

REPUBLIC OF NAURU
CRIMES BILL 2016
EXPLANATORY MEMORANDUM

The *Crimes Bill 2016* is a Bill for the *Crimes Act 2016*.

PART 1—PRELIMINARY

Short title

Clause 1 provides that, once enacted, the short title of the Bill will be the *Crimes Act 2016*.

Commencement

Clause 2 provides for the commencement of the Act when certified by the Speaker.

Application

Clause 3 provides for the Republic of Nauru to be bound by the Act.

Codification

Clause 4 establishes that the general principles of criminal responsibility are codified and the only offences against laws of Nauru are those created by legislation.

Standard geographical jurisdiction

Clause 5 establishes the jurisdiction of the Act, and the standard, or ‘default’, jurisdiction that applies to all offences in Nauru – including those created by other Acts – unless the law creating the offence expressly says otherwise.

The standard rule is that conduct that takes place outside Nauru does not constitute an offence against the laws of Nauru unless conduct that constitutes at least part of the offence takes place in Nauru, or an event necessary to the completion of the offence takes place in Nauru.

Extraterritorial jurisdiction—ship or aircraft outside Nauru

Clause 6 clarifies the extent of criminal responsibility for conduct outside Nauru on Nauruan or foreign ships or aircraft. The jurisdiction of Nauru’s offences is generally extended to cover:

- conduct that takes place on a Nauruan ship or aircraft,

- conduct that occurs on foreign ships or aircraft that arrive in, or pass over, Nauru, and
- conduct of a Nauruan citizen or resident that takes place on a foreign ship or aircraft.

Extraterritorial jurisdiction—transnational crime

Clause 7 ensures that specified offences that often have a transnational character - such as identity crimes, child-sex tourism and bribery and corruption offences - will have jurisdiction outside Nauru in a broader range of circumstances. In accordance with international best practice, the geographical application of these crimes is extended to capture conduct outside Nauru by Nauruan citizens or residents or corporations, or where the victim of the transnational offence is a Nauruan citizen or resident.

PART 2—INTERPRETATION

Definitions

Clause 8 sets out the definitions of significant terms used in other provisions throughout the Bill.

Importantly for all offence provisions, ‘conduct’ can be an act, an omission to perform an act or a state of affairs. Similarly, ‘engage in conduct’ means to do an act, omit to do an act or be in a state of affairs.

The definition of property includes all tangible and intangible forms of property, including interests in property, and expressly includes money and electricity.

The definition of ‘private act’ is important for new offences of observing or taking images of the private acts of another person without their consent. This definition, as well as covering sexual activity, includes acts involving undressing and nudity.

The clause also contains a broad definition of ‘public official’ (extending to members of parliament and judicial officers).

‘Serious harm’ is defined as harm that endangers, or is likely to endanger, someone’s life or that is, or is likely to be, significant and longstanding.

The definition of ‘threat’ is intended to cover all modes of threatening behaviour and so includes direct and indirect communication and conduct.

Definition of consent

Clause 9 deals with the meaning of ‘consent’ for the Act. This issue, which is fundamental to a number of offences, is addressed by specifying that consent must be freely and voluntarily given by a person with the capacity to provide consent, and by providing a non-exhaustive list of circumstances in which consent is taken not to be given freely and voluntarily, for example if force or threats are used.

Subclause (3) clarifies circumstances when a person does not have cognitive capacity to give consent, including if asleep.

Subclause (4) clarifies that a person is not to be regarded as consenting to an act merely because the person does not protest or offer physical resistance to it.

PART 3—PRINCIPLES OF CRIMINAL RESPONSIBILITY

DIVISION 3.1—PURPOSE AND APPLICATION

The Bill clearly sets out fundamental concepts about criminal responsibility which in the Criminal Code tend to be implicit, rather than explicitly stated. These principles are essentially a codification of the common law (judge-made law) that applies in most Commonwealth countries, and which was originally adopted from the English legal system.

Purpose of this Part

Clause 10 sets out the purpose of Part 3, which is to codify the general principles of criminal responsibility.

Application of this Part

Clause 11 applies Part 3 to all offences created by the Act and other offences committed on or after its commencement.

DIVISION 3.2—ELEMENTS OF AN OFFENCE

It is fundamental to codifying the general principles of criminal responsibility that the physical and mental elements of crimes which, if satisfied, will constitute an offence, are set out clearly.

Elements of an offence

Clause 12 explains that offences consist of physical elements and fault elements. Most offences consist of one or more physical elements each with an accompanying fault element.

For example, the offence in clause 71 of the Bill (Intentionally causing serious harm) has two physical elements, each with an accompanying fault element. The physical elements are that the person: (i) engages in conduct, and (ii) that conduct causes serious harm to another person. The fault elements are that the person: (i) intends to engage in that conduct, and (ii) intends to cause serious harm to the other person, or another person, by the conduct. For this offence, both fault elements are intention.

Subclause (2) provides that an offence may have different fault elements for different physical elements or no fault element for a physical element.

For example, the offence in clause 72 of the Bill (Recklessly causing serious harm) has two physical elements, each with a different fault element. The physical elements are that the person: (i) engages in conduct, and (ii) that conduct causes serious harm to another person. The fault elements are that the person: (i) intends to engage in that conduct, and (ii) is reckless about causing serious harm to the other person, or another person, by the conduct. One physical element has a fault element of 'intention', while the other has a fault element of 'recklessness'. Clauses 16-21 set out the different types of fault elements used in the Bill, and what they mean. Clauses 22-24 set out the circumstances in which a physical element of an offence can have no accompanying fault element – that is, in circumstances of strict liability or absolute liability (outlined below).

Establishing criminal responsibility for offences

Clause 13 states the presumption of innocence, that is, a person is innocent of an offence until the elements of the offence are proved. For a person to be found guilty of an offence, it is necessary to prove the existence of the physical elements of the offence and the relevant fault elements (if any) required for each physical element of the offence. If the law that creates the offence requires the existence of two or more fault elements for a physical element of the offence, it is sufficient to prove that one of the fault elements exists for that physical element.

Physical elements

Clause 14 explains that the physical elements of an offence may be conduct, a result of conduct or a circumstance in which conduct, or a result of conduct, occurs.

For example, the offence in clause 71 of the Bill (Intentionally causing serious harm) has a physical element of 'conduct' (engaging in conduct), and a physical element that is 'a result of conduct' (that conduct causes serious harm to another person). An example of a physical element of an offence that is 'a circumstance' arises in the offence, in clause 77 of the Bill (Causing harm to a police officer). The fact that the person harmed is a police officer is the circumstance in which conduct occurs.

Subclause (2) provides that in order for conduct to exist it must be voluntary. 'Voluntary' is defined in clause 8 of the Bill.

Omissions

Clause 15 provides that an omission can be a physical element of an offence if the law creating the offence makes it a physical element or impliedly provides that the offence is committed by an omission to perform a statutory duty.

The offence in clause 94 (Neglecting a child or vulnerable adult), provides an example of an omission being a physical element of an offence: the responsible carer fails to provide the child or vulnerable adult with adequate food, clothing, accommodation or care.

Fault elements

Clause 16 sets out the fault elements that may be required for a physical element of an offence, which may be intention, knowledge, recklessness, reckless indifference to consent or negligence. This is not an exhaustive list of the fault elements that can apply, and accordingly, paragraph (f) provides for an offence to specify other fault elements for physical elements of the offence. For example, an offence may have a fault element of doing, or not doing, something 'dishonestly'.

Negligence is only rarely used as a fault element in the Bill, and given the serious consequences of criminal liability, it is defined to require a higher level of moral culpability than is required to establish negligence in civil matters (such as when suing another person).

Intention

Clause 17 explains what the fault element of 'intention', the most culpable fault element, is in relation to a physical element. It provides that a person has intention with respect to conduct if the person means to engage in that conduct, has intention with respect to a circumstance if the person believes that it exists or will exist, and has intention with respect to a result if the person means to bring it about or is aware that it will occur in the ordinary course of events.

For example, the offence in clause 71 of the Bill (Intentionally causing serious harm) has two fault elements of intention, one with respect to conduct and the other with respect to a result: (i) intends to engage in the conduct (i.e. the conduct that causes serious harm); and (ii) intends to cause serious harm to the other person, or another person, by the conduct. Applying the definition of conduct in clause 17, this means the prosecution would need to prove that the person meant to engage in the conduct, and meant to bring about the serious

harm to the other person or was aware that serious harm would occur in the ordinary course of events.

Knowledge

Clause 18 makes it clear that a person has knowledge of a circumstance or result if the person is aware that it exists or will exist in the ordinary course of events.

If 'knowledge' is the fault element for a physical element of an offence, proof of 'intention' or 'knowledge' will satisfy that fault element.

Clause 222 (Perjury), provides an example of a fault element of 'knowledge'. That offence arises where a person makes a false sworn statement in a legal proceeding in circumstances where the person knows the statement is false. Applying the definition of knowledge in clause 18, the person must have been aware the statement is false or that it would be false in the ordinary course of events.

Recklessness

Clause 19 explains that a person is reckless in relation to a result if the person is aware that there is a substantial risk that the result will happen, and having regard to the known circumstances, it is unjustifiable to take the risk. A person is reckless in relation to a circumstance if the person is aware that there is a substantial risk that the circumstance exists or will exist, and having regard to the known circumstances, it is unjustifiable to take the risk.

Subclause (2) makes it clear that the question whether taking a risk is unjustifiable is a question to be determined by the decider of fact on the evidence.

If 'recklessness' is the fault element for a physical element of an offence, proof of 'intention', 'knowledge' or 'recklessness' will satisfy that fault element.

For example, the offence in clause 72 of the Bill (Recklessly causing serious harm) has a fault element that the person is reckless about the result of causing serious harm to another person by their conduct. Applying the definition in clause 19, the prosecution would need to prove that the person was aware that there was a substantial risk that their conduct would cause serious harm to another person, and having regard to the circumstances known to that person, it was unjustifiable to take the risk. The question of whether the risk was unjustifiable is a question for the decider of fact to decide on the evidence. In proving this fault element of recklessness, it would also be sufficient to prove intention (i.e. the person intended to cause serious harm to the other person) or knowledge (i.e. the person knew that their conduct would cause serious harm to the other person).

Reckless indifference to consent

Clause 20 provides that a person is reckless to consent if, in circumstances where another person's consent is required for the person to do an act, the first person is aware of the possibility that the other person might not consent and either decides to do the act anyway or fails to take reasonable steps to find out whether the other person consents, or does not give any thought as to whether or not the other person consents.

'Consent' has the meaning given in clause 9.

Subclause (2) makes it clear that whether a person is recklessly indifferent to consent is a question to be determined by the decider of fact on the evidence.

Clause 105 (Rape), provides an example of a fault element of 'reckless indifference to consent'. That offence arises where a person intentionally engages in sexual intercourse with another person, the other person did not consent, and the offender was recklessly indifferent to the consent of the other person. Applying the definition in clause 20, this means that the offender is aware of the possibility that the other person might not consent to the sexual intercourse and either decides to engage in sexual intercourse anyway or fails to take reasonable steps to find out whether the other person consents, or does not give any thought to whether or not the other person consents.

Negligence

Clause 21 explains that a person will be regarded as negligent with respect to a physical element of an offence if the person's conduct falls so far short of the standard of care that a reasonable person would exercise in the circumstances, and involves such a high risk that the physical element exists or will exist, that it merits criminal punishment. Given the serious consequences of criminal liability, this definition requires a higher level of moral culpability than is required to establish negligence in civil matters.

Clause 57(Causing death by criminal negligence), provides an example of a fault element of negligence. That offence arises where a person intentionally engages in conduct, the conduct causes the death of another person, and the person (the offender) is negligent about causing the death of that person, or any other person, by the conduct.

Offences that do not provide fault elements

Clause 22 deals with offences that do not provide fault elements, ensuring that criminal offences will always be construed as having a fault element unless the provision creating the offence expressly states that no fault element applies (for instance, by saying that strict or absolute liability applies to it). Clause 22 makes clear which fault elements will apply automatically in the event that the offence provision does not set them out or expressly say

that they do not apply. This ensures that strict liability and absolute liability offences cannot be created unintentionally by the Parliament.

If the law that creates the offence does not specify a fault element for a physical element of the offence that consists only of conduct, intention is the fault element for that physical element and the prosecution will need to prove that the accused intended to engage in the conduct. If the law that creates 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 the physical element. These rules will apply to all offences enacted on or after the commencement of this Bill.

Subclause 22(3) provides that, if a physical element consists only of the existence or content of an Act or law, this clause will not apply to automatically create a fault element in the event that none is specified. This is to safeguard the principle that 'ignorance of law is no excuse'. This principle is enshrined in clause 46 which provides that a person can be criminally responsible for an offence even if the person is mistaken about, or ignorant of, the existence or content of an Act or law that creates the offence, or affects the scope or operation of the offence.

Clause 194 (Dealing in identification information), provides an example of how the exception in subclause 22(3) applies. That offence arises where a person deals in identification information (for example, uses credit card details belonging to another person), and intends to use that information to pretend to be another person for the purpose of committing an offence that has a maximum penalty of over 12 months imprisonment. One of the physical elements of this offence is that the secondary offence which the person intends to commit carries a penalty of over 12 months imprisonment. A fault element is not specified for this physical element, and strict or absolute liability is not expressed to apply to it. However, clause 22 does not apply to create a fault element for this physical element because it consists of the content of a law (i.e. that the offence carries a maximum penalty of over 12 months imprisonment). If a fault element were to automatically apply, the prosecution would need to prove that the person knew, believed, or was aware of a substantial risk that the secondary offence (e.g. credit card fraud) carried a penalty of over 12 months imprisonment. This would infringe against the principle that 'ignorance of the law is no excuse', as enshrined in clause 46 of the Bill.

Strict liability

Clause 23 sets out what is meant by strict liability. If a law that creates an offence provides that the offence is one of strict liability, there are no fault elements for any of the physical elements of the offence. This means that conduct alone is sufficient for culpability. The

defence of mistake or ignorance of fact is available in relation to the physical element of strict liability offences.

Subclause (2) envisages that there will be offences where strict liability applies only to a particular physical element of the offence (rather than the whole offence). There will be no fault element for this physical element, although fault elements could apply to another physical element of the offence.

For example, strict liability as to just one physical element applies in clause 70 (Misconduct in relation to dead human bodies). This offence arises where a person intentionally engages in conduct, the conduct relates to a dead human body or human remains, the conduct is indecent or improper, and the person is reckless about that fact. Clause 70 expressly states that strict liability applies to the physical element that the conduct relates to a dead human body or human remains. This means that the prosecution does not need to prove that the person knew, believed, or was aware of a substantial risk that the object involved was a dead human body or human remains. However, it would be a defence if the accused could establish that he or she had a reasonable but mistaken belief that the object was not a dead human body or human remains.

Subclause (3) makes it clear that other defences may still be available for strict liability offences, for example, the defence of mental impairment.

Absolute liability

Clause 24 deals with offences of absolute liability. If an offence states that it is one of absolute liability, there are no fault elements and the defence of mistake or ignorance of fact is not available. Absolute liability may also apply to a particular physical element of an offence.

The absence of a defence of mistake of fact is what distinguishes absolute liability offences from strict liability offences. However, subclause (3) makes it clear that other defences may still be available for absolute liability offences.

DIVISION 3.3—PROOF OF CRIMINAL RESPONSIBILITY

Burden of proof on prosecution

Clause 25 places on the prosecution the legal burden of proving every element of an offence relevant to the guilt of the person charged with the offence. The prosecution also bears the legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof which has been imposed on the defendant.

Subclause (3) explains the standard of proof. Unless a different standard of proof is specified for the offence, the legal burden on the prosecution must be discharged beyond reasonable doubt.

Evidential burden of proof on defendant

Clause 26 provides that, subject to clause 27, where a burden of proof is cast on the defendant, it is an evidential burden only and explains that an evidential burden means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

A defendant who wishes to rely on an exception, exemption, excuse, justification or qualification to an offence bears an evidential burden in relation to that matter (unless the law says otherwise – see clause 27). The exception, exemption, excuse, qualification or justification need not accompany the description of the offence in order to apply to the offence.

