28 August 2014

Law Council
OF AUSTRALIA

Tim Watling
Secretary
Senate Standing Committee on Rural and Regional Affairs and Transport
SG.62, Parliament House
CANBERRA ACT 2600

By email: Tim.Watling@aph.gov.au

Dear Mr Watling

Crimes Legislation Amendment (Psychoactive Substances) Bill 2014

The Law Council was grateful for the opportunity to attend the hearing on 22 August 2014 as part of the Senate Legal and Constitutional Affairs Committee's (the Committee) inquiry into the Crimes Legislation Amendment (Psychoactive Substances) Bill 2014 (the Bill).

At the hearing, the Committee referred the following matters to the Law Council for its further consideration:

- the Law Council's views on the part of the Bill that relates to psychoactive substances particularly regarding whether the Law Council shares the Law Society of New South Wales concerns about the reversal of onus of proof in regard to the offence created by the Bill in the criminal code to ban the importation of substances that (a) have a psychoactive effect or (b) pretend to be an illicit substance;
- whether the offence relating to a psychoactive effect which carries a maximum penalty of imprisonment for two years is proportionate;
- whether the Law Council has a view on using a term like 'psychoactive effect', which is so broad and that carries with it a maximum penalty of two years, in the Bill; and
- whether the Law Council has preliminary views on whether a premarket assessment scheme for psychoactive substances such as that which exists in New Zealand is a more appropriate regulatory response than that provided by the Bill.

Given the timeframe available for responding to these matters, the Law Council's responses, which fall outside the scope of the Law Council's submission regarding the Bill, are by way of general comment only and are not a formal submission.

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The Law Council notes that the Queensland Bar Association's submission to the Committee's inquiry regarding the Bill has raised some specific concerns relating to the psychoactive substances issues and their potential breadth. It encourages the Committee to have close regard to the Queensland Bar Association's submission.

In addition, the Law Council notes that the rule of law requires that the intended scope and operation of offence provisions should be unambiguous and key terms should be defined. Offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct and are thus overly dependent on police and prosecutorial discretion to determine, in practice, what type of conduct should or should not be subject to sanction (please see the Law Council of Australia, *Policy Statement Rule of Law Principles*, March 2011, Principle 1(b), p 2. – **attached**).

The rule of law also requires that people are entitled to the presumption of innocence and to a fair and public trial. Inherent in this is that the state should be required to prove, beyond a reasonable doubt, every element of a criminal offence, particularly any element of the offence which is central to the question of culpability for the offence. Only where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, should the defendant bear the onus of establishing that matter. Even then the defendant should ordinarily bear an evidential, as opposed to a legal burden (please see the Law Council of Australia, Policy Statement Rule of Law Principles, March 2011, Principle 3(e), p 3.). Mr Stephen Odgers SC has provided specific guidance on the relevant distinctions in his evidence before the Committee on 22 August 2014.

The Law Council would also like to draw the Committee's attention to the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (also **attached**) which includes a discussion of the reverse onus of proof and the distinction between an evidential and legal burden (see in particular pp. 50-52).

At this time, the Law Council has no further comment on the matters raised by the Committee in relation to the Bill.

Please do not hesitate to contact Mr Stephen Odgers SC (02 9390 7777), Ms Leonie Campbell (02 6246 3733) or Dr Natasha Molt (02 6246 3754) should you wish to discuss.

Yours faithfully

MARTYN HAGAN
SECRETARY-GENERAL

Law Council
OF AUSTRALIA

POLICY STATEMENT

Rule of Law Principles

March 2011

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Introduction

A key objective of the Law Council of Australia is the maintenance and promotion of the rule of law. For that reason, the Law Council often provides analysis of federal legislation and federal executive action based on its compliance with so-called "rule of law principles".

This document seeks to articulate some of those key principles. It is intended to act as a guide to the framework often employed by the Law Council and its committees in evaluating the merits of government legislation, policy and practice.

This document is not intended to offer a comprehensive definition of the "rule of law". It is acknowledged that what is encompassed under the banner of that phrase is a matter of some contest and that it is a concept which is not necessarily amenable to an exhaustive definition.

In particular, it is acknowledged that there is considerable public debate about two matters:

- the intersection between human rights and the rule of law and the extent to which the rule of law is necessarily predicated on respect for human rights.
- the intersection between democracy and the rule of law and the extent to which the rule of law necessarily assumes that laws are passed by a democratically elected legislature formed following free, fair and regular elections.

It is not necessary to definitively resolve either of those debates in this document.

Instead, this document focuses on the most basic tenets of the rule of law — and those which are most often invoked in Law Council submissions and advocacy.

With respect to broader human rights principles, it is noted that Australia is a party to the seven key international human rights treaties and has also signed or ratified a number of optional protocols to those treaties. These international treaties, which Australia has voluntarily entered in, set out in clear terms Australia's international human rights obligations. Australia is bound to comply with their provisions and to implement them domestically. For that reason, in an Australian context, regardless of the extent of any agreed overlap between the rule of law and human rights, it is entirely appropriate to evaluate government legislation, policy and practice by reference to its compliance with international human rights law.

Key Principles

1. The law must be both readily known and available, and certain and clear

In particular, people must be able to know in advance whether their conduct might attract criminal sanction or a civil penalty. For that reason:

a. Legislative provisions which create criminal or civil penalties should not be retrospective in their operation.

b. The intended scope and operation of offence provisions should be unambiguous and key terms should be defined. Offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct and are thus overly dependent on police and prosecutorial discretion to determine, in practice, what type of conduct should or should not be subject to sanction.

c. The fault element for each element of an offence should be clear.

2. The law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds

In particular, no one should be regarded as above the law and all people should be held to account for a breach of law, regardless of rank or station. Furthermore:

a. Everyone is entitled to equal protection before the law and no one should be conferred with special privileges.

b. Where the law distinguishes between different classes of persons, for example on the basis of age, there should be a demonstrable and rational basis for that differentiation.

3. All people are entitled to the presumption of innocence and to a fair and public trial

In particular, no one should be subject to punitive action by the state unless he or she has first been found guilty of an offence by an independent, impartial and competent tribunal. Inherent in this is a prohibition on indefinite detention without trial. Furthermore:

a. No one should be compelled to testify against him or herself. Where a person is subject to questioning by the state, he or she should be given appropriate warnings about this right. Where a person is compelled to provide information to the state, there should be a prohibition on that information, or further information derived from it, being used in proceedings against that person (that is there should be use and derivative use immunity)..

b. Upon arrest and/or charge, a person should be fully and promptly informed of any offence which he or she is alleged to have committed and, at trial, an accused person should be afforded a meaningful opportunity to interrogate and challenge the information which is relied upon against him or her.

c. A person who is subject to criminal charge should be tried without undue delay. Where the time delay between the conduct constituting an offence and the prosecution for that offence is such that it will unduly prejudice a person's ability to defend themselves, proceedings should be stayed, except where the person has caused or substantially contributed to the delay.

d. Persons awaiting trial should not generally be detained in custody, unless they are a demonstrated flight risk or their release poses a demonstrated risk to the community or ongoing investigation.

e. The state should be required to prove, beyond reasonable doubt, every element of a criminal offence, particularly any element of the offence which is central to the question of culpability for the offence. Only where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, should the defendant bear the onus of establishing that matter. Even then the defendant should ordinarily bear an evidential, as opposed to a legal burden.

f. The state should be required to prove that a person intended, or at the very least was reckless about, each physical element of an offence in order for a person to be found guilty of that offence. Strict and absolute liability should only be applied to less serious offences and where such an approach is necessary for the success of the relevant regulatory regime.

g. A person convicted of a crime should have the opportunity to have his or her conviction and sentence reviewed by a higher tribunal.

4. Everyone should have access to competent and independent legal advice

In particular, everyone should have access to a competent and independent lawyer of their choice in order to establish and defend their rights. Furthermore:

a. The state should provide adequate resources to guarantee access to a competent and independent lawyer in circumstances where individuals do not have the independent means to retain a lawyer.

b. Lawyer-client communications should be regarded as confidential, except where lawyer and client are together engaged in conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.

c. Lawyers should not be subject to sanction or discrimination as a result of the legal advice or representation they have provided, except where that advice fails to comply with agreed standards of professional conduct.

d. Lawyers should be given timely access to relevant information and documents about their client in order to enable them to provide effective legal assistance to their clients.

5. The Judiciary should be independent of the Executive and the Legislature

The existence of an independent, impartial and competent judiciary is an essential component of the rule of law. On that basis:

a. Procedures for appointing judicial officers should be based on identifying individuals of integrity and ability with appropriate training or qualifications in law and should not be such that they compromise the independence of those appointed.

b. The term of office of judges, their independence, security, remuneration, conditions of service, pensions and the age of retirement should be adequately secured by law.

c. Judicial officers should have the power to control proceedings before them and, in particular, to ensure that those proceedings are just and impartial.

d. The allocation of cases to judges within a particular court should be an internal matter of judicial administration.

e. Legislation, particularly legislation which seeks judicial authorisation for executive action, should not limit judicial discretion to such an extent that the Judiciary is effectively compelled to act as a rubber stamp for the Executive. The Judiciary should always have sufficient discretion to ensure that they can act as justice requires in the case before them.

f. In criminal matters, judges should not be required to impose mandatory minimum sentences. Such a requirement interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime.

6. The Executive should be subject to the law and any action undertaken by the Executive should be authorised by law

Executive powers should be carefully defined by law, such that it is not left to the Executive to determine for itself what powers it has and when and how they may be used. In particular:

a. Where legislation allows for the Executive to issue subordinate legislation in the form of regulations, rules, directions or like instruments, the scope of that delegated authority should be carefully confined and remain subject to parliamentary supervision. Moreover, the Executive should not be able to issue an instrument which creates new offences or confers new powers on Executive agencies.

b. The use of executive powers should be subject to meaningful parliamentary and judicial oversight, particularly: powers to use force; to detain; to enter private premises; to seize property; to copy or seize information; to intercept or access telecommunications or stored communications; to compel the attendance or cooperation of a person; or to deport a person. Mechanisms should be in place to safeguard against the misuse or overuse of executive powers.

c. Where the Executive has acted unlawfully, anyone affected should have access to effective remedy and redress.

d. Executive decision making should comply with the principles of natural justice and be subject to meaningful judicial review.

7. No person should be subject to treatment or punishment which is inconsistent with respect for the inherent dignity of every human being

In particular:

a. No person should be subject to torture. Information obtained by torture should be inadmissible in any legal proceedings. Adequate provision should be made to prosecute and punish the perpetrators of such conduct.

b. No person should be subject to cruel, inhuman or degrading treatment or punishment. No person should be held in conditions of detention which amount to cruel, inhuman or degrading treatment. Information obtained by cruel, inhuman or degrading treatment should be inadmissible in any legal proceedings. Adequate provision should be made to prosecute and punish the perpetrators of such conduct.

c. No person should be subject to the death penalty.

