



THIRTY-EIGHTH PARLIAMENT

REPORT 43

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

**REPORT IN RELATION TO THE
ARSON LEGISLATION AMENDMENT BILL 2009**

Presented by Hon Adele Farina MLC (Chairman)

November 2009

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“8. Uniform Legislation and Statutes Review Committee

8.1 *A Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

- (a) to consider and report on Bills referred under SO 230A;
- (b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
- (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
- (d) to review the form and content of the statute book;
- (e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and
- (f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)

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Hon Nigel Hallett MLC (Deputy Chairman)

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REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

ARSON LEGISLATION AMENDMENT BILL 2009

1 REFERENCE AND PROCEDURE

- 1.1 On 11 November 2009 the Arson Legislation Amendment Bill 2009 (**Bill**) stood referred to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**) pursuant to Standing Order 230A.¹
- 1.2 Standing Order 230A(5) ordinarily requires that the Committee report to the Legislative Council within 30 days of the first reading of the Bill. As 10 December 2009 occurs during the summer recess, the due date for the report on this Bill was effectively the first scheduled sitting day for 2010, being 2 March 2010.
- 1.3 However, on the evening of 17 November 2009, the Legislative Council passed a motion requiring the Committee to report on 19 November 2009.

2 INQUIRY PROCESS

- 2.1 The Committee first considered the Bill at its meeting on 13 November 2009. The Committee was not able to commence its inquiry into the Bill at its meeting on 13 November 2009 as the responsible Minister had not provided the Committee with the usual supporting documents. No Explanatory Memorandum was available in respect of the Bill.
- 2.2 The Committee instructed staff to advertise its inquiry in respect of this Bill in *The West Australian* at the next available opportunity, which was Saturday, 21 November 2009.
- 2.3 The Committee identified some preliminary issues, which are set out in Part 3 below, and instructed its staff to identify stakeholders relating to those issues for consideration at its next meeting. It also scheduled four meetings during the summer recess to conduct its inquiry.
- 2.4 However, time constraints imposed by the Council's resolution of 17 November 2009 rendered it impossible for the Committee to conduct its inquiry.

¹ Hon Simon O'Brien MLC, Minister for Transport, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 November 2009, p8754.

2.5 A document entitled “*Arson Legislation Amendment Bill 2009: Clause Notes*” was provided to the Committee Office on the afternoon of 16 November 2009. This document is **Appendix 1**.

2.6 The Committee appends to this report, at **Appendix 2**, the relevant provisions of the Model Criminal Code of the Standing Committee of the Attorneys-Generals (SCAG) relating to this Bill.² (This document is called the “*Model Criminal Law*” on the first page of the website but is titled “*Model Criminal Code*” and is generally referred to by that title in other documents).

3 PRELIMINARY ISSUES IDENTIFIED BY THE COMMITTEE

3.1 The Committee’s preliminary consideration of the Bill raised the following issues that it intended to explore in its inquiry:

- What is the standard of care required to meet the duty imposed by section 444A? Is this offence properly characterised as an “*intent*” offence or is it more accurately a “*strict liability*” offence? If an “*intent*” offence, what is the degree of the required intent? How is the standard determined from the legislation?
- Is that standard objective/subjective (in respect of both the physical and mental elements)?
- Why have different words been used to impose what is asserted to be the same standard as that imposed by the Model Criminal Code?³
- Should the standard of care be clarified by definition in the Bill?⁴
- Under the Model Criminal Code, it appears that it is a defence for a person to hold a belief as to entitlement to take the action causing the fire; whereas under the *Criminal Code*, the prosecution must establish that there was no entitlement to destroy/damage the property and it may be a defence that a

² These provisions are taken from the Model Criminal Law posted on the website of the Standing Committee of the Attorneys General at:
http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_model_laws (viewed 18 November 2009).

³ The Second Reading Speech states: “*This new offence is based on the prescription of a range of arson-related behaviours in the Model Criminal Code of the Standing Committee of the Attorneys General. The Model Criminal Code recommends arson offences with an intention element of recklessness. Creating an offence of recklessly causing property damage by fire will further enhance the ability of the Office of the Director of Public Prosecutions to successfully prosecute arsonists ...*” (Hon Simon O’Brien MLC, Minister for Transport, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 November 2009, p8754.) However, the Bill speaks, in clause 10, of a “*duty of a person*” to use “*reasonable care*”.

