

Model Criminal Code

1st Edition

28 May 2009

This is the model Criminal Code prepared by the Parliamentary Counsel's Committee. The Code has been prepared as a law of a State or Territory. The Code is a collation of draft provisions in various separate reports of the Model Criminal Code Officers Committee (and its successor, the Model Criminal Law Officers Committee) of the Standing Committee of Attorneys-General.

Criminal Code of [Name of State/Territory]

28 May 2009

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Criminal Code of [Name of State/Territory]

A Bill for

An Act relating to the criminal law.

The Parliament of [Name of State/Territory] enacts:

1 Short title

This Act may be cited as the *Criminal Code of [Name of State/Territory] Act*.

2 Commencement

- (1) This Act commences on a day or days to be fixed by Proclamation.
- (2) Different days may be fixed for the commencement of different provisions of the Schedule.

3 The Criminal Code

The Schedule has effect as a law of [Name of State/Territory]

Abbreviations:

“C'wealth Code” means the Commonwealth Criminal Code enacted by the Criminal Code Act 1994 of the Commonwealth.

“MCCOC” means the Model Criminal Code Officers Committee of the Standing Committee of Attorneys General.

“MCCOC Draft” means the draft provisions contained in the relevant MCCOC report.

“MCLOC” means the Model Criminal Law Officers Committee of the Standing Committee of Attorneys General (the successor of MCCOC).

Schedule The Criminal Code of [Name of State/Territory]

Chapter 1 Preliminary

1.1 Short title

This Code may be cited as the *Criminal Code of [Name of State/Territory]*.

1.2 Codification (cf s. 1.1 C'wealth Code)

The only offences against the laws of [Name of State/Territory] are those offences created by, or under the authority of, this Code or any other Act of [Name of State/Territory].

1.3 Definitions (cf Dictionary to C'wealth Code)

In this Code, except in so far as the context or subject-matter otherwise indicates or requires:

conduct—see section 2.2.3 (2).

employee includes a servant.

evidential burden—see section 2.6.3 (6).

intention has the meaning given in section 2.2.7.

knowledge has the meaning given in section 2.2.8.

law means a law of [name of State/Territory], and includes this Code.

legal burden—see section 2.6.1 (3).

negligence has the meaning given in section 2.2.10.

offence means an offence against a law of [name of State/Territory].

offensive weapon means:

- (a) a firearm (including an airgun), or
- (b) an imitation firearm (being anything that has the appearance of being a firearm, whether capable of being discharged or not), or
- (c) an explosive (including anything producing the sound or other effect of an explosive, or intended by the person having it with him or her to produce any such effect), or
- (d) an imitation explosive (being an article that might reasonably be taken to be or to contain an explosive), or
- (e) any other article that is made or adapted for use for causing injury to or incapacitating a person, or that the person having it with him or her intends or threatens to use for such a purpose.

recklessness has the meaning given in section 2.2.9.

vessel includes a water craft of any description used or capable of being used as

a means of transportation on water.

1.4 Regulations

The [*Governor/Administrator*] may make regulations prescribing matters:

- (a) required or permitted by this Code to be prescribed, or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Code.

Chapter 2 General principles of criminal responsibility

Note: This Chapter gives effect to the final report of MCCOC on general principles of criminal responsibility (December 1992) and is in the same form as that enacted by the Commonwealth in 1995 as part of the Commonwealth Criminal Code. In addition, this Chapter includes provisions recommended by MCCOC on geographical jurisdiction (Part 2.7) and some other minor changes made by the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 of the Commonwealth.

Part 2.1 Purpose and application

2.1.1 Purpose (cf s. 2.1 C'wealth Code)

The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of [Name of State/Territory]. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

2.1.2 Application (cf s. 2.2 C'wealth Code)

- (1) This Chapter applies to all offences against this Code.
- (2) On and after the day occurring 5 years after the commencement of this Chapter, this Chapter applies to all other offences.
- (3) Section 2.4.6 (References in Acts to offences) applies to all offences.

Part 2.2 The elements of an offence

Division 1 General

2.2.1 Elements (cf s. 3.1 C'wealth Code)

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

2.2.2 Establishing guilt in respect of offences (cf s. 3.2 C'wealth Code)

In order for a person to be found guilty of committing an offence the following must be proved:

- (a) the existence of such physical elements as are, under the law

- (b) creating the offence, relevant to establishing guilt, in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

Note 1. See Part 2.6 on proof of criminal responsibility.

Note 2. See Part 2.7 on geographical jurisdiction.

Division 2 Physical elements

2.2.3 Physical elements (cf s. 4.1 C'wealth Code)

- (1) A physical element of an offence may be:
- (a) conduct, or
 - (b) a circumstance in which conduct occurs, or
 - (c) a result of conduct.
- (2) In this Code:
conduct means an act, an omission to perform an act or a state of affairs.

2.2.4 Voluntariness (cf s. 4.2 C'wealth Code)

- (1) Conduct can only be a physical element if it is voluntary.
- (2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.
- (3) The following are examples of conduct that is not voluntary:
- (a) a spasm, convulsion or other unwilled bodily movement,
 - (b) an act performed during sleep or unconsciousness,
 - (c) an act performed during impaired consciousness depriving the person of the will to act.
- (4) An omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing.
- (5) If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.
- (6) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.
- (7) Intoxication is self-induced unless it came about:
- (a) involuntarily, or
 - (b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

2.2.5 Omissions (cf s. 4.3 C'wealth Code)

An omission to perform an act can only be a physical element if:

- (a) the law creating the offence makes it so, or

- (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.

Division 3 Fault elements

2.2.6 Fault elements (cf s. 5.1 C'wealth Code)

- (1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.
- (2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

Example. The fault element for the offence of judicial corruption under section 32 of the *Crimes Act 1914* of the Commonwealth is that the relevant conduct be carried out "corruptly".

2.2.7 Intention (cf s. 5.2 C'wealth Code)

- (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
- (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

2.2.8 Knowledge (cf s. 5.3 C'wealth Code)

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

2.2.9 Recklessness (cf s. 5.4 C'wealth Code)

- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstance exists or will exist, and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
 - (a) he or she is aware of a substantial risk that the result will occur, and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

2.2.10 Negligence (cf s. 5.5 C'wealth Code)

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

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances, and
- (b) such a high risk that the physical element exists or will exist, that the conduct merits criminal punishment for the offence.

2.2.11 Offences that do not specify fault elements (cf s. 5.6 C'wealth Code)

- (1) If the law creating the offence does not specify a fault element for a physical element of an offence that consists only of conduct, intention is the fault element for that physical element.
- (2) If the law creating the offence does not specify a fault element for a physical element of an offence that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note. Under section 2.2.9 (4), recklessness can be established by proving intention, knowledge or recklessness.

Division 4 Cases where fault elements are not required

2.2.12 Strict liability (cf s. 6.1 C'wealth Code)

- (1) If a law that creates an offence provides that the offence is an offence of strict liability:
 - (a) there are no fault elements for any of the physical elements of the offence, and
 - (b) the defence of mistake of fact under section 2.3.10 is available.
- (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
 - (a) there are no fault elements for that physical element, and
 - (b) the defence of mistake of fact under section 2.3.10 is available in relation to that physical element.
- (3) The existence of strict liability does not make any other defence unavailable.

2.2.13 Absolute liability (cf s. 6.2 C'wealth Code)

- (1) If a law that creates an offence provides that the offence is an offence of absolute liability:
 - (a) there are no fault elements for any of the physical elements of the offence, and
 - (b) the defence of mistake of fact under section 2.3.10 is unavailable.
- (2) If a law that creates an offence provides that absolute liability applies to a

particular physical element of the offence:

- (a) there are no fault elements for that physical element, and
 - (b) the defence of mistake of fact under section 2.3.10 is unavailable in relation to that physical element.
- (3) The existence of absolute liability does not make any other defence unavailable.

Part 2.3 Circumstances in which there is no criminal responsibility

Note. This Part sets out defences that are generally available. Defences that apply to a more limited class of offences are dealt with elsewhere in this Code and in other laws.

Division 1 Circumstances involving lack of capacity

2.3.1 Children under 10 (cf s. 7.1 C'wealth Code)

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

2.3.2 Children over 10 but under 14 (cf s. 7.2 C'wealth Code)

- (1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.
- (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.

2.3.3 Mental impairment (cf s. 7.3 C'wealth Code)

- (1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:
 - (a) the person did not know the nature and quality of the conduct, or
 - (b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong), or
 - (c) the person was unable to control the conduct.
- (2) The question whether the person was suffering from a mental impairment is one of fact.
- (3) A person is presumed not to have been suffering from such a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment.
- (4) The prosecution can only rely on this section if the court gives leave.

- (5) The tribunal of fact must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment.
- (6) A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely on this section to deny criminal responsibility.
- (7) If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.
- (8) In this section:
mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.
- (9) The reference in subsection (8) to mental illness is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.

Division 2 Intoxication

2.3.4 Definition—self-induced intoxication (cf s. 8.1 C'wealth Code)

For the purposes of this Division, intoxication is self-induced unless it came about:

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

2.3.5 Intoxication (offences involving basic intent) (cf s. 8.2 C'wealth Code)

- (1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.
- (2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.
Note. A fault element of intention with respect to a circumstance is not a fault element of basic intent.
- (3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.
- (4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.

- (5) A person may be regarded as having considered whether or not facts existed if:
 - (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion, and
 - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

2.3.6 Intoxication (negligence as fault element) (cf s. 8.3 C'wealth Code)

- (1) If negligence is a fault element for a particular physical element of an offence, in determining whether that fault element existed in relation to a person who is intoxicated, regard must be had to the standard of a reasonable person who is not intoxicated.
- (2) However, if intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

2.3.7 Intoxication (relevance to defences) (cf s. 8.4 C'wealth Code)

- (1) If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.
- (2) If any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.
- (3) If a person's intoxication is not self-induced, in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.
- (4) If, in relation to an offence:
 - (a) each physical element has a fault element of basic intent, and
 - (b) any part of a defence is based on actual knowledge or belief, evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.
- (5) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note. A fault element of intention with respect to a circumstance is not a fault element of basic intent.

2.3.8 Involuntary intoxication (cf s. 8.5 C'wealth Code)

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

Division 3 Circumstances involving mistake or ignorance

2.3.9 Mistake or ignorance of fact (fault elements other than negligence) (cf s. 9.1 C'wealth Code)

- (1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:
 - (a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts, and
 - (b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.
- (2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.

2.3.10 Mistake of fact (strict liability) (cf s. 9.2 C'wealth Code)

- (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:
 - (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts, and
 - (b) had those facts existed, the conduct would not have constituted an offence.
- (2) A person may be regarded as having considered whether or not facts existed if:
 - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion, and
 - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

Note. Section 2.2.13 prevents this section applying in situations of absolute liability.

2.3.11 Mistake or ignorance of statute law (cf s. 9.3 C'wealth Code)

- (1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.
- (2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:
 - (a) the Act is expressly or impliedly to the contrary effect, or
 - (b) the ignorance or mistake negates a fault element that applies to a physical element of the offence.

2.3.12 Mistake or ignorance of subordinate legislation (cf s. 9.4 C'wealth Code)

- (1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence he or she is mistaken about, or ignorant of, the existence or content of the subordinate legislation that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.
- (2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:
 - (a) the subordinate legislation is expressly or impliedly to the contrary effect, or
 - (b) the ignorance or mistake negates a fault element that applies to a physical element of the offence, or
 - (c) at the time of the conduct, copies of the subordinate legislation have not been made available to the public or to persons likely to be affected by it, and the person could not be aware of its content even if he or she exercised due diligence.
- (3) In this section:
available includes available by sale.
subordinate legislation means an instrument of a legislative character made directly or indirectly under an Act, or in force directly or indirectly under an Act.

2.3.13 Claim of right (cf s. 9.5 C'wealth Code)

- (1) A person is not criminally responsible for an offence that has a physical element relating to property if:
 - (a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right, and
 - (b) the existence of that right would negate a fault element for any physical element of the offence.
- (2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.
- (3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

Division 4 Circumstances involving external factors

2.3.14 Intervening conduct or event (cf s. 10.1 C'wealth Code)

- A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if:
- (a) the physical element is brought about by another person over

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

2.3.15 Duress (cf s. 10.2 C'wealth Code)

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.
- (2) A person carries out conduct under duress if and only if he or she reasonably believes that:
 - (a) a threat has been made that will be carried out unless an offence is committed, and
 - (b) there is no reasonable way that the threat can be rendered ineffective, and
 - (c) the conduct is a reasonable response to the threat.
- (3) This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

2.3.16 Sudden or extraordinary emergency (cf s. 10.3 C'wealth Code)

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.
- (2) This section applies if and only if the person carrying out the conduct reasonably believes that:
 - (a) circumstances of sudden or extraordinary emergency exist, and
 - (b) committing the offence is the only reasonable way to deal with the emergency, and
 - (c) the conduct is a reasonable response to the emergency.

2.3.17 Self-defence (cf s. 10.4 C'wealth Code)

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:
 - (a) to defend himself or herself or another person, or
 - (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person, or
 - (c) to protect property from unlawful appropriation, destruction, damage or interference, or
 - (d) to prevent criminal trespass to any land or premises, or

- (e) to remove from any land or premises a person who is committing criminal trespass,
and the conduct is a reasonable response in the circumstances as he or she perceives them.
- (3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:
 - (a) to protect property, or
 - (b) to prevent criminal trespass, or
 - (c) to remove a person who is committing criminal trespass.
- (4) This section does not apply if:
 - (a) the person is responding to lawful conduct, and
 - (b) he or she knew that the conduct was lawful.However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

2.3.18 Lawful authority

A person is not criminally responsible for an offence if the person's conduct constituting the offence is justified or excused by any Act or other law.

Note: The defence of lawful authority was not included in MCCOC's final report on this Chapter, but is referred to in its final report on Chapter 5 (Non-fatal offences against the person) at p. 139.

Part 2.4 Extensions of criminal responsibility

2.4.1 Attempt (cf s. 11.1 C'wealth Code)

- (1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.
- (2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.
- (3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.
Note. Under section 2.2.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.
- (4) A person may be found guilty even if:
 - (a) committing the offence attempted is impossible, or
 - (b) the person actually committed the offence attempted.
- (5) A person who is found guilty of attempting to commit an offence cannot be

subsequently charged with the completed offence.

- (6) Any defences, procedures, limitations or qualifying-provisions that apply to an offence apply also to the offence of attempting to commit that offence.
- (7) It is not an offence to attempt to commit an offence against section 2.4.2 (Complicity and common purpose), section 2.4.5 (Conspiracy) or section 3.3.4 (Conspiracy to defraud).

Note: *Other provisions of this Code provide that it is not an offence to attempt to commit particular offences under those provisions.*

2.4.2 Complicity and common purpose (cf s. 11.2 C'wealth Code)

- (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
- (2) For the person to be guilty:
 - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person, and
 - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
 - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed, or
 - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
 - (a) terminated his or her involvement, and
 - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.

2.4.3 Innocent agency (cf s. 11.3 C'wealth Code)

A person who:

- (a) has, in relation to each physical element of an offence, a fault element applicable to that physical element, and
- (b) procures conduct of another person that (whether or not together with the conduct of the procurer) would have constituted an

offence on the part of the procurer if the procurer had engaged
in it,
is taken to have committed that offence and is punishable accordingly.

2.4.4 Incitement (cf s. 11.4 C'wealth Code)

- (1) A person who urges the commission of an offence is guilty of the offence of incitement.
- (2) For the person to be guilty, the person must intend that the offence incited be committed.
- (3) A person may be found guilty even if committing the offence incited is impossible.
- (4) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence.
- (5) It is not an offence to incite the commission of an offence against section 2.4.1 (Attempt), this section, section 2.4.5 (Conspiracy) or section 3.3.4 (Conspiracy to defraud).

Maximum penalty:

- (a) if the offence incited is punishable by life imprisonment—imprisonment for 10 years, or
- (b) if the offence incited is punishable by imprisonment for 14 years or more, but is not punishable by life imprisonment—imprisonment for 7 years, or
- (c) if the offence incited is punishable by imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more—imprisonment for 5 years, or
- (d) if the offence is otherwise punishable by imprisonment—imprisonment for 3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser, or
- (e) if the offence incited is not punishable by imprisonment—the number of penalty units equal to the maximum number of penalty units applicable to the offence incited.

Note. [This note to be adapted to suit the relevant State or Territory]. Under section 4D of the *Crimes Act 1914* of the Commonwealth, these penalties are only maximum penalties. Subsection 4B (2) of that Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of the offence, subsection 4B (3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence. Penalty units are defined in section 4AA of that Act.

2.4.5 Conspiracy (cf s. 11.5 C'wealth Code)

- (1) A person who conspires with another person to commit an offence punishable

Criminal Code of [State/Territory]

- by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.
- (2) For the person to be guilty:
 - (a) the person must have entered into an agreement with one or more other persons, and
 - (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement, and
 - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
 - (3) A person may be found guilty of conspiracy to commit an offence even if:
 - (a) committing the offence is impossible, or
 - (b) the only other party to the agreement is a body corporate, or
 - (c) each other party to the agreement is at least one of the following:
 - (i) a person who is not criminally responsible,
 - (ii) a person for whose benefit or protection the offence exists, or
 - (d) subject to subsection (4) (a), all other parties to the agreement have been acquitted of the conspiracy.
 - (4) A person cannot be found guilty of conspiracy to commit an offence if:
 - (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal, or
 - (b) he or she is a person for whose benefit or protection the offence exists.
 - (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
 - (a) withdrew from the agreement, and
 - (b) took all reasonable steps to prevent the commission of the offence.
 - (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
 - (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
 - (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

2.4.6 References in Acts to offences (cf s. 11.6 C'wealth Code)

- (1) A reference in an Act to an offence against an Act (including this Code) includes a reference to an offence against section 2.4.1 (Attempt), 2.4.4 (Incitement) or 2.4.5 (Conspiracy) of this Code that relates to such an offence.
- (2) A reference in an Act (including this Code) to a particular offence includes a reference to an offence against section 2.4.1 (Attempt), 2.4.4 (Incitement) or 2.4.5 (Conspiracy) of this Code that relates to that particular offence.
- (3) Subsection (1) or (2) does not apply if an Act is expressly or impliedly to the contrary effect.

Note. Sections 2.4.2 (Complicity and common purpose) and 2.4.3 (Innocent agency) of this Code operate as extensions of principal offences and are therefore not referred to in this section.

Part 2.5 Corporate criminal responsibility

2.5.1 General principles (cf s. 12.1 C'wealth Code)

- (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
- (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note. [*This note to be adapted to suit the relevant State or Territory*]. Section 4B of the *Crimes Act 1914* of the Commonwealth enables a fine to be imposed for offences that only specify imprisonment as a penalty.

2.5.2 Physical elements (cf s. 12.2 C'wealth Code)

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

2.5.3 Fault elements other than negligence (cf s. 12.3 C'wealth Code)

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
 - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the

- commission of the offence, or
 - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence, or
 - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision, or
 - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Subsection (2) (b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of subsection (2) (c) or (d) include:
 - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate, and
 - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:
 - board of directors** means the body (by whatever name called) exercising the executive authority of the body corporate.
 - corporate culture** means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.
 - high managerial agent** means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

2.5.4 Negligence (cf s. 12.4 C'wealth Code)

- (1) The test of negligence for a body corporate is that set out in section 2.2.10.
- (2) If:
 - (a) negligence is a fault element in relation to a physical element of

- an offence, and
 - (b) no individual employee, agent or officer of the body corporate has that fault element,
- that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
- (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
 - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers, or
 - (b) failure to provide adequate systems or conveying relevant information to relevant persons in the body corporate.

2.5.5 Mistake of fact (strict liability) (cf s. 12.5 C'wealth Code)

- (1) A body corporate can only rely on section 2.3.10 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:
 - (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence, and
 - (b) the body corporate proves that it exercised due diligence to prevent the conduct.
- (2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
 - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers, or
 - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

2.5.6 Intervening conduct or event (cf s. 12.6 C'wealth Code)

A body corporate cannot rely on section 2.3.14 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

Part 2.6 Proof of criminal responsibility

2.6.1 Legal burden of proof prosecution (cf s. 13.1 C'wealth Code)

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

Note. See section 2.2.2 on what elements are relevant to a person's guilt.

- (2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.
- (3) In this Code:
legal burden, in relation to a matter, means the burden of proving the existence of the matter.

2.6.2 Standard of proof prosecution (cf s. 13.2 C'wealth Code)

- (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.
- (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

2.6.3 Evidential burden of proof—defence (cf s. 13.3 C'wealth Code)

- (1) Subject to section 2.6.4, a burden of proof that a law imposes on a defendant is an evidential burden only.
- (2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 2.3.3) bears an evidential burden in relation to that matter.
- (3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.
- (4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.
- (5) The question whether an evidential burden has been discharged is one of law.
- (6) In this Code:
evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

2.6.4 Legal burden of proof—defence (cf s. 13.4 C'wealth Code)

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

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

2.6.5 Standard of proof—defence (cf s. 13.5 C'wealth Code)

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

2.6.6 Use of averments (cf s. 13.6 C'wealth Code)

A law that allows the prosecution to make an averment is taken not to allow the prosecution:

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

Part 2.7 Geographical jurisdiction (cf Part 2.7 C'wealth Code)

2.7.1 Application and effect of Part

- (1) This Part applies to all offences.
- (2) This Part extends the application of a law of this State/Territory that creates an offence beyond the territorial limits of this State/Territory if there is the nexus required by this Part between this State/Territory and the offence.
- (3) If the law that creates an offence makes provision with respect to any geographical consideration concerning the offence, that provision prevails over any inconsistent provision of this Part.