8. States must comply with their international legal obligations whether created by treaty or arising under customary international law

Both states and individuals are entitled to expect that other states will comply with and honour their international legal obligations, including obligations relating to the promotion and protection of human rights. States must avoid inconsistencies between their international legal obligations and their domestic laws and policies.

Authorised by LCA Directors
Law Council of Australia
19 March 2011

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A GUIDE TO FRAMING COMMONWEALTH OFFENCES, INFRINGEMENT NOTICES AND ENFORCEMENT POWERS

September 2011 edition

Contents

CHAPTER 1—INTRODUCTION

OVERVIEW

1.1 Purpose of this Guide

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) has been developed by the Criminal Justice Division of the Attorney-General's Department to assist officers in Australian Government departments to frame criminal offences, infringement notices, and enforcement provisions that are intended to become part of Commonwealth law.

The Guide provides a general overview of the types of things that need to be considered when developing or amending offences and enforcement powers, including relevant principles and precedents.

This third version of the Guide takes account of developments in policy and precedent since the Guide was last published in December 2007.

1.2 Content of the Guide

The Guide contains information about the following matters.

- The purpose of the Guide and where further information can be obtained (Chapter 1).
- Guidance on framing criminal offences, including information about provisions contained in Schedule 1 to the *Criminal Code Act 1995* (the Criminal Code) and the *Crimes Act 1914* (the Crimes Act) that have a bearing on the framing and operation of offences, choosing appropriate penalties and developing defences (Chapter 2, Chapter 3 and Chapter 4).
- Guidance on developing presumptions, averments and evidentiary certificates (Chapter 5).
- Considerations when developing an infringement notice scheme (Chapter 6).
- Guidance in developing coercive powers, such as entry, search and seizure powers, notices to produce or attend, and other types of enforcement powers (Chapter 7, Chapter 8, Chapter 9 and Chapter 10).

The principles and precedents contained in this Guide have been drawn from a variety of sources, including reports from Senate Committees, the Australian Law Reform Commission (ALRC), and the Administrative Review Council (ARC).

Senate Committee reports

The Guide contains references to numerous reports and papers, including those published by the Senate Standing Committee for the Scrutiny of Bills[1] (the Scrutiny of Bills Committee) and the Senate Standing Committee on Regulations and Ordinances.[2]

The Scrutiny of Bills Committee regularly asks relevant Ministers to advise whether the Guide was consulted in developing offence or enforcement provisions. The Committee may also comment adversely, or seek clarification from the relevant Minister, where provisions deviate from the principles set out on this Guide. Consequently, provisions that depart from the principles in this Guide should be carefully explained in the explanatory material.

Please note that references to reports and papers, and the recommendations they contain, do not necessarily mean that the reports, papers and recommendations have Government endorsement. In many cases, the Government's position will depend on the context of the legislative proposal.

ALRC reports

The Guide also contains references to reports published by the ALRC. Of particular significance is the 2002 ALRC *Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia*.[3] This Report is a useful resource for Ministers and agencies considering different options for imposing liability under legislation. It examines sanctions that are alternatives to criminal offences, including infringement notice schemes and enforceable undertakings.

ARC reports

ARC *Report 48: The Coercive Information-gathering Powers of Agencies*[4] considers powers granted to government agencies for compelling the provision of information, production of documents, and answers to questions. The Report considers the use of these powers with specific reference to the legislation and practices of Centrelink, Medicare Australia, the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority, the Australian Taxation Office and the Australian Competition and Consumer Commission.

[1] Senate Standing Committee for the Scrutiny of Bills, Department of the Senate, Canberra, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/index.htm>.

[2] Senate Standing Committee on Regulations and Ordinances, Department of the Senate, Canberra, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/index.htm>.

[3] Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95, 2003, available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>.

[4] Administrative Review Council, *The Coercive Information-gathering Powers of Agencies*, Report 48, 2008, available at <http://www.arc.ag.gov.au/Documents/a00Final+Version+-+Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf>.

It highlights the significance of coercive powers as administrative and regulatory tools for government. The report suggests 20 best practice principles that are generally applicable to Commonwealth agencies.

1.3 Obtaining further information and advice

1.3.1 Other useful resources

In addition to this Guide, there is a wide variety of resources and guidance material that may assist when developing new offences, infringement notices and enforcement powers.

Senate Committee Reports

- Scrutiny of Bills Committee website: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/index.htm>
  - Includes information on the Committee's terms of reference and links to Alert Digests, Reports and completed enquiries.
- Senate Standing Committee on Regulations and Ordinances: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/index.htm>

Guidance material

- The Department of Prime Minister and Cabinet publishes the Legislation Handbook, available at <http://www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf>
- Office of Parliamentary Counsel (OPC) website:<http://www.opc.gov.au/>
  - Contains a guide on providing drafting instructions and OPC's drafting directions.
- Office of Legislative Drafting and Publishing (OLDP) website: <http://www.ag.gov.au/Organisationalstructure/Pages/OfficeofLegislativeDraftingandPublishing.aspx>
  - Contains information on OLDP's areas of responsibility, drafting services for legislative instruments and other instruments, FAQs and other related links.
- Australian Law Reform Commission website: <http://www.alrc.gov.au/>
  - The 2002 ALRC Report *Principled Regulation: Federal Civil and Administrative Penalties in Australia* examines alternatives to criminal offences, *Report 95*, available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/95>
- Attorney-General's Department *Developing Clearer Commonwealth Laws website:* <http://www.ag.gov.au/clearerlaws>
  - Contains a Quick Reference Guide and key principles related to developing clearer laws that should apply when developing Commonwealth legislation, and contact details for other Commonwealth policy areas that may be relevant to the legislation being developed

1.3.2 Contacting the Criminal Justice Division

Where an offence, infringement notice scheme, or enforcement power proposal is novel, is not addressed by the advice in the Guide, or involves a departure from a fundamental principle of Commonwealth criminal law, you should contact the Criminal Justice Division. The Criminal Justice Division is also available to answer general questions in relation to this Guide.

Instructing agencies should contact the Criminal Justice Division at an early stage in the legislative process if proposed provisions would depart from a fundamental criminal law principle. Examples of departures from fundamental principles may include provisions that:

- create a criminal offence that operates retrospectively (subpart 2.1.3)
- create a strict liability offence that is punishable by imprisonment (subpart 2.2.6)
- create a Regulation-making power that would allow Regulations to contain offences punishable by imprisonment (part 3.3)
- allow for evidentiary certificates to be conclusive evidence of a fact (part 5.3)
- enable infringement notices to be issued for fault-based offences (subpart 6.2.1)
- remove the privilege against self-incrimination without providing for a 'use' or 'derivative use' immunity (subpart 9.5)
- enable persons assisting an authority that is executing a warrant to use force against a person (subpart 8.3.4)
- enable the use of lethal force
- allow for invasive personal searches (part 10.3), or
- allow entry, search and seizure without a warrant or consent (part 8.6).

Enquiries should be directed to the Principal Legal Officer of the Criminal Law Policy Section:

Phone: (02) 6141 6666 (AGD switchboard)

Email: crjd.draftbills@ag.gov.au

The OPC and OLDP will also refer draft legislation to the Criminal Justice Division if they consider that it contains novel or complex issues that the Guide does not address, or where provisions in the Bill depart significantly from the principles in this Guide.

Where legislation departs from a fundamental principle in this Guide, such as in the examples listed above, or where it is likely to be sensitive or contentious, the Attorney-General may need to personally approve that departure prior to the Bill being introduced into Parliament. The Criminal Justice Division will advise you if the Attorney-General's approval is likely to be required.

If the Attorney-General's approval is required, a letter should be sent from the Minister responsible for the Bill to the Attorney-General, outlining how the Bill departs from a fundamental principle in this Guide and the reasons that the departure is necessary. As the Attorney-General requires a reasonable amount of time to consider a departure from

the Guide, the relevant letter should be sent to the Attorney-General at least a week before the proposed date for finalising the Bill.

1.3.3 Liaising with other areas of the Attorney-General's Department and other agencies

Depending on the policy and practical issues raised by proposals, other areas of the Attorney-General's Department may also be able to provide advice on issues related to offence, infringement notice or enforcement powers provisions. For example:

- National Security Law and Policy Division on secrecy provisions: SLB_Draftbills@ag.gov.au
- The Office of International Law on implementation of international instruments, or the application of provisions of Australian law extraterritorially or in Australia's maritime zones
- The Administrative Law Unit in the Access to Justice Division on decision-making powers and structures, review bodies and other accountability mechanisms. It also has responsibility for amendments to and/or exemptions from the *Administrative Appeals Tribunal Act 1975*, *Administrative Decisions (Judicial Review) Act 1977*, *Judiciary Act 1903* and *Legislative Instruments Act 2003*: ajdalb@ag.gov.au
- The Federal Courts Branch in the Access to Justice Division should be consulted if a provision is likely to affect the federal courts, including if a provision creates, abolishes or affects the power or jurisdiction of a court, may impact significantly on the workload of a federal court, might be viewed as a privative or ouster provision, creates new reviewable or appealable rights, entitlements or responsibilities, or involves an issue relating to Chapter III of the Constitution (by conferring non-judicial functions or powers on judicial officers, or by conferring judicial functions or powers on non-judicial officers) where AGS advice on the issue has been sought: FCBScrutiny@ag.gov.au.
- The Evidence and Legislative Frameworks Section in the Access to Justice Division on provisions relating to evidence and procedure, application and removal of privileges, evidentiary certificates, burden of proof, standard of proof and alternative dispute resolution: evidence@ag.gov.au.
- The Dispute Resolution Policy Section in the Access to Justice Division on provisions relating to alternative dispute resolution: ADR@ag.gov.au.
- The Constitutional Policy Unit, where the conduct regulated was not previously regulated by Commonwealth law, including where possible inconsistency with State law requires management, or where the provisions involve new spending, penalty taxation, inter-governmental cooperation, acquisition of property or enforcement in forums other than courts: cpu@ag.gov.au
- The International Law and Human Rights Division where a measure might discriminate against an individual or impact on human rights.

The Department of the Prime Minister and Cabinet may have an interest in provisions that affect individual privacy.

Treasury should also be consulted on provisions that seek to impose criminal or civil liability on directors or officers of a body corporate for actions or omissions by that body.

Instructing agencies should also liaise with the Australian Federal Police (AFP) at an early stage if they propose to create or expand entry, search or seizure powers, or where a Bill or Regulations would impose new functions or responsibilities on AFP officers.