If evidence sufficient to discharge the burden is adduced by the prosecution or the court, the defendant no longer bears the evidential burden in relation to the matter.

Subclause (4) makes it clear that the question whether an evidential burden has been discharged is a matter of law.

Legal burden of proof on defendant

Clause 27 makes it clear that a burden of proof that a law imposes on the defendant is a legal burden only if the law expressly specifies that the burden of proof in relation to the matter in question is a legal burden, or requires the defendant to prove the matter, or creates a presumption that the matter exists unless the contrary is proved.

Subclause (2) explains that the standard of proof for a legal burden of proof borne by a defendant must be discharged on the balance of probabilities.

Use of averments

Clause 28 provides that a law which allows the prosecution to make an averment is taken not to allow the prosecution to aver any fault element of an offence (for example the intention of the defendant) nor allow the prosecution to make an averment for offences that are directly punishable by imprisonment.

DIVISION 3.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY

Aiding, abetting, counseling and procuring

Clause 29 provides that a person who aids, abets, counsels or procures the commission of an offence by someone else is taken to have committed the offence and is punishable as if the person in fact committed the offence.

For this offence to apply the other person must in fact commit an offence and the conduct of the defendant must in fact have aided, abetted, counselled or procured the offence. Further, the defendant must have intended either that his or her conduct would aid, etc the commission of any offence of the type the other person committed, or intended that his or her conduct would aid etc an offence and was reckless as to the possibility that the other person would commit the offence he or she in fact did commit. Recklessness in this context amounts to an awareness of a substantial and unjustifiable risk that the offence would be committed.

Subclause (3) is an important qualification to this offence in that it provides that a person cannot be found guilty of aiding etc the commission of an offence if, before the offence was committed, the person ended his or her involvement and took all reasonable steps to prevent the offence. What amounts to taking all reasonable steps will vary from case to case but might include alerting the intended victim or the appropriate law enforcement authority.

Subclause (4) explains that a person may be found guilty of this offence even if the other person has not been prosecuted or has not been found guilty of the primary offence.

Incitement

Clause 30 provides that a person who urges another to commit an offence commits the offence of incitement. The fault element that must be proved to establish the offence of incitement is intention. That is, the person must intend the incited offence to be committed.

Consistent with the position taken in relation to attempt, subclause (2) provides that a person may be found guilty of incitement even if the intended offence is impossible.

Subclause (3) provides that it is not an offence to urge someone to commit incitement, conspiracy or attempt.

The penalty (of up to 10 years imprisonment) depends upon the seriousness of the offence incited.

Conspiracy

Clause 31 makes it an offence for a person to conspire with someone else to commit an offence. For a person to be guilty of this offence, the person must have entered into an arrangement with one or more other people, and the person and at least one other party to the arrangement must have intended that an offence would be committed under the arrangement. A party to the arrangement must have committed an overt act pursuant to the arrangement.

Subclause (3) makes it clear that whether an act is overt is a question to be determined by the decider of fact on the evidence.

Subclause (4) provides for disassociation from the offence. That is, a person cannot be found guilty of this offence if, before an overt act is committed pursuant to the arrangement, the person withdraws from the arrangement and takes all reasonable steps to prevent the doing of the thing that is the subject of the arrangement. What amounts to taking all reasonable steps will vary from case to case but might include informing the other parties of the withdrawal, alerting the intended victim or the appropriate law enforcement authority.

Subclause (5) clarifies some important matters about when a person may be found guilty of the conspiracy. For example, it provides that a person may be liable even if the intended offence is impossible (consistent with attempt and incitement) or if the other parties to the agreement are not criminally responsible (for example, a child) or the only other parties are bodies corporate.

A person may be liable even if all other parties to the alleged agreement have been acquitted, but if finding the person guilty would be inconsistent with their acquittal, the person cannot be found guilty of the offences in this clause. Subclause (6) allows a court to dismiss a conspiracy charge if it considers that the interests of justice require it to do so.

Joint commission

Clause 32 makes it an offence for a person to enter into an arrangement with someone else to commit an offence. For a person to be guilty of this offence, the person and at least one other party to the arrangement must intend to commit an offence and to assist one another to do so, and an offence must be committed under the arrangement or in the course of carrying it out.

This offence is punishable as if the person had committed the primary offence.

Subclauses (4), (5) and (6) clarify the meaning of 'arrangement', 'in accordance with an arrangement' and 'in the course of carrying out an arrangement'.

Subclause (7) provides that a person cannot be found guilty of this offence if, before a joint offence is committed under the arrangement, the person withdraws from the arrangement and takes all reasonable steps to prevent the commission of an offence by the parties. What amounts to taking all reasonable steps will vary from case to case but might include informing the other parties of the withdrawal, or alerting the intended victim or the appropriate law enforcement authority.

A person may be guilty of this offence even if another party to the arrangement is not prosecuted or found guilty, or the person was not present when conduct making up the joint offence was engaged in, or the intended offence is impossible.

Commission by proxy

Clause 33 provides that a person is taken to commit an offence if the person has all the fault elements that apply to the physical elements of an offence and procures someone else to engage in the conduct that makes up the physical elements of that offence. The person is punishable for this offence as if he or she had committed the offence.

It is not necessary that the defendant procure the other person to commit all the physical elements of the offence, but only those physical elements necessary to make the offence complete.

Attempts

Clause 34 provides that a person who attempts to commit an offence commits the offence of attempt. It is a separate and distinct crime from the offence the person attempted to commit, but is punishable as if the attempted offence had been committed.

Not all conduct directed to the commission of an offence will amount to attempt. As subclause (3) explains, the conduct must be more than merely preparatory to the commission of an offence. The question whether conduct is merely preparatory is a question of fact to be determined by the decider of fact.

Subclause (5) provides that a person may be found guilty of attempt even if committing the offence attempted is impossible or the person actually committed the offence attempted.

The effect of subclause (6) is that a person who is found guilty of attempting to commit an offence cannot be subsequently charged for the completed offence.

Accessory after the fact

Clause 35 contains the elements of an offence aimed at those who help offenders to escape punishment or benefit from the proceeds of their crime. It makes it an offence to assist someone, knowing that the person committed the offence, in order to enable that person to escape punishment or to dispose of proceeds of the offence.

The penalty (of up to 10 years imprisonment) depends upon the seriousness of the offence committed by the other person.

Offences under this division

Clause 36 provides that a reference to an offence in any written law of Nauru is taken to include a related offence under this division. For example, a reference in another Act to the offence of murder under clause 55, will also be taken to include a reference to the ancillary offences in Division 3.4 of the Bill (i.e. aiding and abetting the offence of murder, conspiring to murder, attempted murder and so on).

Subclause (2) clarifies that any defence, procedure, limitation or qualifying provision that applies to an offence will also apply to a related offence under this division. For example if the primary offence is assault, any defence available in relation to assault (such as self-defence) will also apply to the offence of attempted assault.

DIVISION 3.5—CORPORATE CRIMINAL RESPONSIBILITY

Act applies to bodies corporate

Clause 37 provides that the Act will apply to corporations in the same way as it applies to individuals, subject to certain modifications. This clause has the effect that the general principles of criminal responsibility apply to corporations. Subclause (2) provides that an offence provision can apply to a corporation even if the offence is punishable by imprisonment only. As the note explains, this clause should be read in conjunction with section 80 of the *Interpretation Act 2011* (which provides that, if a body corporate is found guilty of an offence, the court may impose a fine of an amount equal to 5 times the fine for an individual).

‘Corporation’ is not defined in the Bill because it is defined in section 65 of the *Interpretation Act 2011* (as ‘a corporation incorporated under the *Corporations Act 1972* or a corresponding foreign law’). The terms ‘bodies corporate’ and ‘corporations’ are used interchangeably in the Bill and the *Interpretation Act 2011*.

Application of physical elements to bodies corporate

Clause 38 deals with how physical elements of an offence are attributed to corporations. A physical element of an offence consisting of conduct is taken to be committed by a corporation if it is committed by an employee acting within the actual or apparent scope of his or her employment, or by an agent or officer of the corporation acting within his or her actual or apparent authority.

Application of fault elements to bodies corporate

Clause 39 deals with how fault elements of an offence are attributed to corporations. A corporation is taken to have a fault element in relation to an offence if it expressly, tacitly or impliedly authorises or permits the commission of the offence. Subclause (2) sets out ways in which this may be established. For example, it may be shown that the conduct was performed or tolerated by the board of directors or a high managerial agent (defined as someone whose position in the corporation can be said to represent the policy of the corporation). The corporation has a defence in the case of a high managerial agent if the corporation proves that it used due diligence to prevent the offence. This defence is not available in the case of the board of directors itself. A further means by which it may be established is proof that a corporate culture existed within the corporation that directed, encouraged, tolerated or led to non-compliance with the relevant provision. Another means is proving the corporation failed to create and maintain a corporate culture that required compliance with the relevant provision.

Subclause (4) provides factors relevant to the corporate culture provisions.

Subclause (5) provides that if intention or knowledge is the fault element for a physical element of an offence, then the fault element may not be proved by proving that the board of directors, or a high managerial agent of the company, recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

DIVISION 3.6—CIRCUMSTANCES WHERE THERE IS NO CRIMINAL RESPONSIBILITY

Children under 10 years old

Clause 40 has the effect that a child under the age of 10 is not criminally responsible for an offence and therefore cannot be convicted of a crime.

Children aged 10 to 14 years

Clause 41 provides that a child aged 10 or more but under 14 is not criminally responsible unless the child knows that his or her conduct is wrong.

To establish criminal responsibility the onus is on the prosecution to prove beyond a reasonable doubt that the child knew the conduct was wrong. This is a question of fact for the judge to determine on the evidence.

Mental impairment

Clause 42 provides that a person is not criminally responsible for an offence if, at the time of the relevant conduct, the person was suffering from a mental impairment that had the effect that the person: did not know the nature and quality of the conduct; or did not know that the conduct was wrong; or was unable to control the conduct. A mentally impaired person is not criminally responsible if any one of these effects is present at the time of his or her conduct. Subclause (2) makes it clear that the reference to conduct as 'wrong' is to the sense of what is wrong held by reasonable people.

There is a presumption that a person is not suffering from a mental impairment, which can be displaced by either the prosecution or defence on the balance of probabilities.

The question of whether someone is suffering from a mental impairment is a question for the decider of fact to determine on the evidence.

A person cannot also rely on delusion as a defence if the court is satisfied that the person engaged in the conduct as a result of delusion caused by a mental impairment.

Subclause (7) only allows the prosecution to rely on this clause if the court gives leave.

The court must return a special verdict that a person is not guilty of an offence because of mental impairment if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment.

Intoxication

Clause 43 provides that a person is not criminally responsible for an offence if the conduct making up the offence was as a result of intoxication that was not self-induced (i.e. it must have been involuntary intoxication).

The effect of subclause (2) is that, for a physical element consisting only of conduct, intoxication that is self-induced cannot be taken into account for the question of whether the person intended the conduct.

Subclause (3) provides that evidence of self-induced intoxication can still be considered in determining whether conduct is voluntary. 'Voluntary' is defined in clause 8 of the Bill.

A person's intoxication may be caused by alcohol, a drug or any other substance. Intoxication is self-induced unless it is brought about involuntarily or by fraud, sudden or

extraordinary emergency, accident, reasonable but mistaken belief, duress or force. It will also be regarded as not self-induced if a person takes a drug in accordance with the directions of the prescribing medical practitioner or dentist or, in the case of non-prescription drugs, the recommendations of the manufacturer. This is intended to ensure that people are not held criminally liable for the adverse or abnormal reactions they may suffer to a drug taken properly and for the purpose for which it was intended.

Mistake or ignorance of fact—fault elements other than negligence

Clause 44 explains that if a person is under a reasonable but mistaken belief about matters relevant to the offence, or is ignorant of relevant facts, then this may negate a fault element of the offence. For example, if a person is charged with murder after fatally shooting another person, they may be able to negate the fault element of intending to cause the death, if they can show that they had a reasonable but mistaken belief that the gun they fired was a toy gun.

This provision cannot apply to negate a fault element of negligence, as negligence is already defined in clause 21 by reference to ‘the standard of care that a reasonable person would exercise in the circumstances’, and therefore there is no need to provide additional protection in the circumstances of a ‘reasonable but mistaken belief’.

Mistake or ignorance of fact—strict liability

Clause 45 explains when a person is not criminally liable for a strict liability offence, or a relevant physical element to which strict liability applies, because of a mistake of fact. In brief, the defence will apply if, when the physical element happened, the person considered whether or not facts existed and was under a mistaken but reasonable belief about those facts, and if the person had been correct the physical element would not have constituted an offence. Strict liability is discussed in the commentary to clause 23.

Mistake of law

Clause 46 provides that a person can be criminally responsible for an offence created by statute even if the person is mistaken to, or ignorant of, the existence or content of an offence or its scope (unless the law creating the offence expressly provides to the contrary). This clause enshrines the principle of criminal law that ‘ignorance of law is no excuse’. Accordingly, where a physical element of an offence relates only to the existence or content of a law, there will generally be no corresponding fault element prescribed for that physical element (ie. it will be an element of strict liability). For this reason, clause 22 – which ensures that every physical element of an offence has a corresponding fault element unless strict or absolute liability is expressed to apply – will not apply to create a fault element for

a physical element that consists only of the existence or content of an Act or law. The commentary to clause 22 explains this in more detail.

Claim of right

Clause 47 explains that a person is not criminally responsible for a property offence in certain circumstances, where the person had an honest and reasonable but mistaken belief that they had a legal right to the property in question. For example, if a person is charged with an offence of theft after taking a bag belonging to another from a public place, and the person can show that they had an honest and reasonable but mistaken belief that the bag belonged to them (for instance, because it looked exactly the same as a bag owned by them), then the defendant may be able to rely on this provision to negate both the fault element of dishonesty and the fault element of intending to permanently deprive the owner of the property. Whether or not the mistaken belief is sufficient to negate the relevant fault element will depend on the circumstances.

Subclause (2) precludes this clause being relied upon to negate criminal responsibility for an offence involving the use of force.

Intervening events

Clause 48 deals with the defence of intervening conduct or event. The defence only applies to strict and absolute liability offences, and to the strict and absolute liability components of offences. A person is not criminally responsible for such offences if the physical element to which strict or absolute liability applies is brought about by someone else over whom the defendant has no control, or by an act or event over which the person has no control and could not reasonably be expected to have guarded against. By way of illustration, despite the fact that a person's truck exceeded the prescribed weight limit, it did so because a third person had secretly loaded it with additional items and the defendant could not reasonably have been expected to guard against this. The defence is not necessary for offences containing fault elements because the defendant will lack the fault element or, in the case of negligence, argue that she or he had taken reasonable care.

Strict liability is discussed in the commentary to clause 23. Absolute liability is discussed in the commentary to clause 24.

Duress

Clause 49 explains that a person is not criminally responsible for an offence that he or she carries out under duress. Subclause (2) clarifies that for the purposes of the defence the person is acting (or omitting to act) under duress only if he or she reasonably believes that a threat has been made and will be carried out unless an offence is committed, that there is

no reasonable way that the threat can be rendered ineffective, and that the conduct is a reasonable response to the threat.

Subclause (3) provides that the clause does not apply if the threat is made by or on behalf of someone with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

Sudden or extraordinary emergency

Clause 50 provides that a person is not criminally responsible for an offence where his or her conduct is a response to circumstances of sudden or extraordinary emergency. Unlike for an intervening event, this defence applies to fault element offences as well as strict and absolute liability offences.

Like duress, the necessity of the occasion and the response to it are both subject to an objective test of reasonableness.

Self-defence

Clause 51 sets out the defence of self-defence. The general principle is set out in subclause (1), which provides that a person is not criminally responsible for an offence if the conduct is carried out in self-defence.

The elements of the defence are essentially set out in subclause (2) which provides that it is only self-defence if the person's conduct is reasonable in the circumstances as he or she perceives them, and the person believes the conduct is necessary for any of the following reasons:

- to defend himself, herself or someone else;
- to prevent or terminate the unlawful imprisonment of himself, herself or someone else;
- to protect property from unlawful appropriation, destruction, damage or interference;
- to prevent any unlawful entry to any land or premises;
- to remove from any land or premises someone who is committing unlawful entry.