Note: Examples of special provisions made by the law creating an offence are as follows:

Part 8.1 (offences relating to contamination of goods) -see section 8.1.5; Part 9.1 (offences relating to slavery and sexual servitude) - see section 9.1.8; Part 5.1 (offences relating to stalking) - see section 5.1.22; Part 5.1 (offences relating to genital mutilation) - see section 5.1.35; Chapter 5.2 (offence relating to persistent sexual abuse) - see section 5.2.14.

2.7.2 Interpretation

- (1) For the purposes of this Part, the necessary geographical nexus is the nexus required by section 2.7.3.
- (2) For the purposes of this Part, the place in which an offence is committed is the place in which the physical elements of the offence occur.
- (3) For the purposes of this Part, the place in which an offence has an effect includes:
 - (a) any place whose peace, welfare or good government is threatened by the offence; and
 - (b) any place in which the offence would have an effect (or would

cause such a threat) if the criminal activity concerned were carried out.

- (4) A reference in this Part to this State/Territory includes a reference to the coastal waters of this State/Territory in which the criminal laws of this State/Territory apply by virtue of the *[here insert relevant Act of this State/Territory]*.

2.7.3 Extension of offences if there is a geographical nexus

- (1) If:
- (a) all elements necessary to constitute an offence against a law of this State/Territory exist (disregarding geographical considerations); and
 - (b) a geographical nexus exists between this State/Territory and the offence,
- the person alleged to have committed the offence is guilty of an offence against that law.
- (2) A geographical nexus exists between this State/Territory and an offence if:
- (a) the offence is committed wholly or partly in this State/Territory (whether or not the offence has any effect in this State/Territory); or
 - (b) the offence is committed wholly outside this State/Territory, but the offence has an effect in this State/Territory.

2.7.4 Provisions relating to double criminality

- (1) This Part applies to an offence that is committed partly in this State/Territory and partly in another place outside this State/Territory, irrespective of whether it is also an offence in that other place.
- (2) This Part applies to an offence that is committed wholly in a place outside this State/Territory only if:
- (a) it is also an offence in that place; or
 - (b) it is not also an offence in that place, but the trier of fact is satisfied that the offence constitutes such a threat to the peace, welfare or good government of this State/Territory that the offence warrants criminal punishment in this State/Territory.

2.7.5 Procedural and other provisions

- (1) The existence of the necessary geographical nexus for an offence will be presumed and the presumption is conclusive unless rebutted under subsection (2).
- (2) If a person charged with an offence disputes the existence of the necessary geographical nexus, the court will proceed with the trial of the offence in the

usual way. If, at the conclusion of the trial, the trier of fact is satisfied on the balance of probabilities that the necessary geographical nexus does not exist, it must (subject to subsection (3)) make or return a finding to that effect and the charge will be dismissed.

- (3) If the trier of fact would, disregarding any geographical considerations, find the person not guilty of the offence, it must make or return a finding of not guilty. The trier of fact must make or return a finding of not guilty on the grounds of mental impairment in any such case if they were the only grounds on which the trier of fact would have found the person not guilty of the offence.
- (4) This section also applies to any alternative verdict available by law to the trier of fact in respect of another offence with which the person was not charged. A finding of guilt may be made or returned in any such case, unless the trier of fact is satisfied on the balance of probabilities that the necessary geographical nexus for that other offence does not exist.
- (5) The issue of whether the necessary geographical nexus exists must, if raised before the trial, be reserved for consideration at the trial.
- (6) A power or authority exercisable on reasonable suspicion or belief that an offence has been committed may be exercised in this State/Territory if the person in whom the power or authority is vested suspects on reasonable grounds or believes that the elements necessary to constitute the offence exist (whether or not the person suspects or believes or has any ground to suspect or believe that the necessary geographical nexus with this State/Territory exists).

Chapter 3 Theft, fraud, blackmail, forgery, bribery and related offences

Note: This Chapter gives effect to the final reports of MCCOC of December 1995 (except in respect of conspiracy to defraud) and May 1997 (in respect of conspiracy to defraud—section 3.3.4) and April 2006 (in respect of credit card skimming - section 3.3.5). A related report by MCCOC on “dishonesty” (and conspiracy to defraud) was issued in 1998.

Part 3.1 Purpose and definitions

3.1.1 Purpose (cf s. 14.1 MCCOC Draft)

The purpose of this Chapter is to codify the law of theft, fraud, blackmail, forgery, bribery and related offences.

3.1.2 Dishonesty (cf s. 14.2 MCCOC Draft)

(1) In this Chapter, **dishonest** means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.

(2) In a prosecution for an offence, **dishonesty** is a matter for the trier of fact.

Note. Section 3.2.2 affects the meaning of **dishonesty** in offences related to theft and section 3.3.2 (3) affects the meaning of **dishonesty** in the offences of obtaining property or a financial advantage by deception. See also section 2.3.13 (Claim of right).

3.1.3 Gain and loss (cf s. 14.3 MCCOC Draft)

(1) In this Chapter:

gain or **loss** means gain or loss in money or other property, whether temporary or permanent, and:

(a) **gain** includes keeping what one has, and

(b) **loss** includes not getting what one might get.

(2) In this Chapter:

(a) **obtaining** a gain means obtaining a gain for oneself or for another, and

(b) **causing** a loss means causing a loss to another.

3.1.4 Property (cf s. 14.4 MCCOC Draft)

In this Chapter:

property includes all real or personal property, including:

(a) money, and

(b) things in action or other intangible property, and

(c) electricity, and

- (d) a wild creature that is tamed or ordinarily kept in captivity or that is reduced (or in the course of being reduced) into the possession of a person.

3.1.5 Person to whom property belongs (cf s. 14.5 MCCOC Draft)

For the purposes of this Chapter, *property belongs* to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest or from a constructive trust).

3.1.6 Proceedings for offence may be taken by husband against wife and vice versa (cf s. 14.6 MCCOC Draft)

Despite anything to the contrary in any other Act, proceedings for an offence against this Chapter relating to property belonging, or claimed to belong, to a person who was married at the time of the alleged offence may be taken by the person against the other party to the marriage, whether or not the parties were living together at the time of the alleged offence.

Note: The above provision is only required in jurisdictions that have laws that prevent a husband or wife from taking proceedings against the other party to the marriage for an offence in relation to property belonging to the husband or wife if the parties were living together at the time (for example, see section 16A of the Married Persons (Property and Torts) Act 1901 (NSW)). The provision could be included in the relevant legislation.

Part 3.2 Theft and related offences

Division 1 Theft

3.2.1 Theft (cf s. 15.1 MCCOC Draft)

- (1) A person who dishonestly appropriates property belonging to another, with the intention of permanently depriving the other of it, is guilty of the offence of theft. Maximum penalty: Imprisonment for 10 years.
- (2) The following provisions of this Division apply to the offence of theft.

3.2.2 Dishonesty—interpretation (cf s. 15.2 MCCOC Draft)

- (1) A person's appropriation of property belonging to another is not dishonest if the person appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps. This subsection does not apply if the person appropriating the property held it as

trustee or personal representative.

- (2) A person's appropriation of property belonging to another may be dishonest notwithstanding that the person is willing to pay for the property.

3.2.3 Appropriation—interpretation (cf s. 15.3 MCCOC Draft)

- (1) Any assumption of the rights of an owner to ownership, possession or control of property, without the consent of a person to whom it belongs, amounts to an appropriation of the property. This includes, if a person has come by property (innocently or not) without committing theft, any later such assumption of rights without consent by keeping or dealing with it as owner.
- (2) If property or a right or interest in property is or purports to be transferred or given to a person acting in good faith, a later assumption by the person of rights which the person had believed himself or herself to be acquiring, does not, because of any defect in the transferor's title, amount to an appropriation of the property.

3.2.4 Property—interpretation (cf s. 15.4 MCCOC Draft)

- (1) A person cannot commit theft of land or things forming part of land and severed from it by the person or by the person's directions, except in the following cases:
- (a) when the person is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and the person appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in the person, or
 - (b) when the person is not in possession of the land and appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed, or
 - (c) when, being in possession of the land under a tenancy, the person appropriates the whole or part of any fixture or structure let to be used with the land.
- (2) For the purposes of this section:
- (a) *land* does not include incorporeal hereditaments,
 - (b) *tenancy* means a tenancy for years or any less period, and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be treated as having possession under the tenancy, and *let* is to be construed accordingly.

3.2.5 Belonging to another—interpretation (cf s. 15.5 MCCOC Draft)

- (1) If property is subject to a trust, the persons to whom it belongs include any person having a right to enforce the trust. Accordingly, an intention to defeat the

- trust is an intention to deprive any such person of the property.
- (2) If a person receives property from or on account of another, and is under a legal obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds belong (as against the person) to the other.
 - (3) If a person gets property by another's fundamental mistake, and is under a legal obligation to make restoration (in whole or in part) of the property or its proceeds, then to the extent of that obligation the property or proceeds belongs (as against the person) to the person entitled to restoration. Accordingly, an intention not to make restoration is an intention to deprive the person so entitled of the property or proceeds, and an appropriation of the property or proceeds without the consent of the person entitled to restoration.
 - (4) For the purposes of subsection (3), a *fundamental mistake* is:
 - (a) a mistake about the identity of the person getting the property or a mistake as to the essential nature of the property, or
 - (b) a mistake about the amount of any money, direct credit into an account, cheque or other negotiable instrument if the person getting the property is aware of the mistake at the time of getting the property.
 - (5) Property of a corporation sole belongs to the corporation despite a vacancy in the corporation.
 - (6) If property belongs to 2 or more persons, a reference in this Division to the person to whom the property belongs is a reference to all those persons.

3.2.6 Intention of permanently depriving—interpretation (cf s. 15.6 MCCOC Draft)

- (1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself has, nevertheless, the intention of permanently depriving the other of it if the person's intention is to treat the thing as his or her own to dispose of regardless of the other's rights. A borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.
- (2) Without prejudice to the generality of subsection (1), if a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return that the person may not be able to perform, this (if done for purposes of his or her own and without the other's authority) amounts to treating the property as his or her own to dispose of regardless of the other's rights.

3.2.7 General deficiency (cf s. 15.7 MCCOC Draft)

A person may be convicted of theft of all or any part of a general deficiency in

money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were appropriated over a period of time.

Division 2 Offences related to theft

3.2.8 Robbery (cf s. 16.1 MCCOC Draft)

A person who commits theft and, at the time of or immediately before or immediately after doing so:

- (a) uses force on any person, or
 - (b) threatens to use force then and there on any person,
- with intent to commit theft or to escape from the scene, is guilty of the offence of robbery.

Maximum penalty: Imprisonment for 12 years and 6 months.

3.2.9 Aggravated robbery (cf s. 16.2 MCCOC Draft)

A person who:

- (a) commits any robbery in company with one or more other persons, or
- (b) commits any robbery and at the time has an offensive weapon with him or her,

is guilty of the offence of aggravated robbery.

Maximum penalty: Imprisonment for 20 years.

3.2.10 Burglary (cf s. 16.3 MCCOC Draft)

- (1) A person who enters or remains in any building as a trespasser with intent:
 - (a) to commit theft in the building, or
 - (b) to commit an offence in the building that is punishable with imprisonment for 5 years or more and that involves causing harm to a person or damage to property,is guilty of the offence of burglary.
Maximum penalty: Imprisonment for 12 years and 6 months.
- (2) A person is not a trespasser merely because the person is permitted to enter or remain in the building for a purpose that is not the person's intended purpose, or as a result of fraud, misrepresentation or another's mistake.
- (3) In this section, **building** includes:
 - (a) a part of a building, or
 - (b) a structure (whether or not moveable), a vehicle, or a vessel, that is used, designed or adapted for residential purposes.

3.2.11 Aggravated burglary (cf s. 16.4 MCCOC Draft)

A person who:

- (a) commits any burglary in company with one or more other persons, or
- (b) commits any burglary and at the time has an offensive weapon with him or her,

is guilty of the offence of aggravated burglary.

Maximum penalty: Imprisonment for 15 years.

3.2.12 Taking motor vehicle without consent (cf s. 16.5 MCCOC Draft)

A person:

- (a) who dishonestly takes a motor vehicle belonging to another person, and
- (b) who does not have consent to do so from a person to whom the vehicle belongs,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

3.2.13 Making off without payment (cf s. 16.6 MCCOC Draft)

- (1) A person who, knowing that immediate payment for any goods supplied or service provided is required or expected from him or her, dishonestly makes off without having paid and with intent to avoid payment of the amount due, is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

- (2) This section does not apply if the supply of the goods or the provision of the service is contrary to law.
- (3) For the purposes of this section, *immediate payment* includes payment at the time of collecting goods in respect of which a service has been provided.

3.2.14 Going equipped for theft, robbery, burglary or other offences (cf s. 16.7 MCCOC Draft)

- (1) A person who, when not at home, has with him or her any article with intent to use it in the course of or in connection with any theft or related offence is guilty of an offence.

Maximum penalty: Imprisonment for 3 years.

- (2) For the purposes of this section, a *related offence* is robbery, burglary, an offence against section 3.2.12 or an offence against section 3.3.2.

3.2.15 Receiving (cf s. 16.8 MCCOC Draft)

- (1) A person who dishonestly receives stolen property, knowing or believing the property to be stolen, is guilty of the offence of receiving.

Criminal Code of [State/Territory]

Maximum penalty: Imprisonment for 10 years.

- (2) Property is *stolen property* if:
- (a) it was appropriated or obtained in the course of any theft or any offence against section 3.3.2, or
 - (b) it was appropriated or obtained outside this jurisdiction in the course of an offence outside this jurisdiction (and that would have amounted to theft or an offence against section 3.3.2 if it had occurred in this jurisdiction), or
 - (c) it is (in whole or in part) the proceeds of sale of, or property exchanged for, stolen property and is in the possession or custody of the person who so appropriated or obtained the stolen property or who received the stolen property (or the proceeds or exchanged property) in the course of an offence against this section.

Stolen property does not include land obtained in the course of an offence against section 3.3.2.

- (3) Property ceases to be stolen property:
- (a) after the property is restored to the person from whom it was appropriated or obtained or to other lawful possession or custody, or
 - (b) after that person or any person claiming through him or her ceases to have any right to restitution in respect of the property.
- (4) A person charged with theft may be convicted of receiving and a person charged with receiving may be convicted of theft. If the trier of fact is satisfied beyond reasonable doubt that a person has committed either theft or receiving but is unable to determine which of those offences the person has committed, the person is to be convicted of whichever of those offences is the more probable or, if they are equally probable, the person is to be convicted of theft.
- (5) A person may not be convicted of both theft and receiving in respect of the same property if the person retains possession or custody of the property.
- (6) In proceedings for the offence of receiving, it does not matter whether the property concerned was stolen before or after the commencement of this section.

Note. *The following draft summary offence is referred to at page 125 of the MCCOC final report and is designed to complement the offence of receiving.*

*** Unlawful possession of stolen property**

- (1) Any person who:
- (a) has any property in his or her possession, or
 - (b) has any property in the possession of another person, or
 - (c) has any property in or on any premises, whether belonging to or

- occupied by the person or not, or whether that property is there for the person's own use or the use of another, or
- (d) gives possession of any property to a person who is not lawfully entitled to possession of the property,
- which property may be reasonably suspected of being stolen, is guilty of an offence.
- Maximum penalty: Imprisonment for 6 months.
- (2) In any prosecution for an offence against this section, it is not necessary for the prosecution to prove that the defendant knew or suspected that the property was stolen. However, it is a defence to such a prosecution if the defendant satisfies the court that:
- (a) the defendant had no reasonable grounds for suspecting that the property concerned was stolen, or
- (b) the property concerned was not stolen property.
- (3) [*Code definition of receiving stolen property to be included here*]
- (4) If a person is charged with both an offence against this section and an offence of receiving in relation to the same property, proceedings for those offences are not to be heard together.
- (5) In this section, **premises** includes any structure, building, vehicle, aircraft, vessel (of any description) or place (whether built on or not).

Part 3.3 Fraud

3.3.1 Deception—definition (cf s. 17.1 MCCOC Draft)

In this Part, **deception** means any deception, by words or other conduct, as to fact or as to law, including:

- (a) a deception as to the intentions of the person using the deception or any other person, or
- (b) conduct by a person that causes a computer system or any machine to make a response that the person is not authorised to cause it to do.

3.3.2 Obtaining property by deception (cf s. 17.2 MCCOC Draft)

- (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an offence.
- Maximum penalty: Imprisonment for 10 years.
- (2) For the purposes of this section, a person is to be treated as **obtaining property** if the person obtains ownership, possession or control of it, and **obtain** includes obtaining for another or enabling oneself or another to obtain or to retain.

- (3) A person's obtaining of property belonging to another may be dishonest notwithstanding that the person is willing to pay for the property.
- (4) Section 3.2.6 applies to this section as if references to appropriating property were references to obtaining property.
- (5) A person may be convicted of an offence against this section involving all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time.
- (6) A conviction for an offence against this section is an alternative verdict to a charge for the offence of theft and a conviction for the offence of theft is an alternative verdict to a charge for an offence against this section.

3.3.3 Obtaining financial advantage by deception (cf s. 17.3 MCCOC Draft)

A person who by any deception dishonestly obtains for himself, herself or another any financial advantage is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

3.3.4 Conspiracy to defraud (cf s. 17.4 MCCOC Draft)

- (1) A person who conspires with another person to do something dishonestly:
 - (a) with the intention of obtaining a gain, or
 - (b) with the intention of causing a loss or being reckless with respect to that result, or
 - (c) with the intention of influencing the exercise of a public duty,is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.
- (2) For the person to be guilty:
 - (a) the person must have entered into an agreement with one or more other persons, and
 - (b) the person and at least one other party to the agreement must have intended to do the thing pursuant to the agreement, and
 - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (3) A person may be found guilty of an offence against this section even if:
 - (a) doing the thing, or obtaining the gain or causing the loss, or influencing the exercise of the public duty, is impossible, or
 - (b) the only other party to the agreement is a body corporate, or
 - (c) each other party to the agreement is at least one of the following:
 - (i) a person who is not criminally responsible,
 - (ii) in the case of an agreement to commit an offence—a person for whose benefit or protection the offence exists, or

- (d) subject to subsection (4), all other parties to the agreement have been acquitted of the offence.
- (4) A person cannot be found guilty of an offence against this section if:
 - (a) all other parties to the agreement have been acquitted of such an offence and a finding of guilt would be inconsistent with their acquittal, or
 - (b) in the case of an agreement to commit an offence—he or she is a person for whose benefit the offence exists.
- (5) A person cannot be found guilty of an offence against this section if, before the commission of an overt act pursuant to the agreement, the person:
 - (a) withdrew from the agreement, and
 - (b) took all reasonable steps to prevent the doing of the thing.
- (6) A court may dismiss a charge of an offence against this section if it thinks that the interests of justice require it to do so.
- (7) In the case of an agreement to commit an offence, any defences, procedures, limitations or qualifying provisions that apply to the offence apply also to the offence against this section.
- (8) Proceedings for an offence against this section must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence against this section before the necessary consent has been given.

3.3.5 Credit card skimming and related offences

- (1) In this section:
 - personal financial information* means information relating to a person that may be used (whether alone or in conjunction with other information) to access funds, credit or other financial benefits.
- (2) A person who dishonestly obtains or deals in personal financial information without the consent of the person to whom it relates is guilty of an offence.
Maximum penalty: imprisonment for 5 years.
- (3) For the purposes of this section:
 - i. obtaining personal financial information includes possessing or making any such information, and
 - ii. dealing in personal financial information includes supplying or using any such information.
- (4) For the purposes of this section, a person is taken to obtain or deal in personal financial information without the consent of the person to whom it relates if the consent of the person is obtained by any deception.
- (5) This section extends to personal financial information relating to a natural person or a body corporate, or to a living or dead person.

Note: *This credit card skimming offence was not included in the original MCCOC report on this Chapter. It was the subject of a separate discussion paper in March 2004 and report in April 2006. MCLOC issued a report on Identity Crime—December 2007 (the draft provisions are not included here).*

Part 3.4 Blackmail

3.4.1 Blackmail (cf s. 18.1 MCCOC Draft)

A person who makes any unwarranted demand with menaces:

- (a) with the intention of obtaining a gain or of causing a loss, or
 - (b) with the intention of influencing the exercise of a public duty,
- is guilty an offence.

Maximum penalty: Imprisonment for 12 years and 6 months.

3.4.2 Unwarranted demands—interpretation (cf s. 18.2 MCCOC Draft)

- (1) A *demand is unwarranted* unless the person believes that he or she has reasonable grounds for making the demand and reasonably believes that the use of the menaces is a proper means of reinforcing the demand.
- (2) The demand need not be a demand for money or other property.