More information on consultations that may be required can be found:

- in the Legislation Handbook, available at <http://www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf>
- in the *Commonwealth Government Contacts for Specific Areas of Policy Responsibility* paper at <http://www.ag.gov.au/clearerlaws> or
- by conferring with OPC or OLDP.

CHAPTER 2—OFFENCES

OVERVIEW

2.1 Is a criminal offence appropriate?

2.1.1 Determining whether behaviour should be criminalised

Consider the range of legislative options for imposing liability for contravening a statutory requirement

Principle

A criminal offence is the ultimate sanction for breaching the law and there can be far-reaching consequences for those convicted of criminal offences. Consequently, Ministers and agencies should consider the range of options for imposing liability under legislation and select the most appropriate penalty or sanction.

Discussion

A criminal offence is the benchmark against which other sanctions are measured.

The ALRC's Report 95: *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, states:

> The main purposes of criminal law are traditionally considered to be deterrence and punishment. Central to the concept of criminality are the notion of individual culpability and the criminal intention for one's actions.[5]

The report continues:

> ... a key characteristic of a crime, as opposed to other forms of prohibited behaviour, is the repugnance attached to the act, which invokes social censure and shame.[6]

Certain conduct should be almost invariably classified as criminal due to the degree of malfeasance or the nature of the wrongdoing involved. Examples include conduct that results in physical or psychological harm to other people (murder, rape, terrorist acts) or conduct involving dishonest or fraudulent conduct (false and misleading statements, bribery, forgery). In addition, criminal offences should be used where the relevant conduct involves, or has the potential to cause, considerable harm to society or individuals, the environment or Australia's national interests, including security interests.

Alternatives to imposing a criminal conviction

There are a variety of other mechanisms for imposing liability on a person for contravening a statutory requirement. Other mechanisms include infringement notices, civil penalties, enforceable undertakings and administrative sanctions, such as licence cancellation. In many instances, these penalties can be as effective, or more effective, in deterring and punishing breaches of legislation.

[5] Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95: 2003, available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>.

[6] ALRC 95 at 2.9.

ALRC Report 95: *Principled Regulation: Federal Civil and Administrative Penalties in Australia* is a useful resource for Ministers and agencies considering different options for imposing liability under legislation. Chapters 2 and 3 of this report examine sanctions that are alternatives to criminal offences, including infringement notice schemes, civil penalties and enforceable undertakings.[7]

Choosing an appropriate sanction

Factors that should be considered in determining whether to impose a criminal or civil (non-criminal) sanction include:

- the nature of the conduct to be deterred
- the circumstances surrounding the proposed provision
- whether the proposed provision fits into the overall legislative scheme
- whether the conduct causes serious harm to other people
- whether the conduct in some way so seriously contravenes fundamental values as to be harmful to society
- whether it is justified to use criminal enforcement powers in investigating the conduct
- whether similar conduct is regulated in the proposed legislative scheme and other Commonwealth legislation
- if the conduct has been regulated for some time, how effective existing provisions have been in deterring the undesired behaviour, and
- the level and type of penalties that will provide deterrence.

In determining whether a criminal or civil sanction should be applied, perhaps the most important factor to consider will be the effect of a criminal conviction. Conviction for a crime carries with it a range of consequences beyond the immediate penalty.

- Subject to the spent conviction provisions in Part VIIC of the Crimes Act, a person may be required to disclose their criminal conviction in a range of circumstances.[8] For example, disclosure may be required in seeking employment to work with children or work in a law enforcement agency. Imposing a criminal conviction may affect a person's employment opportunities.
- The person may be ineligible to travel to many countries.

[7] This report is available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>.

[8] Division 3 of Part VIIC of the Crimes Act establishes a scheme whereby a conviction for an offence is taken to be 'spent' if:

- the person was not sentenced to imprisonment for the offence, or was not sentenced to imprisonment for more than 30 months
- ten years has elapsed since the conviction (five years where the offence was committed by a minor), and
- the person has committed no further offences during that period.

Subject to certain exclusions, where a conviction for a Commonwealth or Territory offence is spent, the person is not required to disclose to any person in any State or Territory the fact that they have been charged with or convicted of the offence (section 85ZW of the Crimes Act).

- A conviction may also affect the right of a non-citizen to remain in Australia under the *Migration Act 1958.*
- A person, whether a natural person or a body corporate, may be disqualified from being accredited under certain legislation.
- A person may be ineligible to be a director, principal executive officer or auditor of a company, for example, under section 245 of the *Life Insurance Act 1995*.
- A person who has been convicted of an offence punishable by imprisonment for 12 months or longer cannot be a Senator or a member of the House of Representatives (section (44)(ii) of the *Commonwealth of Australia Constitution Act*).
- A criminal conviction carries with it a social stigma, particularly where the conviction is accompanied by imprisonment.

Offences in legislative instruments – need for express power, and use of appropriate kind of instrument

If it is intended that an offence is to be included in a legislative instrument, the empowering Act for the instrument must include express power for the instrument to provide for offences, and should also include the maximum penalty that is considered appropriate to contain offences. In general, a regulation is the only kind of legislative instrument that is considered appropriate to contain offences.

2.1.2 Criminal Code offences of general application

Generally, the offences of general application in the Criminal Code should be relied on, rather than creating new offences

Principle

The Criminal Code and the Crimes Act contain offences of general relevance to Commonwealth administration. These provisions should be utilised, where possible, instead of creating a new offence.

Discussion

Broadly framed provisions of general application were placed in the Criminal Code to avoid the technical distinctions, loopholes, additional prosecution difficulty and appearance of incoherence associated with having numerous slightly different provisions of similar effect across Commonwealth law.

There are also some offences in the Crimes Act. It is intended that these will be transferred to the Criminal Code in the course of modernising Commonwealth criminal laws.

Where a relevant Criminal Code or Crimes Act offence applies, these provisions should generally be relied upon, rather than creating a new offence.

Offences of general application in the Criminal Code are:

- Section 131.1 – Theft

- Section 134.1 – Obtaining property by deception
- Section 134.2 – Obtaining a financial advantage by deception
- Section 135.1 – General dishonesty
- Section 136.1 – False or misleading statements in applications
- Section 137.1 – False or misleading information
- Section 137.2 – False or misleading documents
- Section 141.1 – Bribery of a Commonwealth public official
- Section 149.1 – Obstruction of a Commonwealth public official
- Division 145 – Offences relating to forgery

Offences of general application in the Crimes Act are:

- Section 29 – Destroying or damaging Commonwealth property
- Section 70 – Disclosure of information by Commonwealth officers
- Section 89 – Trespassing on Commonwealth land

2.1.3 Retrospectivity

Offences should impose retrospective criminal liability only in exceptional circumstances

Principle

An offence should be given retrospective effect only in rare circumstances and with strong justification. If legislation is amended with retrospective effect, this should generally be accompanied by a caveat that no retrospective criminal liability is thereby created.

There are additional requirements where delegated legislation operates retrospectively.

The Criminal Justice Division should be consulted at an early stage if a proposed provision would impose retrospective criminal liability.

Discussion

The Federal Parliament and successive governments have only endorsed retrospective criminal offences in very limited circumstances. People are entitled to regulate their affairs on the assumption that something which is not currently a crime will not be made a crime retrospectively through backdating criminal offences.

Exceptions have normally been made only where there has been a strong need to address a gap in existing offences, and moral culpability of those involved means there is no substantive injustice in retrospectivity. Notable examples of retrospective offences in Commonwealth Acts have been:

- the 'bottom of the harbour' tax evasion offences (*Crimes (Taxation Offences) Act 1980*)

- the war crimes offences inserted in the *War Crimes Act 1945* by the *War Crimes (Amendment) Act 1988*, and
- the anti-hoax offence inserted in the Criminal Code by the *Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002*.

In a letter to the Scrutiny of Bills Committee dated 4 April 2002 concerning the Criminal Code Amendment (Anti-hoax and Other Measures) Bill, the then Attorney-General assured the Committee that it would not use the Bill as a precedent for retrospective creation of criminal offences and that the Government did not lightly pursue retrospective criminal laws.[9]

In some cases, retrospectivity of non-offence provisions will be justified. However, where they might indirectly affect liability under a criminal offence, the retrospective operation of the provisions should be expressed not to make a person liable for an offence for which they were not liable at the time.[10]

As a matter of practice the Scrutiny of Bills Committee draws attention to any Bill that seeks to have retrospective impact and will comment adversely where such a Bill has a detrimental effect on people. However, the Committee noted that it will not comment adversely on the issue of retrospectivity if the Bill implements a tax or revenue measure in respect of which the relevant Minister has published a date from which the measure is to apply, and the publication took place prior to the date of application.[11]

Where a Bill has retrospective effect, the Scrutiny of Bills Committee requires the Explanatory Memorandum to contain sufficient justification. This must include an assessment of whether the retrospective provisions will adversely affect any person other than the Commonwealth.[12] Justification in the Explanatory Memorandum is required even if retrospectivity is imposed only as a result of making a technical amendment or correcting a drafting error.[13]

Retrospectivity in delegated legislation

Subsection 12(2) of the *Legislative Instruments Act 2003* provides that delegated legislation which takes effect before gazettal, and which prejudicially affects the rights of

[9] Senate Standing Committee for the Scrutiny of Bills, Report 4/2002, p 160, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2002/index.htm>.

[10] See for example subsection 47(6) of Schedule 1 to the *Superannuation Legislation Amendment Act (No. 4) 1999* and section 9 of the *Superannuation (Unclaimed Money and Lost Members) Consequential and Transitional Act 1999.*

[11] Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39th Parliament November 1998 - October 2001*, p 14, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/completed_inquiries/index.htm>.

[12] See Senate Standing Committee for the Scrutiny of Bills, Report 9/2007, at page 388, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2007/index.htm>.

[13] Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39th Parliament November 1998 – October 2001*, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/completed_inquiries/index.htm> and Report 9/2007.

anyone (other than the Commonwealth), has no effect. However, it is possible for the empowering Act for the Regulations to override the effect of subsection 12(2) by placing an express statement in that Act (under subsection 12(3)).

The Senate Standing Committee on Regulations and Ordinances shares the concerns of the Scrutiny of Bills Committee about retrospectivity.[14] The Committee has stated that unless delegated legislation with retrospective effect is accompanied by an Explanatory Statement indicating that no person other than the Commonwealth is adversely affected, it will raise the matter with the relevant Minister.[15]

2.2 What should I consider when framing an offence?

2.2.1 What characterises a criminal offence?

Offence = physical elements + fault elements

Principle

Offences are made up of physical elements and fault elements.

Discussion

Chapter 2 of the Criminal Code contains the general principles that form the basis for interpreting and applying criminal offence provisions in Commonwealth legislation. Under the Criminal Code, Commonwealth offences consist of physical elements and fault elements (section 3.1).