Subclause (3) restricts the defence to ensure it does not apply to force that involves the intentional infliction of death or serious harm for the purpose of protecting property rights, nor if the person is responding to conduct that the person knows is lawful.

Subclause (4) clarifies that conduct is not lawful only because the person carrying it out is not criminally responsible for it.

Lawful authority

Clause 52 provides that a person is not criminally responsible for an offence if his or her conduct is justified or excused under law. An example is a police officer who uses physical force to effect an arrest. Although the officer's conduct may technically amount to an assault, an offence is not committed so long as the use of force falls within the proper exercise of the officer's power of arrest as conferred by statute (which will typically require that the force used is reasonable and necessary).

Surgical operations and medical treatment

Clause 53 sets out a specific defence in relation to surgical operations and medical treatment. A person is not criminally responsible if the relevant conduct was for beneficial surgery or treatment and was performed or given in good faith and with reasonable care and skill. For the defence to apply the surgery or treatment must be reasonable in all the circumstances including the patient's condition.

PART 4—OFFENCES CAUSING DEATH

DIVISION 4.1—GENERAL

Abolition of particular rules about murder

Clause 54 abolishes the time limit on criminal responsibility for murder under which a person cannot be convicted if the victim dies more than a year and a day after the infliction of the injury which caused the death. This accounts for advances in medical technology where a victim may be kept alive on life support for longer than a year and a day without precluding a later charge of murder.

The clause also abolishes the offence of committing or attempting to commit suicide (although it will remain an offence to assist or encourage another person to commit suicide (clauses 60 and 61)). The abolition of this offence is consistent with reforms made in other Pacific jurisdictions. Suicide is now seen as a mental health issue rather than one that should be dealt with through the criminal law.

DIVISION 4.2—CAUSING DEATH

Murder

Clause 55 provides for the offence of murder. The offence is committed when a person who causes the death of another does so with either the intention of causing the death of the other person or anyone else, or being reckless about causing the death.

Manslaughter

Clause 56 provides for the offence of manslaughter. The offence is committed when a person who causes the death of another does so with the intention of causing serious harm to the other person or anyone else, or being reckless about causing serious harm. Serious harm is defined in clause 8.

Causing death by criminal negligence

Clause 57 provides an offence where the conduct of a person causes the death of another and the person was negligent about causing the death of the other person or anyone else. If the person intended to cause or was reckless about causing death, the offence of murder would apply.

A failure or omission to perform a statutory duty in Part 6 of the Bill could constitute 'conduct' for the purposes of this offence – i.e. where that failure or omission causes the death of the person to whom the duty is owed.

Clause 100 makes clear that a failure or omission to perform a statutory duty in Part 6 of the Bill is taken to have caused the consequences to the life or health of the person to whom the duty is owed.

Clause 21 explains that a person will be regarded as negligent with respect to a physical element of an offence if the person's conduct falls so far short of the standard of care that a reasonable person would exercise in the circumstances, and involves such a high risk that the physical element exists or will exist, that it merits criminal punishment.

Causing death—criminal responsibility despite certain other factors

Clause 58 clarifies certain circumstances where a person can be criminally responsible for murder, manslaughter or criminal negligence causing death. There can be criminal responsibility even if the victim would have died anyway (whether because of circumstances or a medical condition), or the victim consented to, or could have prevented, the conduct which caused his or her death.

Also, subclause (2) provides that there can be criminal responsibility if the immediate cause of death was treatment given for serious harm caused by the offender.

Subclause (3) provides that a person can be criminally responsible for a death caused by the victim's own conduct if that conduct was a natural response to avoiding threatened violence by the person.

Defence of provocation

Clause 59 sets out how the defence of provocation applies. Provocation is a specific defence to murder which reduces murder to manslaughter, and its scope in the Bill is a change from the Criminal Code which requires that the killing be one in the heat of passion caused by sudden provocation. This clause adopts a more commonly accepted modern formulation of the defence.

Subclause (3) sets out the main elements of the defence, which applies if the conduct causing death resulted from the defendant's loss of self-control induced by conduct of the deceased towards, or affecting, the defendant if that conduct was such as could cause an ordinary person to have lost self-control to an extent that he or she would have intended to kill or cause serious harm to the deceased.

Grossly indecent or offensive words or gestures may be such conduct, and the question whether they are grossly indecent or offensive is a matter for the decider of fact. Subclause (6) clarifies that the defence may arise whether the conduct occurred immediately before the conduct causing death or at an earlier time.

Subclause (7) is intended to limit the availability of the defence of provocation where the provoking act was a non-violent sexual advance by the deceased towards the person accused of murder. A non-violent sexual advance is not to be taken, by itself, to be sufficient basis for the defence but may be taken into account with other conduct of the deceased in deciding whether provocation has been established. This provision is intended to preserve the availability of provocation where the non-violent sexual advance is an act that follows from a previous history of other provoking conduct.

DIVISION 4.3—SUICIDE

Aiding or abetting suicide

Clause 60 makes it an offence to intentionally aid or abet another person to commit, or attempt to commit, suicide. The person's conduct must in fact aid or abet the other person to commit, or attempt to commit, suicide.

Encouraging suicide

Clause 61 makes it an offence for a person to intentionally encourage someone else to commit suicide. The relevant conduct must in fact encourage the other person to commit, or attempt to commit, suicide.

Defence of using reasonable force to prevent suicide

Clause 62 provides that a person does not commit an offence by using force that is reasonable to prevent the suicide of another person, or to prevent an act that the person believes on reasonable grounds would, if committed, result in the suicide of another person. For example, if a person uses reasonable force to prevent another person committing suicide, and in so doing causes an injury to the other person, the rescuer would not be criminally responsible for the offence of assault, or causing harm.

A defendant wishing to rely on this defence will have an evidential burden in relation to the matters covered by it.

DIVISION 4.4—CAUSING DEATH OF CHILDREN

Meaning of *lawful medical procedure*

Clause 63 sets out the meaning of ‘lawful medical procedure’ (which relates to the offences of killing an unborn child and abortion (clauses 66 and 68)) which must always be carried out by a medical practitioner and with the consent of the pregnant woman (or a person lawfully entitled to consent on her behalf if she is not capable of consenting). There are additional criteria which differ depending on how far progressed the pregnancy is. For example after 20 weeks gestation, the procedure is only lawful if the medical practitioner considers it necessary to save the life of the woman or prevent serious permanent injury to her physical or mental health.

Meaning of *miscarriage*

Clause 64 sets out the meaning of ‘miscarriage’ for the division.

Infanticide

Clause 65 provides for a new offence of infanticide which applies in circumstances of conduct that would otherwise constitute murder or manslaughter. The offence is made out where a woman causes the death of her child (under 2 years old) when the balance of her mind was disturbed to the extent that she was not fully responsible because of not having fully recovered from, or any other disorder arising from, giving birth to the child.

Subclause (2) makes it clear that infanticide is an alternative verdict available to the court but if the defendant raises it the defendant has a legal burden in relation to the defendant’s disturbance of mind.

Subclause (3) makes it clear that this clause does not prevent another person being found guilty of an offence of murder or manslaughter arising from the same facts.

Killing unborn child

Clause 66 criminalises conduct causing the death of an unborn child of more than 27 weeks gestation (or otherwise capable of being born alive). The fault element is recklessness about the fact that the unborn child is capable of being born alive or about whether the conduct would prevent the child from being born alive, or about whether the conduct would contribute to the child's death. A person acting in good faith for the preservation of the life of the woman carrying the unborn child is not criminally responsible for this offence, and the offence does not apply to conduct that is part of a lawful medical procedure.

Concealing body of dead child

Clause 67 criminalises the intentional disposal of a child's body with the intention of concealing the child's birth. The offence covers circumstances where the child dies during childbirth.

Carrying out abortion

Clause 68 criminalises the intentional causing of a miscarriage where the conduct is not a lawful medical procedure.

Supplying items for miscarriage

Clause 69 criminalises the supply of a thing, when the person believes the thing will be used to commit an offence under clause 68.

DIVISION 4.5—OTHER OFFENCES

Misconduct in relation to dead human bodies

Clause 70 contains offences relating to misconduct in relation to dead human bodies. Subclause (1) makes it an offence for a person to intentionally do something that is indecent or improper in relation to a body or human remains, reckless as to whether the conduct is indecent or improper.

The question of whether conduct is indecent or improper according to the standards of an ordinary person, is one of fact.

Subclause (4) makes it an offence for a person to fail to comply with a legal obligation they have in relation to burial or cremation of a body or remains. Strict liability applies to the circumstance that the other person in fact has the obligation, meaning that there is no fault element for this. However, the defence of mistake of fact is available to a defendant.

PART 5—OFFENCES CAUSING HARM AND RELATED OFFENCES

DIVISION 5.1—ASSAULT

Intentionally causing serious harm

Clause 71 makes it an offence to intentionally cause serious harm to someone else.

Serious harm is defined in clause 8 as harm that endangers, or is likely to endanger, someone's life or that is, or is likely to be, significant and longstanding.

The offence attracts a penalty of 15 years imprisonment, or if aggravating circumstances apply, 20 years. Circumstances of aggravation are set out in clause 79.

Recklessly causing serious harm

Clause 72 makes it an offence to intentionally engage in conduct that causes serious harm to someone else, reckless about whether the conduct would cause serious harm. Recklessness in this context amounts to an awareness of a substantial and unjustifiable risk of serious harm to someone.

The offence attracts a penalty of 12 years imprisonment, or if aggravating circumstances apply, 15 years. Circumstances of aggravation are set out in clause 79.

Negligently causing serious harm

Clause 73 makes it an offence to intentionally engage in conduct that causes serious harm to someone else, negligent about whether the conduct would cause serious harm.

The offence attracts a penalty of 10 years imprisonment, or if aggravating circumstances apply, 13 years. Circumstances of aggravation are set out in clause 79.

Intentionally causing harm

Clause 74 makes it an offence to intentionally cause harm to someone else.

Harm is defined in clause 8 to include physical or mental harm. 'Physical harm' and 'mental harm' are also defined terms in clause 8.

The offence attracts a penalty of 7 years imprisonment, or if aggravating circumstances apply, 9 years. Circumstances of aggravation are set out in clause 79.

Recklessly causing harm

Clause 75 makes it an offence to intentionally engage in conduct that causes harm to someone else, reckless about whether the conduct would cause harm. Recklessness in this

context amounts to an awareness of a substantial and unjustifiable risk of harm to someone.

The offence attracts a penalty of 5 years imprisonment, or if aggravating circumstances apply, 7 years. Circumstances of aggravation are set out in clause 79.

Causing harm to public official

Clause 76 is a specific offence aimed at protection of public officials from intentional harm. The prosecution must establish that the offender intended to cause the harm believing the victim to be a public official and the other person actually is a public official.

The offence attracts a penalty of 8 years imprisonment, or if aggravating circumstances apply, 10 years. Circumstances of aggravation are set out in clause 79.

Causing harm to police officer

Clause 77 contains a similar offence to that under clause 76, in relation to police officers.

The offence attracts a penalty of 8 years imprisonment, or if aggravating circumstances apply, 10 years. Circumstances of aggravation are set out in clause 79.

Common assault

Clause 78 is the basic assault offence. The offence is committed if a person intentionally does something resulting in direct or indirect force to someone else, or makes direct or indirect contact with someone knowing that the other person might reasonably object in the circumstances, or makes a threat of direct or indirect force that the other person reasonably believes is able to be carried out. The offence is only made out if the other person does not consent (or consents only because of a dishonest representation by the offender).

Subclause (2) makes it clear that the offence does not cover conduct that is acceptable to a reasonable person as incidental to normal social interactions or community life.

The offence attracts a penalty of 12 months imprisonment, or if aggravating circumstances apply, 2 years. Circumstances of aggravation are set out in clause 79.

Aggravating circumstances for assault offences

Clause 79 sets out the circumstances of aggravation for the assault offences. If an aggravating circumstance exists it will increase the maximum penalty for any offence that so provides. Aggravating circumstances are:

- the defendant is, or pretends to be, armed with an offensive weapon

- the defendant is with 1 or more other people
- the defendant intends to commit another offence
- the defendant intends to avoid the lawful arrest or detention of anyone.

DIVISION 5.2—ENDANGERING LIFE OR SAFETY

Endangering life

Clause 80 makes it an offence (punishable by 10 years imprisonment) to intentionally do or omit to do something that endangers another person’s life, reckless about endangering the other person. Recklessness in this context amounts to an awareness of a substantial and unjustifiable risk that the other person’s life would be endangered.

Risking serious harm

Clause 81 makes it an offence (punishable by 7 years imprisonment) to intentionally do or omit to do something that causes risk of serious harm to someone else, reckless about that risk. Recklessness in this context amounts to an awareness of a substantial and unjustifiable risk that the conduct in question would cause a risk of serious harm.

Serious harm is defined in clause 8 as harm that endangers, or is likely to endanger, someone’s life or that is, or is likely to be, significant and longstanding.

Risking serious harm intending to commit offence or avoid apprehension

Clause 82 makes it an offence (punishable by 10 years imprisonment) to intentionally do or omit to do something that causes risk of serious harm to someone else, reckless about that risk. The offender must also intend to commit an offence or intend to avoid the lawful arrest or detention of any person.

It is not necessary for the prosecution to prove that the offender intended to commit a particular offence.

Risking harm

Clause 83 contains an offence similar to the offence in clause 81 but in relation to a risk of harm rather than serious harm, and carries a lower penalty of 5 years imprisonment. Harm is defined in clause 8 to include physical or mental harm. ‘Physical harm’ and ‘mental harm’ are also defined terms in clause 8.

Risking harm with intent to commit offence or avoid apprehension

Clause 84 contains an offence similar to the offence in clause 82 but the risk is of harm rather than serious harm. It is punishable by a lower penalty of 8 years imprisonment. Like

the offence of risking serious harm with intent to commit an offence or avoid arrest or detention, it is not necessary for the prosecution to prove that the offender intended to commit a particular offence.

Obstructing medical personnel

Clause 85 provides that it is an offence to intentionally obstruct medical personnel (public or private) responding to a medical issue or attempting to give treatment.

PART 6—OTHER OFFENCES AGAINST THE PERSON

Stalking

Clause 86 creates the new offence of stalking, which is designed to capture behaviour that stops short of assault, but which could raise fear or apprehension in the victim. To be found guilty of stalking, a defendant must intentionally engage in conduct either for an extended period or on more than one occasion and the conduct (which includes a broad range of activities including following, contacting, intimidating, harassing and threats of violence) must be such as would cause a reasonable person to fear or apprehend violence against anyone or anyone's property.

It is sufficient if the defendant is reckless as to whether his or her actions would be likely to cause apprehension or fear in the victim or someone else regardless of whether the defendant actually intended that result. This reflects the fact that stalking behaviour is to be taken seriously notwithstanding that the offender may not actually intend to cause his or her victim fear and provides victims with an appropriate level of protection from these behaviours.

The question whether conduct would cause a reasonable person to fear or apprehend violence is a question of fact to be determined by the decider of fact.

The offence is not intended to capture conduct that is reasonable in the circumstances and subclause (3) specifies conduct not covered by the clause.

Kidnapping

Clause 87 contains the offence of kidnapping someone with the intention of holding the person hostage or for ransom, or taking or sending them out of Nauru, or to commit an offence punishable by at least 1 year imprisonment against anyone. For the offence to be made out the person kidnapped must be an adult who does not consent to being taken or detained, or a child. It is sufficient if the offender is reckless about taking or detaining the other person.

'Child' for this clause means a person under 18 years (see clause 8) and strict liability applies to whether the person is a child.

The offence is punishable by 20 years imprisonment if the victim is a child and 15 years otherwise.

Deprivation of liberty

Clause 88 makes it an offence to intentionally take or detain someone else intending to unlawfully confine or imprison them. For the offence to be made out the person deprived of liberty must be an adult who does not consent to being confined or imprisoned, or a child. It is sufficient if the offender is reckless about confining or imprisoning the other person. 'Child' for this clause means a person under 18 years (see clause 8) and strict liability applies to whether the person is a child.