3.4.3 Menaces—interpretation (cf s. 18.3 MCCOC Draft)

- (1) For the purposes of this Part, *menaces* includes:
 - (a) an express or implied threat of any action detrimental or unpleasant to another person, and
 - (b) a general threat of detrimental or unpleasant action that is implied because the person making the unwarranted demand holds a public office.
- (2) A threat against an individual does not constitute a menace unless:
 - (a) the threat would cause an individual of normal stability and courage to act unwillingly in response to the threat, or
 - (b) the threat would cause the particular individual to act unwillingly in response to the threat and the person who makes the threat is aware of the vulnerability of the particular individual to the threat.
- (3) A threat against a Government or body corporate does not constitute a menace unless:
 - (a) the threat would ordinarily cause an unwilling response, or
 - (b) the threat would cause an unwilling response because of a particular vulnerability of which the person making the threat is aware.
- (4) It is immaterial whether the menaces relate to action to be taken by the person making the demand.

Part 3.5 Forgery and related offences

3.5.1 Definitions—general (cf s. 19.1 MCCOC Draft)

- (1) In this Part:
document includes:
 - (a) any paper or other material on which there is writing or on which there are marks, symbols or perforations that are capable of being given a meaning by qualified persons or machines, or
 - (b) a disc, tape or other article from which sounds, images or messages are capable of being reproduced, or
 - (c) a card by means of which credit or other property, or services, can be obtained, or
 - (d) a formal or informal document.
- (2) In this Part, a reference to inducing a person to accept a false document as genuine includes a reference to causing a machine to respond to the document as if it were a genuine document.
- (3) If it is necessary for the purposes of this Part to prove an intent to induce some person to accept a false document as genuine, it is not necessary to prove that the accused intended so to induce a particular person.

3.5.2 Definition—false document (cf s. 19.2 MCCOC Draft)

- (1) For the purposes of this Part, a *document is false* if, and only if, the document purports:
 - (a) to have been made in the form in which it is made by a person who did not in fact make it in that form, or
 - (b) to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form, or
 - (c) to have been made in the terms in which it is made by a person who did not in fact make it in those terms, or
 - (d) to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms, or
 - (e) to have been altered in any respect by a person who did not in fact alter it in that respect, or
 - (f) to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect, or
 - (g) to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered, or
 - (h) to have been made or altered by an existing person who did not in fact exist.
- (2) For the purposes of this Part, a person is to be treated as *making a false document* if the person alters a document so as to make it false within the meaning of this section (whether or not it is false in some other respect apart

from that alteration).

- (3) For the purpose of the application of this section, a document that purports to be a true copy of another document is to be treated as if it were the original document.

3.5.3 Forgery—making false document (cf s. 19.3 MCCOC Draft)

A person who makes a false document with the intention that the person or another will dishonestly use it:

- (a) to induce some person to accept it as genuine, and
(b) by reason of so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty,

is guilty of the offence of forgery.

Maximum penalty: Imprisonment for 7 years and 6 months.

3.5.4 Using false document (cf s. 19.4 MCCOC Draft)

A person who dishonestly uses a false document, knowing that it is false, with the intention of:

- (a) inducing some person to accept it as genuine, and
(b) by reason of so accepting it, obtaining a gain or causing a loss or influencing the exercise of a public duty,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

3.5.5 Possession of false document (cf s. 19.5 MCCOC Draft)

A person who has in his or her possession a false document, knowing that it is false, with the intention that the person or another will dishonestly use it:

- (a) to induce some person to accept it as genuine, and
(b) by reason of so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

3.5.6 Making or possession of devices etc for making false documents (cf s. 19.6 MCCOC Draft)

- (1) A person who makes, or has in his or her possession, any device, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted, with the intention that the person or another person will use it to commit forgery, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

- (2) A person who, without lawful excuse, makes or has in his or her possession any device, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted, is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

3.5.7 False accounting (cf s. 19.7 MCCOC Draft)

A person who dishonestly, with the intention of obtaining a gain or causing a

loss:

- (a) destroys, defaces, conceals or falsifies any document made or required for any accounting purpose, or
- (b) in furnishing information for any purpose, produces or makes use of any document made or required for any accounting purpose that to his or her knowledge is or may be misleading, false or deceptive in a material particular,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

3.5.8 False statement by officer of organisation (cf s. 19.8 MCCOC Draft)

- (1) An officer of an organisation who, with the intention of deceiving members or creditors of the organisation about its affairs, dishonestly publishes or concurs in publishing a document containing a statement or account that to his or her knowledge is or may be misleading, false or deceptive in a material particular is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

- (2) In this section:

creditor of an organisation, includes a person who has entered into a security for the benefit of the organisation.

officer of an organisation, includes any member of the organisation who is concerned in its management and any person purporting to act as an officer of the organisation.

organisation means any body corporate or unincorporated association.

Part 3.6 Bribery and other corrupt practices

3.6.1 Definitions (cf s. 20.1 MCCOC Draft)

- (1) In this Part:

agent includes the following:

- (a) a person who acts on behalf of another person with that other person's actual or implied authority (in which case the other person is the principal),
- (b) a public official (in which case the Government or Government agency for which the official acts is the principal),
- (c) an employee (in which case the employer is the principal),
- (d) a legal practitioner acting on behalf of a client (in which case the client is the principal),
- (e) a partner (in which case the partnership is the principal),
- (f) an officer of a corporation or other organisation, whether or not employed by it (in which case the corporation or other organisation is the principal),
- (g) a consultant to any person (in which case that person is the principal).

benefit includes any advantage and is not limited to property.

function of an agent includes any power, authority or duty of the agent or any function that the agent holds himself or herself out as having.

exercise a function includes perform a duty.

public official means any official having public official functions or acting in a public official capacity, and includes the following:

- (a) a member of Parliament or of a local government authority,
 - (b) a Minister of the Crown,
 - (c) a judicial officer,
 - (d) a police officer,
 - (e) a person appointed by the Government or a Government agency to a statutory or other office,
 - (f) a person employed by the Government or a Government agency (including a local government authority).
- (2) For the purposes of this Part, a person is an agent or principal if the person is, or has been or intends to be, an agent or principal.
 - (3) For the purposes of this Part, the provision of a benefit may be dishonest notwithstanding that the provision of the benefit is customary in any trade, business, profession or calling.

3.6.2 Bribery (cf s. 20.2 MCCOC Draft)

- (1) **Giving a bribe.** A person who dishonestly provides, or offers or promises to provide, a benefit to any agent or other person with the intention that the agent will provide a favour is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.
- (2) **Receiving a bribe.** An agent who dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another person with the intention of providing a favour is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.
- (3) For the purposes of this section, a *favour* is:
 - (a) the agent being influenced or affected in the exercise of the agent's functions as such an agent, or
 - (b) the agent doing or not doing something as such an agent or because of his or her position as such an agent, or
 - (c) the agent causing or influencing his or her principal or other agents of the principal to do or not to do something.

3.6.3 Other corrupting benefits (cf s. 20.3 MCCOC Draft)

- (1) **Giving other corrupting benefits.** A person who dishonestly provides, or offers or promises to provide, a benefit to any agent or other person in any case where the receipt, or expectation of the receipt, of the benefit would in any way tend to influence the agent to provide a favour is guilty of an offence.
Maximum penalty: Imprisonment for 5 years.
- (2) **Receiving other corrupting benefits.** An agent who dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another person in any case

where the receipt, or expectation of the receipt, of the benefit by the agent would in any way tend to influence the agent to provide a favour is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

- (3) For the purposes of this section, a *favour* is:
- (a) the agent being influenced or affected in the exercise of the agent's functions as such an agent, or
 - (b) the agent doing or not doing something as such an agent or because of his or her position as such an agent, or
 - (c) the agent causing or influencing his or her principal or other agents of the principal to do or not to do something.

3.6.4 Payola (cf s. 20.4 MCCOC Draft)

A person who:

- (a) holds himself or herself out to the public as being engaged in any business or activity of making disinterested selections or examinations, or expressing disinterested opinions in respect of property or services, and
- (b) dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another in order to influence his or her selection, examination or opinion,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

3.6.5 Abuse of public office (cf s. 20.5 MCCOC Draft)

A public official who dishonestly:

- (a) exercises any function or influence that the official has because of his or her public office, or
- (b) refuses or fails to exercise any function the official has because of his or her public office, or
- (c) uses any information the official has gained because of his or her public office,

with the intention of obtaining a benefit for the official or another person or causing a detriment to another person, is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

Chapter 4 Property damage and computer offences

Note: This Chapter gives effect to the final report of MCCOC.

Part 4.1 Property damage offences

Division 1 Definitions

4.1.1 Property

In this Part:

property means any real or personal property of a tangible nature, including:

- (a) a wild creature that is tamed or ordinarily kept in captivity or that is reduced (or in the course of being reduced) into the possession of a person, and
- (b) any organ or part of a human body and any blood, ova, semen or other substance extracted from the human body.

4.1.2 Damage to property

For the purposes of this Part, *damage* to property includes:

- (a) destroying the property, or
- (b) causing the physical loss of the property by interfering with the property (including by removing any restraint over the property or abandoning the property), or
- (c) causing any loss of a use or function of the property by interfering with the property, or
- (d) defacing the property, or
- (e) in the case of a document—obliterating or rendering illegible the whole or any part of the document, or
- (f) in the case of an animal—harming or killing the animal, or
- (g) in the case of a plant or other thing forming part of land—severing it from the land.

4.1.3 Person to whom property belongs

- (1) For the purposes of this Part, property *belongs* to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest or from a constructive trust).
- (2) If property is subject to a trust, the persons to whom it belongs include any person having a right to enforce the trust.
- (3) If property belongs to 2 or more persons, a reference in this Part to the person to whom the property belongs is a reference to all those persons.

4.1.4 Threats

For the purposes of this Part:

- (a) a threat may be made by any conduct, and may be explicit or

- (b) implicit and conditional or unconditional, and
- (c) a threat to a person includes a threat to a group of persons, and fear that a threat will be carried out includes apprehension that it will be carried out.

4.1.5 Causing damage or other result

For the purposes of an offence under this Part, a person causes damage or any other result if the person's conduct substantially contributes to the damage or other result.

Division 2 Offences

4.1.6 Damaging property

- (1) A person who:
 - (a) causes damage to property belonging to another person, and
 - (b) intends to cause, or is reckless as to causing, damage to that or any other such property,is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.
- (2) A conviction for an offence against this section is an alternative verdict to a charge for:
 - (a) an offence against section 4.2.5 (Unauthorised modification of data to cause impairment), or
 - (b) an offence against section 4.2.6 (Unauthorised impairment of electronic communication).

Note. Section 4.1.11 provides a defence for persons who damage property with consent. The defence applies to other offences against this Part.

4.1.7 Arson

- (1) A person who:
 - (a) causes damage to a building or conveyance by means of fire or explosive, and
 - (b) intends to cause, or is reckless as to causing, damage to that or any other building or conveyance,is guilty of an offence.
Maximum penalty: Imprisonment for 15 years.
Note. The offence extends to damage to a person's own building or conveyance, but section 4.1.12 (Claim of right) may provide a defence.
- (2) A person who:
 - (a) makes to another person a threat to damage any building or conveyance belonging to that other person or a third person by means of fire or explosives, and
 - (b) intends that other person to fear that the threat will be carried out or is reckless as to causing that other person to fear that the threat will be carried out,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

(3) In the prosecution of an offence against subsection (2) it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

(4) In this section:

building includes:

(a) a part of a building, or

(b) a structure (whether or not moveable) that is used, designed or adapted for residential purposes.

conveyance means a motor vehicle, motor vessel or aircraft.

4.1.8 Bushfires

(1) A person:

(a) who causes a fire, and

(b) who intends or is reckless as to causing a fire, and

(c) who is reckless as to the spread of the fire to vegetation on property belonging to another,

is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.

(2) In this section:

causing a fire includes:

(a) lighting a fire, or

(b) maintaining a fire, or

(c) failing to contain a fire, except where the fire was lit by another person or the fire is beyond the control of the person who lit the fire.

spread of a fire means spread of a fire beyond the capacity of the person who caused the fire to extinguish it.

4.1.9 Threat to cause property damage—fear of death or serious harm

(1) A person who:

(a) makes to another person a threat to damage property, and

(b) is reckless as to causing that other person to fear that the carrying out of the threat will kill or cause serious harm to that other person or a third person,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

(2) In the prosecution of an offence against this section it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

(3) In this section, **serious harm** has the same meaning as it has in Part 5.1.

Note: *The following draft summary offence is referred to in MCCOC's report.*

* **Threat to cause property damage**

(1) A person who:

- (a) makes to another person a threat to damage property belonging to that other person or a third person, and
 - (b) intends that other person to fear that the threat will be carried out,
- is guilty of an offence.
Maximum penalty: Imprisonment for 2 years.
- (2) In the prosecution of an offence against this section it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

4.1.10 Possession of thing with intent to damage property

- (1) A person who possesses any thing, with the intention that the person or another person will use it to damage property belonging to another, is guilty of an offence.
Maximum penalty: Imprisonment for 3 years.
- (2) In this section:
possession of a thing includes:
 - (a) having control over the disposition of the thing (whether or not the thing is in the custody of the person), or
 - (b) having joint possession of the thing.

Note: *The following draft summary offence is referred to in MCCOC's report:*

*** Poaching etc wild creatures**

- (1) A person who intentionally takes, kills or harms any wild creature on land belonging to another is guilty of an offence.
Maximum penalty: Imprisonment for 2 years.
- (2) A person is not criminally responsible for an offence against this section if:
 - (a) the person engaged in the conduct constituting the offence with the consent of the owner or occupier of the land, or
 - (b) at the time of the conduct constituting the offence, the person believed that he or she had a right or interest in the wild creature which authorised the person to engage in that conduct, or
 - (c) the person's conduct constituting the offence is justified or excused by any Act or other law.
- (3) In this section, *wild creature* means any live bird, mammal, fish (including crustacean) or amphibian that is not tamed or ordinarily kept in captivity or not reduced (or in the course of being reduced) into the possession of a person.

Division 3 Defences

4.1.11 Consent

- A person is not criminally responsible for an offence against this Part if, at the time of the conduct constituting the offence:
- (a) the person entitled to consent to the damage to the property concerned had so consented, or

- (b) he or she believed that the person whom he or she believed was entitled to consent to the damage to the property concerned had so consented, or
- (c) he or she believed that such a person would have so consented if that person had known about the damage to be caused to the property and its circumstances.

4.1.12 Claim of right

- (1) A person is not criminally responsible for an offence against this Part if, at the time of the conduct constituting the offence, the person believed that he or she had a right or interest in the property concerned which authorised the person to engage in that conduct.
- (2) In this section, a right or interest in property includes a right or privilege in or over land or waters, whether created by grant, licence or otherwise.

4.1.13 Self-defence

To avoid doubt, section 2.3.17 (Self-defence) applies to an offence against this Part.

Part 4.2 Computer offences

4.2.1 General definitions

In this Part:

computer offence means:

- (a) an offence against this Part, or
- (b) conduct in another jurisdiction that is an offence in that jurisdiction and that would constitute an offence against this Part if the conduct occurred in this jurisdiction.

data includes:

- (a) information in any form, or
- (b) any program (or part of a program).

data held in a computer includes:

- (a) data entered or copied into the computer, or
- (b) data held in any removable data storage device for the time being in the computer, or
- (c) data held in a data storage device on a computer network of which the computer forms part.

data storage device means any thing (for example a disk or file server) containing or designed to contain data for use by a computer.

electronic communication means a communication of information in any form by means of guided or unguided electromagnetic energy.

4.2.2 Meaning of access to data, modification of data and impairment of electronic communication

(1) In this Part, **access** to data held in a computer means:

- (a) the display of the data by the computer or any other output of the data from the computer, or
- (b) the copying or moving of the data to any other place in the computer or to a data storage device, or
- (c) in the case of a program—the execution of the program.

(2) In this Part, **modification** of data held in a computer means:

- (a) the alteration or removal of the data, or
- (b) an addition to the data.

(3) In this Part, **impairment** of electronic communication to or from a computer includes:

- (a) the prevention of any such communication, or
- (b) the impairment of any such communication on an electronic link or network used by the computer,

but does not include a mere interception of any such communication.

(4) A reference in this Part to any such access, modification or impairment is limited to access, modification or impairment caused (whether directly or indirectly) by the execution of a function of a computer.

4.2.3 Meaning of unauthorised access, modification or impairment

- (1) For the purposes of this Part, access to or modification of data, or impairment of electronic communication, by a person is *unauthorised* if the person is not entitled to cause that access, modification or impairment.
- (2) Any such access, modification or impairment is not unauthorised merely because the person has an ulterior purpose for that action.
- (3) For the purposes of an offence under this Part, a person causes any such unauthorised access, modification or impairment if the person's conduct substantially contributes to the unauthorised access, modification or impairment.

4.2.4 Unauthorised access, modification or impairment with intent to commit serious offence

- (1) A person who causes any unauthorised computer function:
 - (a) knowing it is unauthorised, and
 - (b) with the intention of committing a serious offence, or facilitating the commission of a serious offence (whether by the person or by another person),is guilty of an offence.
Maximum penalty: The maximum penalty applicable if the person had committed, or facilitated the commission of, the serious offence in this jurisdiction.
- (2) For the purposes of this section, an *unauthorised computer function* is:
 - (a) any unauthorised access to data held in any computer, or
 - (b) any unauthorised modification of data held in any computer, or
 - (c) any unauthorised impairment of electronic communication to or from any computer.
- (3) For the purposes of this section, a *serious offence* is:
 - (a) an offence in this jurisdiction punishable by imprisonment for a period of 5 years or more, or
 - (b) an offence in any other jurisdiction, being an offence so punishable if committed in this jurisdiction.
- (4) A person may be found guilty of an offence against this section:
 - (a) even if committing the serious offence concerned is impossible, or
 - (b) whether the serious offence is to be committed at the time of the unauthorised conduct or at a later time.
- (5) It is not an offence to attempt to commit an offence against this section.

4.2.5 Unauthorised modification of data to cause impairment

- (1) A person who:
 - (a) causes any unauthorised modification of data held in a computer, and
 - (b) knows that the modification is unauthorised, and
 - (c) intends by the modification to impair access to, or to impair the reliability, security or operation of, any data held in a computer,

or who is reckless as to any such impairment,
is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

- (2) A conviction for an offence against this section is an alternative verdict to a charge for:
- (a) an offence against section 4.1.6 (Damaging property), or
 - (b) an offence against section 4.2.6 (Unauthorised impairment of electronic communication).

4.2.6 Unauthorised impairment of electronic communication

- (1) A person who:

- (a) causes any unauthorised impairment of electronic communication to or from a computer, and
- (b) knows that the impairment is unauthorised, and
- (c) intends to impair electronic communication to or from the computer, or who is reckless as to any such impairment,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

- (2) A conviction for an offence against this section is an alternative verdict to a charge for:
- (a) an offence against section 4.1.6 (Damaging property), or
 - (b) an offence against section 4.2.5 (Unauthorised modification of data to cause impairment).

4.2.7 Possession of data with intent to commit computer offence

- (1) A person who is in possession or control of data:

- (a) with the intention of committing a computer offence, or
- (b) with the intention of facilitating the commission of a computer offence (whether by the person or by another person),

is guilty of an offence.

Maximum penalty: Imprisonment for 3 years.

- (2) For the purposes of this section, *possession or control of data* includes:

- (a) possession of a computer or data storage device holding or containing the data or of a document in which the data is recorded, and
- (b) control of data held in a computer that is in the possession of another person (whether the computer is in this jurisdiction or outside this jurisdiction).

- (3) A person may be found guilty of an offence against this section even if committing the computer offence concerned is impossible.

- (4) It is not an offence to attempt to commit an offence against this section.

4.2.8 Producing, supplying or obtaining data with intent to commit computer offence

- (1) A person who produces, supplies or obtains data:

- (a) with the intention of committing a computer offence, or

- (b) with the intention of facilitating the commission of a computer offence (whether by the person or by another person), is guilty of an offence.
Maximum penalty: Imprisonment for 3 years.
- (2) For the purposes of this section, ***produce, supply or obtain data*** includes:
 - (a) produce, supply or obtain data held or contained in a computer or data storage device, or
 - (b) produce, supply or obtain a document in which the data is recorded.
- (3) A person may be found guilty of an offence against this section even if committing the computer offence concerned is impossible.

Note: *The following draft summary offences are referred to in MCCOC's report*

* **Unauthorised access to or modification of restricted data held in computer**

- (1) A person who:
 - (a) causes any unauthorised access to or modification of restricted data held in a computer, and
 - (b) knows that the access or modification is unauthorised, and
 - (c) intends to cause that access or modification,is guilty of an offence.
Maximum penalty: Imprisonment for 2 years.
- (2) In this section:
restricted data means data held in a computer to which access is restricted by an access control system associated with a function of the computer.

* **Unauthorised impairment of data held in computer disk, credit card etc**

- (1) A person who:
 - (a) causes any unauthorised impairment of the reliability, security or operation of any data held on a computer disk, credit card or other device used to store data by electronic means, and
 - (b) knows that the impairment is unauthorised, and
 - (c) intends to cause that impairment,is guilty of an offence.
Maximum penalty: Imprisonment for 2 years.
- (2) For the purposes of this section, impairment of the reliability, security or operation of data is ***unauthorised*** if the person is not entitled to cause that impairment.

Part 4.3 Sabotage

4.3.1 General definitions

In this Part:

property offence means:

- (a) an offence against Part 4.1, or
- (b) conduct in another jurisdiction that is an offence in that jurisdiction and that would constitute an offence against Part 4.1 if the conduct occurred in this jurisdiction.

public facility means any of the following (whether publicly or privately owned):

- (a) government facilities, including premises used by government employees in connection with official duties,
- (b) public infrastructure facilities, including facilities providing water, sewerage, energy, fuel, communication or other services to the public,
- (c) public information systems, including systems used to generate, send, receive, store or otherwise process electronic communications,
- (d) public transport facilities, including conveyances used to transport people or goods,
- (e) public places, including any premises, land or water open to the public.

unauthorised computer function means any of the following (within the meaning of Part 4.2):

- (a) any unauthorised access to data held in any computer, or
- (b) any unauthorised modification of data held in any computer, or
- (c) any unauthorised impairment of electronic communication to or from any computer.