The *physical elements* of an offence may be conduct, the result of conduct, or a circumstance in which conduct, or a result of conduct occurs (section 4.1). Conduct includes an act, an omission to perform an act (failure to act) or a state of affairs. All offences must have at least one physical element, and commonly have more.

Fault elements relate to the defendant's state of mind at the time the physical elements are engaged in, or arise. The Criminal Code provides four standard fault elements: intention, knowledge, recklessness and negligence. A fifth alternative, dishonesty (defined in section 130.3), was included with the fraud and related provisions and may be applicable in limited cases.

The fault element that applies to a particular physical element can be determined in several ways. An offence may explicitly state that a particular fault element applies to a physical element of an offence. Alternatively, an offence may provide that no fault elements apply to one or more physical elements by expressly applying strict or absolute liability (sections 6.1 and 6.2 – discussed in subpart 2.2.6 of this Guide). If the law

[14] For examples of where the Senate Standing Committee on Regulations and Ordinances has raised concerns about retrospective subordinate legislation outside the criminal context, see the Committee's 40th Parliament Report published in June 2005, pp 26–29, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/reports.htm>.

[15] Senate Standing Committee on Regulations and Ordinances, 110th Report, Annual Report 2000/01, p 14, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/reports.htm>.

creating the offence does not specify a fault element or expressly state that no fault elements apply, section 5.6 of the Criminal Code will automatically apply a fault element depending on whether the physical element is conduct, a result, or a circumstance.

The way in which fault elements apply to physical elements in an offence can be illustrated using subsection 137.2(1) of the Criminal Code as an example.

		Physical elements	Fault elements
Under section 137.2(1) of the Criminal Code a person commits an offence if:			
(a)	the person produces a document to another person	Conduct	Intention Reason: automatic fault element section 5.6 Criminal Code
(b)	the person does so knowing that the document is false or misleading	Circumstance	Knowledge Reason: specified by the offence
(c)	the document is produced in compliance or purported compliance with a law of the Commonwealth.	Circumstance	Recklessness Reason: automatic fault element section 5.6 Criminal Code

For a defendant to be found guilty, the prosecution must prove each physical element and the corresponding fault element beyond reasonable doubt (sections 3.2, 13.1 and 13.2 of the Criminal Code). Proof of guilt is not established unless the physical and fault elements occur concurrently.

Further information about the operation of the Criminal Code provisions concerning the physical and fault elements of offences is contained in *The Commonwealth Criminal Code: A Guide for Practitioners*[16] and in the Criminal Law Officers Committee,[17] *Model Criminal Code Report, Chapters 1 and 2: General Principles of Criminal Responsibility*.[18]

2.2.2 Physical elements

The different physical elements of an offence should be able to be clearly distinguished

Principle

Criminal offences should generally be expressed in a way that enables each physical element of the offence to be clearly distinguished (either expressly or by construction). In particular, the elements of conduct, circumstances and results constituting the offence should be distinguishable from each other.

[16] Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, March 2002, Canberra, pp 21-124, available at <http://www.ag.gov.au/Publications/Pages/CriminalCodePractitionerGuidelinesMarch2002.aspx>.

[17] Now the Model Criminal Law Officers Committee (MCLOC).

[18] Model Criminal Code Officers Committee, *Model Criminal Code Report, Chapters 1 and 2: General Principles of Criminal Responsibility*, December 1992, Canberra, available at <http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_mcloc>.

Discussion

Under Division 5 of Chapter 2 of the Criminal Code, a fault element (or strict or absolute liability) attaches to each separate physical element of an offence. If no fault elements are specified, the fault element that applies automatically under section 5.6 of the Criminal Code depends on whether the physical element is conduct, a circumstance or a result (default fault elements in the Criminal Code are discussed in subpart 2.2.4 of this Guide).

The ability to distinguish physical elements is particularly important where the default fault elements in the Criminal Code are to apply, so that it is clear which fault elements will apply to the physical elements of the offence. Whilst still important to ensure that physical elements are clear, it is less critical to be able to distinguish physical elements if strict liability or absolute liability attaches to all of the physical elements of the offence. In this situation, it is not necessary to prove a fault element in relation to the physical elements of the offence (see subpart 2.2.6 of this Guide).

The physical elements of an offence can be distinguished in a number of ways. One of the most common ways to achieve this is by placing each physical element in a separate paragraph. This is the approach that is generally used in the Criminal Code and is the preferred drafting model as it separates out each of the physical elements so it is clear how the Criminal Code will apply. However, in other instances, it may be possible to ensure that the physical elements can be distinguished using different drafting methods. Your drafter will be able to advise you on the most effective way to achieve this.

2.2.3 Fault elements

Use the fault elements in the Criminal Code

Principle

Fault elements, and alternatives to requiring proof of fault (such as applying strict or absolute liability), should be drawn from the Criminal Code.

Discussion

The four standard fault elements of **intention**, **knowledge**, **recklessness** and **negligence**, have been carefully devised and codified in the Criminal Code. In almost all cases, Commonwealth criminal offences should use these fault elements, including relying on the Criminal Code's definition of those terms.

In the process of harmonising Commonwealth criminal law with the Criminal Code, a much wider range of 'fault' and 'no fault' terminology was removed from the statute book. Use of the Criminal Code elements is designed to remove ambiguities that had been present in much of the alternative terminology used, and provides a much simpler basis for understanding and applying Commonwealth offences, including by providing a clearer and firmer basis for any prosecution.

There are significant dangers in using formulations of fault that depart from the fault elements set down in the Criminal Code. A departure would normally only be justified where it was demonstrably not possible to achieve the Government's objectives through

the Criminal Code fault elements or alternatives to fault, taking into account the dangers in using alternative formulations. To date, such cases have been very rare.

2.2.4 Choosing an appropriate fault element

Generally, the default fault element in the Code should apply

Principle

The default fault elements supplied by section 5.6 of the Criminal Code should apply unless there is a sound reason to depart from them.

Where the default fault elements are not relied upon, certain formulations should generally be avoided. For example, knowledge or recklessness should generally not be applied to conduct, and care should be taken in applying intention or knowledge to circumstances or results.

Discussion

As discussed in subpart 2.2.1 of this Guide, where the relevant legislation does not specify any fault element for a criminal offence (or a particular physical element of the offence), then in the absence of an express statement that the criminal offence is one of strict or absolute liability, the Criminal Code will import the relevant fault element.

Where the physical element is conduct, the fault element if no other is specified is 'intention' (subsection 5.6(1)). Where the physical element is a circumstance or result, the fault element if no other is specified is 'recklessness' (subsection 5.6(2)).

The default fault elements were carefully considered and devised in the process of developing the Criminal Code. Consequently, the default fault elements supplied by the Criminal Code should apply unless there is a sound reason to depart from these.

Departure from the standard application of fault in the Criminal Code may be justified where, for example, it is not possible to achieve the Government's objectives through the Criminal Code options. Any departure from the automatic fault elements should be justified in the explanatory material to the legislation.

For a 'circumstance' or 'result', the default fault element is recklessness. Imposing a higher fault requirement (namely 'intention' or 'knowledge') will have the consequence that a person who is aware of a substantial risk that a circumstance exists or a result will occur will not be liable.

The Criminal Code reflects the common law in providing that the automatic fault element for a conduct element of an offence is intention. The fault elements of knowledge and recklessness should generally not apply to conduct. While in some cases, strict and absolute liability may apply to conduct, there is rarely any problem of proof that would necessitate this because it will almost always be clear that a person intended his or her own conduct.

2.2.5 When is it appropriate to apply negligence as a fault element?

Do not use negligence unless it is appropriate for a person's liability to be determined with reference to an objective standard

Principle

Negligence should be specified as a fault element for an offence only where it is necessary that a person be criminally liable based in part on objective standards rather than their own subjective mental state.

Where negligence is specified it should be applied to a 'circumstance' or 'result' rather than to 'conduct'.

Discussion

Proof of negligence, as defined in the Criminal Code, requires an objective assessment of the standard of care and of risk. It requires 'such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that the physical element exists or will exist, that the conduct merits criminal punishment...' (section 5.5).

The following considerations should be applied in determining whether negligence is a suitable fault element.

- Where the context is one where negligence is a well-established indication of liability (eg occupational health and safety), this will support the use of negligence.
- Where a person who was not aware of relevant risks or circumstances is deserving of criminal punishment if they fall seriously short of the requisite standard of care, this will suggest that negligence may be a suitable standard.
- The higher the proposed penalty for an offence, the stronger the justification for negligence should be. Traditionally, negligence has not been considered appropriate for an offence for which the penalty is a significant term of imprisonment.
- Negligence can be applied to a circumstance or result but should not be applied to conduct, as the definition of negligence in the Criminal Code is problematic when applied to conduct.
- For certain kinds of physical elements (ie jurisdictional elements[19]), strict or absolute liability may be more suitable than negligence.

[19] A jurisdictional element of an offence is an element that does not relate to the substance of the offence, but instead links the offence to the relevant legislative power of the Commonwealth. For example, in the case of theft of Commonwealth property, the act of theft is the substantive element of the offence, while the circumstance that the property belongs to the Commonwealth is a jurisdictional element (see section 131.1 of the Criminal Code).

The Scrutiny of Bills Committee has indicated that where a Bill includes provision for a fault element of negligence, the Explanatory Memorandum to that Bill should explain the reasons for the use of negligence.[20] The Committee may express concern about the use of negligence as a fault element if it does not consider that adequate justification has been provided.

2.2.6 Strict liability and absolute liability

Strict liability and absolute liability remove a fault element that would otherwise attach to a physical element and are generally only appropriate in limited circumstances

Principle

The requirement for proof of fault is one of the most fundamental protections in criminal law. This reflects the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).

The application of strict and absolute liability negates the requirement to prove fault (sections 6.1 and 6.2 of the Criminal Code). Consequently, strict and absolute liability should only be used in limited circumstances, and where there is adequate justification for doing so. This justification should be carefully outlined in the explanatory material.

The Criminal Justice Division should be consulted at an early stage on any proposal to apply strict liability to all elements of an offence that is punishable by imprisonment.

Discussion

Strict and absolute liability remove a fault element that would otherwise attach to a physical element. Consequently, where strict or absolute liability applies to an element of an offence, that element will be made out if it is shown that the physical elements were engaged in, or existed. The prosecution is not required to prove fault.

Strict liability and absolute liability can only be applied by an express provision to this effect and can attach to either a single physical element of an offence or all physical elements of an offence.

The difference between strict and absolute liability is that strict liability allows a defence of honest and reasonable mistake of fact to be raised (section 9.2 of the Criminal Code, discussed in subpart 4.2.1 of this Guide). The application of absolute liability does not. Under this defence, a defendant must turn his or her mind to the existence of the facts, and be under a mistaken but reasonable belief about those facts. Failure to consider the existence of the facts does not constitute a 'reasonable mistake of fact'.