The offence is punishable by 10 years imprisonment if the victim is a child and 7 years otherwise.

Removing child unlawfully

Clause 89 makes it an offence to intentionally take a child from someone else's care (or refuse or fail to give a child back to someone else) with the intention of preventing someone else from exercising his or her parental responsibility for the child.

'Child' for this clause means a person under 18 years (see clause 8) and strict liability applies to whether the victim is a child.

Defences for deprivation of liberty offences

Clause 90 explains when a person is not criminally responsible for an offence of kidnapping a child, deprivation of liberty of a child or unlawfully removing a child. There is no criminal responsibility for the reasonable actions of a parent, guardian or teacher (or someone else with parental responsibility) in detaining a child for the purpose of correcting the child's behaviour, as long as this detention is reasonable. It is also a defence if the person took or detained the child in the honest exercise of an entitlement to have the child.

The question whether detention is reasonable is a question of fact to be determined by the decider of fact.

It is also a defence to the offence of unlawful removal of a child if the offender believes on reasonable grounds that his or her actions were necessary for the child's safety. This is to ensure that, where a child is living in an abusive or unsafe environment from which they wish to escape, the child is not returned to an unsafe place.

Threatening to kill

Clause 91 contains the most serious threat offence, committed if a person threatens to kill someone and intends the threatened person to fear the threat will be carried or is reckless about whether the other person fears it will be carried out. It includes an important qualifier that the fear caused by the threat be reasonable.

'Threat' is defined in clause 8 to cover all modes of threatening behaviour includes direct and indirect communication and conduct.

Threatening to cause serious harm

Clause 92 provides for the offence of threatening to cause serious harm. This offence has the same fault elements as the offence of threatening to kill and also includes the important qualifier that the fear caused by the threat be reasonable.

'Threat' is defined in clause 8 to cover all modes of threatening behaviour includes direct and indirect communication and conduct. Serious harm is defined in clause 8 as harm that endangers, or is likely to endanger, someone's life or that is, or is likely to be, significant and longstanding.

Threatening to cause serious harm to public official

Clause 93 is a specific offence targeting threats to cause serious harm to public officials made because the person is believed to be a public official and actually is a public official. This offence has the same fault elements as the offence of threatening to kill and also includes the important qualifier that the fear caused by the threat be reasonable.

Neglecting child or vulnerable adult

Clause 94 makes it an offence for someone who is the responsible carer for a child or vulnerable adult to intentionally fail to care for that child or adult. The person's conduct must cause a significant detrimental effect (whether temporary or permanent) to the physical, psychological or emotional wellbeing of the person to be cared for, and it is sufficient if the offender is reckless about the effect the person's wellbeing.

'Child' for this clause means a person under 18 years (see clause 8).

Failure to protect child or vulnerable adult

Clause 95 creates a new offence for someone (aged 18 or over) who has a duty of care in relation to a child or vulnerable adult to fail to take reasonable steps to protect that child or adult knowing of a likelihood of serious harm or sexual assault. Subclauses (4) and (5) explains the meaning of duty of care in the context of this clause, and strict liability applies

to the existence of the duty. This new offence, which carries a maximum penalty of 10 years imprisonment, is designed to ensure that adults who ‘turn a blind-eye’ to abuse of a child or vulnerable adult in their household will be guilty of an offence. This offence can also apply to teachers, doctors or other carers or relatives of a child or vulnerable person, who know or suspect abuse but fail to take reasonable steps to provide protection from harm.

‘Child’ for this clause means a child under 18 years (see clause 8).

Statutory duty—carer to provide necessities of life to child or vulnerable adult

Clause 96 places a duty on the carer for a child or vulnerable adult. The carer must provide the necessities of life and take reasonable steps to protect the child or vulnerable adult from death or injury.

‘Child’ for this clause means a child under 18 years (see clause 8).

Statutory duty—person providing medical treatment

Clause 97 places a duty on a person who provides medical treatment to someone else. The person must ensure that he or she has the necessary knowledge or skill and take reasonable steps to protect the other person from death or injury. Subclause (2) makes it clear that the duty does not apply to a Good Samaritan.

Statutory duty—person in charge of dangerous object etc

Clause 98 places a duty on anyone who has, designs, makes, operates or maintains a thing that may endanger human life. The person must take reasonable steps to protect people’s lives.

Statutory duty—person to avoid omissions endangering life

Clause 99 places a duty on anyone who has agreed to do something if not doing it would endanger the life, safety or health of someone else. The duty applies only if the danger arises from something, or in circumstances, under the person’s control.

Effect of breach of statutory duty

Clause 100 sets out the consequences of a person not performing a duty imposed under clause 96, 97, 98 or 99. This clause deems any consequences to the life or health of the person to whom the duty was owed to have been caused by the person. Also, if the failure or omission is an offence, it deems the person to have committed the offence.

PART 7—SEXUAL OFFENCES

DIVISION 7.1—GENERAL

Abolition of particular rules about corroboration

Clause 101 abolishes any requirement for corroboration of the evidence of a witness for a conviction for an offence involving an unlawful sexual act. This supports compliance with the Convention on the Elimination of all forms of Discrimination Against Women.

Aggravating circumstances for sexual offences

Clause 102 sets out the aggravating circumstances for those offences under this division which provide for a penalty if aggravating circumstances apply, including threats to inflict physical harm with an offensive weapon, depriving the victim of liberty or giving the victim alcohol, a drug or other intoxicating substances.

Aggravating circumstances of intentionally breaking and entering into a building to commit the offence (or any other offence punishable by imprisonment for at least 1 year) or being intentionally in the company of another do not apply to an offence under clause 107 or 119.

Defence for offences under Part 7

Clause 103 sets out a specific defence to the offences in this part, which is in addition to any other defences that may apply. This clause provides a defence if the relevant conduct was for a legitimate law enforcement purpose or a legitimate medical or hygienic purpose.

DIVISION 7.2—UNLAWFUL SEXUAL ACTS

Application to marriage and de facto partners

Clause 104 clarifies that the offences in this division apply even if the people concerned are married or in a de facto relationship. This supports compliance with the Convention on the Elimination of all forms of Discrimination Against Women.

Rape

Clause 105 contains the offence of rape, broadening the range of conduct previously captured by rape to include anal sex, oral sex and the penetration of the genitals or the anus by any object or any part of the other person's body.

Subclause (1) provides that it is an offence to intentionally engage in sexual intercourse without the other person consenting. Subclause (2) provides that it is an offence to intentionally cause someone else to do an act that is sexual intercourse with a third person,

or sexual self-penetration, or that constitutes the offence of bestiality, without the other person consenting.

For either offence to be made out the offender must know that the other person does not consent or is recklessly indifferent about the consent. Reckless indifference to consent has the meaning given in clause 20 and is a question of fact.

The offences are punishable by 20 years imprisonment, or 25 years if aggravating circumstances apply. Clause 102 deals with aggravating circumstances for sexual offences.

Indecent acts

Clause 106 contains 3 offences about indecent acts.

Subclause (1) provides that it is an offence to intentionally touch someone else in an indecent way, reckless about whether it is indecent and without the other person consenting. Subclause (2) provides that it is an offence to intentionally cause someone else to touch the person, a third person, themselves or an animal in an indecent way, reckless about whether it is indecent and without the other person consenting. Subclause (3) covers an intentional indecent act of the offender towards someone else, reckless about whether it is indecent and without the other person consenting.

In each case, for the offence to be made out the offender must know that the other person does not consent or is recklessly indifferent about the consent. Reckless indifference to consent has the meaning given in clause 20 and is a question of fact.

Whether something is indecent according to the standards of an ordinary person is a question of fact to be determined by the decider of fact.

The offences are punishable by 5 years imprisonment, or 8 years if aggravating circumstances apply. Clause 102 deals with aggravating circumstances for sexual offences.

Engaging person to provide commercial sexual services

Clause 107 provides for a new offence to intentionally engage, employ, cause or permit someone else to provide a commercial sexual service. 'Commercial sexual service' is defined in clause 8 to cover a wide range of sexual activity under a commercial arrangement.

The offence is punishable by 5 years imprisonment, or 7 years if aggravating circumstances apply (for example the victim suffers physical harm in the course of the offence).

Holding interest in premises used for commercial sexual services

Clause 108 criminalises the holding of an interest in premises with the knowledge that the premises are or will be made available for commercial sexual services. Subclause (1)(a) provides a list of interests to which the offence applies. Strict liability applies to this element of the offence, meaning that the prosecution does not have to prove intention or any other mental element in relation to the holding of the interest, however the defence of mistake of fact is available to a defendant.

Compelling prostitution and giving of earnings from prostitution

Clause 109 contains a new offence of forced prostitution and criminalises intimidatory conduct that substantially contributes to:

- someone (whether an adult or child) engaging in prostitution, if the offender intended the other person to enter into or remain in prostitution; or
- someone (whether an adult or child) giving the offender or anyone else money or reward gained from prostitution, if the offender intended that person to give the money or reward earned.

'Intimidatory conduct' is defined in subclause (3) broadly to capture explicit or implicit threats or promises including in relation to improper use of power or authority, accusations or disclosures about offences or misconduct and supply or withholding of drugs.

Both offences are punishable by 25 years imprisonment.

Observing private acts

Clause 110 makes it an offence to intentionally observe someone doing a private act without the other person's consent, knowing or being recklessly indifferent about whether the person consents. The prosecution must also establish that the defendant knew or was reckless about the fact that it was a private act.

The offence is not intended to capture conduct that is reasonable in the circumstances and so the circumstances must be such that a reasonable person would reasonably expect privacy. Subclause (2) clarifies that the question of 'reasonableness' is a question of fact.

Taking images of private acts without consent

Clause 111 makes it an offence to intentionally and without consent take an image of another person doing a private act. Like the offence in clause 110, the offender must know or be recklessly indifferent about whether the other person consents. Also, the prosecution

must establish that the defendant knew or was reckless about the fact that the act was private.

Similarly to clause 110, it is not intended to capture reasonable conduct and so the circumstances must be such that a reasonable person would reasonably expect privacy. Subclause (2) clarifies that the question of 'reasonableness' is a question of fact.

Taking images of private parts without consent

Clause 112 makes it an offence to intentionally and without consent take an image of another person's private parts (covered or uncovered). Like the offence in clause 110, the offender must know or be recklessly indifferent about whether the other person consents.

As for clauses 110 and 111, it is not intended to capture reasonable conduct and so the circumstances must be such that a reasonable person would reasonably expect this not to happen. Subclause (2) clarifies that the question of 'reasonableness' in this context is a question of fact.

A person cannot, on the same facts, be convicted of both this offence and an offence under clause 110.

Installing device to facilitate observation or image-taking

Clause 113 is an offence of intentionally installing a device or constructing or adapting any structure with the intention of committing an offence under clause 110, 111 or 112.

Incest

Clause 114 contains the offence of incest. The offence is committed if a person intentionally has sexual intercourse with someone with whom the person knows they are in a prohibited relationship for the purposes of this offence (for example parent, brother or sister, grandchild). The offence only applies if both people are 16 years or older.

Subclause (3) and (4) provide that there is no defence of consent to this offence and the offence does not apply to someone who did not consent to the sexual intercourse.

Bestiality

Clause 115 criminalises intentional physical sexual activity with an animal.

DIVISION 7.3—SEXUAL ACTS WITH CHILDREN

The Bill provides separate offences for rape and indecent acts where the victim is a child. These offences have more serious penalties than the equivalent offences involving adults, including even higher penalties if the child is under 13 years old.

Importantly, for offences involving sexual conduct below the age of consent (set for both males and females at 16), it is not a defence to prove the child consented, unless the offender was within 2 years of age of the victim. This supports compliance with the Convention of the Rights of the Child, which considers conduct between children with a significant age difference to be abuse, while protecting consenting teenagers from the detriment of a criminal record and allowing the issue to be addressed through means other than criminal punishment.

Rape of child under 16 years old

Clause 116 sets out the offence of rape as it applies to children. For this and certain other sexual offences involving children the relevant age is under 16 years.

Subclause (1) provides that a person commits an offence by intentionally engaging in sexual intercourse with a child. ‘Sexual intercourse’ is defined in clause 8 to cover a broad range of conduct. Subclause (2) provides that a person commits an offence by intentionally causing a child to engage in sexual acts including the offence of bestiality.

Both offences are punishable by life imprisonment if the victim is under 13 years old or an aggravating circumstance applies, and 25 years otherwise. Aggravating circumstances for a sexual offence are set out in clause 102.

Although absolute liability applies to the circumstance that the other person is under 16 years old (which means the defence of mistake of fact is not available), other defences apply to these offences (see clause 127).

Indecent acts in relation to child under 16 years old

Clause 117 contains 3 offences about indecent acts in relation to a child.

Subclause (1) provides that a person commits an offence by intentionally indecently touching a child, reckless about whether the touching is indecent. Subclause (2) provides that it is an offence to intentionally cause a child to touch the person, a third person, the child themselves or an animal in an indecent way, reckless about whether it is indecent. Subclause (3) covers an intentional indecent act of the offender towards a child, reckless about whether it is indecent.

Whether something is indecent is a question of fact to be determined by the decider of fact applying the standards of an ordinary person.

All three offences are punishable by 15 years imprisonment if the victim is under 13 years old or an aggravating circumstance applies, and 12 years otherwise. Aggravating circumstances for a sexual offence are set out in clause 102.

Although absolute liability applies to the circumstance that the child is under 16 years old (which means the defence of mistake of fact is not available), other defences apply to these offences (see clause 127).

Causing etc. child under 16 years old to engage in sexual activity

Clause 118 provides that it is an offence to intentionally cause or procure (or make it easier to cause or procure) a child to do an act that is a sexual activity. Subclause (1)(c) lists the activities covered by the offence and includes any act with or towards the child that is indecent. This is a new broad offence which covers preparatory conduct by capturing, for example, grooming a child for sex.

Whether something is indecent is a question of fact applying the standards of an ordinary person.

The offence is punishable by 15 years imprisonment if the victim is under 13 years old or an aggravating circumstance applies, and 12 years otherwise. Aggravating circumstances for a sexual offence are set out in clause 102.

Although absolute liability applies to the circumstance that the child is under 16 other specific defences apply to these offences (see clause 127).

Engaging child to provide commercial sexual services

Clause 119 states that it is an offence to intentionally ask, engage, employ, cause or permit a child to provide a commercial sexual service. 'Commercial sexual service' is defined in clause 8 to cover a wide range of sexual activity under a commercial arrangement.

Strict liability applies to the circumstance that the victim is a child.

The offence is punishable by life imprisonment if the child is under 13 years old or an aggravating circumstance applies, and 25 years otherwise. Aggravating circumstances for a sexual offence are set out in clause 102.

Obtaining benefits from commercial sexual services with child

Clause 120 contains two offences relating to obtaining benefits from commercial sexual services with a child. It is an offence to arrange to obtain a benefit from a child providing a

commercial sexual service. It is also an offence to obtain the benefit, knowing that it is from the provision of commercial sexual services by a child.

'Commercial sexual service' is defined in clause 8 to cover a wide range of sexual activity under a commercial arrangement

Strict liability applies to the circumstance that the victim is a child.

The offences are punishable by 17 years imprisonment if the child is under 13 years old, and 12 years otherwise.

Observing private acts of child

Clause 121 makes it an offence to intentionally observe a child doing a private act, in circumstances where a reasonable person would reasonably expect that the child would be given privacy. The prosecution must also establish that the defendant knew or was reckless about the fact that it was a private act.

Strict liability applies to the circumstance that the victim is a child.

The question of whether a reasonable person would reasonably expect that the child would be given privacy for the act is one of fact.

The offence is punishable by 15 years imprisonment if the child is under 13 years old and 10 years otherwise.

Taking images of private acts of child

Clause 122 makes it an offence to intentionally take an image of a child doing a private act, in circumstances where a reasonable person would reasonably expect that the child would be given privacy. The prosecution must also establish that the defendant knew or was reckless about the fact that it was a private act.

Strict liability applies to the circumstance that the victim is a child.

The question of whether a reasonable person would reasonably expect that a child would be afforded privacy for the act is one of fact.

The offence is punishable by 15 years imprisonment if the child is under 13 years old and 10 years otherwise.