4.3.2 Meaning of damage to public facility

- (1) In this Part, ***damage*** a public facility means:
 - (a) cause damage to the facility or any part of the facility, or
 - (b) cause disruption to the use or operation of the facility.
- (2) For the purposes of an offence under this Part, a person causes any such damage or disruption if the person's conduct substantially contributes to the damage or disruption.

4.3.3 Sabotage

A person:

- (a) who damages a public facility by committing a property offence or by causing an unauthorised computer function, and
- (b) who intends to cause:
 - (i) major disruption to government functions, or
 - (ii) major disruption to the use of services by the public, or
 - (iii) major economic loss,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

4.3.4 Threaten sabotage

- (1) A person who:
 - (a) makes to another person a threat to damage a public facility by committing a property offence or by causing an unauthorised computer function, and
 - (b) intends that person to fear that the threat will be carried out and will cause:
 - (i) major disruption to government functions, or
 - (ii) major disruption to the use of services by the public, or
 - (iii) major economic loss,is guilty of an offence.
Maximum penalty: Imprisonment for 15 years.
- (2) In the prosecution of an offence against this section it is not necessary to prove that the person threatened actually feared that the threat would be carried out.
- (3) For the purposes of this section:
 - (a) a threat may be made by any conduct, and may be explicit or implicit and conditional or unconditional, and
 - (b) a threat to a person includes a threat to a group of persons, and
 - (c) fear that a threat will be carried out includes apprehension that it will be carried out.

Chapter 5 Offences against the person

Part 5.1 Fatal and non-fatal offences

Note: *This Part gives effect to the discussion paper of MCCOC of June 1998 (relating to fatal offences) and the final report of MCCOC of September 1998 (relating to non-fatal offences).*

Division 1 Definitions

5.1.1 Harm

- (1) In this Part, *harm* means physical harm or harm to a person's mental health, whether temporary or permanent.
- (2) Physical harm includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that a person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).
- (3) Harm to a person's mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.
- (4) Harm does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

5.1.2 Serious harm

In this Part, *serious harm* means any harm (including the cumulative effect of more than one harm):

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

5.1.3 Causing death or harm

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

5.1.4 Person against whom offence may be committed

A person against whom an offence may be committed under this Part is a person who has been born and who has not already died.

5.1.5 Birth

- (1) For the purposes of this Part, a person's birth occurs at the time the person is fully removed from the mother's body and has an independent existence from the mother.
- (2) The following are relevant, but not determinative, as to whether a person has an independent existence from the mother:
 - (a) the person is breathing,

- (b) the person's organs are functioning of their own accord,
(c) the person has an independent circulation of blood.
- 5.1.6 Death**
- (1) For the purposes of this Part, a person has died when there has occurred:
- (a) irreversible cessation of all function of the person's brain (including the brain stem), or
- (b) irreversible cessation of circulation of blood in the person's body.
- (2) In this section, irreversible means irreversible by natural or artificial means.

- 5.1.7 Omissions**
- (1) An omission to perform an act can be a physical element of an offence against this Part if it is a person's omission to perform any of the following duties:
- (a) The duty to provide the necessities of life to another person if the person has assumed responsibility for the welfare of that other person and that other person is unable to provide himself or herself with those necessities.
- (b) The duty to avoid or prevent danger to the life, safety or health of any child if the person has assumed responsibility for the welfare of the child (whether or not the child is related to the person).
- (c) The duty to avoid or prevent danger to the life, safety or health of another person if the danger arises from an act of the person, from anything in the person's possession or control or from any undertaking of the person.
- (2) The fault element for an omission to perform such an act that causes, or that gives rise to the danger of, death or harm is, if not otherwise specified in this Part, the same as the fault element for the result of that omission.

Note. Chapter 2 provides that in the Code "conduct" includes an omission to perform an act. That Chapter also provides that an omission can only be a physical element of an offence if the law creating the offence makes it so or if the law creating the offence provides that the offence can be committed by an omission to perform an act that by law there is a duty to perform. In the absence of subsection (2), the fault element for conduct consisting of an omission to perform an act would be intention under the default provision in section 2.2.11 (1) of Chapter 2. Generally in respect of offences under this Part, the fault element for acts that cause etc death or harm is not specified but the fault element for the result concerned is specified as either intention, recklessness or negligence.

5.1.8 Other definitions

In this Part:

aggravated offence means an offence against this Part that is an aggravated offence by the operation of Division 11.

child means a person under the age of 18 years.

consent has the same meaning it has in Part 5.2.

fear includes apprehension.

parent of a person, includes a guardian of the person or any other person who is responsible at law for the person's maintenance.

Criminal Code of [State/Territory]

Note. Part 5.2 defines "consent" as follows:

- (1) In this Part, *consent* means free and voluntary agreement.
- (2) Examples of circumstances in which a person does not consent to an act include the following:
 - the person submits to the act because of force or the fear of force to the person or to someone else,
 - the person submits to the act because the person is unlawfully detained,
 - the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting,
 - the person is incapable of understanding the essential nature of the act,
 - the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes).

Division 2 Murder

5.1.9 Murder

A person:

- (a) whose conduct causes the death of another person, and
- (b) who intends to cause, or is reckless as to causing, the death of that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for life.

Division 3 Other unlawful homicides

5.1.10 Manslaughter

A person:

- (a) whose conduct causes the death of another person, and
- (b) who intends to cause, or is reckless as to causing, serious harm to that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

5.1.11 Causing death by criminal negligence

A person:

- (a) whose conduct causes the death of another person, and
- (b) who is negligent as to causing the death of that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

5.1.12 Causing death by dangerous operation of vehicle

(1) A person:

- (a) whose operation of a vehicle causes the death of another person, and
- (b) whose operation of the vehicle was dangerous,

is guilty of an offence.

- Maximum penalty: Imprisonment for 10 years.
- (2) Strict liability applies to the dangerous operation of the vehicle.
Note: Section 6.1 provides as follows:
If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
- (a) *there is no fault element for that physical element of the offence, and*
- (b) *the defence of mistake of fact under section 9.2 is available.*
- (3) A person is not criminally responsible for an offence against this section if the death was not in any way attributable to the dangerous manner in which the vehicle was operated.
- (4) In this section:
operation of a vehicle means:
- (a) the driving of a motor vehicle, or
- (b) the navigation of a motorised vessel, or
- (c) the piloting of an aircraft.

5.1.13 Causing death by operation of vehicle while intoxicated

- (1) A person:
- (a) whose operation of a vehicle causes the death of another person, and
- (b) whose operation of the vehicle was impaired by the presence of alcohol in the person's blood,
- is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.
- (2) Absolute liability applies to the impaired operation of the vehicle.
Note: Section 6.2 provides as follows:
If a law that creates an offence provides that absolute liability applies to a physical element of the offence:
- (a) *there is no fault element for that physical element of the offence, and*
- (b) *the defence of mistake of fact under section 9.2 is unavailable.*
- (3) A person is not criminally responsible for an offence against this section if the death caused by the operation of the vehicle was not in any way attributable to the presence of alcohol in the person's blood.
- (4) For the purposes of this section, the accused's operation of a vehicle is conclusively presumed to have been impaired by the presence of alcohol in the accused's blood if the prosecution proves that the prescribed concentration of alcohol was present in the accused's blood at the time of the operation of the vehicle.
- (5) Evidence may be given of the concentration of alcohol present in an accused's blood at the time of the operation of a vehicle as determined by a blood analysis carried out in accordance with [section # of the *Road Transport Act*], whether or not the vehicle was being operated on a road.
- (6) A concentration of alcohol determined by any such blood analysis is taken to

be the concentration of alcohol in the accused's blood at the time of the operation of the vehicle if the analysed blood sample was taken within 2 hours after the operation of the vehicle, unless the accused proves that a different concentration of alcohol was present in the accused's blood at the time of the operation of the vehicle.

(7) In this section:

operation of a vehicle means:

- (a) the driving of a motor vehicle, or
- (b) the navigation of a motorised vessel, or
- (c) the piloting of an aircraft.

prescribed concentration of alcohol means a concentration of 0.15 grams or more of alcohol in 100 millilitres of blood.

5.1.14 Child destruction

(1) A person:

- (a) whose conduct, when a woman is about to be delivered of a child, prevents the child from being born alive, and
- (b) who would have been guilty of an offence against section 5.1.9 (Murder) or section 5.1.10 (Manslaughter) if the child had been alive at the time of that conduct and had then died because of that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

- (2) A person is not criminally responsible for an offence against this section for anything done or omitted in good faith for the purpose only of preserving the life of the mother or a child.
- (3) Section 5.1.4 does not apply to an offence against this section.

5.1.14A Alternative verdicts

- (1) If on the trial of a person charged with an offence against this Division the trier of fact is not satisfied that the person committed the offence but is satisfied that the person committed another offence against this Division, the trier of fact may find the person not guilty of the offence charged but guilty of that other offence, and the person is liable to punishment accordingly.
- (2) This section does not authorise the trier of fact to find a person guilty of an offence for which the maximum penalty is greater than the maximum penalty for the offence with which the person was charged.

Division 4 Offences relating to suicide

5.1.15 Assisting suicide

- (1) A person who assists another person to commit suicide is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.
- (2) For the person to be guilty of the offence:
 - (a) the person must have intended that his or her conduct would

- (b) assist the other person to commit suicide, and the other person committed or attempted to commit suicide and was assisted to do so by that conduct.
- (3) It is not an offence to attempt to commit an offence against this section.

5.1.16 Encouraging suicide

- (1) A person who encourages another person to commit suicide is guilty of an offence.
Maximum penalty: Imprisonment for 5 years.
- (2) For the person to be guilty of the offence:
 - (a) the person must have intended that his or her conduct would encourage the other person to commit suicide, and
 - (b) the other person committed or attempted to commit suicide and was encouraged to do so by that conduct.
- (3) It is not an offence to attempt to commit an offence against this section.

Division 5 Causing harm

5.1.17 Intentionally causing serious harm

A person:

- (a) whose conduct causes serious harm to another person, and
- (b) who intends to cause serious harm to that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 20 years.

Maximum penalty (aggravated offence): Imprisonment for 25 years.

5.1.18 Recklessly causing serious harm

A person:

- (a) whose conduct causes serious harm to another person, and
- (b) who is reckless as to causing serious harm to that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.

Maximum penalty (aggravated offence): Imprisonment for 19 years.

5.1.19 Negligently causing serious harm

A person:

- (a) whose conduct causes serious harm to another person, and
- (b) who is negligent as to causing serious harm to that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

5.1.20 Intentionally causing harm

A person:

- (a) whose conduct causes harm to another person, and
- (b) who causes that harm without the consent of the other person, and
- (c) who intends to cause harm to that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

Maximum penalty (aggravated offence): Imprisonment for 13 years.

5.1.21 Recklessly causing harm

A person:

- (a) whose conduct causes harm to another person, and
- (b) who causes that harm without the consent of the other person, and
- (c) who is reckless as to causing harm to that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

Maximum penalty (aggravated offence): Imprisonment for 9 years.

Division 6 Threats and stalking

5.1.22 Threat—interpretation

- (1) For the purposes of this Division, a *threat* may be made by any conduct, and may be explicit or implicit and conditional or unconditional.
- (2) For the purposes of this Division, a threat to a person includes a threat to a group of persons.

5.1.23 Threat to kill

A person who:

- (a) makes to another person a threat to kill that other person or a third person, and
- (b) intends that other person to fear that the threat will be carried out or is reckless as to causing that other person to fear that the threat will be carried out,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

Maximum penalty (aggravated offence): Imprisonment for 13 years.

5.1.24 Threat to cause serious harm

A person who:

- (a) makes to another person a threat to cause serious harm to that other person or a third person, and
- (b) intends that other person to fear that the threat will be carried

out or is reckless as to causing that other person to fear that the threat will be carried out,
is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.
Maximum penalty (aggravated offence): Imprisonment for 9 years.

Note: The following draft summary offence is referred to at p. 50 of MCCOC's final report:

* **Threat to cause harm**

- (1) A person who:
 - (a) makes to another person a threat to cause harm to that other person or a third person, and
 - (b) intends that other person to fear that the threat will be carried out or is reckless as to causing that other person to fear that the threat will be carried out,is guilty of an offence.
Maximum penalty: Imprisonment for 2 years.
- (2) For the person to be guilty of the offence, that other person must have actually feared that the threat would be carried out.

5.1.24A Spiking drink or food

- (1) In this section:

harm includes an impairment of the senses or understanding of a person that the person might reasonably be expected to object to in the circumstances.

impair includes further impair.

intoxicating substance includes any substance that affects a person's senses or understanding.
- (2) A person:
 - (1) who causes another person to be given or to consume drink or food:
 - (0) containing an intoxicating substance that the other person is not aware it contains, or
 - (0) containing more of an intoxicating substance than the other person would reasonably expect it to contain, and
 - (2) who intends a person to be harmed by the consumption of the drink or food,is guilty of an offence.
Maximum penalty: Imprisonment for 2 years.
- (3) For the purposes of this section, giving a person drink or food includes preparing the drink or food for the person or making it available for consumption by the person.

Criminal Code of [State/Territory]

Note: *The above drink and food spiking offence was recommended by MCLOC in its report of July 2007.*

5.1.25 Stalking

- (1) A person who stalks another person:
 - (a) with the intention of causing harm to that other person or a third person by that stalking, or
 - (b) with the intention of causing by that stalking that other person or a third person fear of harm to any person,is guilty of an offence.
Maximum penalty: Imprisonment for 5 years.
- (2) A person stalks another if on at least two separate occasions the person:
 - (a) follows that other person, or
 - (b) loiters outside the place of residence of that other person or some other place frequented by that other person, or
 - (c) telephones that other person, or
 - (d) enters or interferes with property in the possession of that other person, or
 - (e) gives or sends offensive material to that other person, or leaves offensive material where it will be found by, given to or brought to the attention of that other person, or
 - (f) keeps that other person under surveillance, or
 - (g) acts in any other way that could be expected to arouse a reasonable person's fear.
- (3) It is immaterial that the conduct on those two or more occasions occurred outside the jurisdiction so long as the conduct on at least one of those occasions:
 - (a) occurred in the jurisdiction, or
 - (b) occurred when the person or that other person was in the jurisdiction.
- (4) It is not an offence to attempt to commit an offence against this section.

5.1.26 Not necessary to prove that person threatened or stalked actually feared harm

In the prosecution of an offence under this Division it is not necessary to prove that the person threatened or stalked actually feared that the threat would be carried out or that the person or any other person would be caused harm.

Division 7 Endangerment

5.1.27 Danger of death or serious harm—interpretation

- (1) For the purposes of this Division, conduct that may give rise to a danger of death or serious harm includes exposing a person to the risk of catching a disease that may give rise to a danger of death or serious harm.
- (2) For the purposes of this Division, conduct gives rise to a danger of death or serious harm if it is ordinarily capable of creating a real, and not merely a theoretical, danger of death or serious harm.
- (3) Conduct may give rise to a danger of death or serious harm whatever the statistical or arithmetical calculation of the degree of risk of death or serious harm

involved.

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

5.1.28 Recklessly endangering life

A person:

- (a) whose conduct gives rise to a danger of death to any person, and
(b) who is reckless as to the danger of death to any person that arises from that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

Maximum penalty (aggravated offence): Imprisonment for 13 years.

5.1.29 Recklessly endangering serious harm

A person:

- (a) whose conduct gives rise to a danger of serious harm to any person, and
(b) who is reckless as to the danger of serious harm to any person that arises from that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

Maximum penalty (aggravated offence): Imprisonment for 9 years.

5.1.30 Setting traps or devices to kill

- (1) A person who sets a trap or device:

- (a) with the intention of killing another person by that trap or device, or
(b) being reckless as to killing another person by that trap or device,

is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.

Maximum penalty (aggravated offence): Imprisonment for 19 years.

- (2) It is immaterial that the trap or device is set for a trespasser.

- (3) In this section, setting a trap or device includes maintaining a trap or device.

5.1.31 Setting traps or devices to cause serious harm

- (1) A person who sets a trap or device:

- (a) with the intention of seriously harming another person by that trap or device, or
(b) being reckless as to seriously harming another person by that trap or device,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

Maximum penalty (aggravated offence): Imprisonment for 13 years.

- (2) It is immaterial that the trap or device is set for a trespasser.

- (3) In this section, setting a trap or device includes maintaining a trap or device.

Division 8 Kidnapping, child abduction and unlawful detention

5.1.32 Taking or detaining—interpretation

For the purposes of this Division:

- (a) taking another person includes causing the person to accompany a person and causing the person to be taken, and
- (b) detaining another person includes causing the person to remain where he or she is.

5.1.33 Kidnapping

- (1) A person who takes or detains another person, without the person's consent:
 - (a) with the intention of holding that other person to ransom or as a hostage, or
 - (b) with the intention of taking or sending that other person out of the jurisdiction, or
 - (c) with the intention of committing an indictable offence against that other person or a third person,

is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.

Maximum penalty (aggravated offence): Imprisonment for 19 years.

- (2) A person who takes or detains a child is to be treated as acting without the consent of the child.
- (3) A person who takes or detains a child with the intention of taking or sending the child out of the jurisdiction does not commit an offence against subsection (1) (b) if:
 - (a) the person has lawful custody of the child or is acting with the consent of the person who has lawful custody of the child, and
 - (b) the person is not acting in contravention of any order of a court relating to the child.

5.1.34 Child abduction

- (1) A person who takes or detains a child with the intention of removing or keeping the child from the lawful control of any parent of the child, without the consent of that parent, is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.
Maximum penalty (aggravated offence): Imprisonment for 9 years.
- (2) It is not a defence to a charge under this section that the child consented to being taken or detained unless, at the time of the taking or detention, the person who took or detained the child was the child's spouse or defacto partner and the child was over 14 years of age.
- (3) A person does not commit an offence against this section if the person is a parent of the child.

5.1.35 Unlawful detention

A person who takes or detains another person without the other person's consent is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

Maximum penalty (aggravated offence): Imprisonment for 6 years.

Division 9 Female genital mutilation

5.1.36 Female genital mutilation—definition

In this Division, *female genital mutilation* means:

- (a) a clitoridectomy, or
- (b) excision of any other part of the female genital organs, or
- (c) infibulation or any similar procedure, or
- (d) any other mutilation of the female genital organs.

5.1.37 Prohibition of female genital mutilation

- (1) A person who intentionally performs female genital mutilation on another person is guilty of an offence.
Maximum penalty: Imprisonment for 15 years.
- (2) It is not a defence to a charge under this section that the person on whom the female genital mutilation was performed, or a parent of that person, consented to the mutilation.

5.1.38 Removal of child from jurisdiction for genital mutilation

- (1) A person who takes a child from this jurisdiction, or arranges for a child to be taken from this jurisdiction, with the intention of having female genital mutilation performed on the child is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.
Maximum penalty (aggravated offence): Imprisonment for 9 years.
- (2) In proceedings for an offence against this section, if it is proved that:
 - (a) the accused took a child, or arranged for a child to be taken, from this jurisdiction, and
 - (b) female genital mutilation was performed on the child while then outside this jurisdiction,it will be presumed, in the absence of proof to the contrary, that the accused took the child, or arranged for the child to be taken, from this jurisdiction with the intention of having female genital mutilation performed on the child.

5.1.39 Exception—medical procedures for genuine therapeutic purposes

- (1) It is not an offence under this Division to perform a medical procedure that has a genuine therapeutic purpose or to take a person, or arrange for a person to be taken, from this jurisdiction with the intention of having such a medical procedure performed on the person.
- (2) The fact that a procedure is performed as, or as part of, a cultural, religious or other social custom is not to be regarded as a genuine therapeutic purpose.

5.1.40 Exception—sexual reassignment procedures

- (1) It is not an offence under this Division to perform a sexual reassignment procedure or to take a person, or arrange for a person to be taken, from this jurisdiction with the intention of having such a procedure performed on the person.

- (2) A sexual reassignment procedure means a surgical procedure to give a female, or a person whose sex is ambivalent, the genital appearance of a particular sex (whether male or female).

Division 10 Abortion

Note: *Any abortion offence would be included here. MCCOC has made no recommendation concerning abortion.*

Division 11 Increased penalties for aggravated offences

5.1.41 Increased penalties for aggravated offences

The following are factors of aggravation for offences committed against this Part, and a maximum penalty specified in this Part for an aggravated offence applies if any such factor of aggravation applies to the offence:

- (a) In the case of an offence against section 5.1.14 (Intentionally causing serious harm)—the offence was committed during torture (that is, the person who committed the offence deliberately and systematically inflicted over a period of time severe pain on the person against whom the offence was committed).
- (b) The offence was committed by the use or threatened use of an offensive weapon.
- (c) The offence was committed against a public official (within the meaning of Part 3.6) who was, at the time of the offence, acting in the course of his or her duty as a police officer, prison officer or other law enforcement officer.
- (d) The offence was committed against a person involved in any capacity in legal proceedings (within the meaning of Part 7.1) in connection with any conduct or future conduct of the person in respect of those proceedings.
- (e) The offence was committed against a child under the age of 10 years.
- (f) The offence was committed against a person in abuse of a position of trust.
- (g) The offence was committed against a person in abuse of a position of authority.