Because proof of fault is one of the most fundamental protections of criminal law, strict or absolute liability should only apply where there is adequate justification and subject to

[20] See Senate Standing Committee for the Scrutiny of Bills, Alert Digest 6/2001, p 30, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/alerts/2001/index.htm>.

the limitations outlined below. The Scrutiny of Bills Committee regularly comments on strict and absolute liability offences.

Applying strict or absolute liability to a particular physical element

Applying strict or absolute liability to a *particular* physical element of an offence may be justified where one of the following applies.

- Requiring proof of fault of the particular element to which strict or absolute liability applies would undermine deterrence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made a reasonable mistake of fact in respect of that element.
- The element is a jurisdictional element rather than one going to the essence of the offence. Absolute liability should apply to jurisdictional elements. Alert Digest 2/2010 (at pages 26–27) provides some useful examples of what the Scrutiny of Bills Committee has previously considered are appropriate uses of absolute liability.[21]

Applying strict or absolute liability to all physical elements

Application of strict or absolute liability to *all* physical elements of an offence is generally only considered appropriate where all of the following apply.

- The offence is not punishable by imprisonment.
- The offence is punishable by a fine of up to:
  - 60 penalty units for an individual (300 for a body corporate) in the case of strict liability, or
  - 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability.[22]
- The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct.
- There are legitimate grounds for penalising persons lacking fault; for example, because he or she will be placed on notice to guard against the possibility of any contravention. If imposing absolute liability, there should also be legitimate grounds for penalising a person who made a reasonable mistake of fact.

[21] Senate Standing Committee for the Scrutiny of Bills, Alert Digest 2/2010, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2010/index.htm>.

[22] A higher maximum fine may be used where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment. See the Government Response to the Senate Standing Committee for the Scrutiny of Bills Report, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 2002, available at <https://docs.google.com/viewer?a=v&q=cache:IQDN-yjFF_EJ:www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url%3Dscrutiny/bills/2002/b06_response.pdf+Government+Response+to+the+Senate+Standing+Committee+for+the+Scrutiny+of+Bills+Report,+Application+of+Absolute+and+Strict+Liability+Offences+in+Commonwealth+Legislation,+2002&hl=en&gl=au&pid=bl&srcid=ADGEESgCJWNAhrcCizACeEJZImbqknj-ZQMbT7PtJfz1tdIkjKceWTev2AcCyOTlQ1ZKqkBErb-F93uLY63PpSb17_9ccJNlJokNG-Wjbnrx2cLqT7WX6eN0QjsJRXeW1-vBWY9MApaQ&sig=AHIEtbS5CmjXE9sIFCYkY5rVO_qJdWWRAQ>.

Strict liability should apply to all physical elements of an offence that is subject to an infringement notice scheme (see Chapter 6 of this Guide).

These principles are compatible with comments made by the Scrutiny of Bills Committee in its Report 6/2002.[23] The Committee considers that the following principles should apply to the framing and administration of strict and absolute liability offences.

- Strict liability offences should be applied only where the penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.
- Strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime, such as public health, the environment, or financial or corporate regulation. However, as with other criteria, this should be applied subject to other relevant principles.
- Strict liability should not be justified by reference to broad uncertain criteria, such as offences being intuitively against community interests or for the public good. Criteria should be more specific.
- Strict liability may be justified where its application is necessary to protect the general revenue.
- Strict liability should not be justified on the sole ground of minimising resource requirements; cost saving alone would normally not be sufficient, although it may be relevant together with other criteria.
- Absolute liability may be acceptable where an element is essentially a precondition of an offence and the state of mind of the defendant is not relevant. Such cases are rare and should be carefully considered.

The Committee has previously asked relevant Ministers to confirm whether the principles in Report 6/2002 were considered when applying strict or absolute liability to an offence.[24] Instructing agencies should familiarise themselves with the principles in Report 6/2002 and the Government response to that report, tabled in June 2004.[25]

Explaining the justification for strict or absolute liability

The Committee also frequently asks relevant Ministers to advise whether this Guide was consulted in the framing of the provisions and will comment adversely where provisions do not accord with the principles outlined in this Guide (see for example Reports 5/2010, 6/2010, 7/2010, 12/2009 and 8/2007).

Consequently, the explanatory material should contain the reasons for applying strict or absolute liability to an offence, including whether the provisions are consistent with the principles in this Guide. The Committee will seek the responsible Minister's advice about the justification for applying strict or absolute liability where there is no explanation for the application of strict liability or absolute liability in an Explanatory

[23] *Application of Absolute and Strict Liability Offences in Commonwealth Legislation,* available at <http://www.aph.gov.au/binaries/senate/committee/scrutiny/bills/2002/b06.pdf>.

[24] See, for example, Senate Standing Committee for the Scrutiny of Bills, Report 7/2008, available at <http://www.aph.gov.au/binaries/senate/committee/scrutiny/bills/2008/b07.pdf>.

[25] Copies of the Report and the Government Response are available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2002/index.htm>.

Memorandum or where the explanation given is inadequate (see for example Reports 6/2010, 7/2010 and 10/2009).[26]

2.3 Ensuring that the scope of the offence is clear

2.3.1 Location of offences

Offences should be located with related provisions

Principle

Offences should generally be located with other provisions with the same substantive subject matter, rather than being grouped together in an 'Offences' Part.

Discussion

Placing offences with related substantive provisions (for example, those conferring an obligation to engage in certain conduct) assists the reader in identifying and understanding the relationship between the two. It also makes it clear to the reader when failure to meet an obligation under the legislation will lead to a criminal sanction.

Where provisions are separated, the offence provision and substantive provisions should explicitly refer to each other, by way of explanatory notes or otherwise, so that those subject to the law and those administering the law can readily ascertain the relationship between the provisions.

2.3.2 Extended application of an offence

Any extended application of an offence should be clear

Principle

The scope of an offence should be clear on its face. Where it is necessary to extend an offence's application through another provision, consider inserting a note under the offence referring to the extended application provision.

Discussion

An example of extended application is where it is an offence under one provision to export apples, and a separate provision states that the offence also applies to the export of pears. Such cross-references are generally undesirable, because of the potential confusion for readers of the legislation and because such cross-references may give rise to an unintended interpretation of the offence.

Where possible, it is preferable to either directly amend the original offence (eg to apply to apples and pears) or to create a new, self-contained offence (eg concerning export of pears).

[26] The Senate Standing Committee for the Scrutiny of Bills' reports are available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2012/index.htm>.

If an offence is to have extended application through another provision, consider including a note to the main offence provision pointing to the extended application provision. The note inserted at the start of Part II of the *Crimes (Taxation Offences) Act 1980* is an example.[27]

2.3.3 General offences

Do not use 'general' offences

Principle

General offence provisions that are expressed to apply to any contravention of an Act, Chapter, Part or Division should be avoided.

Discussion

General offence provisions often lack specificity and can create confusion as to which contraventions are subject to the offence. For example, it will often be unclear whether a general offence provision is intended to capture procedural provisions (such as provisions that allow an authorised Government employee to issue a notice or grant a licence and set out a process which should be followed).

Because the intended scope of a general offence is often unclear, it can cause difficulty in enforcing or prosecuting the relevant provisions. In addition, the provisions in the Act, Chapter, Part or Division may not be drafted in accordance with the principles in this Guide.

For many years, the inclusion of such provisions in new Commonwealth laws has been actively discouraged and older provisions of this kind repealed as the opportunity arises. Instead, each contravention that is intended to constitute an offence should be drafted as a separate offence.

2.3.4 Delegation of offence content

The content of an offence should only be delegated to another instrument where there is a demonstrated need to do so

Principle

The content of an offence set out in an Act or regulation should be clear from the offence provision itself, although the offence may rely on the Act or regulation, or another instrument, to define terms used or give context to the offence. The content of the offence should not be provided in another instrument unless there is a demonstrated need to do so. Where it is necessary for offence content to be delegated, it is preferable for that content to be placed in Regulations.

[27] This note provides as follows: 'Note: The offences in this Part are applied to other taxes by the later Parts of this Act. These taxes are…'

Discussion

It is normally desirable for the content of an offence to be clear from the offence provision itself, so that the scope and effect of the offence is clear to the Parliament and those subject to the offence. This also enables the entirety of the content of an offence to be scrutinised by Parliament. An offence to the following effect would normally be considered undesirable:

> A person commits an offence if the person fails to comply with obligations set out in Regulations / a document published by the Minister / a code of conduct.

A further problem with the offence in this example is that it is a form of general offence that applies a single maximum penalty to a wide range of potential conduct of undifferentiated seriousness (see subpart 2.3.3 of this Guide).

Offence content should also only be delegated from an Act to an instrument where there is a demonstrated need to do so. For example, it may be appropriate to delegate offence content where:

- the relevant content involves a level of detail that is not appropriate for an Act (eg section 20AB of the *Civil Aviation Act 1988* allows for the Regulations to specify the process for determining the types of people who are authorised to carry out a variety of duties in relation to different categories of aircraft)
- prescription by legislative instrument is necessary because of the changing nature of the subject matter (eg section 18HE of the *National Measurement Act 1960* allows for the prescription of scales of measurement on measuring instruments appropriate for particular classes of goods for sale)
- the relevant content involves material of such a technical nature that it is not appropriate to deal with it in the Act (eg Division 4 of Part VI of the *National Measurement Act 1960* allows for the prescription of the procedures by which the average quantity of a statistically significant sample of goods is calculated), or
- elements of the offence are to be determined by reference to treaties or conventions, in order to comply with Australia's obligations under international law or for consistency with international practice (eg the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008*).

Offence content should not be delegated from an Act to a subordinate instrument if it would be more appropriate for that content to receive the full consideration and scrutiny of the Parliament (eg if the content to be delegated is likely to be significant or contentious).[28] The Scrutiny of Bills Committee is likely to be critical of any offence containing an excessive delegation of rule-making power to the executive or unelected public officials (eg Report 3/2002 pages 121-23 and Report 14/2003 pages 309-311).[29]

[28] See for example, the Senate Standing Committee for the Scrutiny of Bills' comments at paragraphs 5.8-5.14 in *The Work of the Committee during the 40th Parliament*, in which the Committee expresses its concern about modifying serious offences by Regulations. This report is available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/work40/index.htm>.

[29] These reports are available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2012/index.htm>.

It is generally easier to justify the delegation of offence content to Regulations than other kinds of subordinate instruments. Regulations are considered by the Federal Executive Council and are subject to disallowance by Parliament. This provides an additional layer of scrutiny and accountability.