Taking images of private parts of child

Clause 123 makes it an offence to intentionally take an image of a child's private parts (covered or uncovered) in circumstances where a reasonable person would reasonably expect this not to happen.

A person cannot, on the same facts, be convicted of both this offence and an offence under clause 121.

Strict liability applies to the circumstance that the victim is a child.

The question of whether a reasonable person would reasonably expect that an image of a child's private parts would not be taken is one of fact.

The offence is punishable by 15 years imprisonment if the child is under 13 years old and 10 years otherwise.

Installing device to facilitate observation or image-taking of child

Clause 124 is an offence of intentionally installing a device or constructing or adapting any structure with the intention of committing an offence under section 121, 122 or 123.

The offence is punishable by 15 years imprisonment if the child is under 13 years old and 10 years otherwise.

Promoting or organising travel for unlawful sexual activity with child under 16 years old

Clause 125 criminalises activity relating to travel or transport to engage in sexual activity with a child outside Nauru, including promoting such activity.

The offence is punishable by 10 years imprisonment if the child is under 13 years old and 7 years otherwise.

Consent not a defence

Clause 126 provides that there is no defence of consent for offences involving sexual acts with children.

Defences for certain offences under Division 7.3

Clause 127 sets out specific defences to the offences at clauses 116, 117 and 118. These defences apply only if the child was at least 13 years old and there was no aggravating circumstance. Aggravating circumstances for a sexual offence are set out in clause 102.

This clause provides a defence if the defendant proves that he or she took reasonable steps to find out the age of the child and honestly and reasonably believed that the child was at least 16 years old and wished to consent to the conduct making up the offence.

Subclause (3) provides that it is also a defence if the defendant proves that the child was within 2 years of age of the defendant, and the child wished to consent.

DIVISION 7.4—EVIDENCE ABOUT COMPLAINANT

Application—div 7.4

Clause 128 provides that this division applies to any criminal proceeding (including the trial, bail, committal, sentencing or appeal) relating to a charge for a sexual offence.

Meaning of *sexual history evidence*

Clause 129 explains what is meant by evidence of a complainant's sexual history for this division.

No questions or evidence about complainant's sexual reputation

Clause 130 prohibits questioning or evidence about a complainant's sexual reputation.

Leave required for questions or evidence about complainant's sexual activities

Clause 131 requires the leave of the court for any cross-examination or admission of evidence about a complainant's sexual activities.

Notice of application for leave

Clause 132 requires 7 days notice to the Director of Public Prosecutions of an application for leave to cross-examine or admit evidence about the complainant's sexual activities.

Content of application for leave

Clause 133 sets out the requirements for an application for leave to cross-examine or admit evidence about a complainant's sexual activities.

Hearing application for leave

Clause 134 provides that an application for leave (under clause 131) to cross-examine or admit evidence about a complainant's sexual activities must, if requested by the accused, be heard in the absence of the complainant.

Deciding application for leave

Clause 135 provides that leave may not be given unless the proposed evidence has substantial relevance and it is in the interests of justice to allow the cross-examination or admission of the evidence, and sets out the factors to be taken into account.

Court must give reasons if leave granted

Clause 136 requires the court to give and record reasons for any grant of leave to cross-examine or admit evidence about a complainant's sexual activities.

Admissibility of sexual history evidence

Clause 137 provides that sexual history evidence may not be used to support an inference in relation to consent to sexual activity.

Limitation on sexual history evidence

Clause 138 sets out limitations on the relevance of sexual history evidence in criminal proceedings related to sexual offences.

PART 8—OFFENSIVE MATERIAL AND OTHER OFFENCES

Dealing with pornography

Clause 139 makes it an offence to intentionally deal with pornographic material that is likely to offend an ordinary person (including by advertising, supplying, selling, communicating, or producing material or entering into an arrangement for such a purpose), reckless about whether the material is pornography and reckless about whether an ordinary person would be likely to be offended. Recklessness in this context amounts to an awareness of a substantial and unjustifiable risk (that the material is pornography or a person would be likely to be offended).

'Pornography' is defined in clause 8.

The question whether an ordinary person is likely to be offended is a question of fact.

Dealing with abuse material

Clause 140 makes it an offence to intentionally deal with abuse material that is likely to offend an ordinary person, reckless about whether the material is abuse material and reckless about whether an ordinary person would be likely to be offended. Subclause (1) sets out the various ways of dealing with material that is captured by the offence.

'Abuse material' is defined in clause 8 to cover material that is of a more serious nature than pornography.

The question whether an ordinary person is likely to be offended is a question of fact.

Involving child to produce or perform in offensive material

Clause 141 criminalises certain conduct relating to involving children in the production of offensive material.

Subclause (1) makes it an offence for a person to engage in conduct intending to cause or procure (or make it easier to cause or procure) a child to be involved in the making of pornography or abuse material that is likely to offend an ordinary person, reckless about whether the material is pornography and reckless about whether an ordinary person would be likely to be offended. Recklessness in this context amounts to an awareness of a substantial and unjustifiable risk (that the material is pornography or abuse material, or that a person would be likely to be offended).

Subclause (2) creates a similar offence in relation to involvement by a child in a pornographic or abusive performance.

Strict liability applies to whether the victim is a child (in this context under 18 years), meaning that there is no fault element for this. However, the defence of mistake of fact is available to a defendant.

'Pornography', 'abuse material' and 'pornographic or abuse performance' are defined in clause 8.

The question whether an ordinary person is likely to be offended is a question of fact.

Both offences are punishable by 20 years imprisonment if the victim is under 13 years old and 15 years otherwise.

Dealing with offensive material involving child

Clause 142 makes it an offence for a person to deal with pornography or abuse material that describes, depicts or represents someone who is, appears to be or is implied to be a child and in a way that is likely to offend an ordinary person, reckless about whether the material is pornography and reckless about whether an ordinary person would be likely to be offended.

'Pornography' and 'abuse material' are defined in clause 8.

Strict liability applies to whether the person depicted etc is a child (in this context under 18 years), meaning that there is no fault element for this. However, the defence of mistake of fact is available to a defendant.

The question whether an ordinary person is likely to be offended is a question of fact.

This offence is punishable by 15 years imprisonment if the person depicted etc is under 13 years old and 10 years otherwise.

Exposing child to offensive material

Clause 143 provides that it is an offence to intentionally send, show or make pornography or abuse material available to a child (in this context under the age of 18 years) that is likely to offend an ordinary person, reckless about whether the material is pornography or abuse material and reckless about whether it is likely to offend an ordinary person.

'Pornography' and 'abuse material' are defined in clause 8.

Strict liability applies to whether the victim is a child (in this context under 18 years), meaning that there is no fault element for this. However, the defence of mistake of fact is available to a defendant.

The question whether an ordinary person is likely to be offended is a question of fact.

This offence is punishable by 10 years imprisonment if the child is under 13 years old and 7 years otherwise.

Forfeiture of offensive material to government

Clause 144 enables the court to order the forfeiture, destruction or disposal of material relating to an offence under this division if someone has been charged with the offence.

Defences for offensive material offences

Clause 145 sets out specific defences to the offences in this division, which are in addition to any other defences that may apply.

Subclause (1) provides that a person is not criminally responsible for an offence in certain circumstances including if the material relates to legal, medical or scientific knowledge, or is of artistic or literary merit, or the person is an internet provider unaware of the use of his or her facilities for the relevant conduct, or the person did not solicit the material and disposed of it on becoming aware of it.

Subclause (2) contains a defence specific to the offence of dealing with offensive material involving a child. A person is not criminally responsible for the offence if the material is

pornography and the child depicted was at least 13 years old and within 2 years of age of the person and consented to the possession, control or production of the material.

Distributing image of private act

Clause 146 is a new offence targeting a form of sexual exploitation where images of a person doing a private act, are distributed without the person's consent (for example, by posting the images on social media). It is an offence to intentionally and without consent, distribute images of a person doing a private act if the distribution is contrary to community standards of acceptable conduct.

Threatening to distribute image of private act

Clause 147 makes it an offence for a person to make a threat to someone to distribute an image of that person or another person doing a private act, intending to cause the person to fear that the threat will be carried out or reckless about whether the person fears it will be carried out. It includes an important qualifier that the fear caused by the threat be reasonable.

Serious animal cruelty

Clause 148 criminalises intentional cruelty to animals where the cruelty causes pain or death and the person is reckless about that fact. Recklessness in this context amounts to an awareness of a substantial and unjustifiable risk of causing pain or death.

Subclause (2) provides a defence where the conduct happened as part of routine agricultural or animal husbandry activities, recognised religious or cultural practices, the killing of pests, or veterinary practice.

Bigamy

Clause 149 contains the offence of bigamy. A person commits this offence if he or she intentionally marries someone while already married to another living person.

Strict liability applies to the person having another spouse and to whether that spouse is alive. The defence of mistake or ignorance of fact is specifically excluded by subclause (3), however it is a defence if at the time of the marriage ceremony the defendant's first spouse had been absent for 7 years and the defendant reasonably believed that the first spouse was dead. A person is also not criminally responsible for this offence if the person was under a mistaken but reasonable belief that a court has dissolved or declared void the marriage to the first spouse.

PART 9—THEFT, FRAUD, BRIBERY AND RELATED OFFENCES

The offences of theft, fraud and property damage are drafted to ensure that they will apply where the offender is a co-owner of the property, but has acted dishonestly to obtain a benefit for themselves without the consent of other co-owners. Importantly, the Bill removes rules which preclude a spouse from being capable of stealing or committing a property offence, in relation to property belonging to the other spouse.

DIVISION 9.1—INTERPRETATION

Meaning of ‘dishonest’ and ‘dishonestly’

Clause 150 defines the element of ‘dishonesty’ both objectively (dishonest to the standards of ordinary people) and subjectively (the person knows he or she is being dishonest by the standards of ordinary people). By referring to the standards of ordinary people, the definition allows locally accepted traditions, customs and approaches to be taken into account. A person acts dishonestly if he or she engages in conduct that is dishonest or done with a dishonest intent.

Subclause (3) makes it clear that the question whether a person is dishonest, or acts dishonestly, is one of fact.

Meaning of ‘gain’ and ‘loss’ etc

Clause 151 defines ‘cause’, ‘gain’, ‘loss’ and ‘obtain’ for theft, fraud, bribery and related offences.

‘Gain’ is defined as any temporary or permanent gain of property or services and includes keeping what a person already has. For example, if a person alters a record to establish ownership of a vehicle he or she dishonestly acquired six months earlier it would still be a gain under this definition even though the person already had the vehicle at the time the record is altered.

‘Loss’ is defined as any temporary or permanent loss of property and includes not getting what one might get. While there will invariably be a loss to someone whenever there is a gain for another, in some cases it is more appropriate to the facts of the case to prove the defendant dishonestly caused a loss rather than obtained a gain.

The definition of ‘obtain’ is an inclusive definition so that in addition to obtaining for oneself the term also covers obtaining for another person.

When does property ‘belong’ to a person

Clause 152 clarifies when property belongs to a person. Importantly, property belongs to each person having possession and control of it, or having in it any proprietary right or interest. This ensures that an owner of property may be guilty of theft against another owner of that property (for example a joint owner dishonestly taking the jointly owned property).

Permanently deprive another person of property

Clause 153 defines the term ‘intends to permanently deprive’. It ensures that intention to permanently deprive someone of property includes situations where the person intends to deal with the property in such a way that it will not be able to be returned to the owner in the same condition.

DIVISION 9.2—THEFT

Theft

Clause 154 contains the core offence in this part, which is the offence of theft. It provides that a person commits the offence if he or she dishonestly takes or carries away, or dishonestly uses or deals with, property belonging to another with the intention of permanently depriving the other of the property. The elements of the offence have been explained above. It is important to note that all these elements must exist at the same time in order for the offence to apply.

The penalty structure provides for a sentence of imprisonment between 1 and 7 years depending on the value of the property.

Subclause (2) makes it clear that the taking, carrying away, using or dealing with property is not theft if it is done with the consent of the owner, even where the consent is obtained by deception. For example, a taxi driver deceives a foreign traveller by telling the traveller that the fare for a journey is \$50 when in fact it is \$20 and the traveller hands the driver their bag, allowing the driver to take whatever money is necessary. If the driver takes \$50 from the purse, because of the victim’s consent, the defendant could only be convicted of obtaining by deception.

‘Property’ is defined in clause 8.

Theft in fiduciary relationship

Clause 155 provides for an offence of aggravated theft carrying a maximum penalty of 7 years imprisonment, irrespective of the value of the property. The offence is committed if a person is a fiduciary (that is, in a special relationship of trust) in relation to someone else’s

property and intentionally fails to account to the person for, or deal with, the property or proceeds from the property in accordance with that special relationship.

Whether or not a person is a fiduciary in relation to another person's property requires knowledge of terms or circumstances requiring the person to account to the other person for, or to deal with, the property or any proceeds arising from it, in accordance with that other person's requirements. Subclause (4) makes it clear that the question of whether the circumstances so require the person to account or act in accordance with particular requirements is a question of law.

Looting

Clause 156 provides for an offence of aggravated theft with a penalty structure depending on the value of the property. The offence is committed if a person commits theft in circumstances of natural disaster, civil unrest or industrial dispute and the thing stolen was left unattended because of the death, incapacity or absence of its owner.

Making off without payment

Clause 157 provides that it is an offence for a person, who knows that payment is required or expected for goods and services, dishonestly makes off without payment, intending to avoid payment. It covers circumstances where the owner of the property intends the person to take possession of the property before payment (for example, restaurants) and, at the time when the person dishonestly leaves without payment, possession of the property has already passed to the person.

The offence does not apply to payment for illegal goods or services. Subclause (2) also excludes transactions that are unenforceable as contrary to public policy from the ambit of the offence. This refers to the situation where a transaction is not illegal, but where it is still undesirable for the legal system to enforce the transaction because the transaction is inconsistent with standards of behavior accepted in the general community.

The penalty structure is the same as for the general theft offence, tiered depending on the value of the property in question.

Robbery and aggravated robbery

Clauses 158 and 159

The robbery offences have been simplified and consolidated into two broad offences of robbery and aggravated robbery.

Clause 158 sets out the elements for the robbery offence and is essentially the same in effect as the robbery offence in the Criminal Code. It provides that in addition to the

elements of theft, robbery requires proof that at the time of the theft or immediately before or immediately after, the defendant used force on any person or threatened to use force on any person then and there. It has been made clear that escaping from the scene is a relevant motive. The penalty for this offence is 12 years imprisonment.

Clause 159 is a modernised aggravated robbery offence. It is a separate, more serious robbery offence where the robbery is committed in the company of others, or with an offensive weapon, or causing physical harm to someone else. The term 'offensive weapon' is defined in clause 8. The maximum penalty is 14 years imprisonment.

Burglary

Clause 160 sets out the elements of the offence of burglary. To commit the offence a person must enter or remain in a building, without having the right to enter or remain there, with the intention of stealing or committing another offence that involves causing harm or threatening to cause harm to someone or a serious property offence (defined as an offence involving damage to property and punishable by imprisonment for at least 5 years). To establish burglary there must be no right to enter or remain (for example entering a house through an open door without permission). The prosecution must prove that the defendant knew that he or she had no such right or was reckless about having such a right.

Aggravated burglary

Clause 161 is a new offence of aggravated burglary. Similarly to aggravated robbery, it is a separate, more serious offence where the burglary is committed in the company of others, or with an offensive weapon. Committing the offence at night is also an aggravating factor for this offence. To establish aggravated burglary the prosecution must satisfy all the elements of the basic burglary offence and also prove that one or more of the aggravating factors was present. The maximum penalty is 12 years imprisonment.

Going equipped for theft etc

Clause 162 sets out a preparatory offence of possessing an article with intent to use it in the course of or in relation to committing a theft or related offence or going disguised or with one's face covered with intent to commit theft or a related offence. Related offence is defined as robbery, aggravated robbery, burglary and aggravated burglary. This is an offence that could be committed well before it could be said that an attempted theft or burglary etc has occurred. However it must be proved that the person has an article with intent to use it for theft or one of the offences referred to in subclause (2), or is disguised or has his or her face covered with the intent to commit such an offence.