5.1.42 Procedural and evidentiary provisions

- (1) If the prosecution intends to prove an aggravated offence, the relevant factor of aggravation must be contained in the charge.
- (2) In order to prove an aggravated offence, the prosecution must prove that the person who committed the offence intended or was reckless as to the factor of aggravation.

Division 12 Defences

5.1.43 Activities involving serious harm or risk of death or serious harm

- (1) A person is not criminally responsible for an offence against this Part that is

constituted by conduct that causes serious harm to another person or gives rise to a danger of death or serious harm to another person if the conduct concerned is engaged in by the person:

- (a) for the purpose of benefiting the other person or in pursuance of a socially acceptable function or activity, and
 - (b) having regard to the purpose, function or activity, the conduct was reasonable.
- (2) This section does not apply in respect of an offence against Division 9 (Female genital mutilation).

Note. If a person causes less than serious harm to another person, the prosecution is obliged to prove that the harm was caused without the consent of the person harmed (see sections 5.1.17 and 5.1.18).

5.1.44 Correction of children

- (1) A parent of a child is not criminally responsible for an offence against Division 5 (Causing harm), 6 (Threats and stalking) or 8 (Kidnapping, child abduction and unlawful detention) committed against the child if the conduct of the parent constituting the offence amounted to reasonable correction of the child.
- (2) Any other person who has the care of a child is not criminally responsible for an offence against Division 5 (Causing harm), 6 (Threats and stalking) or 8 (Kidnapping, child abduction and unlawful detention) committed against the child if the conduct of the person constituting the offence amounted to reasonable correction of the child and:
 - (a) the parent of the child consented to such correction of the child by the person, or
 - (b) the person reasonably believed that the parent of the child consented to such correction of the child by the person, or
 - (c) the parent of the child consented to the person taking responsibility for the care and management of the child (but only in the case of an offence against Division 8).
- (3) Conduct can amount to reasonable correction of a child only if it is reasonable in the circumstances for the purposes of the discipline, management or control of the child. The following conduct does not amount to reasonable correction of a child:
 - (a) causing or threatening to cause harm to a child that lasts for more than a short period, or
 - (b) causing harm to a child by use of a stick, belt or other object (other than an open hand).

5.1.45 Law enforcement officers

A person is not criminally responsible for an offence against this Part if the person is, at the time of the offence, a public official (within the meaning of Part 3.6) acting in the course of his or her duty as a police officer, prison officer or other law enforcement officer and the conduct of the person is reasonable in the circumstances for the purpose of performing that duty.

5.1.46 Evidential burden of proof

Criminal Code of [State/Territory]

An accused who wishes to deny criminal responsibility by relying on a provision of this Division bears an evidential burden in relation to that matter.

Note: A general defence of lawful authority has been added to Chapter 2 of the Code, namely, a person is not criminally responsible for an offence if the person's conduct constituting the offence is justified or excused by any Act or other law.

Part 5.2 Sexual offences

Note: This Part gives effect to the final report of MCCOC of May 2009.

Division 1 Definitions

5.2.1 Sexual penetration

- (1) In this Part, *sexually penetrate* means:
 - (a) penetrate (to any extent) the genitalia or anus of a person by any part of the body of a person or by any object manipulated by a person, or
 - (b) penetrate (to any extent) the mouth of a person by the penis of a person, or
 - (c) continue to sexually penetrate as defined in paragraph (a) or (b).
- (2) For the purposes of this Part, the genitalia or other parts of the body of a person include surgically constructed genitalia or other parts of the body of the person.
Note. Section 5.2.44 provides a general defence for an offence against this Part in respect of an act of penetration in the course of a procedure carried out in good faith for medical or hygienic purposes.

5.2.2 Indecency

- (1) In this Part, *indecent* means indecent according to the standards of ordinary people.
- (2) In a prosecution for an offence, *indecent* is a matter for the trier of fact.

5.2.3 Consent

- (1) In this Part, *consent* means free and voluntary agreement.
- (2) Examples of circumstances in which a person does not consent to an act include the following:
 - (a) the person submits to the act because of force or the fear of force to the person or to someone else,
 - (b) the person submits to the act because the person is unlawfully detained,
 - (c) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting,
 - (d) the person is incapable of understanding the essential nature of the act,
 - (e) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes).

Note. Section 5.2.43 also requires that the judge direct a jury, in a relevant case, as to the factors the jury may have regard to in determining whether or not there was consent.

5.2.4 Compulsion

For the purposes of this Part, a person *compels* another person to engage in conduct if the person compels (by force or otherwise) the other person to engage in that conduct:

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

5.2.5 Other definitions

- (1) In this Part:
aggravated offence means an offence against this Part that is an aggravated offence by the operation of section 5.2.36.
married means married according to the law of Australia.
- (2) For the purposes of this Part, a person *touches* another person if he or she touches the other person with any part of his or her body or with any implement manipulated by the person.

Division 2 Sexual acts committed without consent

5.2.6 Unlawful sexual penetration

- (1) A person who sexually penetrates another person:
 - (a) without the other person's consent, and
 - (b) knowing about or being reckless as to the lack of consent,is guilty of an offence.
Maximum penalty: Imprisonment for 15 years.
Maximum penalty (aggravated offence): Imprisonment for 20 years.
- (2) A person who is sexually penetrated by another person:
 - (a) without the other person's consent, and
 - (b) knowing about or being reckless as to the lack of consent,is guilty of an offence.
Maximum penalty: Imprisonment for 15 years.
Maximum penalty (aggravated offence): Imprisonment for 20 years.
Note. Section 2.3.15 of Chapter 2 (Duress) provides a defence to a person who is sexually penetrated without his or her consent.
- (3) For the purposes of this section, being reckless as to a lack of consent to sexual penetration includes not giving any thought to whether or not the other person is consenting to sexual penetration.

5.2.7 Compelling sexual penetration

- A person who compels another person:
- (a) to sexually penetrate the other person's own genitalia or anus, or
 - (b) to sexually penetrate, or be sexually penetrated by, a third person, or
 - (c) to sexually penetrate, or be sexually penetrated by, an animal,
- is guilty of an offence.
-
- Maximum penalty: Imprisonment for 15 years.
-
- Maximum penalty (aggravated offence): Imprisonment for 20 years.

5.2.8 Indecent touching

- (1) A person who indecently touches another person:
 - (a) without the other person's consent, and
 - (b) knowing about or being reckless as to the lack of consent,is guilty of an offence.
Maximum penalty: Imprisonment for 5 years.
Maximum penalty (aggravated offence): Imprisonment for 6 years.

- (2) A person who is indecently touched by another person:
- (a) without the other person's consent, and
 - (b) knowing about or being reckless as to the lack of consent,
- is guilty of an offence.
Maximum penalty: Imprisonment for 5 years.
Maximum penalty (aggravated offence): Imprisonment for 6 years.
- (3) For the purposes of this section, being reckless as to a lack of consent to touching includes not giving any thought to whether or not the other person is consenting to the touching.

5.2.9 Compelling indecent touching

A person who compels another person:

- (a) to indecently touch any part of the person's own body, or
 - (b) to indecently touch, or be indecently touched by, a third person,
or
 - (c) to indecently touch, or be indecently touched by, an animal,
- is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

Maximum penalty (aggravated offence): Imprisonment for 6 years.

Note: The following is a draft summary offence for an indecent act directed at an adult

Indecent act directed at another person

A person who commits an indecent act that is directed at another person:

- (a) without the consent of the other person, and
 - (b) knowing about or being reckless as to the lack of consent of that other person,
- is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

Division 3 Sexual acts committed against or with children

5.2.10 Definition—child

In this Division, *child* means a person who is under the age of *[age of consent]*.

5.2.11 Sexual penetration

- (1) A person who:
- (a) sexually penetrates a child under the age of *[no defence age]*, or
 - (b) is sexually penetrated by a child under the age of *[no defence age]*,
- is guilty of an offence.
Maximum penalty: Imprisonment for 25 years.
- (2) A person who:
- (a) sexually penetrates a child of or over the age of *[no defence age]*, or
 - (b) is sexually penetrated by a child of or over the age of *[no defence age]*,
- is guilty of an offence.
Maximum penalty: Imprisonment for 12 years.

Criminal Code of [State/Territory]

Maximum penalty (aggravated offence): Imprisonment for 15 years.

5.2.12 Indecent touching

- (1) A person who:
 - (a) indecently touches a child under the age of *[no defence age]*, or
 - (b) is indecently touched by a child under the age of *[no defence age]*,is guilty of an offence.
Maximum penalty: Imprisonment for 12 years.
Maximum penalty (aggravated offence): Imprisonment for 15 years.
- (2) A person who:
 - (a) indecently touches a child of or over the age of *[no defence age]*, or
 - (b) is indecently touched by a child of or over the age of *[no defence age]*,is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.
Maximum penalty (aggravated offence): Imprisonment for 9 years.

5.2.13 Indecent act directed at a child

- (1) A person who commits an indecent act directed at a child under the age of *[no defence age]* is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.
Maximum penalty (aggravated offence): Imprisonment for 9 years.
- (2) A person who commits an indecent act directed at a child of or over the age of *[no defence age]* is guilty of an offence.
Maximum penalty: Imprisonment for 5 years.
Maximum penalty (aggravated offence): Imprisonment for 6 years.

5.2.14 Persistent sexual abuse of a child

- (1) A person who, on 3 or more separate occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes an offence against this Part is guilty of an offence.
Maximum penalty: Imprisonment for 25 years.
- (2) It is immaterial whether or not the conduct is of the same nature, or constitutes the same offence, on each occasion.
- (3) It is immaterial that the conduct on any of those occasions occurred outside this jurisdiction, so long as the conduct on at least one of those occasions occurred in this jurisdiction.
- (4) In proceedings for an offence against this section, it is not necessary to specify or to prove the dates or exact circumstances of the alleged occasions on which the conduct constituting the offence occurred.
- (5) A charge of an offence against this section:
 - (a) must specify with reasonable particularity the period during which the offence against this section occurred, and
 - (b) must describe the nature of the separate offences alleged to have been committed by the accused during that period.

- (6) In order for the accused to be convicted of an offence against this section:
 - (a) the trier of fact must be satisfied beyond reasonable doubt that the evidence establishes at least 3 separate occasions, occurring on separate days during the period concerned, on which the accused engaged in conduct constituting an offence against this Part in relation to a particular child of a nature described in the charge, and
 - (b) the trier of fact must be so satisfied about the material facts of the 3 such occasions, although the trier of fact need not be so satisfied about the dates or the order of those occasions, and
 - (c) if the trier of fact is a jury and more than 3 such occasions are relied on as evidence of the commission of an offence against this section, all the members of the jury must be so satisfied about the same 3 occasions.
- (7) In proceedings for an offence against this section, the judge must inform the jury (if any) of the requirements of subsection (6).
- (8) A person who has been convicted or acquitted of an offence against this section may not be convicted with another offence against this Part in relation to the same child that is alleged to have been committed in the period during which the accused was alleged to have committed an offence against this section. This subsection does not prevent an alternative verdict under section 5.2.46.
- (9) A person who has been convicted or acquitted of an offence against this Part in relation to a child may not be convicted of an offence against this section in relation to the same child if any of the occasions relied on as evidence of the commission of the offence against this section includes the occasion of that sexual offence.
- (10) Proceedings for an offence against this section must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, such an offence before the necessary consent has been given.

Note: The options for transitional provisions with respect to this new offence include the following:

- (a) *ss (6) (d): the trier of fact must be satisfied that the 3 such occasions relied on as evidence of the commission of an offence against this section occurred after the commencement of this section.*
- (a) *ss (6) (d): the trier of fact must be satisfied that at least one of the 3 such occasions relied on as evidence of the commission of an offence against this section occurred after the commencement of this section.*

5.2.15 Consent not a defence

Consent of the child concerned is not a defence to an offence against this Division.

5.2.16 Defence—marriage

A person is not criminally responsible for an offence against this Division in respect of an act if, at the time of the act, the child concerned was of or over the

age of *[no defence age]* and:

- (a) the person was married to the child, or
- (b) the person reasonably believed he or she was married to the child.

5.2.17 Defence—similarity of age

- (1) A person is not criminally responsible for an offence against this Division in respect of an act if, at the time of the act, the child concerned was over the age of *[no defence age]* and:
 - (a) the person was not more than 2 years older than the child, and
 - (b) the person was not more than 2 years younger than the child.
- (2) An offence of incitement under Part 2.4 is committed by a person who urges another person to engage in an act of sexual penetration or indecent touching or an indecent act even if the other person does not commit an offence by doing so because of subsection (1).

5.2.18 Absolute liability applies to circumstance of child being under the age of *[no defence age]*

For the purpose of an offence against this Division, absolute liability applies to the circumstance of a child against whom the offence is committed being under the age of *[no defence age]*.

Note. Section 2.2.13 of Chapter 2 provides that if the law that creates an offence provides that absolute liability applies to a particular physical element of the offence:

- (a) there are no fault elements for that physical element, and
- (b) the defence of mistake of fact under section 2.3.10 of Chapter 2 is unavailable in relation to that physical element.

5.2.19 Strict liability applies to circumstance of child being under the age of *[age of consent]*

For the purpose of an offence against this Division, strict liability applies to the circumstance of a child against whom the offence is committed being under the age of *[age of consent]*.

Note. Section 2.2.12 of Chapter 2 provides that if the law that creates an offence provides that strict liability applies to a particular physical element of the offence:

- (a) there are no fault elements for that physical element, and
- (b) the defence of mistake of fact under section 2.3.10 of Chapter 2 is available in relation to that physical element (that is, a mistaken but reasonable belief about the age of the child).

Section 2.6.3 of Chapter 2 provides that an accused relying on such a defence has an evidential burden in relation to the matter. A similar evidential burden applies to other defences under this Part (see section 5.2.45).

5.2.20 Proceedings against children under 14 years

Proceedings for an offence against this Division must not be commenced against a child who is under the age of 14 years without the consent of the Director of Public Prosecutions. However, a child may be arrested for, charged with, or remanded in custody or on bail in connection with, such an offence before the necessary consent has been given.

Division 4 Sexual acts committed against young persons by persons in positions of

authority

5.2.21 Definitions

- (1) In this Division, **young person** means a person who is of or over the age of [*age of consent*] and under the age of [*age of consent + 2 years*].
- (2) A person is in a **position of authority** in relation to a young person if, at the time of the conduct concerned:
 - (a) the person is a school teacher and the young person is his or her pupil, or
 - (b) the person is a parent, step-parent, foster parent, legal guardian or legal custodian of the young person, or
 - (c) the person is a religious instructor to the young person, or
 - (d) the person is a counsellor to the young person in a professional capacity, or
 - (e) the person is a health professional and the young person is his or her patient, or
 - (f) the person is a police or prison officer and the young person is in his or her care, custody or control as such an officer.

5.2.22 Sexual penetration

A person who is in a position of authority in relation to the young person and who:

- (a) sexually penetrates the young person, or
 - (b) is sexually penetrated by the young person,
- is guilty of an offence.

Maximum penalty: Imprisonment for 12 years.

Maximum penalty (aggravated offence): Imprisonment for 15 years.

5.2.23 Indecent touching

A person who is in a position of authority in relation to a young person and who:

- (a) indecently touches the young person, or
 - (b) is indecently touched by the young person,
- is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

Maximum penalty (aggravated offence): Imprisonment for 9 years.

5.2.24 Indecent act directed at young person

A person who:

- (a) is in a position of authority in relation to a young person, and
 - (b) commits an indecent act directed at the young person,
- is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

Maximum penalty (aggravated offence): Imprisonment for 6 years.

5.2.25 Consent not a defence

Consent of the young person concerned is not a defence to an offence against this Division.

5.2.26 Defence—marriage

A person who is in a position of authority in relation to a young person is not criminally responsible for an offence against this Division in respect of an act if, at the time of the act:

- (a) the person was married to the young person, or
- (b) the person reasonably believed he or she was married to the young person.

5.2.27 Absolute liability applies to circumstance of person being a young person

For the purpose of an offence against this Division, absolute liability applies to the circumstance of a person against whom the offence is committed being a young person.

Division 5 Sexual acts committed against or with mentally impaired persons by carers

5.2.28 Definitions

- (1) In this Division, *mental impairment* includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.
- (2) For the purposes of this Division, a person is responsible for the care of a person with a mental impairment if the person provides medical, nursing, therapeutic or educative services to the person in connection with his or her mental impairment.

5.2.29 Sexual penetration

A person who is responsible for the care of a person with a mental impairment and who:

- (a) sexually penetrates that person, or
 - (b) is sexually penetrated by that person,
- is guilty of an offence.

Maximum penalty: Imprisonment for 12 years.

Maximum penalty (aggravated offence): Imprisonment for 15 years.

5.2.30 Indecent touching

A person who is responsible for the care of a person with a mental impairment and who:

- (a) indecently touches that person, or
 - (b) is indecently touched by that person,
- is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

Maximum penalty (aggravated offence): Imprisonment for 9 years.

5.2.31 Indecent act directed at person with mental impairment

A person who:

- (a) is responsible for the care of a person with a mental impairment, and
 - (b) commits an indecent act directed at that person,
- is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

Maximum penalty (aggravated offence): Imprisonment for 6 years.

5.2.32 Defence—consent

- (1) Consent of the person with the mental impairment is not a defence to an offence against this Division, except as provided by this section.
- (2) A person who is responsible for the care of a person with a mental impairment is not criminally responsible for an offence against this Division in respect of an act if, at the time of the act:
 - (a) the person with the mental impairment consented to the act, and
 - (b) the giving of that consent was not unduly influenced by the fact that the person was responsible for the care of the person with the mental impairment.

5.2.33 Defence—marriage or defacto partners

A person who is responsible for the care of a person with a mental impairment is not criminally responsible for an offence against this Division in respect of an act if, at the time of the act:

- (a) the person was married to, or reasonably believed he or she was married to, the person with the mental impairment, or
- (b) the person was the defacto partner of the person with the mental impairment.

Division 6 Incest

5.2.34 Incest

- (1) A person who:
 - (a) sexually penetrates a close family member, or
 - (b) is sexually penetrated by a close family member,knowing that the person is a close family member, is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.
- (2) For the purposes of this section, a *close family member* is a parent, son, daughter, sibling (including a half-brother or half-sister), grandparent or grandchild, being such a family member from birth and not from marriage or adoption.
- (3) Proceedings for an offence against this section must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence against this section before the necessary consent has been given.

5.2.35 Consent not a defence

Consent of the close family member is not a defence to an offence against this Division.

Division 7 Increased penalties for aggravated offences

5.2.36 Increased penalties for aggravated offences

The following are factors of aggravation for offences committed against this Part, and a maximum penalty specified in this Part for an aggravated offence applies

if any such factor of aggravation applies to the offence:

- (a) The offence was committed during torture (that is, the person who committed the offence deliberately and systematically inflicted over a period of time severe pain on the person against whom the offence was committed).
- (b) The offence was committed by the use or threatened use of an offensive weapon.
- (c) The offence was committed by a person in the company of another person.
- (d) The offence was committed in circumstances that involved the victim being caused serious harm (within the meaning of section 5.1.2) or being threatened with serious harm or death.
- (e) The offence was committed against a child under the age of 12 years (except in the case of an offence against section 5.2.11 (1), 5.2.12 (1) or 5.2.13 (1)).
- (f) The offence was committed against a child who was 12 years of age or older and under the age of *[age of consent]* (except in the case of an offence against section 5.2.11 (2), 5.2.12 (2) or 5.2.13 (2)).
- (g) The offence was committed against a person in abuse of a position of trust (except in the case of an offence against Division 4, 5 or 6).
- (h) The offence was committed against a person in abuse of a position of authority (except in the case of an offence against Division 4).

5.2.37 Procedural and evidentiary provisions

- (1) If the prosecution intends to prove an aggravated offence, the relevant factor of aggravation must be contained in the charge.
- (2) In order to prove an aggravated offence, the prosecution must prove that the person who committed the offence intended or was reckless as to the factor of aggravation.

Division 8 Provisions relating to evidence

5.2.38 Evidence with respect to sexual reputation of complainant not admissible

In proceedings that relate to an offence against this Part (including committal proceedings), evidence of the reputation of the complainant with respect to sexual activity is not admissible.

5.2.39 Admissibility of evidence relating to specific sexual activities of a complainant

- (1) In proceedings that relate to an offence against this Part (including committal proceedings), evidence is not to be admitted as to the specific sexual activities of the complainant (other than with the accused), except with the leave of the court.
- (2) The court is not to give leave under this section unless it is satisfied that the evidence has substantial relevance to facts in issue or is a proper matter for cross-examination as to credit.

- (3) Evidence that relates to or tends to establish the fact that the complainant was accustomed to engage in sexual activities is not to be regarded:
 - (a) as having a substantial relevance to the facts in issue by virtue of any inferences it may raise as to general disposition, or
 - (b) as being a proper matter for cross-examination as to credit in the absence of special circumstances that would be likely materially to impair confidence in the reliability of the evidence of the complainant.
- (4) An application for leave under this section:
 - (a) is to be in writing, and
 - (b) is to be made in the absence of the jury (if any) and, if the accused so requests, in the absence of the complainant, and
 - (c) is to be determined after the court has allowed such submissions or other evidence as the court considers necessary for the determination of the application.
- (5) If the court gives leave under this section, the court must state in writing the reasons for doing so and cause those reasons to be entered in the records of the court.