⁴ The Committee notes that the Model Criminal Code contains a provision, section 2.2.9, explaining what is meant by “*recklessness*”. (See Appendix 2)

person holds an honest but mistaken belief as to entitlement to destroy/damage the property damaged/destroyed.⁵

What are the legal effects of these differences in terminology?

What is the effect of the second paragraph of section 24 of the *Criminal Code*, on the defence of ‘honest but mistaken belief’ when read with the terms of section 444A (and the other amendments introduced by the Bill)?

- What is the difference between the Model Criminal Code obligations and the obligations imposed by the Bill in respect of containing a fire which has spread beyond the ability of a person to control it?
- What will occur in the case of a person who is mentally impaired to the extent that they cannot foresee the consequences of their actions but not mentally ill?
- Will the ‘intervening event’ defence apply to the proposed section 444A?⁶
- What would occur if there is a convergence of natural and deliberately lit fires (or of several independently lit fires), which combine to cause damage greater than that which could have been foreseen as the result of lack of care of an individual?
- What is “control” of a “source of ignition”?
- What is a “source of ignition”? How is this ascertained from the legislation?
- What will occur if a person does not recognise a potential “source of ignition”? Is this a defence? Is it a mistake of fact? Or is it a question of whether a reasonable person would have recognised the matter as a “source of ignition”?
- Will reporting the fire to the authorities relieve a person who started a fire from criminal responsibility?

⁵ Section 24 of the *Criminal Code*.

⁶ The defence is set out by Bray CJ in *Mayer v Marchant* (1973) 5 SASR 567: *It is a defence to any criminal charge to show that the forbidden conduct occurred as the result of an act of a stranger, or as the result of non-human activity, over which the defendant had no control and against which he or she could not reasonably have been expected to guard. ... Despite the fact, for example, that D’s truck exceeded the prescribed weight limit, it did so because a third person had secretly loaded it with additional items and D could not reasonably have been expected to guard against this. The defence is not necessary for offences containing fault elements because D will lack the fault element or, in the case of negligence, argue that she or he had taken reasonable care.* (Quoted in the Report by the Criminal Law Officers Committee of the Standing Committee of the Attorneys General on the *Model Criminal Code - Chapters 1 and 2: General Principles of Criminal Responsibility*, December 1992, p63.)

- What is the situation if lack of funding/multiplicity of events prevents a call for help in controlling a fire to be successful?
 - What if an authority imposes a charge for the “*service*” of checking whether a potential “*source of ignition*” is a hazard or remedying an identified hazard? Is a person obliged to undertake that expense to avoid criminal liability?
 - Is there any conflict between section 444A and the *Native Title Act 1993*/common law native title rights;⁷
 - What rights to burn are conferred by native title?
 - What other persons/entities retain property rights in property which indigenous persons are entitled to burn? And what impact does this retention of rights have on an “*entitlement*” to burn/destroy property for the purposes of proposed section 444A?
 - What legal duties of care do indigenous persons exercising native title burning rights owe to co-owners of property - owners of contiguous or other property that may be damaged?
 - Generally, legislation governing officers of government departments and local governments who have duties that involve control of sources of ignition and deliberately lighting fires provides protection from negligence claims.⁸ What is the explanation for the introduction of criminal liability in circumstances where civil liability is excluded?
 - Why is the definition of “*property*” different from that used in the *Bush Fires Act 1954*?
- 3.2 The Committee has set out in Part 4 a summary of the relevant legislative provisions and in Part 5 some of its preliminary research giving rise to the issues noted above.
- 3.3 The Committee draws these issues, on which it has reached no conclusion, to the attention of the Legislative Council.

⁷ One of the questions asked pursuant to the Fundamental Legislative Scrutiny Principles used by the Committee is: *Does the Bill have sufficient regard to Aboriginal tradition and Island custom?* This question was not addressed in the limited explanatory materials available to the Committee.

⁸ Section 121 of the *Environment Protection Act 1986*, for example, provides: “(1) An action in tort does not lie against a person for anything that the person has done, in good faith, in the performance or purported performance of a function under this Act.” See also section 5.96 of the *Local Government Act 1995*.