Going equipped with offensive weapon for theft etc

Clause 163 contains a preparatory offence similar to clause 162 except that it applies to a person who has an offensive weapon with intent to use it in the course of or in relation to committing a theft or related offence, and carries a higher penalty of 5 years imprisonment. The term 'offensive weapon' is defined in clause 8.

Being found in certain places without lawful authority or excuse

Clause 164 provides for a minor trespass offence whereby a person commits an offence by entering or remaining at a place without the consent of the owner. The places covered by the offence are a dwelling-house, shop, office, factory, garage, out-house or other building, an enclosed yard, garden or other area, a ship or other vessel or an area in which mining operations are being carried on.

The general defence of lawful authority will apply to this offence as it does to all offences.

Receiving

Clause 165 sets out the elements of the offence of receiving. It provides that a person commits an offence if he or she receives property that was unlawfully obtained, knowing or reckless as to whether the property was unlawfully obtained. While the elements of this offence are largely covered by offences ancillary to theft, a separate receiving offence is necessary to reflect the common understanding of a form of criminality which is different from theft. This offence has been simplified and is considerably broader than the offence in the Criminal Code (which is limited to property obtained as a result of an indictable offence and requires knowledge that the property was unlawfully obtained).

Subclause (4) makes it clear that after the property is restored the offence ceases to apply to it. The same is the case where the person who previously had it ceases to have a right to its restitution because title has been acquired by someone else. There is a public interest in encouraging people to return stolen property or to establish ownership where there is a dispute over the property.

DIVISION 9.3—FRAUD

Fraud relates to the dishonest obtaining of a benefit, or causing a loss, by deception or other means (for example, by making a false representation, failing to disclose information when there is a duty to do so, or by abusing one's position in order to make a gain or to cause a loss to someone else). This division replaces multiple offences relating to fraud that unnecessarily apply different terminology and penalties with consolidated and streamlined offences. The 2 key offences in the part are obtaining property by deception (clause 167)

and obtaining a financial advantage or causing a financial disadvantage by deception (clause 168).

Meaning of 'deception'

Clause 166 defines 'deception' as any deception, whether it is by words or by conduct and whether it is about a fact, the law or the intentions of any person (not just the person making the deceptive representation). This clause also provides that deception includes any conduct by a person that causes a computer, a machine or an electronic device to make a response that the person is not authorised to cause it to make. Therefore a person who obtains money from an automatic teller machine by dishonestly using someone else's card will be caught by this aspect of the definition and the offences in clauses 167 and 168 (assuming all the other elements are made out).

Obtaining property by deception

Clause 167 makes it an offence for a person to dishonestly obtain property belonging to another, by deception and with the intention of permanently depriving the other of the property. Many of the elements of this offence have already been explained in the context of the theft offence. The penalty structure depends on the value of the property and is the same as the penalty for theft and obtaining a financial advantage or causing a financial disadvantage by deception in clause 168.

The word 'by' in the phrase, 'by deception' makes it clear that there must be a causal link between the deception and the obtaining. Simply engaging in a deception is not enough. It must be the cause of obtaining the property.

The general definition of dishonesty in clause 150 applies to this offence (although it is supplemented by subclause (3) which provides that that a person who obtains another's property is not necessarily absolved of dishonesty because he or she is prepared to pay for it). Consequently, in addition to proving a deception, the prosecution must also show that the defendant was dishonest.

Like the offence of theft, the penalty structure provides for a sentence of imprisonment between 1 and 7 years depending on the value of the property.

Obtaining financial advantage or causing financial disadvantage by deception

Clause 168 imposes criminal liability on those who obtain financial advantage or cause financial disadvantage by deception. Obtaining services without payment by means of a deception is a classic instance falling within the scope of this offence. To establish this offence the prosecution must prove that the defendant, by a deception, dishonestly obtained a financial advantage. The maximum penalty is the same as theft and the property

fraud offence in clause 167. This is appropriate given the similarities in the conduct involved.

False statement by promoter

Clause 169 targets specific fraudulent activity that may lead to investment loss and can undermine trust in business ventures. For a person to commit this offence, he or she must know or be reckless about whether the false statement he or she makes, concurs in making or publishes is false in a material particular and also have the intention of inducing someone to acquire a financial product, or to deceive or cause loss to someone, or inducing someone to entrust or advance property to someone else. It is not necessary for the person to be aware of a particular person to be induced deceived.

Dishonestly damaging property

Clause 170 is similar to the property damage offence (at clause 201) but with the fault element of dishonesty. The offence is established if the person causes damage to the property of another person (including where it belongs to the person and the other person) dishonestly and with the intention of obtaining a gain for himself or herself, or for someone else.

Removing boundary marks

Clause 171 provides for an offence of intentionally and dishonestly removing or defacing an object that indicates the boundary of land. For the offence to be committed the person must either have intended to thereby obtain a gain or have acted with the intention of causing a loss or being reckless about causing a loss.

DIVISION 9.4—BRIBERY AND CORRUPTION

The Bill modernizes and streamlines Nauru's offences of bribery, corruption and offences against public administration in a way that is consistent with Nauru's international obligations as a party to the United Nations Convention against Corruption. It addresses significant gaps in the current laws relating to public and private sector corruption and bribery of foreign officials.

Interpretation—Division 9.4

Clause 172 sets out definitions for the bribery and corruption offences. The clause contains a broad definition of 'agent'. The definition of 'public official' (extending to members of parliament and judicial officers) in clause 8 applies. The application to the private sector reflects contemporary understanding of the negative impact that bribery and corruption in both the public and private spheres can have on the community.

Because the bribery and corrupt benefit offences will apply to the public and private sectors, common terms need to be used to define the class of people affected. An agent is a person who acts on behalf of another person with that other person's actual or implied authority and the principal is the other person on whose behalf the agent acts. The definition then lists categories of people who clearly fall within the concept of agent. However, the definition is in inclusive terms so that someone else not listed in the provision, who acts for another with actual or implied authority can be an 'agent'.

It is important to read the definition of agent with subclause (2) which extends the meaning of the concepts of agent and principal to cover people who are, have been or who intend to become an agent or principal. This will ensure that a person cannot avoid liability by arranging for payment of a corrupt benefit after resigning or seeking a corrupt benefit just before taking up an appointment.

Whether a benefit is given dishonestly or not is to be determined in accordance with the general test for dishonesty (in clause 150). However, subclause (3) adds a clarification that it may be dishonest even if it is customary for a benefit to be given in the particular trade, profession, or business etc in which the agent is involved.

Bribery

Clause 173 concerns the giving and receiving of bribes. It provides that it is an offence for a person to dishonestly provide, offer or promise to give a benefit to any agent or other person with the intention that the agent will provide a favour. The benefit need not be a benefit to the agent. It could be a benefit to a third person (eg the agent's family) in return for a favour from the agent.

In addition to dishonestly providing, offering or promising a benefit, it must be proved that the defendant did so with the intention of causing the agent to give a favour. This does not mean that the prosecution has to show that there was an actual agreement between the parties but only that the giver intended the agent to provide a favour. Therefore, a person is liable even if, for example, the agent does not "take" the bribe or it is not within the agent's ability to provide the favour.

Subclause (2) concerns the taking of bribes. It provides that it is an offence for an agent to dishonestly ask for, receive or agree to receive a benefit for the agent or someone else, with the intention of providing a favour

Giving or receiving other corrupting benefits

Clause 174 creates new offences that are less serious than bribery and carry a less onerous burden of proof, with no need for the prosecution to prove that the person providing, offering or promising a bribe intended to influence the agent to provide a favour. It is only

necessary to prove that the benefit has the tendency to influence the agent. Similarly, for the taking of bribes, there is no need for the prosecution to prove that the agent dishonestly asking for, receiving or agreeing to receive the benefit did so with the intention of providing a favour. It is because this offence encompasses a lower order fault element that the maximum penalty is 5 years imprisonment.

Bribery of foreign public official

Clause 175 criminalises the bribery of a foreign public official in line with international standards. The clause provides that it is an offence for a person to dishonestly provide, offer or promise to provide a benefit to someone else with the intention of influencing a foreign public official in his or her official capacity with the intention of obtaining or retaining business, or obtaining an improper advantage in the conduct of business.

Bribery outside Nauru of foreign public official

Clause 176 extends extraterritorial jurisdiction to the foreign bribery offence.

Exception for acts lawful in country of foreign public official

Clause 177 creates an exception to the offence relating to bribery outside Nauru of a foreign official to ensure that a person will not be held criminally responsible for conduct that was lawful in the foreign country for which the foreign public official was acting.

Abuse of public office

Clause 178 creates a new offence of abuse of public office to ensure that a broad range of conduct relating to abuse of office is captured under a single modern offence. It targets public officials who improperly use their office to obtain a benefit (for themselves or someone else) or cause a detriment to someone else. This improper use may include using influence, exercising the person's duties or using information acquired in an official capacity with the intention of dishonestly obtaining benefits or causing a detriment to someone else. Subclause (2) extends criminality to circumstances where the person has ceased to be a public official.

Embezzlement

Clause 179 provides for a specific offence of embezzlement by a public official. While embezzlement has common elements to theft and fraud offences, this offence highlights the importance of ensuring that public officials manage property in a way that serves the community and not private interests. The definition of property in clause 8 applies to this provision and includes all tangible and intangible forms of property and expressly includes money and electricity.

DIVISION 9.5—BLACKMAIL

Interpretation—Division 9.5

Clause 180 defines the terms ‘unwarranted’ and ‘threat’ for the purposes of the offences in this division. A demand is unwarranted unless the person making it believes both that he or she is entitled to obtain the thing demanded and that the threat is a reasonable and proper way to reinforce the demand. ‘Threat’ is defined broadly to cover a wide range of conduct including implied threats and threats to third parties.

Blackmail

Clause 181 creates a modern blackmail offence. The offence requires that the offender make an unwarranted demand with a threat, with the intention of obtaining a gain or causing a loss, or influencing the exercise of a public duty. The offence is punishable by a maximum of 10 years imprisonment.

Aggravated blackmail

Clause 182 provides for an offence of aggravated blackmail carrying a maximum penalty of 14 years imprisonment. The aggravating factor is that the threat, if carried out, would likely cause death or serious harm to someone or substantial economic loss to the Republic of Nauru or an industrial or commercial activity.

Unwarranted demand on public official

Clause 183 contains a specific offence of blackmail of a public official with the intention of obtaining a gain or causing a loss or influencing the official in the exercise of his or her duties. ‘Public official’ is defined broadly in clause 8 (extending to members of parliament and judicial officers).

DIVISION 9.6—FORGERY

Division 9.6 is a new framework for forgery offences consolidating a wide range of specific offences into broader general offences criminalising the making, using and processing of false documents, possession of instruments for forgery and false accounting.

Meaning of ‘document’

Clause 184 provides a definition of ‘document’ that covers everything from traditional paper based documents with writing on them to coding for computers. It is expressed in inclusive terms, leaving room for a court to find that other things are documents. This is an important feature to ensure that the offences can deal with future technological developments. Also, the definition expressly covers credit and debit cards.

Meaning of 'false' document

Clause 185 defines the concept of 'false document' which is a key element in forgery and forgery related offences. The definition covers only documents that suggest that:

- they were made or authorised by someone in a form that they were not;
- they were made or authorised by someone in terms that they were not;
- they were changed by, or changed on the authority of someone when they were not;
- they were made or changed by, or made or changed on the authority of an existing person, who did not exist; or
- they were made or changed on a day when they were not or at a place or in circumstances that they were not.

Subclause (2) explains that 'making' a false document includes changing a document in a way that makes it false under subclause (1) and that this is so whether or not it was already a false document before the change. This is an important provision for the offences in clauses 186 and 189 which refer to the making of false documents.

Forgery—making false document

Clause 186 deals with making false documents. To establish this offence the prosecution must prove that the defendant made a false document with the intention that the defendant (or someone else) would use it to dishonestly induce another person to accept it as genuine and thereby dishonestly obtain a gain, dishonestly cause a loss or dishonestly influence the exercise of a public duty. The maximum penalty is 8 years imprisonment.

Using false document

Clause 187 contains an offence similar to the forgery offence in clause 186, except that it relates to a person 'using' (rather than 'making') a false document. It also requires proof that the person 'dishonestly' used the false document and that he or she 'knew' that it was false. Whether the use is 'dishonest' is a matter to be determined in accordance with the general definition of dishonesty in clause 150. A person has knowledge if he or she is aware that the document is false and dishonestly uses it for the intended outcomes detailed above in relation to the forgery offence (clause 186).

The maximum penalty is the same as for forgery.

Possessing false document

Clause 188 contains an offence following the same pattern as the 'making' and 'using' forgery offences, except that it relates to the possession of false documents. To commit the offence a person must possess the false document, knowing that it is false and intending that it will be dishonestly used (by the person or someone else) for the intended outcomes

detailed above in relation to the offences in clauses 186 and 187. The maximum penalty is the same as for forgery.

Making or possessing device etc for making false document

Clause 189 contains 2 offences that relate to making and possessing devices for making false documents. Subclause (1) provides that a person commits the offence if the person makes or adapts a device, material or other thing designed or adapted for making a false document, with the knowledge that it is designed or adapted for that purpose and with the intention that the person or another will use it to commit forgery. The maximum penalty is the same as for forgery.

The less serious offence in subclause (2) is similar except that it provides that a person commits the offence if the person makes or adapts a device, material or other thing designed or adapted for making a false document, with the knowledge that it is designed or adapted for that purpose. It will apply where it cannot be shown that the person possessed or made etc the device with the intention of committing forgery. It carries a lesser penalty of 5 years imprisonment.

False accounting

Clause 190 contains a specific offence which recognises the central importance of accounts in the world of commerce.

Subclause (1) provides that it is an offence for a person to dishonestly destroy, deface, conceal or falsify an accounting document or in giving information for any purpose, produces or makes use of an accounting document that he or she knows is or may be misleading, false or deceptive in a material particular, with the intention of obtaining a gain for himself, herself or another or causing someone a loss.

Subclause (2) recognises that a misleading entry or the failure to make a material entry can render a document false or misleading and this provision ensures that such conduct is caught.

The term 'accounting document' is defined in subclause (3) as an account, record or document made or required for an accounting purpose.

DIVISION 9.7—COUNTERFEITING

This division addresses counterfeiting and defacing of currency by simplified provisions that criminalise counterfeiting, possession of tools used to make counterfeit currency, dealing in counterfeit and defacing or destroying currency.

Counterfeit money

Clause 191 contains 3 offences. The first criminalises the making of counterfeit money with the intention that it be acted on as genuine, or possessing a thing capable of being used to make counterfeit money intending to use it to make counterfeit money. The maximum penalty is 10 years imprisonment.

Subclause (2) provides for an offence of dealing in counterfeit money at a lower value than its face value, or importing or exporting counterfeit money knowing that it is counterfeit. This offence carries a maximum penalty of 7 years imprisonment.

Subclause (3) provides for a lesser offence of possessing counterfeit money, lapsed currency or other thing and passing it into circulation. This offence carries a maximum penalty of 5 years imprisonment.

‘Current money’ (which counterfeit money resembles or is intended to resemble or pass for) includes legal foreign currency, reflecting the potentially transnational nature of counterfeiting offences.

Defacing or destroying currency

Clause 192 provides that it is an offence to mutilate, deface or destroy a coin or currency note that is lawfully current in Nauru.

DIVISION 9.8—IDENTITY CRIME

This division creates specific identity theft offences to fill a gap regarding criminalising identity crime. Although general stealing, forgery and criminal deception offences may capture identity crime, these offences do not cover preparatory offending such as the act of obtaining identifying data belonging to another person which cannot be prosecuted until and unless a further offence is committed.

Definitions—Division 9.8

Clause 193 provides definitions for the identity crime offences. Importantly, ‘identification information’ is defined broadly and is expressed in inclusive terms, leaving room for a court to find that other things are identification information. This is an important feature to ensure that the offences can deal with future technological developments

Dealing in identification information

Clause 194 creates an offence of dealing in identification information. It is not the intention to criminalise legitimate use of identification information, for example, the use of it by a bank or financial institution. In order to ensure that legitimate use is not captured, it

must be established that there was intention to use the information to commit or facilitate the commission of a crime.