5.2.40 Reliability of evidence of complainant

In proceedings for an offence against this Part, the judge must not warn, or suggest in any way to, the jury that the law regards complainants in sexual cases as an unreliable class of witness.

5.2.41 Reliability of evidence of children

In proceedings for an offence against this Part in which evidence is given by a child, the judge must not warn, or suggest in any way to, the jury that the law regards children as an unreliable class of witness.

5.2.42 Warning to be given as to lack of complaint or delay in making complaint

If evidence is given or a question is asked of a witness in proceedings for an offence against this Part that tends to suggest that there was an absence of complaint or a delay in making a complaint about the alleged offence by the person against whom the offence is alleged to have been committed, the judge:

- (a) must give a warning to the jury (if any) to the effect that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and
- (b) must inform the jury (if any) that there may be good reasons why a victim of a sexual offence may hesitate in making, or may refrain from making, a complaint about the offence.

5.2.43 Jury directions on consent

- (1) In proceedings for an offence against this Part, the judge must, in a relevant case, direct the jury (if any) that a person is not to be regarded as having consented to a sexual act just because:
 - (a) the person did not say or do anything to indicate that she or he

- did not consent, or
 - (b) the person did not protest or physically resist, or
 - (c) the person did not sustain physical injury, or
 - (d) on that or an earlier occasion, the person consented to engage in a sexual act (whether or not of the same type) with that person, or a sexual act with another person.
- (2) In proceedings for an offence against this Part, the judge must, in a relevant case, direct the jury (if any) that in determining whether the accused was under a mistaken belief that a person consented to a sexual act the jury may consider whether the mistaken belief was reasonable in the circumstances.

Division 9 General provisions

5.2.44 Defence—medical or hygienic procedures

A person is not criminally responsible for an offence against this Part in respect of any sexual penetration, touching or other act carried out in the course of a procedure in good faith for medical or hygienic purposes.

5.2.45 Evidential burden

An accused who wishes to deny criminal responsibility by relying on a provision of this Part that provides that a person is not criminally responsible for an offence against this Part bears an evidential burden in relation to that matter.

5.2.46 Alternative verdicts

- (1) If on the trial of a person charged with an offence against this Part the trier of fact is not satisfied that the person committed the offence but is satisfied that the person committed another offence against this Part, the trier of fact may find the person not guilty of the offence charged but guilty of that other offence, and the person is liable to punishment accordingly.
- (2) This section does not authorise the trier of fact to find a person guilty of an offence for which the maximum penalty is greater than the maximum penalty for the offence with which the person was charged.

Division 10 Special provisions relating to disclosure of counselling communications

5.2.47 Definitions

- (1) In this Division:
 - counselling communication* means a communication made:
 - (a) by a victim or alleged victim of a sexual offence to another person (called *the counsellor* in this Division) in the course of a relationship in which the counsellor is counselling or treating the victim or alleged victim for any emotional or psychological harm suffered in connection with the offence, or
 - (b) to, or in relation to, that victim or alleged victim for the purposes of that counselling or treatment,
- in circumstances that give rise to a reasonable expectation of confidentiality or a duty of confidentiality.
- preliminary criminal proceedings* means:

(a) proceedings for the committal of a person for trial or sentence for an offence, or

(b) proceedings relating to bail.

sexual offence means an offence against this Part.

trial or sentencing proceedings means proceedings relating to the trial or sentencing of a person for an offence, other than preliminary criminal proceedings.

(2) For the purposes of this Division:

(a) in determining whether a person is counselling or treating another person for emotional or psychological harm, it does not matter that the person provides such counselling or treatment on a voluntary basis,

(b) in determining whether a communication was made in circumstances that gave rise to a reasonable expectation of confidentiality, it does not matter that the communication was made in the presence of a third party, if the third party's presence was necessary to facilitate communication or further the counselling process.

(3) This Division applies to communications made before or after the commencement of this Division.

Note. The Interpretation Act of the jurisdiction defines "document" to mean any record of information, including writing, marks, audio or video tapes, drawings or photographs.

5.2.48 Counselling communications not to be disclosed in preliminary criminal proceedings

(1) A counselling communication must not be disclosed in any preliminary criminal proceedings.

(2) Accordingly:

(a) a person cannot be required, in or in connection with those preliminary proceedings, to produce a document that records a counselling communication, and

(b) evidence of a counselling communication cannot be adduced or admitted in preliminary criminal proceedings.

5.2.49 Counselling communications not to be disclosed in trial or sentencing proceedings except with leave of court

(1) A counselling communication must not be disclosed in any trial or sentencing proceedings, except with leave of the court granted in accordance with this Division.

(2) Accordingly:

(a) a person cannot be required, in or in connection with trial or sentencing proceedings, to produce a document that records a counselling communication, and

(b) evidence of a counselling communication cannot be adduced or admitted in trial or sentencing proceedings,

except with such leave of the court.

(3) Leave may be granted subject to restrictions.

- (4) An application for leave is to be made in writing.

5.2.50 Threshold test for grant of leave—legitimate forensic purpose

- (1) Leave to disclose a counselling communication is to be refused by the court if the court is not satisfied that the person seeking leave has established a legitimate forensic purpose for seeking that leave.
- (2) In order to do so, the person must:
- (a) identify a legitimate forensic purpose for seeking that leave, and
 - (b) satisfy the court that there is an arguable case that the evidence of the counselling communication would materially assist the person in his or her case.
- (3) The court must determine whether or not to refuse an application under this section before proceeding to conduct an examination of the relevant evidence.

5.2.51 Preliminary examination of evidence

- (1) If the court is satisfied that the person seeking leave to disclose a counselling communication has established a legitimate forensic purpose for seeking that leave, the court is then to conduct a preliminary examination of the evidence of the counselling communication in order to determine whether leave should be granted.
- (2) The court may, for that purpose:
- (a) require any person having custody or control of a document that records the counselling communication to produce that document to the court for inspection, and
 - (b) require the counsellor concerned or, if the counsellor provides counselling or treatment on behalf of an organisation, the principal or another representative of that organisation:
 - (i) to provide written answers to any questions, or
 - (ii) to attend for oral examination by the court, but only if the preliminary examination cannot otherwise be effectively conducted.
- (3) No other person is to be required to answer any questions or to attend for oral examination by the court for the purposes of the preliminary examination.
- (4) The preliminary examination is to be conducted:
- (a) in the absence of the public and the jury (if any), and
 - (b) in the absence of the parties to the proceedings and their legal representatives, except to the extent otherwise determined by the court.
- (5) Evidence taken at the preliminary examination is not to be disclosed to the parties to the proceedings or to their legal representatives, except to the extent otherwise determined by the court.
- (6) No record of the preliminary examination is to be made available for public access.

5.2.52 Grant of leave—public interest test

- (1) After conducting the preliminary examination of the relevant evidence, the court may grant leave to disclose the counselling communication only if the court is

satisfied that, in the circumstances of the case, the public interest in ensuring the accused is given a fair trial outweighs the public interest in preserving the confidentiality of the counselling communication.

- (2) In making that determination, the court is to have regard to the following:
- (a) the extent to which disclosure of the counselling communication is necessary to allow the accused to make a full defence,
 - (b) the public interest in ensuring that victims of sexual offences receive effective counselling and other treatment, and the extent to which disclosure of counselling communications dissuades victims from seeking such counselling or other treatment or diminishes the effectiveness of such counselling or other treatment,
 - (c) whether the evidence concerned will have a substantial probative value to a fact in issue and whether other evidence of similar or greater probative value is available concerning the matters to which the evidence relates,
 - (d) the likelihood that disclosure of the counselling communication will affect the outcome of the case,
 - (e) whether admission of the counselling communication is being sought on the basis of a discriminatory belief or bias,
 - (f) whether the victim or alleged victim who made the counselling communication concerned, or to whom it was made or relates, objects to disclosure of the counselling communication,
 - (g) the nature and extent of the reasonable expectation of confidentiality with respect to the counselling communication and the potential prejudice to the privacy of any person, including the extent to which any interest in confidentiality has been attenuated by the passage of time or the occurrence of any intervening event since the counselling communication was made.

5.2.53 Powers to prevent further disclosure of counselling communications

If the court grants leave to disclose a counselling communication, it may:

- (a) order that all or part of the evidence concerned be heard in the absence of the public, and
- (b) make such other orders as it considers necessary to prevent any further disclosure or dissemination of the counselling communication.

5.2.54 Protection provided by this Division cannot be waived

This Division applies whether or not the victim or alleged victim who made the counselling communication concerned, or to whom it relates, or any other person, consents, or does not object to, disclosure of the counselling communication.

5.2.55 Prohibition on disclosure does not apply in certain circumstances

This Division does not apply in respect of the following:

- (a) information obtained by a medical practitioner as a result of a

Criminal Code of [State/Territory]

- physical examination of a victim or alleged victim of a sexual offence in connection with the offence, including communications made during that examination,
- (b) a communication made for the purpose of criminal proceedings arising from the commission or alleged commission of the sexual offence,
 - (c) a communication made in furtherance of the commission of an offence against Part 3.3 (Fraud), the offence of perjury (section 7.2.1), an offence against Part 7.3 (Falsifying, destroying or concealing evidence) or an offence against Part 7.5 (Perversion of course of justice and related offences).

Chapter 6 Drug offences

Note: This Chapter gives effect to the final report of MCCOC of October 1998.

Part 6.1 Definitions

6.1.1 Controlled drugs

- (1) In this Chapter:
controlled drug means a substance specified or described in the regulations as a controlled drug, but does not include a growing plant.
- (2) In this Chapter:
trafficable quantity of a controlled drug means a quantity of the drug that is not less than the quantity specified in the regulations as a trafficable quantity of the drug.
commercial quantity of a controlled drug means a quantity of the drug that is not less than the quantity specified in the regulations as a commercial quantity of the drug.
large commercial quantity of a controlled drug means a quantity of the drug that is not less than the quantity specified in the regulations as a large commercial quantity of the drug.
- (3) For the purposes of this Chapter, any such trafficable, commercial or large commercial quantity of a controlled drug in a mixture of substances is (subject to the regulations) as follows:
 - (a) if the prosecution elects to establish the actual quantity of the drug in the mixture—the relevant quantity of the drug determined by reference to the quantity (if any) specified in the regulations for the pure form of the drug,
 - (b) if the prosecution elects to establish the quantity of the mixture instead of the quantity of the drug—the relevant quantity of the mixture determined by reference to the quantity (if any) specified in the regulations for a mixture containing the drug.

6.1.2 Controlled plants

- (1) In this Chapter:
controlled plant means a growing plant specified or described in the regulations as a controlled plant, and includes the seedling of such a plant.
- (2) In this Chapter:
trafficable quantity of a controlled plant means a quantity of the plant that is not less than the quantity specified in the regulations as a trafficable quantity of the plant.
commercial quantity of a controlled plant means a quantity of the plant that is not less than the quantity specified in the regulations as a commercial quantity of the plant.
large commercial quantity of a controlled plant means a quantity of the plant that is not less than the quantity specified in the regulations as a large commercial quantity of the plant.

6.1.3 Controlled precursors

- (1) In this Chapter:
controlled precursor means a substance specified or described in the regulations as a controlled precursor.
- (2) In this Chapter:
commercial quantity of a controlled precursor means a quantity of the precursor that is not less than the quantity specified in the regulations as a commercial quantity of the precursor.
large commercial quantity of a controlled precursor means a quantity of the precursor that is not less than the quantity specified in the regulations as a large commercial quantity of the precursor.

6.1.4 Other definitions

In this Chapter:

conceal a thing includes conceal or disguise:

- (a) the nature, source or location of the thing, or
- (b) any movement of the thing, or
- (c) the rights of any person with respect to the thing, or
- (d) the identity of any owner of the thing.

possession of a thing includes:

- (a) receiving or obtaining possession of the thing, or
- (b) having control over the disposition of the thing (whether or not the thing is in the custody of the person), or
- (c) having joint possession of the thing.

sell includes:

- (a) barter or exchange, or
- (b) agree to sell.

supply includes:

- (a) supply, whether or not by way of sale, or
- (b) agree to supply.

transport includes deliver.

Notes:

1. See section 1.4 for provision which authorises the Governor [Administrator] to make regulations for the purposes of the Code. A proposed regulation (the Criminal Code Drug Offences Regulation) accompanies the draft of this Chapter of the Code.
2. Sections 6.5.2, 6.5.3, 6.5.4 and 6.5.5 affect the meaning of the various quantities of drugs, plants or precursors in respect of drug offences relating to more than one kind of controlled drug, plant or precursor or more than one parcel of a controlled drug, plant or precursor or trafficking or supply on different occasions.
3. Section 6.5.6 makes provision with respect to proof of the identity or quantity of drugs, plants or precursors.
4. The regulations will not specify trafficable, commercial and large commercial quantities for all controlled drugs, precursors and plants. It is proposed to specify quantities on the basis of information from drug enforcement agencies about illegal commercial activity. If there is no evidence of commercial exploitation of a particular substance or plant, no quantities are proposed to be prescribed. In that case, dealing in that substance or plant will only attract the penalty for the basic offence and not the higher penalty for dealing in commercial or large commercial quantities. In addition, proof of the commercial nature of an alleged offence will not be assisted by the special proof provisions that apply to the possession or other dealing in a trafficable quantity.

Part 6.2 Trafficking in controlled drugs

6.2.1 Definition—trafficking

- (1) For the purposes of this Part, a person *traffics* in a controlled drug if:
 - (a) the person sells the drug, or
 - (b) the person prepares the drug for supply with the intention of selling any of it or believing that another person intends to sell any of it, or
 - (c) the person transports the drug with the intention of selling any of it or believing that another person intends to sell any of it, or
 - (d) the person guards or conceals the drug with the intention of selling any of it or assisting another person to sell any of it, or
 - (e) the person possesses the drug with the intention of selling any of it.
- (2) Preparing a drug for supply includes packaging the drug or separating the drug into discrete units.

6.2.2 Trafficking in large commercial quantity of controlled drug

A person who traffics in a large commercial quantity of a controlled drug is guilty of an offence.

Maximum penalty: Imprisonment for life.

Note. The sentencing legislation of the jurisdiction concerned affects a sentence of imprisonment for life. For example, in New South Wales such a sentence must be served for the term of the person's natural life, without parole or remission, but a court may impose a lesser sentence (see s. 19A of NSW Crimes Act 1900).

6.2.3 Trafficking in commercial quantity of controlled drug

A person who traffics in a commercial quantity of a controlled drug is guilty of an offence.

Maximum penalty: Imprisonment for 20 years.

6.2.4 Trafficking in controlled drug

A person who traffics in a controlled drug is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

6.2.5 Trafficable quantity—rebuttable presumption of intention etc of sale

- (1) If, in any proceedings for an offence against this Part, it is proved that the accused:
 - (a) prepared a trafficable quantity of a controlled drug for supply, or
 - (b) transported a trafficable quantity of a controlled drug, or
 - (c) guarded or concealed a trafficable quantity of a controlled drug, or
 - (d) possessed a trafficable quantity of a controlled drug,it is presumed, in the absence of evidence to the contrary, that the accused had the

relevant intention or belief concerning the sale of the drug required to constitute the offence of trafficking in the drug.

- (2) The burden of proof in respect of evidence to the contrary is an evidential burden of proof.
- (3) This section does not apply to a charge under section 6.5.3 (Aggregation of multiple offences on different specific occasions) if the conduct on each separate occasion to which the charge relates did not involve a trafficable quantity of the controlled drug.

6.2.6 Complicity, incitement and conspiracy offences do not apply to purchasers of drugs

A person is not guilty of an offence against section 2.4.2, 2.4.4 or 2.4.5 merely because the person purchased or intended to purchase a controlled drug from another person.

Part 6.3 Commercial manufacture and cultivation

Division 1 Commercial manufacture of controlled drugs

6.3.1 Definition—manufacture

- (1) In this Part, *manufacture* means any process by which a substance is produced (other than the cultivation of a plant), and includes:
 - (a) the process of extracting or refining a substance, or
 - (b) the process of transforming a substance into a different substance.
- (2) For the purposes of this Part, a person *manufactures* a substance if the person:
 - (a) engages in its manufacture, or
 - (b) exercises control or direction over its manufacture, or
 - (c) provides finance for its manufacture.

6.3.2 Manufacture of large commercial quantity of controlled drug

A person who manufactures a large commercial quantity of a controlled drug:

- (a) with the intention of selling any of it, or
 - (b) believing that another person intends to sell any of it,
- is guilty of an offence.

Maximum penalty: Imprisonment for life.

6.3.3 Manufacture of commercial quantity of controlled drug

A person who manufactures a commercial quantity of a controlled drug:

- (a) with the intention of selling any of it, or
 - (b) believing that another person intends to sell any of it,
- is guilty of an offence.

Maximum penalty: Imprisonment for 20 years.

6.3.4 Manufacture of controlled drug

A person who manufactures a controlled drug:

- (a) with the intention of selling any of it, or
- (b) believing that another person intends to sell any of it,
is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.

6.3.5 Trafficable quantity—rebuttable presumption of intention etc of sale

- (1) If, in any proceedings for an offence against this Part, it is proved that the accused manufactured a trafficable quantity of a controlled drug, it is presumed, in the absence of evidence to the contrary, that the accused had the relevant intention or belief concerning the sale of the manufactured drug required to constitute that offence.
- (2) The burden of proof in respect of evidence to the contrary is an evidential burden of proof.

6.3.6 Sale of controlled precursor for purposes of manufacture of controlled drug

- (1) A person who sells a large commercial quantity of a controlled precursor, believing that the person to whom it is sold or another person intends to use any of it to manufacture a controlled drug, is guilty of an offence.
Maximum penalty: Imprisonment for 25 years.
- (2) A person who sells a commercial quantity of a controlled precursor, believing that the person to whom it is sold or another person intends to use any of it to manufacture a controlled drug, is guilty of an offence.
Maximum penalty: Imprisonment for 15 years.
- (3) A person who sells a controlled precursor, believing that the person to whom it is sold or another person intends to use any of it to manufacture a controlled drug, is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.

6.3.7 Manufacture of a controlled precursor for purpose of manufacture of a controlled drug

- (1) A person who manufactures a controlled precursor:
 - (a) with the intention of manufacturing a controlled drug, and
 - (b) with the intention of selling any of the drug so manufactured or believing that another person intends to sell any of the drug so manufactured,is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.
- (2) A person who manufactures a controlled precursor:
 - (a) with the intention of selling any of the precursor to another person, and
 - (b) believing that that person intends to use the controlled precursor to manufacture a controlled drug,is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.

6.3.8 Possession of substance, equipment or instructions for commercial manufacture of controlled drug

A person who possesses any substance, any equipment or any document containing instructions for manufacturing a controlled drug:

- (a) with the intention of using it to manufacture a controlled drug and selling any of the drug so manufactured, or
- (b) with the intention of using it to manufacture a controlled drug and believing that another person intends to sell any of the drug so manufactured,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

Division 2 Commercial cultivation of controlled plants

6.3.9 Definitions—cultivate

(1) In this Part, *cultivate* includes:

- (a) plant a seed, seedling or cutting or transplant a plant, or
- (b) nurture, tend or grow a plant, or
- (c) guard or conceal a plant (including against interference or discovery by humans or by natural predators), or
- (d) harvest a plant (including picking any part of a plant or separating any resin or other substance from a plant).

(2) For the purposes of this Part, a person *cultivates* a plant if the person:

- (a) engages in its cultivation, or
- (b) exercises control or direction over its cultivation, or
- (c) provides finance for its cultivation.

6.3.10 Definition—product of plant

For the purposes of this Part, the *product* of a plant includes:

- (a) a seed of the plant, or
- (b) a part of the plant (whether live or dead), or
- (c) a substance separated from the plant.

6.3.11 Cultivation of large commercial quantity of controlled plant

A person who cultivates a large commercial quantity of a controlled plant:

- (a) with the intention of selling any of them or their products, or
- (b) believing that another person intends to sell any of them or their products,

is guilty of an offence.

Maximum penalty: Imprisonment for life.

6.3.12 Cultivation of commercial quantity of controlled plant

A person who cultivates a commercial quantity of a controlled plant:

- (a) with the intention of selling any of them or their products, or
- (b) believing that another person intends to sell any of them or their products,

is guilty of an offence.

Maximum penalty: Imprisonment for 20 years.

6.3.13 Cultivation of controlled plant

A person who cultivates a controlled plant:

- (a) with the intention of selling it or any of its products, or
- (b) believing that another person intends to sell it or any of its products,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

6.3.14 Trafficable quantity—rebuttable presumption of intention etc of sale

- (1) If, in any proceedings for an offence against this Division, it is proved that the accused cultivated a trafficable quantity of a controlled plant, it is presumed, in the absence of evidence to the contrary, that the accused had the relevant intention or belief concerning the sale of the plant or its products required to constitute that offence.
- (2) The burden of proof in respect of evidence to the contrary is an evidential burden of proof.

6.3.15 Sale of controlled plant

- (1) A person who sells a large commercial quantity of a controlled plant is guilty of an offence.
Maximum penalty: Imprisonment for life.
- (2) A person who sells a commercial quantity of a controlled plant is guilty of an offence.
Maximum penalty: Imprisonment for 20 years.
- (3) A person who sells a controlled plant is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.