4 SUMMARY OF PARTICULAR PROVISIONS OF THE LEGISLATION**Arson Legislation Amendment Bill 2009***Clauses 10 to 12 of the Bill*

4.1 Clause 10 of the Bill inserts a new section 444A into the *Criminal Code*, which, paraphrasing:

- imposes a duty on a person who has charge of, or is in control of, a “*source of ignition*” to “*use reasonable care and take reasonable precautions*” to avoid lighting a fire that may cause damage to property that the person is “*not entitled to damage or destroy*”;
- the person is “*held to have caused any destruction or damage to that property by reason of any omission to perform that duty*” to avoid lighting a fire;
- imposes a duty on a person who has charge of, or is in control of, a fire to “*use reasonable care and take reasonable precautions*” to contain that fire so that it does not cause damage to property that the person is “*not entitled to damage or destroy*”; and
- the person is “*held to have caused any destruction or damage to that property by reason of any omission to perform that duty*” to contain a fire.

4.2 Proposed section 444A(3) will provide that it is not a breach of the duty if the fire does not spread beyond the capacity of the person to control it.

4.3 Clause 12 of the Bill inserts a new section 445A, which provides that “*unlawful*” omission or refusal to perform the duty imposed by section 444A is a crime, which is punishable by 15 years imprisonment.

4.4 Proposed section 445A is headed “*Fires causing damage to vegetation*”. However, proposed section 444A deals with the duty owed in respect of a wider range of property. (The heading to a section is not part of a written law).⁹

4.5 Clause 11 of the Bill increases the penalty for wilful damage to property caused by fire (section 444 of the *Criminal Code*) to life imprisonment.

Clauses 6 and 7 of the Bill

4.6 Clauses 6 and 7 amend sections 23A and 23B of the *Criminal Code*, so as to provide that sections 23A and 23B are to be read as being subject to proposed section 444A.¹⁰

⁹ Section 32(2) of the *Interpretation Act 1984*.

Model Criminal Code of the Standing Committee of the Attorneys General

4.7 The SCAG Model Criminal Code contains two specific fire-related offences:

- Arson - section 4.1.7, which deals with intent, or recklessness as to intent, to cause damage to a “*building or conveyance*” or threat to damage by fire/explosive, and imposes a maximum penalty of 15 years and seven years imprisonment respectively; and
- Bushfires - section 4.1.8, which deals with causing/maintaining/failing to contain a fire, intentionally or recklessly as to the spread of a fire to “*vegetation on property belonging to another*”, and imposes a maximum penalty of 15 years.

(See Appendix 2 for the precise terms of these sections.)

4.8 Under the Model Criminal Code, consent of the owner of the property damaged is a defence (section 4.1.11), as is a “*claim of right*”. Section 4.1.12 provides:

(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.

(See Appendix 2 for the precise terms of this section.)

Some Differences between the Bill and Model Criminal Code

4.9 The Bill uses language associated with the civil tortious concepts of “*reasonable care*” and “*breach of duty*”; whereas the Model Criminal Code uses the criminal law concepts of intent and recklessness. On this:

¹⁰ Section 23A of the *Criminal Code* provides: “(1) This section is subject to the provisions in Chapter XXVII relating to negligent acts and omissions. (2) A person is not criminally responsible for an act or omission which occurs independently of the exercise of the person’s will” and section 24A provides: “(1) This section is subject to the provisions in Chapter XXVII relating to negligent acts and omissions. (2) A person is not criminally responsible for an event which occurs by accident. (3) If death or grievous bodily harm — (a) is directly caused to a victim by another person’s act that involves a deliberate use of force; but (b) would not have occurred but for an abnormality, defect or weakness in the victim, the other person is not, for that reason alone, excused from criminal responsibility for the death or grievous bodily harm. (4) Subsection (3) applies — (a) even if the other person did not intend or foresee the death or grievous bodily harm; and (b) even if the death or grievous bodily harm was not reasonably foreseeable.”

Criminal recklessness is certainly not to be equated with civil negligence.¹¹

4.10 The Bill makes it an element of the duty of care that the person is not “*entitled*” to destroy/damage the property; the Model Criminal Code provides that it is a defence that the owner consented or the person believed that they had a right or title that meant they were “*authorised*” to act in the way that they did.

4.11 Section 22 of the *Criminal Code* provides;

But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.