The clause is also not intended to cover minor offending and so the offence intended to be committed must be punishable by imprisonment for at least 12 months.

Subclause (2) clarifies that a person may be guilty of the offence even if the offence for which the information is dealt with is impossible to commit or is to be committed at a later time. Also the offence applies even if the person to whom the information relates consented to the dealing.

Subclause (3) provides that it is not an offence for a person to deal in his or her own identification information.

Possession of identification information

Clause 195 creates an offence of possession of identification information. In order to ensure that legitimate possession is not captured, it must be established that the offender intended to use (or intended that someone else would use) the information to commit the offence under clause 194.

Subclause (2) clarifies that the offence applies even if the person to whom the information relates consented to the possession.

Subclause (3) provides that this section does not apply to a person possessing his or her own identification information.

Possession of equipment used to make identification information

Clause 196 criminalises the possession of equipment to make identification documentation where the offender intends to use, or intends another person to use, that equipment to make identification documentation to engage in dealing in identification information (clause 194).

Equipment has not been defined to avoid the definition becoming outdated with advances in technology.

Attempt

Clause 197 provides that it is not an offence to attempt to commit identity crime offences, as they are considered to be preparatory offences.

PART 10—PROPERTY DAMAGE, FIREARMS AND OTHER OFFENCES

DIVISION 10.1—PROPERTY DAMAGE

Definitions—Division 10.1

Clause 198 defines ‘damage’ for the property damage offences broadly to include, amongst other things, destroying property, causing it to be lost and impairing its use or function. When property ‘belongs’ to a person is set out in clause 152.

Sabotage

Clause 199 deals with the specific offence of damaging a public facility with the intention of causing major disruption to government functions or the use of public services or major economic loss. Subclause (2) lists things that are public facilities, whether publicly or privately owned.

Threatening to sabotage

Clause 200 makes it an offence for a person to make a threat to someone to cause damage to a public facility intending to cause the other person to fear that the threat will be carried out and will cause major disruption to government functions or the use of public services or major economic loss. As with other ‘threat’ offences in this division, it is not necessary to prove that the person actually feared that the threat would be carried out (subclause (2)).

Subclause (3) clarifies the meaning of threat for this offence, which may be explicit or implied, conditional or unconditional. The requirement to threaten is satisfied if the threat is made to a group of people, and the word ‘fear’ includes apprehension.

Damaging property

Clause 201 sets out the general property damage offence which applies to damaging tangible property of all kinds and by whatever means. It is an offence for a person to recklessly cause damage to the property of another (including where the property belongs to the person and the other person).

Threatening to damage property—fear of death or serious harm

Clause 202 contains an aggravated offence for situations where threats to damage property are made that invoke fear of serious harm or endangerment to life. To establish this offence it must be proved that a person intentionally made a threat to someone to damage property and is reckless about causing the other person to fear that carrying out of the threat would result in someone’s death or serious harm. Serious harm is defined

(clause 8) as harm that endangers, or is likely to endanger, someone's life or that is, or is likely to be, significant and longstanding.

The property involved can be any property. It need not be property that belongs to someone else or property of a specific kind. Also, provided that the threatened action involves a risk of serious harm or death it does not matter whether the threatened damage is relatively minor. A threat to damage a safety device or an alarm by a minor act of interference could induce serious concerns for safety.

As with other 'threat' offences in Division 10.1 it is unnecessary to prove that the threatened person actually feared that the threat would be carried out (subclause (2)). The offence is committed even if the threatened person knows that the threat cannot be carried out, for example, because precautions were taken that effectively rendered the threat hollow.

Threatening to damage property

Clause 203 is directed to the less serious cases of threats to damage property. The offence in this provision applies if a person intentionally threatens to damage another person's property and the person intends the threatened person to fear that the threat will be carried out. It is not necessary to prove that the threatened person actually feared that the threat would be carried out (subclause (2)) but only that the offender intended the other person to fear it.

Like the offence in clause 202, the threat can be a threat to damage property of any kind and the damage proposed can be relatively minor in nature. However unlike clause 201 the property must belong to someone else.

Possessing article with intent to damage property

Clause 204 makes it an offence for a person to possess an article with the intention that he or she or someone else will use it to damage property that belongs to another. In addition to the usual way in which a person is understood to 'possess a thing' the term also includes having control over disposing of an article (such as the power to sell, trade, use up or destroy), whether or not it is in the person's actual custody, and having joint possession of an article (subclause (2)).

It is a preparatory offence designed to impose criminal liability when conduct is advanced towards the commission of an offence but falls short of the technical requirements to establish an attempt to commit the offence. An important feature of this offence is that it applies even if the offender does not intend to use the thing personally.

Arson

Clause 205 provides for the offences of arson and threat to commit arson. Subclause (1) makes it an offence for a person to intentionally or recklessly damage or destroy any building or vehicle by using fire or explosives.

A building includes part of a building or any moveable or non moveable structure used, designed or adapted for residential purposes. A vehicle is defined as a motor vehicle, motorised vessel or aircraft (subclause (4)).

An important distinguishing feature of the arson offence is that it is not limited to causing damage to property 'belonging to someone else'. It can also apply to owners who damage or destroy their own buildings or vehicles by fire or explosives. The uncontrolled use of fire or explosives to destroy or damage buildings, vehicles, vessels or aircraft is likely to cause public alarm, public expense and public nuisance, regardless of the fact that the person who does the damage happens to own the property in question.

Subclause (2) provides for the further offence of threatening to commit arson. To establish the offence it must be proved that the defendant made a threat to someone to damage by fire or explosive a building or vehicle belonging to that person or to a third person and that the defendant intended to cause or was reckless about causing the threatened person to fear that the threat would be carried out. It is not necessary to prove that the threatened person actually feared that the threat would be carried out (subclause (3)).

Marking graffiti on property

Clause 206 makes it an offence for a person to intentionally mark graffiti (paint, write or draw on, mark, scratch or otherwise deface, in a way not easily removable) physical property.

Defence—consent

Clause 207 sets out a specific defence to the offences in this division, which is in addition to any other defences that may apply. This clause provides a defence if at the time of the relevant conduct a person entitled to consent to the property being damaged (usually the owner) had consented or the defendant believed that such a person had consented or would have consented if the person had known about the circumstances of the damage.

The defendant bears the evidential burden in relation to the defence.

Defence—claim of right

Clause 208 sets out a specific defence to the offences in this division, which is in addition to any other defences that may apply. This clause provides a defence if at the time of the

relevant conduct the defendant believed that he or she had a right or interest in the property that entitled him or her to engage in the conduct concerned. A 'right or interest in property' is defined to include a right or privilege in or over land or waters, whether created by grant, licence or otherwise.

The arson offence can also apply to owners who damage or destroy their own buildings or vehicles by fire or explosives. Therefore this defence does not protect an owner from conviction for the arson offence simply because the owner believed that he or she had a right or interest in the property. Rather, in this context the defence requires evidence that the person believed that his or her proprietary right or interest authorised the use of fire or explosives as the means of causing damage or destruction (for example, because the person believed that a permit from a public authority entitled him or her to do so).

DIVISION 10.2—FIREARMS OFFENCES

This division provides for strengthened firearms offences that are modernised and streamlined.

Meaning of 'firearm'

Clause 209 provides a definition of 'firearm' to assist with defining the scope of offences and to ensure they are applied consistently. 'Firearm' is defined to mean a gun, or other weapon that is or was capable of propelling a projectile by means of an explosive force. Paragraph (1) (b) provides a non-exhaustive list including replica firearms. Spear guns have been excluded from the definition in recognition of their use for fishing and other exclusions may be provided by regulation.

Meaning of 'possess'

Clause 210 provides definitions of 'physical possession', 'possess' and 'possesses' a firearm, which include having it at premises owned or occupied by the person.

Subclause (2) sets out the position with respect to possession of firearm parts.

Unlawful possession of firearm

Clause 211 creates an offence of possessing a firearm. The general defence of lawful authority will apply to this offence as it does to all offences. The offence is punishable by 2 years imprisonment, or 4 years if aggravating circumstances apply. Clause 215 deals with aggravating circumstances for firearm offences.

Unlawful possession of firearm in public place

Clause 212 creates an offence of possessing a firearm in a public place. For this offence the term ‘possess’ is limited to physical possession. The general defence of lawful authority will apply to this offence as it does to all offences. The offence is punishable by 4 years imprisonment, or 5 years if aggravating circumstances apply. Clause 215 deals with aggravating circumstances for this offence.

Unlawful entry of property with firearm

Clause 213 deals with entering a building or land, other than a public place, possessing a firearm. Similarly to clause 212, in this offence the term ‘possess’ is limited to physical possession. The general defence of lawful authority will apply to this offence as it does to all offences. Also, the offence does not apply if the person is the owner or occupier of the place or has the permission of the owner or occupier to enter the place, or has a reasonable excuse to do so. In those circumstances the offence in clause 212 may apply. The offence is punishable by 3 years imprisonment, or 5 years if aggravating circumstances apply. Clause 215 deals with aggravating circumstances for this offence.

Recklessly discharging firearm

Clause 214 makes it an offence to discharge a firearm with reckless disregard for the safety of people or property.

The offence is punishable by 5 years imprisonment, or 10 years if aggravating circumstances apply. Clause 215 deals with aggravating circumstances for this offence.

Aggravating circumstances for firearm offences

Clause 215 sets out the following aggravating circumstances for those offences under this division which provide for a penalty if aggravating circumstances apply:

- the defendant intends to commit another offence (for which it is not necessary to prove that the defendant intends to commit a particular offence);
- the defendant intends to avoid the lawful arrest or detention of anyone.

Division 11.3—ENDANGERING TRANSPORT AND PIRACY

Endangering transport

Clause 216 creates a single consolidated offence of endangering transport. The clause criminalises interference or doing anything to transport facilities that is likely to cause danger to people or property. It must be established that the offender acted with the

intention of causing danger to others or property, or with reckless disregard to the safety of others or property.

The offence captures a broad range of conduct and includes a definition of 'transport facility' which contemplates modern transport and infrastructure.

Piracy

Clause 217 provides for the offence of engaging in an act of piracy. It is an updated offence consistent with the United Nations Convention on the Law of the Sea and complements Nauru's other maritime offences in the *Counter Terrorism and Transnational Organised Crime Act 2004*.

The offence is supported by a broad definition of what constitutes an 'act of piracy' and definitions of 'coastal sea', 'high seas' and 'private ship or aircraft'.

Operating a pirate-controlled ship or aircraft

Clause 218 contains a new offence to address acts of intentional participation in the operation of a ship or an aircraft with knowledge that it is a pirate-controlled ship or aircraft.

Seizure of pirate-controlled ship or aircraft etc

Clause 219 provides for the Republic of Nauru through its police service or other authorised people (such as customs officers) to seize ships or aircraft reasonably believed to have been taken by piracy, together with anything on the ship or aircraft connected with the commission of an offence under clause 217 or 218. The power extends to the high seas and places outside the territorial jurisdiction of any country.

Subclause (3) provides for the Supreme Court of Nauru to make orders for the return or forfeiture, or anything else relating to the seizure, detention or disposal of the ship or aircraft or thing.

Consent to prosecution for piracy offence

Clause 220 requires that the consent of the Minister responsible for Justice must be obtained before proceedings can be started for a piracy offence. However, in recognition of the urgent circumstances that may arise, subclause (2) provides that a person may be arrested or remanded in custody or on bail before consent is obtained.

Evidentiary certificate for piracy offence

Clause 221 clarifies that for an offence under this division a certificate by the Minister responsible for Foreign Affairs (or a person authorised by the Minister) is evidence of

matters stated in the certificate about whether at a stated time waters were part of the high seas or within the coastal sea of Nauru.

PART 11—ADMINISTRATION OF JUSTICE OFFENCES

The administration of justice offences are a consolidated and simplified version of those that already exist in the current Code. Corruption and bribery offences are covered in Division 9.4. Part 11 focuses on administration of justice offences as they relate to legal proceedings. It also contains offences relating to escapes and rescues from custody.

DIVISION 11.1—GENERAL OFFENCES

Perjury

Clause 222 contains the perjury offences of the Bill. Subclause (1) provides that a person commits perjury if he or she makes a sworn statement in a legal proceeding and the statement is false. The fault element is only satisfied if the person knows or believes that his or her statement is false. It is not sufficient that the person did not believe that the statement was true. Also the statement must be material to the proceeding, which is a question of law.

Subclause (3) provides that an interpreter commits perjury if by a sworn statement he or she gives a false or misleading interpretation of a statement or other thing in or for a legal proceeding, knowing or believing that the interpretation is false or misleading or reckless about it being false or misleading. This offence recognises the important role of interpreters in judicial proceedings and the degree of reliance placed on statements made by interpreters to ensure witness testimony is accurately given to the court.

The prosecution is required to prove that the sworn statement was in fact false (in the case of the general perjury offence) or false or misleading (in the case of the interpreter offence).

A person cannot be convicted for perjury on the uncorroborated evidence of 1 witness. Legal proceedings are defined to include the proceedings of a court, tribunal or authorised body.

Making false sworn statement and making false statement

Clauses 223 and 224 provide for lesser offences of making a false sworn or unsworn statement if, had the statement been used as evidence in a legal proceeding (as defined for the perjury offence in clause 222), the person making the statement would be guilty of perjury.

A person cannot be convicted for these offences on the uncorroborated evidence of 1 witness.

Taking sworn statement etc without authority

Clause 225 provides that it is an offence to administer an oath, or take or witness a sworn statement, without lawful authority.

Particular informations

Clause 226 provides that for an information for an offence under this division it is enough to state the material meaning or sense of the statement or oath. In relation to the perjury offence, there is no need to allege the jurisdiction of the court or other entity before which the statement was given. These provisions preserve Criminal Code section 566.

Perverting the course of justice

Clause 227 provides for the offence of perverting the course of justice. The maximum penalty for this offence is 5 years imprisonment. Subclause (2) defines the term ‘perverts’ in broad terms to include obstructs, prevents and defeats, which will have their usual natural meaning. The offence is committed if a person’s conduct in fact perverts, obstructs, prevents or defeats the course of justice and the person intends by his or her conduct to pervert, obstruct, prevent or defeat the course of justice.

DIVISION 11.2—CUSTODY OFFENCES

Definitions—Division 11.2

Clause 228 sets out definitions of ‘lawful custody’ and ‘place of custody’ for the offences relating to escapes and rescues from custody. ‘Lawful custody’ is defined broadly to include a person under arrest, remanded, imprisoned following conviction or for contempt, in custody by order of a magistrate under the *Mentally-disordered Persons Act 1963*, or detained or interred under international law, and despite any defect or irregularity affecting the custody.

Escape from custody

Clause 229 makes it an offence for a person to escape from lawful custody.

Damage place of custody for purpose of escape

Clause 230 sets out an offence directed at people damaging a place of custody, or altering, breaching or excavating under or through the place, with the intention of escaping or helping someone else to escape.

Assist escape from custody

Clause 231 provides that it is an offence for a person to free another person, or assist another person to escape or attempt to escape from, lawful custody, including bringing into the place something reasonably able to be used for escape. To establish this offence it must be proved that the person intended to assist the other person to escape.

Permit escape from custody

Clause 232 deals with the offence of people who have a legal duty to ensure that prisoners are held in lawful custody. The offence applies where the person engages in grossly negligent conduct that results in the prisoner's escape, and carries a penalty of 1 year imprisonment.

Assist prisoner of war, internee or parolee to escape

Clause 233 deals with specific offences for assisting a prisoner of war or internee to escape, or a person on parole to leave the place of parole. Both offences require intention to assist the escape (or leaving).

Harbouring escaped prisoner

Clause 234 provides that it is an offence for a person to aid, harbour, conceal or shelter someone knowing that the person has escaped lawful custody.

PART 12—CRIMES AGAINST THE STATE AND PARLIAMENT

Treason

Clause 235 contains a simplified treason offence punishable by life imprisonment. The offence is limited to people who, at the time of the alleged offence, are citizens of Nauru or persons ordinarily resident in Nauru. This highlights the importance of allegiance in the law of treason.

