty.

A proceeding for an offence under this clause cannot be commenced without the consent of the Attorney General or the Director of Public Prosecutions (see clause 726).

Part 7.2 Summary offences for chapter 7

This part contains a range of summary offences that have been suggested in the chapter 7 report but are not included in the MCC (that is, the offences in clauses 718 and 725) or have

been developed as generic offences to replace commonly repeated offences in the statute book that are related to the administration of justice.

Clause 718 Pleading guilty in another's name

This clause makes it an offence for a person to plead guilty to a charge for an offence, knowing that the charge is in someone else name. The maximum penalty is six months imprisonment or 50 penalty units ($5000) or both. Although the ACT has no existing statutory offence for this kind of conduct it is covered by the common law offence of perverting the course of justice.

This offence can apply either when the person pleading did not commit the offence charged but pleads in the name of the person who did, or when the person pleading did commit the offence charged, but pleads in the name of a person who did not. However, there must be a formal charge and the person must know (section 19 of the Criminal Code) that it is in someone else's name. But subclause (2) makes it clear that to establish the offence it is not necessary for the prosecution to prove the identity or existence of the other person.

Clause 719 Failing to attend

This clause sets out the elements of a summary offence for failing to attend legal proceedings when required to do so. The terms of the offence are based on, and will replace, a number of similar offences that appear in legislation throughout the ACT statute book. The offence applies to a person who is served with a subpoena to attend to give evidence or information, or answer questions, in a legal proceeding and who "fails to attend as required by the subpoena" or "fail to continue to attend until excused from further attendance". However, subclause (2) provides that the offence does not apply if the person has a reasonable excuse for not attending or continuing to attend. This defence is common to offences of this kind (including the similar offences in Commonwealth legislation) and is considered appropriate in the context of this offence. The term "subpoena" is defined in clause 700 to include a summons or notice and the offence only applies to a requirement under subpoena to attend etc in a "legal proceeding" (see clause 701). The maximum penalty for this offence is six months imprisonment or 50 penalty units ($5000) or both, which is the usual maximum penalty for this kind of offence.

Clause 720 Failing to produce document or other thing

This is another generic summary offence that is based on the numerous similar offences in the statute book that it will replace. The offence applies to a person who is either served with a subpoena or is otherwise required by law to produce a document or other thing in a legal proceeding and the person fails to produce the document or other thing as required. However, subclause (2) provides that the offence does not apply if the person has a reasonable excuse for not producing the document or other thing. Again, this defence is common to offences of this kind (including the similar offences in Commonwealth legislation) and is considered appropriate in the context of this offence. A person may be required by law to produce a document in the absence of a subpoena (as defined) where the person is directed to do so by a

court, tribunal or other entity legally empowered to compel production. The maximum penalty for this offence is six months imprisonment or 50 penalty units ($5000) or both, which is the usual maximum penalty for this kind of offence.

Often where legislation contains an offence of this kind there is also a provision that provides that a person cannot avoid liability for the offence by claiming the privilege against self-incrimination. However, where the privilege is abrogated in this way it is generally accompanied with another provision that gives the person immunity from prosecution (with some specified exceptions – e.g. if the prosecution is for giving false or misleading statements) for any evidence that is directly or indirectly obtained because of the person's compliance (sometimes the immunity is limited to the evidence that the person gives and does not extend to evidence obtained because of the evidence the person gives).

The long-standing criminal law policy position has been that the privilege against self-incrimination is to be preserved unless there are good reasons for abrogating it. This is reinforced by section 170 of the Legislation Act, which provides that a law must be interpreted to preserve the privilege. Accordingly, the offence in this clause and clause 722 has been framed to reflect the "default position". That is, a person who refuses to give evidence on self-incrimination grounds will not commit an offence against this clause (or clause 722) unless the relevant legislation abrogates the privilege with respect to these offences. In other words, although it is proposed to remove these offences from existing legislation, the provisions in those Acts that abrogate the privilege and provide an immunity in return, will remain, generally in their present terms.