4.12 Section 24 of the *Criminal Code* also provides:

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

4.13 The latter part of section 24 raises the question, which the Committee was not able to consider, of whether the terms of the proposed section 444A would imply that section 24 did not operate.

4.14 The Committee notes the following observation of the Criminal Law Officers Committee of the Standing Committee of the Attorneys General on the law as at 1992:

In Australia, a distinction is drawn between statutory provisions where the statute, having defined the ground of criminal liability, introduces by some distinct provision a matter of exception or excuse and, on the other hand, provisions where the definition of liability contains within it the statement of exception. In the first case, the onus lies on the defendant to prove the exception or excuse on the balance of probabilities, in the latter the onus lies on the prosecution: Dowling v Bowie (1952) 86 CLR 136 at 139-140; De La Rue v

¹¹ Scrutiny of Legislation Committee’s (Queensland) Alert Digest No 5 of 2003. (Each sitting week, the Scrutiny of Legislation Committee tables an Alert Digest in which it reports to the Legislative Assembly upon its examination of bills.)

*Matthews (1945) VLR 275; Ex parte Ferguson; Re Alexander and Ors 45 SR (NSW) 64, R v Golding (1973) WAR 5.*¹²

- 4.15 Under the Model Criminal Code, the relevant belief appears to relate to a right to take the action (lighting the fire), not to entitlement to destroy/damage the particular property damaged. This raises the question, which the Committee has not been able to consider, of whether the Model Criminal Code terms might provide a better protection for persons such as Department of Environment and Conservation officers, who are “*authorised*” to start a fire that, through breach of duty of care, damages property.

5 PRELIMINARY RESEARCH IN RESPECT OF ISSUES ARISING

Standard of care required

- 5.1 As it requires negligence, clause 10 does not appear from its terms to insert a “*strict liability*” offence.¹³
- 5.2 The Second Reading Speech uses the term “*reckless*” to describe the conduct prohibited by section 444A. However, it is not certain that the two terms¹⁴ are interchangeable.
- 5.3 In the Second Reading Speech, Hon Simon O’Brien MLC, the Minister for Transport, said:

*The Model Criminal Code recommends arson offences with an intention element of recklessness. The Western Australian Criminal Code at present contains no provision for an intention element of recklessness. Creating an offence of recklessly causing property damage by fire will further enhance ...*¹⁵

(Committee’s emphasis)

but also says:

¹² Report by the Criminal Law Officers Committee of the Standing Committee of the Attorneys General on the *Model Criminal Code - Chapters 1 and 2: General Principles of Criminal Responsibility*, December 1992, p117.

¹³ “*Strict liability*” is defined in Butterworths Legal Dictionary (online subscription service, viewed on 6 June 2006) as: “*Accountability without the need to prove negligence or fault. If strictly liable of a civil offence, a defendant is liable irrespective of an absence of negligence or intention on his or her part and even if he or she took reasonable care to prevent the damage.*”

¹⁴ That is, “*criminal negligence*” and “*recklessness*”.

¹⁵ There is only one use of the word “*reckless*” in the *Criminal Code* - in a reference to the offence of “*reckless driving*” under the *Road Traffic Act 1974*.

*Various sections of the Criminal Code generally excluding liability in the absence of intention will be expressly declared not to apply to this new offence.*¹⁶

5.4 This may create ambiguity as to the standard of “*intent*” imposed by the proposed section 444A and raises the question of whether, properly interpreted, proposed section 444A is, in fact, closer to a strict liability offence than a “*reckless intent*” offence. It is not clear to the Committee, at first glance, what standard is being set in the legislation. However, the Committee has not been able to consider this matter further.

5.5 Where a uniform model law and/or decision of SCAG is relied upon to justify a bill, the Committee’s standard practice is to comment, amongst other things, on the degree of conformity with that model law/decision. However, the Committee has not been able to consider this question.

6 NO RECOMMENDATION

6.1 Due to the resolution of the Legislative Council on 17 November 2009, the Committee has had little opportunity to explore the issues or consider the Bill and makes no recommendation to the House.



Hon Adele Farina MLC

Chairman

19 November 2009

¹⁶ Both quotes: Hon Simon O’Brien MLC, Minister for Transport, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 November 2009, p8754.