The Scrutiny of Bills Committee prefers offence content to be contained, at a minimum, in subordinate instruments that are subject to Parliamentary review (and therefore disallowance). This includes legislative instruments, whether in the form of Regulations or otherwise. The Committee has previously expressed concern about provisions which allow a change in obligations imposed without the Parliament's knowledge, or without any opportunity for Parliament to scrutinise the variation.[30] There should also be strong justification where delegated legislation is exempted from review.[31]

The above principles also apply to the delegation of offence content from regulations to another subordinate instrument. This can occur:

- where the principal Act delegates offence content to Regulations and also allows those regulations to delegate the offence content to a further subordinate instrument, or
- where the principal Act allows Regulations to provide for offences, and those Regulations create offences that delegate offence content to another subordinate instrument.

In addition, offence content should generally only be sub-delegated where it is likely to be lengthy, technical in nature or change regularly. There should be sound reasons for not placing this content in Regulations.

It may also be appropriate for offence content to be delegated to a document where a person has agreed to be bound by that document (see subpart 2.3.6 of this Guide).

2.3.5 Appropriate safeguards for delegated offence content

Where offence content is delegated, appropriate safeguards should apply

Principle

When the content of an offence is delegated to a subordinate instrument, safeguards should be put in place to ensure that the types of matters that can be delegated are clear and that those who are subject to the offence can readily ascertain their obligations.

[30] See Senate Standing Committee for the Scrutiny of Bills, Report 6/2010, pp 217-21, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2010/index.htm>.

[31] See Senate Standing Committee for the Scrutiny of Bills, Report 1/2007, pp 7-9, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2007/index.htm>.

Discussion

The following principles should be applied in developing appropriate safeguards for offences containing content delegated to a subordinate instrument.

- The content that may be delegated to the subordinate instrument should be clearly defined and circumscribed in the Act.
- There should be a mechanism for ensuring that the subordinate rule is readily obtainable (eg it will be available on the Federal Register of Legislative Instruments (FRLI) and/or the relevant Department's website).[32]
- There should be a mechanism for distinguishing those parts of an instrument to which the offence provision applies. For example, if the offence applies to contravention of a regulation made for the purposes of the offence, relevant Regulations should refer to the offence provision.[33]

Where an offence affects an identifiable class of people, it may also be appropriate for relevant stakeholders to be consulted when changes are made to the delegated content. For example, the Civil Aviation Safety Authority has informal and formal processes for consulting stakeholders in the aviation industry whenever legislative changes are made that affect business or restrict competition.[34]

The explanatory material should also explain why it is necessary to delegate offence content and any safeguards that have been included in the legislation.

2.3.6 Offences for contravention of a licence, authorisation or permit

Where the conditions of a licence, authorisation or permit can be varied, the legislation should include notification requirements and a period for compliance

Principle

Licences, authorisations or permits differ from other forms of delegated content such as Regulations and determinations, because the holder applies for a licence or permit and agrees to its terms.[35] However, where legislation permits the Government (eg the Minister or the Secretary of a Department) to vary the terms of the licence, authorisation or permit, the legislation should generally provide for the holder to be notified of the

[32] The Senate Standing Committee for the Scrutiny of Bills has previously expressed concern that people who are obliged to obey a law that is defined by reference to another document may have inadequate access to that document. See page 218 of Report 6/2010, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2010/index.htm>.

[33] See for example section 167 of the *Airports Act 1996*.

[34] Further information can be obtained on the Civil Aviation Safety Authority website at <http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_91146>.

[35] Similarly, it may be appropriate for it to be an offence where a person fails to comply with a plan or document that they have given to a regulatory agency as a statement of activities that the person will undertake or refrain from (eg safety standards that an organisation has agreed to adhere to as part of a self regulatory regime or an undertaking to perform certain maintenance at set intervals). Where failure to comply with a plan or document is an offence, appropriate safeguards should apply (such as those listed in subparts 2.3.5 and 2.3.6).

change. Consideration should also be given to allowing a minimum period for compliance with the new conditions. This principle is particularly important where a person may be criminally liable for non-compliance.

Discussion

When conditions of a licence, authorisation or permit are changed, the holder should be notified of that change and given an opportunity to comply. This is particularly important in circumstances where breach of a condition is subject to a criminal offence. This is based on the principle that it is generally not fair to subject people to criminal punishment where they are operating under a mistaken belief as to the requirements that apply to their conduct.

For example, under section 77Q of the *Customs Act 1901*, the CEO of Customs may specify additional conditions that apply to a depot licence by notifying the holder of the licence in writing. However, the variation of the licence conditions does not take effect until 30 days after the notice is given.

However, a minimum period of compliance may not be suitable in some cases, and the variation of conditions may take effect upon notification. This may be necessary in provisions dealing with public health and safety, the protection of the environment, or in provisions where the variations are beneficial to the holder of the licence, authorisation or permit.

2.3.7 Terms to be avoided or used with caution

Certain terms should be avoided or used with caution

Principle

Certain terms can cause confusion because of the way they interact with the definitions, physical elements and fault elements in the Criminal Code. Those terms should be avoided or used with caution.

Discussion

Terms that may overlap with terminology in the Criminal Code

Generally, where an offence involves a result element of injury, the standard terms ‘harm’ and ‘serious harm’ should be used rather than terms such as ‘injury’ or ‘grievous bodily harm’. The meaning of ‘harm’ and ‘serious harm’ has been carefully defined in the Dictionary to the Criminal Code. Consistent use of these terms is designed to avoid legal doubts and limitations attaching to alternative terms and to move away from archaic terminology such as ‘grievous bodily harm’.

Terms that may confuse physical elements

Words like ‘kill’, ‘injure’, ‘harm’, ‘damage’ and ‘destroy’ should not be used as active verbs in an offence. Death, injury, harm, damage and destruction are all the results of conduct rather than the conduct itself. Therefore, an offence should be framed in terms of an action that results in ‘damage to’, ‘harm to’, ‘the death of’ etc. This avoids

potential confusion over whether an element is conduct or the result of conduct, and makes it clear that the default fault element is recklessness rather than intention.

Similarly, verbs like 'contravene' can conflate the two physical elements of conduct and result. In this context, it is important to consider which physical element is most appropriate and frame the offence accordingly. For example, the contravention of a licence, authorisation or requirement should be framed as a result, so that it is clear that the automatic fault element is recklessness. This principle does not apply if strict or absolute liability applies to each element of the offence.

Terms that may confuse fault elements

Terms that have traditionally been construed by courts as governing fault should generally be avoided, as using them may result in unintentionally creating a fault element. Examples of words or phrases which should generally not be used include:

- **for the purpose of / so as to**

  In most cases these are better expressed as 'intending'.

- **likely**

  This word may interact with the fault elements of recklessness and negligence with unintended consequences. If 'likely' is used to describe the result, recklessness applies, with the consequence that the prosecution would have to prove that the person was aware of a substantial risk that the result is likely to occur. As 'substantial risk' and 'likely' are different descriptions of probability, using them in combination creates some uncertainty. In most cases, recklessness or negligence should be relied on.

- **improperly**

  This is normally redundant as the impropriety equates to contravening the substance of the offence.

- **ought reasonably to know / had reasonable grounds to believe**

  The Scrutiny of Bills Committee has criticised the use of these terms, which appear to reflect a compromise between requiring proof of fault and imposing strict liability. Because the application is uncertain, depending on the context, a court may read in a requirement for the prosecution to prove something similar to recklessness.

- **reckless indifference**

  The fault element of recklessness, as defined in Chapter 2 of the Criminal Code, should instead be relied on.

- **to affect / to deceive**

  These phrases create uncertainty. It is unclear whether they refer to the intent to affect or deceive or the result of having that effect or causing that deceit. An offence should instead clearly distinguish conduct and result elements of the offence.

- **to the extent that the person is capable of complying**

  This phrase may be redundant. It is implicit in any form of fault that the person is only guilty if they were capable of complying. A fault element should be specified.

- **wilfully**

  This should not be used. It is an archaic alternative for intention, and in some cases extends to recklessness.

Where strict or absolute liability applies to all elements of an offence, words that imply that a person's fault is relevant to committing an offence should be avoided. This includes terms such as 'intends', 'knows', 'becomes aware', 'believes' and 'agrees to'.

2.4 Who can be made responsible for committing a criminal offence?

2.4.1 Corporate criminal responsibility

Corporate criminal responsibility is generally governed by the Criminal Code

Principle

The rules on corporate criminal responsibility in the Criminal Code aim to facilitate effective prosecution of bodies corporate for Commonwealth offences.

Discussion

Part 2.5 of the Criminal Code sets out the rules governing when criminal responsibility can be attributed to a body corporate, based on the conduct of directors and employees and the surrounding circumstances. Part 2.5 applies to Commonwealth offences, unless it is impliedly or expressly displaced.

2.4.2 Vicarious, collective or deemed liability

Vicarious, collective or deemed liability should only be used where strictly justified

Principle

Vicarious, collective or deemed liability should only be used in limited circumstances. This is because it cuts across the fundamental principle that an individual should be responsible only for his or her own acts and omissions.

Discussion

Vicarious, collective or deemed liability is when one person is made liable for the wrongful act of another on the basis of the legal relationship between them. Vicarious, collective or deemed liability should only be used in situations where it can be strictly justified.

A business structure not set up as a corporation, such as a partnership or trust, is not criminally responsible for the acts or omissions of one of its members because it is not a separate legal entity. In a partnership, the partners themselves are often individually or collectively responsible for acts or omissions connected with the business, for example,

for upholding contractual obligations made with other businesses. However, holding all partners or members of non-corporate business associations collectively responsible for the criminal conduct of one individual member should generally be avoided because it is inconsistent with the principle that individuals should not be criminally responsible for the conduct of others (guilt by association).

Holding a body corporate criminally liable for offences committed by its employees or agents is not considered to be imposing vicarious liability or collective responsibility. This is because a body corporate is established as a separate legal entity that acts through its directors and/or employees (see Part 2.5 of the Criminal Code). However, there are limitations on when it will be appropriate to make employees or agents (such as a director) personally liable for actions committed by a corporation. Generally, where personal liability can be justified, it should be imposed on the basis of accessorial liability. That is, a person should be held personally liable if he or she was an accessory to corporate misconduct.

When considering imposing criminal responsibility on directors or officers of bodies corporate, instructors and drafters must apply the Council of Australian Government (COAG) Principles and Guidelines for assessment of directors' liability. Treasury should be consulted on all provisions that seek to impose personal liability for corporate fault.

The Scrutiny of Bills Committee has taken the view that vicarious liability should only be used where the 'consequences of the offence are so serious' that the normal requirement for proof of fault can be put aside.[36] In Alert Digest 3/1998,[37] the Committee indicated that it would be prepared to accept vicarious liability being imposed on the managers or directors of a company, but also indicated that cases in which a person's employer was a natural person rather than a corporation may be treated differently.