Clause 721 Failing to take oath

This clause sets out the elements of a summary offence for failing to take the oath in legal proceedings. It is similar to the numerous offences in the statute book that it will replace. It provides that a person commits an offence if he or she is required by law (e.g. directed by a court or tribunal etc) to take an oath to give evidence in a legal proceeding and the person fails to take the oath when required. However, subclause (2) provides that the offence does not apply if the person has a reasonable excuse for not taking the oath. This is considered appropriate and is common for this kind of offence (including corresponding Commonwealth offences). The maximum penalty of six months imprisonment or 50 penalty units ($5000) or both, is also usual for this kind of offence.

Clause 722 Failing to answer a question or give information

This clause sets out the elements of a summary offence for failing to answer a question or give information in a legal proceeding. Again, it is similar to the numerous offences in the statute book that it will replace. It provides that a person commits an offence if he or she is required by law (e.g. directed by a court or tribunal etc) to answer a question or give information in a legal proceeding and the person fails to answer the question or give the information when required. However, subclause (2) provides that the offence does not apply if the person has a reasonable excuse for not answering the question or giving the information, which is considered appropriate and is common for this kind of offence (including

corresponding Commonwealth offences). The maximum penalty of six months imprisonment or 50 penalty units ($5000) or both, is also usual for this kind of offence.

In considering this offence it is important to also have regard to the commentary on clause 721, particularly in relation to the issue concerning the privilege against self-incrimination.

Clause 723 Making etc false or misleading statements in legal proceeding

This clause contains three summary offences that relate to the making or giving of false or misleading statements or documents in legal proceedings. The offences will replace a large number of existing offences in the statute book that relate to the making or giving false or misleading statements to courts, tribunals and other entities.

The first offence in subclause (1) provides that a person commits an offence if the person makes a false sworn or unsworn statement in a legal proceeding before a court and the person is reckless about whether the statement is false. The maximum penalty for this offence and the offences in subclauses (2) and (6) is 12 months imprisonment or 100 penalty units ($10,000) or both, which is the more usual penalty for offences of this kind.

In contrast to perjury, this offence relates to the making of both sworn and unsworn statements. The terms "statement" (which can be oral or in a document) and "sworn statement" (made or verified on oath) are defined in clause 700 of this chapter. An "unsworn statement" is defined in subclause (8) as a statement that is not made or verified on oath. If the relevant statement is unsworn the offence will not apply unless reasonable steps were taken to warn the person, before the statement was made, that it is an offence to make a false statement (see subclauses (4) and (5)). This is because administering the oath serves as an important warning to witnesses that their undertaking to tell the truth carries with it a liability to criminal penalties if they do not. Accordingly, in the absence of the oath it is important to require a warning to be given, particularly because unsworn statements are usually made in court proceedings by children and young persons.

Since the offence only applies to legal proceedings before a court it does not extend to catch "misleading" statements because this is not considered appropriate in strict adversarial proceedings where witnesses are generally advised to only answer the question that is asked. For the offence to apply the statement must be false in fact and the person must be reckless about whether the statement is false. That is, the defendant must be aware of a substantial risk that the circumstance exists (namely that the statement is false) and having regard to the circumstances known to him or her, it is unjustifiable to take the risk. Also, it is important to note that although paragraph (1)(c) only refers expressly to "recklessness", section 20(4) of the Criminal Code provides that if recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element. Accordingly, if the defendant "knows" that the statement is false, instead of just being reckless about whether it is false, he or she will be caught by this offence.

Although, in most cases where false evidence is sworn a perjury offence will apply (for which a maximum penalty of seven years applies), it is considered appropriate to have a lower order offence of this kind for the more minor incidences of giving false evidence.

Subclause (2) provides that a person commits an offence if the person makes a sworn or unsworn statement in a legal proceeding before an entity that is not a court and the statement is false or misleading and the person is reckless about that fact. However, the offence will not apply if the statement is not false or misleading in a material particular (subclause (3)). This is usual for offences of this kind when they relate to proceedings before tribunals and other similar entities. Like the offence in subclause (1), a warning must be given if the statement is unsworn (subclauses (4) and (5)).

The offence in subclause (6) provides that a person commits an offence if the person files, lodges or gives a sworn document in a legal proceeding and the document contains false or misleading information and the person is reckless about whether the document contains false or misleading information. This offence does not extend to unsworn documents because of the limited opportunities to give a formal warning of the risks of submitting false or misleading documents.