6.3.16 Possession of plant material, equipment or growing instructions for commercial cultivation of controlled plant

A person who possesses any controlled plant, any product of a controlled plant, any equipment or any document containing instructions for growing a controlled plant with the intention of using it to cultivate controlled plants and:

- (a) with the intention of selling any of the plants so cultivated or their products, or
- (b) believing that another person intends to sell any of the plants so cultivated or their products,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

Part 6.4 Drug offences involving children

6.4.1 Definition—child

For the purposes of this Part, a *child* means a person under the age of 18 years.

6.4.2 Supply of controlled drug to child for trafficking

- (1) A person who supplies a commercial quantity of a controlled drug to a child,

believing that the child intends to sell any of the drug, is guilty of an offence.
Maximum penalty: Imprisonment for life.

- (2) A person who supplies a controlled drug to a child, believing that the child intends to sell any of the drug, is guilty of an offence.
Maximum penalty: Imprisonment for 20 years.

6.4.3 Procuring child to traffic

- (1) A person who procures a child to traffic in a commercial quantity of a controlled drug is guilty of an offence.

Maximum penalty: Imprisonment for life.

- (2) A person who procures a child to traffic in a controlled drug is guilty of an offence.

Maximum penalty: Imprisonment for 20 years.

- (3) Subsection (1) applies if the child was procured to traffic in a commercial quantity of a controlled drug on a single occasion or over a period of time.

- (4) For the purposes of this section, a person procures a child to traffic in a controlled drug if:

(a) the person procures the child to sell the drug, or

(b) the person, with the intention of selling any of the drug or believing that another person intends to sell any of the drug, procures the child to prepare the drug for supply or to transport the drug, or

(c) the person, with the intention of selling any of the drug or assisting another person to sell any of the drug, procures the child to guard or conceal the drug.

- (5) Preparing a drug for supply includes packaging the drug or separating the drug into discrete units.

6.4.4 Supply of controlled drug to child

A person who supplies a controlled drug to a child is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

6.4.5 Trafficable quantity—rebuttable presumption of intention etc of sale

- (1) If, in any proceedings for an offence against section 6.4.2, it is proved that the accused supplied a trafficable quantity of a controlled drug to a child, it is presumed, in the absence of evidence to the contrary, that the accused had the relevant belief concerning the sale of the drug by the child required to constitute that offence.

- (2) The burden of proof in respect of evidence to the contrary is an evidential burden of proof.

- (3) This section does not apply to a charge under section 6.5.3 (Aggregation of multiple offences on different specific occasions) if the conduct on each separate occasion to which the charge relates did not involve a trafficable quantity of the controlled drug.

6.4.6 Strict liability—age of person

In the case of an offence against this Part, or an offence against Part 2.4 arising

in connection with an offence against this Part, strict liability applies to the circumstance of a person being a child.

6.4.7 Exemption—children

A person is not criminally responsible for an offence against this Part if, at the time of the conduct constituting the offence, the person was a child.

Part 6.5 General provisions relating to drug offences

6.5.1 Application

This Part applies to offences against this Chapter, except Part 6.6.

6.5.2 Carrying on business of trafficking

- (1) This section applies to offences against:
- (a) section 6.2.2 (Trafficking in large commercial quantity of controlled drug), or
 - (b) section 6.2.3 (Trafficking in commercial quantity of controlled drug), or
 - (c) section 6.4.2 (1) (Supply of commercial quantity of controlled drugs to child for trafficking).

For the purposes of the application of this section to an offence against section 6.4.2 (1), a reference to trafficking in drugs is to be read as a reference to supplying drugs.

- (2) In proceedings for any such offence, the prosecution may establish that the person charged with the offence trafficked in the requisite quantity of a controlled drug (without proof of trafficking in that quantity on a particular occasion) if the prosecution establishes that:
- (a) the person carried on a business of trafficking in controlled drugs, and
 - (b) the requisite quantity of a controlled drug (or of a combination of controlled drugs) was trafficked during repeated transactions in the course of that business.
- (3) For the conduct of a person to constitute the carrying on of a business, the trier of fact must be satisfied that the conduct establishes that the person was engaged in an organised commercial activity involving repeated transactions.
- (4) In proceedings under this section, it is not necessary for the prosecution to specify or to prove the exact dates of each transaction or the exact quantity trafficked during each transaction.
- (5) If the prosecution intends to rely on this section:
- (a) the fact that it intends to do so must be set out in the charge, and
 - (b) a description of the conduct that establishes, under this section, that the accused trafficked in a commercial quantity of a controlled drug must be set out in the charge or provided to the accused within a reasonable time before the trial.
- (6) Section 6.2.5 and section 6.4.5 do not apply to proceedings under this section.
- (7) A person who has been tried and convicted or acquitted on a charge of an offence

in proceedings under this section may not be charged with another offence under this Chapter that is alleged to have been committed in connection with any of the transactions on which the prosecution relied in the proceedings under this section.

- (8) The prosecution may not, in proceedings under this section, rely on any transaction in respect of which the person has been tried and convicted or acquitted on a previous charge of an offence under this Chapter.
- (9) Subject to subsections (7) and (8), this section does not prevent a person being charged with separate offences in respect of conduct on different occasions.

6.5.3 Aggregation of multiple offences on different specific occasions

- (1) This section applies to any offence against this Chapter consisting of:
 - (a) trafficking in controlled drugs on different occasions, or
 - (b) supplying controlled drugs to a child on different occasions,whether they are the same or different kinds of drugs.
- (2) A person may be charged with a single offence in respect of that conduct on all or any number of those occasions, so long as each such occasion occurred not more than 7 days apart.
- (3) The quantity of controlled drugs so trafficked or supplied for the purposes of any such single offence is the sum of the quantities of the drugs trafficked or supplied on each such occasion.
- (4) If the prosecution intends to rely on this section, particulars of each such occasion must be set out in the charge.
- (5) The same parcel of controlled drugs cannot be counted more than once for the purposes of this section. For example, if a person was in possession of a quantity of a controlled drug for sale on one day (the first occasion) and sold that drug the next day (the second occasion), only the quantity trafficked on one of those occasions may be counted.
- (6) This section does not prevent a person being charged with separate offences in respect of conduct on different occasions.

6.5.4 Offences relating to different parcels of drugs, plants or precursors

- (1) This section applies to any offence against this Chapter consisting of:
 - (a) trafficking in different parcels of controlled drugs on the same occasion, or
 - (b) manufacturing different parcels of controlled drugs on the same occasion, or
 - (c) selling different parcels of controlled precursors on the same occasion, or
 - (d) cultivating different parcels of controlled plants on the same occasion, or
 - (e) selling different parcels of controlled plants on the same occasion, or
 - (f) supplying different parcels of controlled drugs to a child on the same occasion,whether they are the same or different kinds of drug, precursor or plant.
- (2) A person may be charged with a single offence in respect of all or any of the different parcels of drugs, precursors or plants.

- (3) The quantity of controlled drugs, precursors or plants concerned for the purposes of any such single offence is the sum of the quantities of the drugs, precursors or plants in the different parcels. If there are different kinds of drugs, precursors or plants in those parcels, this subsection is subject to section 6.5.5.
- (4) If the prosecution intends to rely on this section, particulars of each parcel of drugs, precursors or plants must be set out in the charge.
- (5) This section does not prevent a person being charged with separate offences in respect of different parcels of drugs, precursors or plants.

6.5.5 Offences involving more than one kind of drug, plant or precursor

- (1) This section applies when a person is charged in accordance with this Chapter with a single offence against this Chapter consisting of:
 - (a) trafficking in more than one kind of controlled drug, or
 - (b) manufacturing more than one kind of controlled drug, or
 - (c) selling more than one kind of controlled precursor, or
 - (d) cultivating more than one kind of controlled plant, or
 - (e) selling more than one kind of controlled plant, or
 - (f) supplying more than one kind of controlled drug to a child.
- (2) In any proceedings for such a single offence:
 - (a) the quantity of the drugs or plants is a trafficable quantity if the sum of the requisite fractions of the trafficable quantity of each of those drugs or plants is equal to or greater than one, or
 - (b) the quantity of drugs, plants or precursors is a commercial quantity if the sum of the requisite fractions of the commercial quantity of each of those drugs, plants or precursors is equal to or greater than one, or
 - (c) the quantity of drugs, plants or precursors is a large commercial quantity if the sum of the requisite fractions of the large commercial quantity of each of those drugs, plants or precursors is equal to or greater than one.
- (3) The requisite fraction of:
 - (a) a trafficable quantity of a drug or plant is the actual quantity of the drug or plant divided by the smallest trafficable quantity of the drug or plant, or
 - (b) a commercial quantity of a drug, plant or precursor is the actual quantity of the drug, plant or precursor divided by the smallest commercial quantity of the drug, plant or precursor, or
 - (c) a large commercial quantity of a drug, plant or precursor is the actual quantity of the drug, plant or precursor divided by the smallest large commercial quantity of the drug, plant or precursor.
- (4) The requisite fraction of a trafficable, commercial or large commercial quantity of a drug is to be calculated on the basis of quantities of the drug in pure form. The requisite fraction is zero if:
 - (a) there is no quantity specified in the regulations as the trafficable, commercial or large commercial quantity of the drug, or
 - (b) there is such a quantity specified in the regulations for a mixture

- (c) of substances containing the drug but no such quantity specified for the drug in pure form, or there are different forms of the drug described in the regulations by reference to the percentage of a particular substance in the drug.

6.5.6 Knowledge or recklessness with respect to identity or quantity of drugs, plants and precursors

- (1) This section applies to any offence against this Chapter consisting of conduct relating to a controlled drug, plant or precursor or to a particular quantity of it.
- (2) In any proceedings against a person for such an offence, the prosecution must establish that the person knew, or was reckless with respect to, the following circumstances of the offence:
 - (a) that the substance or plant was a controlled drug, plant or precursor,
 - (b) if relevant, the quantity of the substance or plant concerned.
- (3) The prosecution need not establish that the person knew, or was reckless with respect to, the particular identity of the controlled drug, plant or precursor.
- (4) For example, in proceedings against a person for trafficking in a controlled drug (in the form of tablets), the prosecutor must establish that the person knew, or was reckless, that the tablets trafficked were a controlled drug of some kind (but need not establish that the person knew, or was reckless with respect to, the particular constituent controlled drugs contained in the tablets).

6.5.7 Alternative conviction—mistake as to identity of controlled drug, plant or precursor

- (1) This section applies to a person charged with an offence against this Chapter consisting of conduct relating to a particular quantity of controlled drug, plant or precursor.
- (2) If on the trial of a person to whom this section applies:
 - (a) the trier of fact is satisfied that, at the time of the conduct constituting the offence, the person was under a mistaken belief about the identity of the controlled drug, plant or precursor involved in the offence, and
 - (b) the person would have been guilty of another lesser offence against this Chapter if his or her mistaken belief had been correct,the trier of fact may find the person not guilty of the offence charged but guilty of the other lesser offence. The person is liable to punishment accordingly.
- (3) A person who alleges that he or she was under a mistaken belief as to the identity of a drug, plant or precursor is required to prove that he or she was under that mistaken belief.
- (4) For the purposes of this section, a lesser offence is an offence for which the maximum penalty is not greater than the maximum penalty for the offence charged.

6.5.8 Alternative verdicts—proof of particular quantities

- (1) This section applies to a person charged with an offence against this Chapter consisting of conduct relating to a particular quantity of controlled drug, plant or precursor.
- (2) If on the trial of a person charged with any such offence the trier of fact is not satisfied that the person committed the offence but is satisfied that the person committed another lesser offence against this Chapter, the trier of fact may find the person not guilty of the offence charged but guilty of the other lesser offence. The person is liable to punishment accordingly.
- (3) For the purposes of this section, a lesser offence is an offence involving a lesser quantity of controlled drug, plant or precursor than the quantity required to establish the offence charged.

6.5.9 Alternative conviction—trafficking and obtaining property by deception

- (1) If on the trial of a person charged with an offence against Part 6.2 (Trafficking in controlled drugs) the trier of fact:
 - (a) is satisfied beyond reasonable doubt that the person has committed either the offence charged or an offence against section 3.3.2 (Obtaining property by deception), but
 - (b) is unable to determine which of those offences the person has committed,the person is to be convicted of an offence against section 3.3.2. The person is liable to punishment accordingly.
- (2) If on the trial of a person charged with an offence against Part 6.2 the trier of fact:
 - (a) is not satisfied beyond reasonable doubt that the person has committed the offence charged, but
 - (b) is satisfied beyond reasonable doubt that the person has committed an offence against section 3.3.2,the person is to be convicted of an offence against section 3.3.2. The person is liable to punishment accordingly.
- (3) In this section, a reference to an offence against Part 6.2 or section 3.3.2 includes a reference to the offence of attempting to commit such an offence.

Part 6.6 Offences relating to property derived from drug offences

6.6.1 Definition—drug offence

In this Part, a *drug offence* means:

- (a) an offence against this Chapter (other than this Part), or
- (b) conduct that would amount to such an offence if it occurred in this jurisdiction, or
- (c) conduct before the commencement of this Chapter that would amount to such an offence if it occurred after that commencement.

6.6.2 Definition—property

In this Part, *property* includes all real or personal property including money and things in action or other intangible property.

6.6.3 Definition—property directly or indirectly derived from a drug offence

- (1) For the purposes of this Part, property is *directly derived from a drug offence* if the property:
- (a) is all or part of the proceeds of a drug offence, or
 - (b) is wholly or partly acquired by disposing of, or using, the proceeds of a drug offence.
- The proceeds of a drug offence include the proceeds of any sale involved in committing the offence or any remuneration or other reward for committing the offence.
- (2) For the purposes of this Part, property is *indirectly derived from a drug offence* if the property:
- (a) is wholly or partly acquired by disposing of, or using, property directly derived from a drug offence, or
 - (b) is wholly or partly acquired by disposing of, or using, property indirectly derived from a drug offence (including property indirectly so derived because of a previous operation or previous operations of paragraph (a)).
- (3) Property directly or indirectly derived from a drug offence does not include a controlled drug, controlled plant or controlled precursor.
- (4) Property directly or indirectly derived from a drug offence does not lose its identity as such merely because it is deposited with a financial institution or other person for credit to an account or for investment.

6.6.4 Concealing, conversion and transfer of property directly or indirectly derived from drug offence

A person who, knowing that any property is directly or indirectly derived from a drug offence:

- (a) conceals the property, or
- (b) transfers the property to another person, or
- (c) converts the property, or
- (d) removes the property from this jurisdiction,

with the intention of:

- (e) evading or assisting another person to evade prosecution for a drug offence, or
- (f) evading or assisting another person to evade the imposition or enforcement of a pecuniary penalty for a drug offence, or
- (g) evading or assisting another person to evade the making or enforcement of an order for the confiscation or forfeiture of the property or any part of it,

is guilty of an offence.

Maximum penalty: Imprisonment for 20 years.

6.6.5 Receiving property directly derived from drug offence

- (1) A person who receives property:
- (a) knowing that the property is directly derived from a drug offence committed by another person, and
 - (b) without any legal entitlement to the property,

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is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

- (2) For the purposes of this section, property to which a person is legally entitled extends to property that is received by way of testamentary disposition, as a reasonable payment for the lawful supply of goods or services or in repayment of a lawful debt, but does not extend to property received wholly or partly by way of gift.

MODEL CRIMINAL CODE—REGULATION RELATING TO DRUG OFFENCES

1 Citation

This Regulation may be cited as the *Criminal Code of [Name of State/Territory] (Drug Offences) Regulation*.

2 Commencement

This Regulation commences on the commencement of Chapter 6 of the *Criminal Code of [Name of State/Territory]*.

3 Definitions

In this Regulation:

cannabis means any substance consisting of or containing:

- (a) the fresh or dried parts of a plant of the genus *Cannabis* L, except goods that consist wholly or mainly of cannabis fibre, or
- (b) tetrahydrocannabinol.

the Criminal Code means the *Criminal Code of [Name of State/Territory]*.

ticket of LSD means the amount of the controlled drug, not greater than 200 micrograms, that is prepared or apparently prepared for the purpose of being administered as a single dose.

4 Purpose of Regulation

The purpose of this Regulation is to prescribe for the purposes of Chapter 6 of the Criminal Code:

- (a) the substances that are controlled drugs, the substances that are controlled precursors and the plants that are controlled plants, and
- (b) the quantities of a controlled drug that are a trafficable quantity, a commercial quantity or a large commercial quantity, respectively, and
- (c) the quantities of a controlled precursor that are a commercial quantity or a large commercial quantity, respectively, and
- (d) the quantities of a controlled plant that are a trafficable quantity, a commercial quantity or a large commercial quantity, respectively.

5 Substances that are controlled drugs

- (1) For the purposes of the Criminal Code, the following substances are ***controlled drugs***:

- (a) a substance specified in Table 1,
- (b) a related drug.

- (2) A related drug is any of the following:

- (a) a stereoisomer of a substance specified in Table 1,

- (b) a positional isomer of a substance specified in Table 1 or referred to in paragraph (a),
- (c) an ether of a substance specified in Table 1 or referred to in paragraph (a) or (b),
- (d) an ester of a substance specified in Table 1 or referred to in paragraph (a), (b) or (c),
- (e) a structural modification of any substance specified in Table 1 or referred to in paragraph (a), (b), (c) or (d) obtained in any of the following ways:
 - (i) by the replacement of up to 2 carbocyclic or heterocyclic ring structures with different carbocyclic or heterocyclic ring structures,
 - (ii) by the addition of hydrogen atoms to one or more unsaturated bonds,
 - (iii) by the conversion of a carboxyl or an ester group into an amide group,
 - (iv) by the addition of, or the replacement of a hydrogen atom with, one or more of the following defined functional groups:
 - an alkoxy, cyclic diether, acyl, acyloxy, mono-alkyl amino or dialkyl amino group with up to 6 carbon atoms in any alkyl residue,
 - an alkyl, alkenyl or alkynyl group with up to 6 carbon atoms in the group and where the group is attached to oxygen (for example, forming an ester or an ether group), nitrogen, sulphur or carbon.
 - a halogen, hydroxy, nitro or amino group.

6 Quantities of controlled drugs

For the purposes of the Criminal Code:

- (a) a **trafficable quantity** of a controlled drug is a quantity of the drug that is not less than the quantity specified in Column 1 of Table 1 as a trafficable quantity of the drug, and
- (b) a **commercial quantity** of a controlled drug is a quantity of the drug that is not less than the quantity specified in Column 2 of Table 1 as a commercial quantity of the drug, and
- (c) a **large commercial quantity** of a controlled drug is a quantity of the drug that is not less than the quantity specified in Column 3 of Table 1 as a large commercial quantity of the drug.

Note: Section 6.1.1 (3) of Chapter 6 to the Criminal Code provides as follows:

- (3) For the purposes of this Chapter, any such trafficable, commercial or large commercial quantity of a controlled drug in a mixture of substances is (subject to the regulations) as follows:
 - (a) if the prosecution elects to establish the actual quantity of the drug in the mixture—the relevant quantity of the drug determined by reference to the quantity (if any) specified in the regulations for the pure form of the drug,

- (b) if the prosecution elects to establish the quantity of the mixture instead of the quantity of the drug—the relevant quantity of the mixture determined by reference to the quantity (if any) specified in the regulations for a mixture containing the drug.

This Regulation may include provisions regulating the method of analysis of substances (or samples of substances) for the purposes of determining the relevant quantity of the substance.

7 Plants that are controlled plants

For the purposes of the Criminal Code, a growing plant specified in Table 2 is a *controlled plant*.

Note: Section 6.1.2 of the Criminal Code provides that a seedling of any such controlled plant is also a controlled plant.

8 Quantities of controlled plants

For the purposes of the Criminal Code:

- (a) a *trafficable quantity* of a controlled plant is a quantity of the plant that is not less than the quantity specified in Column 1 of Table 2 as a trafficable quantity of the plant, and
- (b) a *commercial quantity* of a controlled plant is a quantity of the plant that is not less than the quantity specified in Column 2 of Table 2 as a commercial quantity of the plant, and
- (c) a *large commercial quantity* of a controlled plant is a quantity of the plant that is not less than the quantity specified in Column 3 of Table 2 as a large commercial quantity of the plant.

9 Substances that are controlled precursors

For the purposes of the Criminal Code, a substance specified in Table 3 is a *controlled precursor*.

10 Quantities of controlled precursors

For the purposes of the Criminal Code:

- (a) a *commercial quantity* of a controlled precursor is a quantity of the precursor that is not less than the quantity specified in Column 1 of Table 3 as a commercial quantity of the precursor, and
- (b) a *large commercial quantity* of a controlled precursor is a quantity of the precursor that is not less than the quantity specified in Column 2 of Table 3 as a large commercial quantity of the precursor.