However, there are instances where Parliament has permitted vicarious liability, including two areas where vicarious liability is well-established:

- in shipping law, it has been traditional for offence provisions to apply to the master and the owner of a ship, and
- in taxation law, responsibility has traditionally been imposed on the partners of a partnership and the members of unincorporated associations collectively.

2.4.3 Crown responsibility

The Crown should not be made criminally responsible

Principle

The Crown cannot be held criminally responsible unless legislation provides to the contrary. It is generally not appropriate to make a contrary provision.[38]

[36] Senate Standing Committee for the Scrutiny of Bills, Alert Digest 2/1996.

[37] Alert Digests are available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/alerts/2012/index.htm>.

[38] Occupational health and safety legislation is an example of an exception. See for example subsection 11(4) of the *Occupational Health and Safety Act 1991*.

Discussion

There is a strong common law presumption that the Crown is not criminally liable: see *Cain v Doyle* (1946) 72 CLR 409. For the Crown to be bound by the provisions of a statute, there must be clear words or a necessary implication that the Crown is so bound.

As a matter of policy, the view has consistently been taken that Commonwealth law should not impose criminal responsibility on the Crown. Legislation expressed to bind the Crown does not usually impose criminal liability on the Crown. However, to avoid doubt, where legislation is expressed to bind the Crown, this should be qualified by a statement that the Crown is not liable to prosecution for an offence under that Act.

Where legislation is expressed to bind the Crown, directive provisions may be enforced by civil remedies (eg injunction). Furthermore, Crown immunity from criminal responsibility does not extend to Crown servants. An officer, servant or agent of the Commonwealth who commits an offence has no immunity from criminal responsibility: see *Jacobsen v Rogers* (1995) 182 CLR 572 at paragraph 13.

Government business enterprises that are outside the shield of the Crown are subject to criminal responsibility in the same manner as other corporations. Most of the Commonwealth's trading and business activities are carried on by these enterprises, which can be held criminally responsible for unlawful conduct. If it is intended that Crown immunity from criminal responsibility apply to a Commonwealth government business enterprise for the purpose of particular legislation, the legislation should expressly provide for this.

If the question of whether a statutory authority of the Commonwealth falls within the shield of the Crown is put before a court, the court will determine the question by reference to the particular circumstances of the authority. The central issue a court will examine is whether the authority acts solely at the behest of the Crown or is capable of independent action: *Townsville Hospital Board v Townsville City Council* (1982) 149 CLR 282. Generally, if the legislation establishing the authority does not expressly provide immunity, immunity will not readily be implied by courts.

2.4.4 Extensions of criminal liability

Provisions in the Criminal Code should generally be used to extend criminal liability

Principle

The provisions in the Criminal Code automatically extend liability for Commonwealth criminal offences to persons who may not directly commit an offence but engage in other ancillary activities or jointly commit an offence with another person or persons. These provisions will apply unless the legislation displays a contrary intention.

These provisions should generally be relied upon to extend criminal liability.

Discussion

Unless specifically excluded, the provisions in Part 2.4 of the Criminal Code extend criminal liability to persons who may not directly or individually commit an offence, but:

- attempt to commit an offence (attempt at section 11.1)
- are accomplices to the commission of an offence (complicity and common purpose at 11.2)
- jointly commit an offence (joint commission at section 11.2A)
- procure the commission of an offence by an agent (innocent agency at section 11.3)
- incite the commission of an offence (incitement at section 11.4), or
- conspire with another person to commit an offence (conspiracy at section 11.5).

The extension of criminal responsibility provisions in the Criminal Code have been carefully formulated. Consequently, these provisions should be relied upon unless there is sound justification to depart from them.[39]

Where an offence is designed to be a complete articulation of the liability created, or where the offence covers preparatory conduct, consideration should be given to disapplying some or all of Part 2.4 of the Criminal Code (see for example section 272.5 of the Criminal Code).

2.5 Geographical jurisdiction (extraterritoriality)

Ensure any intended extraterritorial application is clearly stated

Principle

If an offence is intended to have extraterritorial operation, the offence should specify the option for geographical jurisdiction under the Criminal Code that applies.

Discussion

The Criminal Code geographical jurisdiction provisions:

- provide a default rule for the geographical reach of all Commonwealth offences (section 14.1), and
- allow Commonwealth offences to have extended geographical application through a convenient shorthand reference to one of the alternatives provided by categories A-D (sections 15.1 to 15.4 of the Criminal Code).

The standard geographical jurisdiction that applies is quite broad and will usually be sufficient to meet policy objectives. Under the standard provision, if any part of the conduct constituting an offence occurs in Australia or on an Australian aircraft or ship, the offence applies. The offence also applies if any part of the result of the conduct

[39] For example, it may be appropriate to depart from these provisions where an offence is intended to cover preparatory conduct and it is necessary to depart from the standard extensions of criminal liability in order to achieve the objectives behind the legislation. The explanatory material should justify any departure from the extensions of criminal responsibility in the Criminal Code.

constituting the offence occurs in Australia or on an Australian aircraft or ship. There is a defence where the offence is committed outside Australia and there is no equivalent offence under the law of the local jurisdiction.

Caution should be exercised before extending geographical jurisdiction beyond the standard articulated in section 14.1. It will often be more appropriate to leave the laws of a foreign jurisdiction to apply to matters falling outside standard jurisdiction as it is unrealistic to expect that Australian enforcement officials could engage in enforcement action overseas.

Where it is considered that an offence should carry extended extraterritorial application, the Criminal Code provides four alternatives:

Category A – provides for an offence to extend to conduct by an Australian citizen or body corporate outside Australia. For an Australian citizen or body corporate, it is not a defence that there is no equivalent local offence (section 15.1 of the Criminal Code). Sections 471.10 - 471.13 of the Criminal Code are examples of Category A offences.

Category B – provides for an offence to further extend to conduct by an Australian resident outside Australia if there is an equivalent offence in the law of the local jurisdiction (section 15.2 of the Criminal Code). Sections 270.6 and 270.7 of the Criminal Code are examples of Category B offences.

Category C – provides for an offence to further extend to conduct by any other person outside Australia if there is an equivalent offence in the law of the local jurisdiction (section 15.3 of the Criminal Code). Division 139 of the Criminal Code contains an example of the application of a Category C offence.

Category D – provides for an offence to further extend to conduct by any person outside Australia even if there is no equivalent offence in the law of the local jurisdiction (section 15.4 of the Criminal Code). Subsections 141.1(1) and (3) of the Criminal Code are examples of the application of Category D offences.

The Attorney-General's consent will be required to commence proceedings if the conduct constituting the offence occurs wholly in a foreign country, and the person alleged to have committed the offence is not an Australian citizen or a body corporate incorporated under a law of the Commonwealth or of a State or Territory (see section 16.1 of the Criminal Code).

In cases where an offence is designed to cover a limited kind of conduct, it may be useful to build the jurisdictional elements into the offence to avoid giving the offence wider operation than is necessary or intended. Section 71.16 of the Criminal Code provides an example of a jurisdictional provision that has been designed for the context of a specific offence.

CHAPTER 3—PENALTIES

OVERVIEW

3.1 Setting an appropriate penalty

3.1.1 General considerations

Penalty should be adequate for worst possible case.
General, fixed and minimum penalties should not be used

Principle

Each offence should have its own single maximum penalty that is adequate to deter and punish a worst case offence, including repeat offences.

A penalty will be read as being a maximum penalty unless the contrary intention appears.[40]

Other than in rare cases, Commonwealth offences should carry a maximum penalty rather than a fixed penalty and should not carry a minimum penalty.

[40] Section 4D of the Crimes Act.

Discussion

A maximum penalty should aim to provide an effective deterrent to the commission of the offence, and should reflect the seriousness of the offence within the relevant legislative scheme. A higher maximum penalty will be justified where there are strong incentives to commit the offence, or where the consequences of the commission of the offence are particularly dangerous or damaging.

It is rare for a Commonwealth offence to be subject to alternative maximum penalties depending, for example, on whether the offence is a first offence or repeat offence. Such distinctions are undesirable because they elevate a single factor above all others, thereby undermining the scope for a court to weigh all relevant factors in determining the penalty in accordance with the sentencing considerations in section 16A of the Crimes Act.

If a proposed offence is to cover a wide range of conduct that would make it difficult to set a single penalty, consideration should be given to creating more than one offence, each with its own penalty. For example, Division 400 of the Criminal Code includes several offences for dealing in proceeds of crime, with each offence relating to conduct for dealing in a different value of money or property with commensurate increases in penalties.

The maximum penalty should normally be limited if an offence, or the substantive elements of an offence, carry strict liability or absolute liability (see subpart 2.2.6 of this Guide).

General penalty provisions should be avoided. For example, a provision stating that 'a contravention of this Part is punishable by a fine of 50 penalty units' would generally be unacceptable.[41] These provisions make it more difficult for the reader to identify the relevant penalty and may make it difficult to convey the relative seriousness of the particular contravention.

While there are some examples of minimum penalties for Commonwealth offences[42], fixed or minimum penalties should also be avoided for the following reasons:

- Fixed and minimum penalties can interfere with the discretion of a court to impose a penalty appropriate in the circumstances of a particular case.
- Defendants may be less likely to cooperate with authorities if such cooperation cannot be reflected in sentencing. Fixed and minimum penalties create an incentive for a defendant to fight charges, even where there is little merit in doing so.
- Fixed and minimum penalties preclude the use of alternative sanctions available in Part IB of the Crimes Act, such as community service orders. In particular cases, these alternatives provide a more effective mechanism for deterrence or rehabilitation.
- Industry confidence in an enforcement system directed at industry regulation is undermined where less serious cases do not result in lesser penalties.
- The judiciary may look for technical grounds to escape restrictions on sentencing discretion when faced with minimum penalties, leading to anomalous decisions.

[41] See also the commentary on general offences at subpart 2.3.3 of this Guide.

[42] See for example section 236B of the *Migration Act 1958* (which also provides an example of using an alternative penalty for a repeat offence) and paragraph 120(2)(b) of the *Excise Act 1901*.

The Senate Standing Committee on the Scrutiny of Bills is likely to be critical of provisions that impose fixed or minimum penalties. The Committee commented adversely when mandatory minimum penalties were included for committing people smuggling offences in the Border Protection (Validation and Enforcement Powers) Bill 2001.[43] The Committee noted that:

> … in general, mandatory sentences limit the usual judicial discretion exercised when determining a proper sentence.[44]

The Committee reiterated these concerns in Report 5/2010 when it considered the expansion of the above scheme of mandatory minimum penalties in the Anti-People Smuggling and Other Measures Bill 2010.