There are a number of defences to this offence. First, the offence will not apply if the relevant information is not false or misleading in a material particular (subclause (8)). Also subclause (7) contains a range of defences that are similar to the defences in subclauses 705(3) to (5) concerning the offence of using false evidence. Paragraph 7(a) of this clause provides that the offence in subclause (6) does not apply to a lawyer or person assisting a lawyer who files, lodges or gives the document on instructions from a client and does not know the document contains false or misleading information. Similarly, paragraph 7(b) provides that the offence does not apply to a person involved in a legal proceeding as a law enforcement officer, lawyer, or party (or those assisting them) and who files or gives the document for a "legitimate forensic purpose". The term "legitimate forensic purpose" has the same meaning as that term in subclause 705(6), and includes for the purpose of demonstrating that evidence is false or misleading. Finally the defence in paragraph (7)(c) provides that the offence in subclause (6) does not apply to a person who, when filing, lodging or giving the document, discloses that it contains or may contain false or misleading information.

Clause 724 Obstructing etc legal proceeding

This offence will replace a number of similar offences in the statute book. It provides that a person commits an offence if the person intentionally obstructs or hinders a court, tribunal, commission, board or other entity in the exercise of its functions in a legal proceeding or intentionally causes a substantial disruption to a legal proceeding before a court, tribunal, commission, board or other entity. The maximum penalty is 12 months imprisonment or 100 penalty units ($10, 000) or both, which is the median penalty for this kind of offence.

Clause 725 Obstructing or hindering investigation

This summary offence has been included on the recommendation of MCCOC in the chapter 7 report. The clause provides that a person commits an offence if the person does something with the intention of obstructing or hindering the investigation of an offence by a law enforcement officer. The maximum penalty is six months imprisonment of 50 penalty units ($5000) or both.

Part 7.3 Procedural matters for chapter 7

This part contains some procedural provisions that relate to the offences in this chapter.

726 Consent required for certain prosecutions

This provision makes it clear that the consent of the Attorney General or the Director of Public Prosecutions is required in order to commence a prosecution for the offences in clauses 702 (aggravated perjury), 703 (perjury), 707 (corruption in relation to legal proceedings), 708 (deceiving witness, interpreter or juror) and 709 (threatening etc witnesses, interpreter or juror. However before the consent is given a person can be arrested, charged remanded in custody or granted bail for those offences.

727 Alternative verdicts—aggravated perjury and perjury

This is an alternative verdict provision that relates to the offences of perjury and aggravated perjury in clauses 702 and 703 of chapter 7. It provides that if a person is on trial for aggravated perjury and the jury (or the court if there is no jury) is not satisfied that the defendant committed that offence but is satisfied beyond reasonable doubt that the defendant committed perjury (clause 703) the jury etc may find the defendant guilty of perjury, but only if the defendant has been given procedural fairness in relation to that finding of guilt.

728 Alternative verdicts—perverting the course of justice and publication that could cause miscarriage of justice

This is an alternative verdict provision that relates to the offences of perverting the course of justice (clause 714) and a publication that could cause miscarriage of justice (clause 713). It provides that if a person is on trial for the publication offence and the jury (or the court if there is no jury) is not satisfied that the defendant committed that offence but is satisfied beyond reasonable doubt that the defendant committed the offence of perverting the course of justice (clause 714) the jury etc may find the defendant guilty of perverting the course of justice, but only if the defendant has been given procedural fairness in relation to that finding of guilt.

Schedule 1 Consequential amendments

This schedule will amend a total of 30 Acts and Regulations, primarily to remove offences (including the offences in the Crimes Act) that will become redundant because of the new codified offences in chapter 7. The schedule will also make a number of minor consequential

amendments that are necessary because of the offences that have been repealed from the various Acts referred to in the schedule. In addition, the schedule will insert a declaration in a number of Acts to clarify the operation of chapter 7 with respect to those Acts (see, for example, items 1.23 and 1.62 of the schedule and the commentary to clause 701). Also, in accordance with current criminal law policy, the schedule will insert a standard form immunity in Acts where the privilege against self-incrimination is abrogated but no immunity has been provided (see items 1.73, 1.78. 1.104, 1.115 and 1.143).

Schedule 2 Technical amendments

This schedule will make a number of minor technical amendments to various Acts. The drafter has included an explanatory note in relation to each amendment.