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TABLE 1 CONTROLLED DRUGS

Commonly trafficked drugs

CONTROLLED DRUG	Column 1		Column 2		Column 3	
	Trafficable Quantity		Commercial Quantity		Large Commercial Quantity	
	Pure	Mixture	Pure	Mixture	Pure	Mixture
AMPHETAMINE	–	6g	5g	125g	100g	2.5kg
CANNABIS containing no, or not more than x% of, Tetrahydrocannabinol (including Cannabis for which the percentage of Tetrahydrocannabinol (if any) is not known)	300g	300g	2.5g	2.5g	50kg	50kg
CANNABIS containing more than x% of Tetrahydrocannabinol	?	?	?	?	?	?
COCAINE	–	3g	25g	50g	750g	1kg
DIACETYLMORPHINE (HEROIN)	–	3g	25g	50g	750g	1kg
LYSERGIDE (LSD)	–	30 tickets	10mg	500 tickets	50mg	10 000 tickets
MDA (3,4-METHYLENE DIOXY AMPHETAMINE)	–	3g	5g	50g	100g	1kg
MDMA (ECSTASY) (3,4-METHYLENE DIOXY METHAMPHETAMINE)	–	3g	5g	50g	100g	1kg
METHYL AMPHETAMINE	–	6g	5g	125g	100g	2.5kg

Other controlled drugs

CONTROLLED DRUG	Column 1		Column 2		Column 3	
	Trafficable Quantity		Commercial Quantity		Large Commercial Quantity	
	Pure	Mixture	Pure	Mixture	Pure	Mixture
2,5-DIMETHOXY-4-METHYL AMPHETAMINE						
ACETORPHINE	2g					
ALPHAMETHYL FENTANYL	5mg		5g			

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BENZYL MORPHINE						
CODEINE	10g					
DEXAMPHETAMINE						
DIHYDROMORPHINE	10g					
DMA (2,5-DIMETHOXY AMPHETAMINE)						
DOET (2,5-DIMETHOXY-4-ETHYL AMPHETAMINE)						
ETHYL MORPHINE	2g					
HYDROXY AMPHETAMINE	2g					
(lysergic acid would not be listed because it is on Table 3)						
MBDB (N-METHYL-3,4-METHYLENEDIOXY PHENYL-2-BUTANAMINE)						
METHADONE	2g					
METHAMPHETAMINE RACEMATE						
METHAQUALONE	50g					
3-METHYLFENTANYL	0.005mg		5g			
MORPHINE	2g			1.5kg		
NEXUS (4-BROMO-2,5-DIMETHOXY PHENETHYLAMINE)						
OPIUM						
PCP (PHENCYCLADINE), (1-(1-PHENYLCYCLOHEXYL) PIPERADINE)						
PETHIDINE						

Note: This listing is indicative only and is not complete. It is included to assist readers to understand the structure and operation of the model scheme.

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TABLE 2 CONTROLLED PLANTS

CONTROLLED PLANT	Column 1	Column 2	Column 3
	Trafficable Quantity	Commercial Quantity	Large Commercial Quantity
all fungi that contain psilocine			
all fungi that contain psilocybine			
any plant of the genus erythroxyton from which cocaine can be extracted either directly or by chemical transformation			
any plant of the genus lophophora coulter			
any plant of the species catha edulis			
any plant of the species ephedra			
arygyreia nervosa			
cannabis L	5 plants	50 plants	1000 plants
ipomoea hederacea			
ipomoea tricolor			
ipomoea violacea			
papaver bracteatum			
papaver somniferum			
piptadenia peregrina (anadenanthera peregrina)			
rivea corymbosa			

Note: This listing is indicative only and is not complete. It is included to assist readers to understand the structure and operation of the model scheme.

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TABLE 3 CONTROLLED PRECURSORS

CONTROLLED PRECURSOR	Column 1	Column 2
	Commercial Quantity	Large Commercial Quantity
3,4-METHYLENE-DIOXYPHENYLACETIC ACID	20g	330g
3,4 METHYLENE-DIOXYPHENYL-2-PROPANONE	10g	165g
ACETIC ANHYDRINE	80g	2.5kg
EPHEDRINE	10g	180g
ERGOMETRINE	40mg	200mg
ERGOTAMINE	60mg	280mg
ISOSAFROLE	16g	320g
LYSERGIC ACID	20mg	100mg
N-ACETYL-ANTHRANILIC ACID		
PHENYL-2-PROPANONE	15g	300g
PHENYLACETIC ACID	30g	600g
PIPERONAL	18g	360g
PSEUDO-EPHEDRINE	10g	180g
SAFROLE	32g	630g

Note: This listing is indicative only and is not complete. It is included to assist readers to understand the structure and operation of the model scheme.

Chapter 7 Administration of justice offences

Note: This Chapter gives effect to the final report of MCCOC of July 1998.

Part 7.1 Definitions

7.1.1 Definition of "legal proceedings"

- (1) In this Chapter, *legal proceedings* means proceedings in which judicial powers may be exercised, and includes proceedings in which evidence may be taken on oath.
- (2) In this Chapter, a reference to legal proceedings includes a reference to any such proceedings that have been or may be instituted.

Note. "Legal proceedings" is defined in general terms for the purposes of State legislation. The definition will need to be modified for the purposes of any Commonwealth legislation relating to the administration of justice—see s. 31 of the Crimes Act 1914 (C'wealth).

7.1.2 Other definitions

In this Chapter:

benefit includes any advantage and is not limited to property.

detriment includes any disadvantage and is not limited to personal injury or to loss of or damage to property.

evidence includes anything that may be used as evidence.

interpreter includes a person who interprets signs or other things made or done by a person who cannot speak adequately for the purpose of giving evidence in legal proceedings.

oath includes affirmation.

sworn statement means an oral statement made on oath or a statement in a document verified on oath.

threat includes a threat made by any conduct, whether explicit or implicit and whether conditional or unconditional.

Part 7.2 Perjury

7.2.1 Perjury—offence

- (1) A person who makes a sworn statement in or for the purposes of legal proceedings:
 - (a) that is false, and
 - (b) being reckless that it is false,is guilty of the offence of perjury.
Maximum penalty: Imprisonment for 10 years.
- (2) An interpreter who, by a sworn statement, gives an interpretation of a statement or other thing in or for the purposes of legal proceedings, being an interpretation:
 - (a) that is false or misleading, and

- (b) being reckless that it is false or misleading,
is guilty of the offence of perjury.
Maximum penalty: Imprisonment for 10 years.

7.2.2 Perjury—ancillary provisions

- (1) For the purposes of the offence of perjury, the following matters are immaterial:
 - (a) whether or not the sworn statement concerned a matter material to the legal proceedings,
 - (b) whether or not the sworn statement was in fact admitted in evidence in the legal proceedings,
 - (c) whether or not the court, body or person dealing with the legal proceedings had jurisdiction, was properly constituted or was sitting in the proper place,
 - (d) whether or not the person who made the statement was competent to give evidence in the legal proceedings (except as provided by subsection (2)).
- (2) A person is not guilty of perjury if the person does not have the capacity because of age or mental impairment to make a sworn statement in or for the purposes of the legal proceedings concerned.
- (3) A person may be convicted of perjury if the trier of fact is satisfied beyond reasonable doubt that the person is guilty of perjury in respect of one of two sworn statements that are irreconcilably in conflict, but is unable to determine which of those statements constitutes the offence. It is immaterial whether or not the two statements were made in the same proceedings.
- (4) If a sworn statement purports to state an opinion of the person making the statement, the statement is false for the purpose of the offence of perjury if the opinion is not genuinely held by the person.
- (5) Proceedings for the offence of perjury must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with, an offence of perjury before the necessary consent has been given.

Part 7.3 Falsifying, destroying or concealing evidence

7.3.1 Making or using false evidence

- (1) A person who makes false evidence with the intention of:
 - (a) influencing a decision on the institution of legal proceedings, or
 - (b) influencing the outcome of legal proceedings,is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.
- (2) A person who uses evidence:
 - (a) that is false evidence and that the person believes is false evidence, and
 - (b) being reckless that the use of the evidence could influence a decision on the institution of legal proceedings or could

influence the outcome of legal proceedings,
is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

- (3) For the purposes of this section, **making** evidence includes altering evidence, but does not include perjury.

7.3.2 Destroying or concealing evidence

- (1) A person who destroys or conceals evidence with the intention of:
- (a) influencing a decision on the institution of legal proceedings, or
 - (b) influencing the outcome of legal proceedings,
- is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

- (2) For the purposes of this section, **destroying** evidence includes making the evidence illegible, indecipherable or otherwise incapable of being identified.

Part 7.4 Protection of witnesses and interpreters

7.4.1 Deceiving witnesses

A person who deceives another person with the intention that the other person or a third person will:

- (a) give false evidence at legal proceedings, or
 - (b) withhold true evidence at legal proceedings,
- is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

7.4.2 Corrupting witnesses or interpreters

- (1) A person who provides, or offers or promises to provide, a benefit to another person with the intention that the other person or a third person will:
- (a) not attend as a witness at legal proceedings, or
 - (b) give false evidence at legal proceedings, or
 - (c) withhold true evidence at legal proceedings,
- is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

- (2) A person who asks for, or receives or agrees to receive, a benefit for himself, herself or another person with the intention that he, she or another person will:
- (a) not attend as a witness at legal proceedings, or
 - (b) give false evidence at legal proceedings, or
 - (c) withhold true evidence at legal proceedings,
- is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

- (3) A person who provides, or offers or promises to provide, a benefit to another person with the intention that the other person or a third person will:
- (a) not attend as an interpreter at legal proceedings, or
 - (b) give a false or misleading interpretation as an interpreter at legal proceedings,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

- (4) A person who asks for, or receives or agrees to receive, a benefit for himself, herself or another person with the intention that he, she or another person will:
- (a) not attend as an interpreter at legal proceedings, or
 - (b) give a false or misleading interpretation as an interpreter at legal proceedings,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

7.4.3 Threatening witnesses or interpreters

- (1) A person who causes or threatens to cause any detriment to another person with the intention that the other person or a third person will:

- (a) not attend as a witness at legal proceedings, or
- (b) give false evidence at legal proceedings, or
- (c) withhold true evidence at legal proceedings,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

- (2) A person who causes or threatens to cause any detriment to another person with the intention that the other person or a third person will:

- (a) not attend as an interpreter at legal proceedings, or
- (b) give a false or misleading interpretation as an interpreter at legal proceedings,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

7.4.4 Preventing witnesses or interpreters

- (1) A person who, by his or her conduct, intentionally prevents another person from attending as a witness or interpreter at legal proceedings is guilty of an offence.
Maximum penalty: Imprisonment for 5 years.
- (2) This section does not apply to conduct that constitutes an offence against another provision of this Part.

7.4.5 Preventing production of things in evidence

A person who, by his or her conduct, intentionally prevents another person from producing in evidence at legal proceedings a thing that is legally required to be produced is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

7.4.6 Reprisals against witnesses or interpreters

- (1) A person who causes or threatens to cause any detriment to a witness in any legal proceedings:

- (a) because of anything done by the witness in or for the purposes of the proceedings, and
- (b) in the belief that the person was a witness who had done that thing,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

- (2) It is a defence to a prosecution for an offence against this section if the accused proves that:
- (a) the detriment to the witness was not (apart from this section) an offence, and
 - (b) the witness committed perjury in the legal proceedings.
- (3) In this section, **witness** includes:
- (a) a person who attends at legal proceedings as a witness but is not called as a witness, or
 - (b) an interpreter.

Part 7.5 Perversion of course of justice and related offences

7.5.1 General offence of perverting the course of justice

- (1) A person who, by his or her conduct, intentionally perverts the course of justice is guilty of an offence.
Maximum penalty: Imprisonment for 5 years.
- (2) This section does not apply to conduct that constitutes the publication of any matter.
- (3) In this section, **perverts** includes obstructs, prevents or defeats.

7.5.2 Publication that could cause miscarriage of justice

- (1) A person who publishes any matter:
- (a) that could cause a miscarriage of justice in legal proceedings, and
 - (b) with the intention of causing that miscarriage of justice,
- is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.
- (2) A person who publishes any matter:
- (a) that could cause a miscarriage of justice in legal proceedings, and
 - (b) being reckless that it could cause that miscarriage of justice,
- is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.

7.5.3 False accusation of offence

A person who makes an accusation to a police officer or other law enforcement officer that another person has committed an offence:

- (a) believing that the other person did not commit the offence, and
- (b) intending that:
 - (i) the other person will be charged with committing the offence, or
 - (ii) police officers or other law enforcement officers will be deflected from prosecuting the offender,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

7.5.4 Compounding of offences

- (1) A person who provides, or offers or promises to provide, a benefit to another person with the intention that the other person or a third person will:
- (a) conceal the commission of an offence, or
 - (b) abstain from, discontinue or delay a prosecution for an offence, or
 - (c) withhold information or provide false information in respect of the commission of an offence, or
 - (d) impede the investigation of an offence by police officers or other law enforcement officers,
- is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

- (2) A person who asks for, or receives or agrees to receive, a benefit for himself or herself or for another person with the intention that he, she or another person will:
- (a) conceal the commission of an offence, or
 - (b) abstain from, discontinue or delay a prosecution for an offence, or
 - (c) withhold information or provide false information in respect of the commission of an offence, or
 - (d) impede the investigation of an offence by police officers or other law enforcement officers,
- is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

- (3) Proceedings for the offence against this section must not be commenced without the consent of the Attorney General. However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with, such an offence before the necessary consent has been given.

7.5.5 Accessory after the fact

- (1) If:
- (a) a person (in this section called the *principal offender*) has committed an offence, and
 - (b) another person (in this section called the *accessory*):
 - (i) believing the principal offender to have committed the offence, or
 - (ii) believing the principal offender to have committed another offence, being a related offence,assists the principal offender with the intention of allowing the principal offender to escape apprehension, or prosecution or to obtain, keep or dispose of the proceeds of the offence,
- the accessory is guilty of an offence.

Maximum penalty (subject to subsection (2)):

- (a) where the maximum penalty for the offence committed by the principal offender is imprisonment for life—imprisonment for

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- (b) a period not exceeding 10 years, or where the maximum penalty for that offence is imprisonment for 14 years or a greater period (not being imprisonment for life)—imprisonment for a period not exceeding 7 years, or
 - (c) in any other case—imprisonment for a period not exceeding 3 years or the maximum penalty for that offence, whichever is the lesser.
- (2) In a case where the offence that the accessory believes the principal offender to have committed is not the offence that the principal offender committed, the penalty for an offence against the section is the lesser of:
 - (a) the penalty applicable under subsection (1), or
 - (b) the penalty that would be calculated under that subsection if the principal offender had committed the offence that the accessory believed him or her to have committed.
- (3) For the purposes of this section, an offence that was not committed but which the accessory believes to have been committed by the principal offender is related to an offence committed by the principal offender if the circumstances in which the accessory believes the offence to have been committed are the same, or partly the same, as those in which the actual offence was committed.
- (4) It is not an offence to attempt to commit an offence against this section.

Chapter 8 Offences against public order

Part 8.1 Contamination of goods

Note: This Part gives effect to the final report of MCCOC of March 1998

8.1.1 Definitions of *contaminate* and *goods*

- (1) In this Part:
 - contaminate* goods includes:
 - (a) interfere with the goods, or
 - (b) making it appear that the goods have been contaminated or interfered with.
 - goods* includes any substance:
 - (a) whether or not for human consumption, and
 - (b) whether natural or manufactured, and
 - (c) whether or not incorporated or mixed with other goods.
- (2) In this Part, a reference to economic loss caused through public awareness of the contamination of goods includes a reference to economic loss caused through:
 - (a) members of the public not purchasing or using those goods or similar goods, or
 - (b) steps taken to avoid public alarm or anxiety or to avoid harm to members of the public.

8.1.2 Contaminating goods with intent to cause public alarm or economic loss

A person who contaminates goods with the intention of:

- (a) causing public alarm or anxiety, or
- (b) causing economic loss through public awareness of the contamination,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

8.1.3 Threatening to contaminate goods with intent to cause public alarm or economic loss

- (1) A person who makes a threat that goods will be contaminated with the intention of:
 - (a) causing public alarm or anxiety, or
 - (b) causing economic loss through public awareness of the contamination,is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.
- (2) For the purposes of this section, a threat may be made by any conduct, and may be explicit or implicit and conditional or unconditional.

8.1.4 Making false statements concerning contamination of goods with intent to cause public alarm or economic loss

- (1) A person who makes a statement that the person believes to be false:

- (a) with the intention of inducing the person to whom the statement is made or others to believe that goods have been contaminated, and
 - (b) with the intention of thereby:
 - (i) causing public alarm or anxiety, or
 - (ii) causing economic loss through public awareness of the contamination,
- is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.
- (2) For the purposes of this section, making a statement includes conveying information by any means.

8.1.5 Territorial nexus for offences

It is immaterial that the conduct of a person constituting an offence under this Part occurred outside the jurisdiction, so long as the person intended by that conduct:

- (a) to cause public alarm or anxiety in the jurisdiction, or
- (b) to cause economic loss in the jurisdiction through public awareness of the contamination.

Note: *Other public order offences could be considered for inclusion in this Chapter (for example, sedition, riot and violent disorder, racial hatred, unlawful private armies, bomb hoaxes).*

Chapter 9 Offences against humanity

Part 9.1 Slavery and sexual servitude

Note: *This Part gives effect to the final report of MCCOC of December 1995*

9.1.1 Definition of "slavery"

For the purposes of this Part, **slavery** is the condition of a person over whom the powers attaching to a right of ownership are exercised. Slavery includes any such condition of a person resulting from a debt owed or contract made by the person.

9.1.2 Slavery remains unlawful

Slavery remains unlawful and its abolition is maintained, despite the repeal by this Code of Imperial Acts relating to slavery.

Note. The following Imperial Acts (to the extent that they remain in force in the jurisdiction) are to be repealed on the enactment of this Part:

- 5 George IV, ch 113 (the Slave Trade Act 1824)
- 3 & 4 William IV, ch 73 (the Slavery Abolition Act 1833)
- 6 & 7 Victoria, ch 98 (the Slave Trade Act 1843)
- 35 & 36 Victoria, ch 19 (Pacific Islanders Protection Act 1873)
- 36 & 37 Victoria, ch 88 (Slave Trade Act 1873)
- 38 & 39 Victoria, ch 51 (Pacific Islanders Protection Act 1875)

9.1.3 Slavery offences

- (1) A person who intentionally:
 - (a) keeps a slave, or
 - (b) takes part in slave trading,is guilty of an offence.
Maximum penalty: Imprisonment for 25 years.
- (2) For the purposes of this section, slave trading includes:
 - (a) the capture, transport or disposal of a person for the purpose of reducing the person to slavery, or
 - (b) the purchase or sale of a slave, or
 - (c) any commercial transaction involving a slave, or exercising control or direction over, or providing finance for, any such act.
- (3) A person who enters into a transaction for the purpose of securing the release of a person from slavery does not commit an offence against this section.

9.1.4 Definition of "sexual servitude"

- (1) For the purposes of this Part, **sexual servitude** is the condition of a person who provides sexual services and who, because of the use of force or threats:
 - (a) is not free to cease providing sexual services, or
 - (b) is not free to leave the place or area where the person provides sexual services.
- (2) In this section:
sexual service means the commercial use or display of the body of the person providing the service for the sexual gratification of others.

threat means:

- (a) a threat of force, or
- (b) a threat to cause a person's deportation, or
- (c) a threat of any other detrimental action unless there are reasonable grounds for the threat of that action in connection with the provision of sexual services by a person.

9.1.5 Sexual servitude offences

- (1) A person:
 - (a) whose conduct causes another person to enter into or remain in sexual servitude, and
 - (b) who intends to cause, or is reckless as to causing, that sexual servitude,is guilty of an offence.
Maximum penalty: Imprisonment for 15 years.
Maximum penalty (aggravated offence): Imprisonment for 19 years.
- (2) A person:
 - (a) who conducts any business that involves the sexual servitude of other persons, and
 - (b) who knows about, or is reckless as to, that sexual servitude,is guilty of an offence.
Maximum penalty: Imprisonment for 15 years.
Maximum penalty (aggravated offence): Imprisonment for 19 years.
- (3) For the purposes of this section, conducting a business includes:
 - (a) taking any part in the management of the business, or
 - (b) exercising control or direction over the business, or
 - (c) providing finance for the business.

9.1.6 Deceptive recruiting for sexual services

- (1) A person who, with the intention of inducing another person to enter into an engagement to provide sexual services, deceives that other person about the fact that the engagement involves the provision of sexual services is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.
Maximum penalty (aggravated offence): Imprisonment for 9 years.
- (2) For the purposes of this section, an engagement of a person to provide sexual services is any employment or other engagement involving the commercial use or display of the body of that person for the sexual gratification of others.

9.1.7 Increased penalty for aggravated offences relating to sexual servitude

- (1) For the purposes of this Part, an offence against section 9.1.5 or 9.1.6 is an aggravated offence if the offence was committed against a person under the age of 18 years.
- (2) If the prosecution intends to prove an aggravated offence, the charge must allege that the offence was committed against a person under that age.
- (3) In order to prove an aggravated offence, the prosecution must prove that the accused intended to commit, or was reckless as to committing, the offence against

a person under that age.

9.1.8 General provisions

(1) **Territorial nexus**

In proceedings for an offence against this Part, it is immaterial whether the accused engaged in the conduct constituting the offence within or outside this jurisdiction.

(2) **No nationality requirement**

In proceedings for an offence against this Part, it is immaterial whether the accused is or is not an Australian citizen or a resident of Australia.

(3) **Institution of proceedings**

Proceedings for an offence against this Part must not be commenced without the consent of the Attorney General if:

- (a) the conduct constituting the offence is to any extent engaged in outside Australia, and
- (b) the accused is not an Australian citizen, a resident of Australia or a body incorporated by or under a law of the Commonwealth or of a State or Territory.

However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with, an offence against this Part before the necessary consent has been given.

(4) **Double jeopardy**

If a person has been convicted or acquitted in any other jurisdiction of an offence against a law of that jurisdiction in respect of any conduct, the person cannot be convicted of an offence against this Part in respect of that conduct.

Note: *Other offences against humanity that could be included in this Chapter are piracy and genocide.*