APPENDIX 1

ARSON LEGISLATION AMENDMENT BILL 2009 CLAUSE NOTES

ARSON LEGISLATION AMENDMENT BILL 2009 CLAUSE NOTES

Part 1 – Preliminary

- Clause 1. Short title**
Provides for the Act to be cited as the *Arson Legislation Amendment Act 2009*.
- Clause 2. Commencement**
The Act comes into operation on a day to be fixed by proclamation.

Part 2 – *Bush Fires Act 1954* amended

- Clause 3. Act amended**
Amendments in this Part are to the *Bush Fires Act 1954*.
- Clause 4. Section 32 amended**
The maximum penalty for an offence under section 32 is increased from a \$250 000 fine and 14 years imprisonment to 20 years imprisonment.
A cross-jurisdictional analysis of other Australian jurisdictions demonstrates that currently all but three jurisdictions have a greater maximum term than Western Australia for similar offences. Consistent with the range of sentences in Western Australia, 20 years imprisonment is the appropriate maximum offence.
The reference to a fine in section 32 has also been deleted with reliance placed on the Court's ability to impose a fine under section 41(5) of the *Sentencing Act 1995* if the Court feels it is appropriate.

Part 3 – *The Criminal Code* amended

- Clause 5. Act amended**
Amendments in this Part are to *The Criminal Code*.
- Clause 6. Section 23A amended**
Amends section 23A, "Unwilled acts and omissions", so that it is subject to the duty imposed by section 444A.

damage is destroyed, the person is held to have caused that destruction or damage.

Subsection (2) imposes a duty on a person to use reasonable care and take reasonable precautions when in charge of a fire so that it does not destroy or cause damage to property. If property or damage is destroyed, the person is held to have caused that destruction or damage.

Subsection (3) notes that a person does not breach a duty imposed by subsections (1) and (2) if the fire does not spread beyond the capacity of the person to extinguish it.

Subsection (4) makes it clear that property which is capable of being destroyed or damaged by fire includes vegetation.

It was also considered whether the phrase "whether or not on Crown land" following "Property that is capable of being destroyed or damaged by fire includes vegetation" was a necessary and desirable amendment.

The concern over whether "property" includes bushland on Crown land arose in the context of section 32 of the *Bush Fires Act 1954*. In lower courts, an argument has occasionally been run, with some success, that fire which threatens or damages bushland on Crown land does not threaten or damage "property" in section 32. The legal correctness of such an analysis was, however, criticised by President Steytler, as he then was, in *Spooner v Western Australia* [2008] WASCA 86 (*Spooner*). At paragraph 10 President Steytler made the following comment:

"It seems, from the transcript, that the trial was conducted upon the assumption that the word 'property' referred to in s 32(a) of the Act does not encompass bushland. That is a debatable proposition, given that any bushland is either publicly or privately owned and the word 'property' (which is not defined in the Act) prima facie encompasses anything that is capable of ownership: see the Shorter Oxford English Dictionary definition and the definition in s 1 of the Criminal Code (WA)" (para. 10).

The comments of President Steytler are consistent with the decision of La Jackson DCJ in *R v Guthrie* [2003] WADC 167, which also considered the interpretation of "property" in the *Bush Fires Act 1954*. After considering the definition of property in the Shorter Oxford English Dictionary, La Jackson DCJ, at paragraph 10, stated the following:

"Crown land is vested in the Crown. It is therefore owned by the Crown. The owner of land owns anything growing on the land. It follows for the purpose of the dictionary definition that bush in the reserve is property."

necessary to impose a duty of care in regards to fire and ignition sources to insert an offence intended to proscribe the same range of behaviours.

Although the period of 15 years imprisonment is not entirely consistent with other provisions in *The Criminal Code*, it is retained from section 4.1.8 to ensure consistency with the *Model Criminal Code*.

Section 445A does overlap to a certain extent with section 32 of the *Bush Fires Act 1954*. However, such overlap is intended as the offences have slightly different elements, and a different sentencing range, giving the Office of the Director of Public Prosecutions some flexibility when prosecuting bushfire offences.

APPENDIX 2

RELEVANT PROVISIONS OF MODEL CRIMINAL CODE CRIMINAL

Criminal Code of [State/Territory]

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

Criminal Code of [State/Territory]

- (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.

Criminal Code of [State/Territory]

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:

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- (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.

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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

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- (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.