The offence is committed if the person intentionally causes the death of, or serious harm to, or takes or detains, the President of Nauru; starts or prepares to start war against, or uses force for the purposes of overthrowing, the Republic of Nauru; or materially assists a public enemy at war with the Republic. By providing that conduct must 'materially assist', it is made clear that mere intellectual or moral support or legitimate political protest is not sufficient.

Subclause (4) reflects section 632 of the Criminal Code, that on a trial for treason evidence cannot be admitted of any overt act not alleged in the information.

Concealment of treason

Clause 236 provides that a person commits an offence if he or she, knowing that someone else intends to commit the offence under clause 235, does not give the information to the police within a reasonable time or otherwise use reasonable endeavours to stop the commission of the offence. This offence is not limited to citizens of Nauru or persons ordinarily resident in Nauru.

Provoking mutiny

Clause 237 deals with the offence of provoking mutiny. A person commits the offence if he or she tries to persuade someone in a foreign military force (or allied military force) to defy his or her duty in the force. Defiance of duty means overthrow the lawful authority of the force or resist it to the extent that the operation of the force is substantially affected.

Interference with members of Parliament

Clause 238 provides that it is an offence to intentionally interfere with a member of Parliament performing his or her duties.

Disturbing Parliament

Clause 239 provides for an offence of intentionally interrupting Parliamentary proceedings or impairing the authority of Parliament.

Unlawful possession of offensive weapon in precincts of Parliament

Clause 240 provides for an offence of possessing an offensive weapon in the precincts of Parliament. 'Offensive weapon' is defined in clause 8.

The general defence of lawful authority will apply to this offence as it does to all offences.

Failure to attend or give evidence before Parliament

Clause 241 provides for an offence punishable by 2 years imprisonment for failing or refusing to appear or produce something or answer a question if required to do so by the Parliament or a Parliamentary committee.

Obstructing public official

Clause 242 is a specific offence aimed at the protection of public officials from hindrance in their duties. The prosecution must establish that the offender believed the victim to be a public official. The definition of 'public official' (extending to members of parliament and judicial officers) in clause 8 applies.

Impersonating public official

Clause 243 contains 2 offences relating to impersonating public officials, both punishable by 3 years imprisonment. Subclause (1) makes it an offence to impersonate someone else in their official capacity, knowing the official is likely to be performing their duty on that occasion and with intent to deceive.

Subclause (2) provides that it is an offence to pretend to be a public official in the course of doing something, or attending a place, in that assumed official capacity. This includes a fictitious capacity.

PART 13—CRIMES AGAINST PUBLIC ORDER AND RELATED OFFENCES

DIVISION 13.1—PUBLIC ORDER

Unlawful assembly

Clause 244 makes it an offence (punishable by 1 year imprisonment) for a person and at least 2 others to gather (in a public or private place) for a common purpose in a way that would cause a reasonable person to fear unlawful violence or provocation of others to use unlawful violence. Subclause (2) makes it clear that it is immaterial whether there is or is likely to be anyone in the vicinity who is afraid, or whether the assembly began lawfully. Common purpose for the purpose of the offence may be inferred from conduct.

The offence does not apply if the common purpose is to protect premises from someone else who intends to commit an offence there (subclause 3).

Rioting

Clause 245 contains a more serious offence where unlawful violence is actually used by the assembly against people or property. For the offence to be made out the person must approve the use of violence, or intending violence or know that the conduct is violent. This offence attracts a higher penalty of 2 years imprisonment and there is no exception for protection of premises.

Riotous damage

Clause 246 provides that if a person is criminally responsible for the offence of rioting (clause 245) and at the same time causes damage to property, the person commits an offence.

Forcible entry and possession of land

Clause 247 contains 2 offences relating to forcible entry and possession of land. Subclause (1) makes it an offence to enter land using force or the threat of force or in a way that would cause a reasonable person to fear violence to someone or property, with the intention to take the land from its lawful owner.

Subclause (2) provides that it is an offence for someone who possesses land with no lawful right and keeps it from its lawful owner using force or the threat of force or in a way that would cause a reasonable person to fear violence to someone or property.

Both offences are punishable by 2 years imprisonment.

Public nuisance

Clause 248 contains the offence of public nuisance. It is an offence to do something that amounts to public nuisance in, or in view, of a public place. Subclause (2) gives a non-exhaustive list of things that amount to a public nuisance (including disorderly, offensive, threatening or violent behaviour) giving a discretion to the police and courts to allow them to apply prevailing community standards. Subclauses (3) and (4) make it clear that more than one behaviour can be engaged in and a complaint by another person is not required.

DIVISION 13.2—DEFAMATION

Definitions—Division 13.2

Clause 249 sets out the meaning of ‘defamatory’, ‘matter’ and ‘publish’ for the defamation offences.

Criminal defamation

Clause 250 modernises Nauru’s defamation offence, providing that it is an offence to publish defamatory matter about another living person knowing the matter is false or without regard to whether it is true or false, and reckless about whether serious harm may be caused to the person or someone else.

The consent of the Director of Public Prosecutions must be obtained before proceedings can be commenced.

A criminal proceeding for this offence does not prevent a civil proceeding against the defendant.

Subclause (4) sets out a specific defence, which is in addition to any other defences that may apply. A person is not criminally responsible if he or she would have had a defence to a civil proceeding for the defamation.

Defence of absolute privilege

Clause 251 sets out a specific defence to the offence of defamation if the defamatory matter was published on an occasion of absolute privilege. Subclause (2) gives a non-exhaustive list of occasions of absolute privilege (including certain Parliamentary and court proceedings).

Defence for publication of public documents

Clause 252 sets out another specific defence to the offence of defamation if the defamatory matter was contained in a public document including a summary or extract from a public document. The term ‘public document’ is defined in subclause (4), and subclause (2) clarifies that something can be a public document even if it does not comply formal requirements for the document.

If the prosecution proves that the defamatory matter was not published by the defendant honestly for public information or advancement of education, the defence is defeated.

Defences of fair report of proceedings of public concern

Clause 253 sets out 2 specific defences to the offence of defamation in circumstances where the defamatory matter was, or was in, a fair report of a proceeding of public concern (including earlier published reports if the person had no knowledge that would reasonably make him or her aware that the report was not fair). Like the defence for publication of public documents, if the prosecution proves that the matter was not published honestly for public information or advancement of education, the defence is defeated.

Subclause (4) defines ‘proceedings of public concern’ and related terms.

Defence of justification

Clause 254 sets out a specific defence to the offence of defamation if both the defamatory matter was substantially true and its publication was of public benefit.

DIVISION 13.3—OTHER OFFENCES

Unlawful vilification

Clause 255 provides protection from vilification on the grounds of race or religion. It provides that it is an offence for a person to intentionally engage in conduct that is a public act inciting hatred towards, serious contempt for, or severe ridicule of someone else (or a group) because of race or religion, reckless as to whether the conduct incites hatred, contempt or severe ridicule and threatens or incites others to threaten physical harm.

The consent of the Director of Public Prosecutions must be obtained before proceedings can be commenced. However, in recognition of the urgent circumstances that may sometimes arise, subclause (4) provides that a person may be arrested or remanded in custody or on bail before consent is given.

Public act is broadly defined to include any form of communication to the public or conduct that can be seen by the public (including actions, gestures and wearing or displaying of emblems and insignia) and the distribution or dissemination of any matter to the public.

Interference with political liberty

Clause 256 provides that it is an offence to interfere, by threats or intimidation, with another person's exercise of a political right. The offence is punishable by 3 years imprisonment if the person is a public official acting in that capacity and 2 years otherwise.

PART 14—CRIMES AGAINST HUMANITY AND RELATED OFFENCES

DIVISION 14.1—SLAVERY

Dealing with person as a commodity

Clause 257 is a new offence criminalising general slavery and slavery-like practices such as forced marriage, debt-bondage and forced labour. The offence is supported by definitions of what constitutes 'dealing' with a person (which is a broad definition of using the person including selling, transferring, bartering, letting, hiring or employing), 'debt-bondage', 'forced labour' and 'serfdom'.

DIVISION 14.2—TORTURE

Torture

Clause 258 deals with the offence of torture. The conduct making up the offence follows the principles of the UN Convention Against Torture and applies to a person acting in the capacity of a public officer (including a foreign public officer) or at the instigation or with the consent or acquiescence of such a person.

The relevant fault element for torture is ulterior intention. This focuses on the person's intention to bring about a particular result. It is not necessary to prove that the result actually eventuated. For example, if the prosecution demonstrates that the defendant engaged in conduct for the purpose of obtaining a confession from the victim, it does not have to prove that the defendant actually gained that confession.

The offence is not designed to affect legitimate law enforcement and intelligence-gathering activities carried out by government agencies in the course of their duties. So, the offence

does not apply to conduct arising only from, inherent in or incidental to lawful sanctions consistent with the Constitution.

Subclause (4) ensures that acts of torture committed both within and outside Nauru are criminalised.

Exceptional circumstances or superior orders no defence

Clause 259 provides that there is no defence of exceptional circumstances or superior orders to a prosecution for an offence under this division. However, such matters may be taken into account in sentencing.

Consent to prosecution for torture offence

Clause 260 provides that the consent of the Minister responsible for Justice must be obtained before torture proceedings can be commenced. However, in recognition of the urgent circumstances that may sometimes arise, subclause (2) provides that a person may be arrested or remanded in custody or on bail before consent is given.

DIVISION 14.3—ROME STATUTE OFFENCES

The Rome Statute of the International Criminal Court is the treaty establishing the International Criminal Court and its jurisdiction over core international crimes. Nauru became party to the treaty in 2001. A key feature of the treaty is its establishment of a jurisdiction complementary to national criminal jurisdictions. The inclusion of relevant offences in the Bill provides the Republic of Nauru with the power to prosecute any person accused of a crime under the Rome Statute in Nauru rather than surrender that person for trial in the International Criminal Court.

Meaning of ‘Rome Statute’

Clause 261 defines ‘Rome Statute’ as the Rome Statute of the International Criminal Court.

Geographical jurisdiction for Rome Statute offences

Clause 262 states that criminal responsibility for an offence under this division is not affected by the nationality or citizenship of the accused, where the offence occurred or the location of the accused when the decision is made to charge the accused.

Interpretation of Rome Statute offences

Clause 263 provides that a court may have regard to any elements of crimes adopted or amended under article 9 of the Rome Statute in interpreting the offences under this division but may not look to offence provisions outside this division to interpret those offences.

Principles of criminal responsibility applying to Rome Statute offence

Clause 264 applies the relevant rules of criminal procedure that apply to the prosecution of the international crimes before the International Criminal Court to proceedings for offences under this division.

Consent to prosecution for Rome Statute offence

Clause 265 requires that the consent of the Minister responsible for Justice must be obtained before proceedings can be started for an offence under this division. However, subclause (2) provides that a person may be arrested or remanded in custody or on bail before consent is obtained.

Genocide

Clause 266 sets out an offence of genocide that is to the same effect as the text of the Rome Statute, Article 6.

Crimes against humanity

Clause 267 sets out an offence of crimes against humanity that is to the same effect as the text of the Rome Statute, Article 7.

War crimes

Clause 268 sets out an offence of war crimes that is to the same effect as the text of the Rome Statute, Article 8. Subclause (6) clarifies that this offence does not affect the operation of the *Geneva Conventions Act 1958* (which makes a grave breach of the Geneva Conventions an offence under Nauruan law).

Superior orders

Clause 269 provides that a person is criminally responsible for an offence under clause 268 even if the conduct was pursuant to an order of a government or a superior unless the person was under a legal obligation to obey and did not know that the order was unlawful, and the order was not manifestly unlawful.

PART 15—ARREST, OFFENCES, PENALTIES AND SENTENCING

DIVISION 15.1—ARREST WITHOUT WARRANT

Arrest without warrant—police

Clause 270 provides for the arrest without warrant if a police officer suspects on reasonable grounds that the person has, is, or is about to commit an offence against this Bill and considers the arrest reasonably necessary.

Subclause (2) lists reasons when an arrest may be reasonably necessary (including the protection of someone's safety or welfare, to stop the commission or repeat of an offence and to prevent a suspect fleeing the scene).

Arrest without warrant—other people

Clause 271 contains a citizen arrest power where a person suspects on reasonable grounds that the other person is committing, or has just committed, an offence against this Act which is punishable by imprisonment for at least 5 years, and considers the arrest reasonably necessary.

DIVISION 15.2—OFFENCES AND PENALTIES

Offences under 2 or more Acts

Clause 272 provides for the rule against double jeopardy that if a person's conduct constitutes an offence under 2 or more provisions (in the same or 1 or more Acts) the person may be prosecuted and punished under any of the provisions, but is not liable to be punished more than once for the same conduct.

Alternative verdicts

Clause 273 supports the table of alternative verdicts in Schedule 1. In these cases it is open to the court to make a determination about a defendant's guilt or innocence for an offence not charged but for which the law allows the court to bring in an alternative verdict. These tend to be offences that are closely related to the offence charged, but less serious and carrying lower maximum penalties.

The table of alternative verdicts ensures that a defendant cannot be convicted of an alternative offence that carries a higher penalty than the original charge. This is consistent with ensuring a defendant is able to prepare a defence against the counts originally charged, not an offence with more elements.

Subclause (2) makes it clear that alternative verdicts can only be made if the defendant has been afforded procedural fairness.

Conversion of term of imprisonment to fine

Clause 274 deals with the amount of a fine that the Court may impose (instead of or in addition to a term of imprisonment) when a person is convicted of an offence for which the penalty stated is a term of imprisonment.

Non-payment of fines

Clause 275 deals with the term of imprisonment that the Court may order for a person who has not paid a fine and the court considers it appropriate to re-sentence the person to a term of imprisonment. The maximum term of imprisonment is linked to the amount of fine unpaid up to a maximum of 6 months.

Penalty for continuation of offence

Clause 276 provides that in addition to a penalty or fine that may be imposed in relation to an offence, the Court may impose a penalty for each day or part of a day when the offence continues if the law creating the offence so provides.

DIVISION 15.3—SENTENCING

Kinds of sentences

Clause 277 sets out the sentencing options available to the court on a finding of guilt, subject to any provision relating to the offence or of this Act.

Purposes of sentencing

Clause 278 identifies the broader criminal justice principles behind sentencing. These factors limit the purposes for which a sentence may be imposed but do not inform the severity of the offence nor specify what type of sentence should be imposed.

Sentencing considerations—general, imprisonment and fines

Clauses 279, 280 and 281 provide criteria to the court for determining the gravity of an offence, allowing the court to retain discretion while ensuring consistent sentencing and penalties within community expectations.

Subclause 280 (1) provides the general rule that a sentence or order must be of appropriate severity in all the circumstances.

Cooperation with law enforcement agencies in the investigation of the offence is a relevant consideration. Also to be taken into account is whether any children were present at the time the offence was committed. This is particularly relevant in cases related to domestic violence. The prospects of rehabilitation of the offender must be taken into account. This is consistent with the sentencing purpose of protecting the community. Another factor

included is the general deterrent effect of sentencing on the person sentenced or other people.

Sentences of imprisonment have unique considerations attached to them due to the restriction they place on a person's liberty, a fundamental human right. In light of the severity and the cost of imprisonment, clause 280 clarifies that a sentence of imprisonment should only be imposed as a last resort in appropriate circumstances or where necessary to give effect to sentencing considerations and purposes.

In relation to the imposition of fines, the court must, as far as is practicable take into account the means of an offender to pay a fine and the burden it would place on them (subject to general sentencing considerations and purposes).

Power to reduce penalties

Clause 282 ensures that penalties under the Act are maximum penalties and a lesser penalty may be imposed.

PART 16—REGULATIONS

Clause 283 gives Cabinet the power to make regulations for the Act.

PART 17—TRANSITIONAL

Part 17 provides for general savings and transitional provisions consequential on repeal of the Code.

This part makes it clear that the Bill will apply prospectively and not retrospectively. This means that any offence occurring before the commencement of the new provisions will need to be prosecuted under the repealed Code.

PART 18—AMENDMENT AND REPEAL OF LAWS

Part 18 provides for amendments consequential on the repeal of the *Criminal Code 1899* and repeals the Code. The *Summary Offences Act 1967* is also repealed.