3.1.2 Penalty benchmarks

Consider relevant penalty benchmarks for consistency across legislation

Principle

A penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness. This should include a consideration of existing offences within the legislative scheme and other comparable offences in Commonwealth legislation such as the Criminal Code.

Discussion

The Scrutiny of Bills Committee has consistently emphasised the need for greater consistency between penalty provisions (see for example Reports 8/1998, 4/1999, and 8/1999).[45]

Some types of offences in Commonwealth law have penalties that are similar across different pieces of legislation. For other types of offences, there are conflicting precedents and/or reasons why different penalties should apply to offences that appear to be similar. Where there is no clear precedent, a penalty should be formulated in a manner that takes account of penalties applying to offences of the same nature in other legislation and to penalties for other offences in the legislation in question.

Where an offence is in some way comparable to an offence in the Criminal Code, the penalty under the Criminal Code should generally be adopted.

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[43] See Alert Digest 13/2001, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/alerts/2001/index.htm> and Report 1/2002, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/alerts/2002/index.htm>.

[44] Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 40th Parliament February 2002 – August 2004*, 2008, paragraph 2.159, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/work40/index.htm>.

[45] These reports are available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/1999/index.htm>.

A table of comparisons of penalties across Commonwealth legislation can be found at **ANNEXURE A**.

3.1.3 Fine/imprisonment ratio

Use ratio of 5 penalty units = 1 month imprisonment

Principle

Section 4B of the Crimes Act provides that if an offence specifies a penalty of imprisonment but no fine, the maximum fine for an individual is 5 penalty units multiplied by the maximum prison term in months. This ratio should be followed unless there are cogent grounds to depart from it.

Discussion

The application of a standard ratio helps to maintain the coherency and rationality of Commonwealth criminal law, and helps to limit the complexity for those subject to or administering the law. A departure may be warranted for corporate and white collar crimes, where the maximum fine needs to be much higher than the ratio would provide, to counter the potential financial gains from committing an offence.

If a maximum penalty of life imprisonment is specified for an offence, and no fine is specified, the maximum fine is 2,000 penalty units for an individual and 10,000 penalty units for a body corporate (under subsections 4B(2A) and (3) of the Crimes Act).

3.1.4 Penalty for a body corporate (the body corporate multiplier rule)

Penalty for body corporate is 5 times higher

Principle

The maximum penalty that can be imposed on a body corporate is 5 times higher than the penalty that can be imposed on a natural person (see subsection 4B(3) of the Crimes Act).

Discussion

The body corporate multiplier rule also applies to an offence in a subordinate instrument even if the maximum fine applicable to a body corporate would exceed the maximum penalty that the subordinate instrument is authorised to impose. The only exception is where, as a matter of law, only a corporation can commit an offence. Then, the multiplier does not apply and a correspondingly higher penalty should be specified. For example, see sections 44ZZRF, 44ZZRG and 77A of the *Competition and Consumer Act 2010*.

3.1.5 Multiple of gain penalties

Multiple of gain penalties should be justified

Principle

In limited circumstances, a specified maximum penalty may not provide a deterrent to the commission of the offence due to the higher possible gains that could be made by committing the offence. For these offences, it may be appropriate to express a maximum penalty as a multiple of the gain that was obtained through a wrongdoing.

Discussion

Generally, a specified maximum penalty will provide for greater certainty across Commonwealth criminal law. However, multiple of gain penalties have been applied where the commission of an offence would lead to a direct and measurable financial gain for the defendant, where the amount of the potential financial gain varies widely, and where that gain may be extremely high. The penalty should be directly related to the improper gain to ensure that the size of the penalty is directly related to the degree of wrongdoing in question.

Multiple of gain penalties have previously been applied for the evasion of customs and excise duty, consistent with the ALRC statement that 'the penalty should be a multiple of the duty avoided'.[46] Subsection 70.2(5) of the Criminal Code is also an example of a multiple gain penalty for committing an offence of bribing a foreign public official.

A penalty as a percentage of turnover should generally be avoided because of a lack of connection between an organisation's total turnover and the contravening conduct.

3.1.6 Maximum imprisonment terms less than 6 months

Do not impose terms of imprisonment of less than 6 months

Principle

If imprisonment is chosen as a penalty for a Commonwealth offence, a term of at least 6 months should be applied. This is because imprisonment should be reserved for serious offences.

Discussion

A person should not be imprisoned for only a very short period, as this is unlikely to indicate that the offence is a serious one, and may burden State and Territory correctional systems with minor offenders. If a longer term of imprisonment would never be justified, a fine should be used.

[46] ALRC, *Administrative Penalties in Customs and Excise*, Report 61, 1992, para 2.25, available at <http://www.alrc.gov.au/report-61>.

3.1.7 Alternative sanctions

Consider applying non-monetary sanctions for corporate offences

Principle

Non-monetary sanctions should be considered when developing corporate offences.

Discussion

Monetary sanctions may not provide the most adequate deterrence or the most effective punishment for corporate crime. There is a range of non-monetary sanctions that can be applied, either separately or in combination (such as suspension or cancellation of licences or permits, adverse publicity orders, orders to publish an advertisement, or information disclosure orders). Chapter 27 of the ALRC Report 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*[47] discusses alternative sanctions and supports the use of these sanctions in cases of corporate crime.

3.2 Framing a penalty and the impact of the *Crimes Act 1914*

3.2.1 Penalty units

Penalties should be expressed in penalty units

Principle

The pecuniary penalty for an offence should be expressed in penalty units rather than dollar amounts.

Discussion

Expressing a penalty in penalty units (rather than a dollar figure) facilitates the uniform adjustment of penalties across legislation from time to time to reflect the changing value of money. This also ensures that the relationship between the levels of maximum fines and imprisonment penalties is preserved despite this change.

Section 4AA of the Crimes Act specifies the monetary value of a penalty unit at any particular time. At present, a penalty unit equals $170.

There are limited circumstances where the expression of penalties in dollars may be appropriate, for example, if other existing penalties within the particular legislation are expressed in dollars, or in the case of a national uniform scheme. In addition, the Protocol on Drafting National Uniform Legislation[48] recommends that offences in such laws should also express penalties in dollars rather than penalty units to ensure uniformity.

Section 4AB of the Crimes Act provides for the automatic translation of penalties expressed in dollars into penalties expressed in penalty units. Generally the effect of

[47] This Report is available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>.
[48] Australasian Parliamentary Counsel's Committee, 3rd ed, July 2008, available at <http://www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf>.

section 4AB is that despite the specific reference to the dollar amount of a fine, the monetary value of the fine will be different. For example, with the current penalty unit valued at $170, a maximum fine expressed to be $500 will have a monetary value of $850.

If penalties are expressed in dollars for a national uniform scheme, section 4AB of the Crimes Act will need to be disapplied to ensure the uniform monetary value of penalties.

3.2.2 Indictable/summary distinction

Crimes Act indictable/summary distinction should apply unless departure justified

Principle

The distinction between indictable and summary offences outlined in section 4G of the Crimes Act should apply unless there is a justifiable reason to depart from this for a particular offence.

Discussion

Section 4G of the Crimes Act provides that an offence is *indictable* if it is punishable by imprisonment for a period exceeding 12 months.

An offence that is punishable by 12 months imprisonment or less, or by a fine only, is a *summary* offence. Summary offences are heard in lower courts, allowing for a quicker and more resource-effective resolution.

Departures from this well-established distinction have been rare and should only be made where there is a clear and cogent reason for such a departure. For example, this has been done where an offence is punishable by a large fine or where prosecution of an offence will involve the proof of complex issues (see for example the cartel offence provisions at sections 44ZZRF and 44ZZRG of the *Competition and Consumer Act 2010*).

Other provisions of the Crimes Act also deal with indictable and summary offences, including sections 4J (Certain indictable offences may be dealt with summarily) and 4JA (Some indictable offences punishable by fine only may be dealt with summarily).

3.2.3 Continuing offences

Continuing offences should be expressed clearly and the penalty should be lower to reflect that a person may be liable for multiple contraventions

Principle

A continuing offence should be clearly expressed so that a person is aware that a continued failure to comply will lead to further offences being committed.

Where an offence is a continuing offence, the maximum penalty should be a daily penalty and therefore should be significantly less than if the penalty were a global maximum.

Discussion

Under subsection 4K(2) of the Crimes Act, a person is guilty of a separate offence for each day of non-compliance, where an act or thing must be done within a particular period or before a particular time, and failure to comply is an offence. This is referred to as a continuing offence.

Continuing offences provide a strong incentive for compliance with a continuing obligation (for example to submit an annual report) following an initial contravention. Clearly marking a continuing offence ensures that people are aware that the obligation is ongoing and that there are consequences for continuing not to comply with that obligation.

3.2.4 Investigation costs

There should not be provision for recovery of investigation costs

Principle

In most circumstances it will be undesirable to include provision in Commonwealth legislation allowing for the recovery of investigation costs from a convicted defendant.

Discussion

Provisions allowing for recovery may, among other things, distort investigation priorities and potentially cause injustice to poorer defendants, who may be more inclined to admit guilt rather than risk the prospect of greater investigation costs being incurred.

3.3 Penalties in Regulations

Regulations should not be authorised to impose fines exceeding 50 penalty units

Principle

Where an Act authorises the creation of offences in Regulations, it should generally specify that these offences may carry a maximum fine of 50 penalty units for an individual and 250 penalty units for a body corporate. It should not enable the creation of offences punishable by imprisonment. The Attorney-General's Department should be consulted at an early stage on any proposal to enable offences in subordinate legislation to be punishable by imprisonment.

Discussion

Successive Commonwealth governments have taken the view that serious criminal offences and penalties should be contained in Acts of Parliament rather than subordinate legislation, irrespective of the penalty to be imposed. This enables full Parliamentary scrutiny of the scope of the offence and the penalty. There is also a legitimate expectation on the part of those who read legislation that fundamental aspects of a legislative scheme (such as serious criminal offences) will be in the principal Act.

Almost all Commonwealth Acts enacted in recent years that authorise the creation of offences in subordinate legislation have specified the maximum penalty that may be imposed as 50 penalty units or less. Penalties of imprisonment have not been authorised. Under subsections 4B(3) and (3A) of the Crimes Act, a maximum penalty of five times the penalty specified in the relevant regulation is automatically applicable to a body corporate, notwithstanding the upper limit specified in the Act.

The Scrutiny of Bills Committee is likely to be critical of provisions that are considered to delegate legislative powers inappropriately, such as allowing Regulations to impose a penalty above 50 penalty units or where insufficient justification is given for allowing Regulations to impose a lower penalty.[49]

3.4 Forfeiture

3.4.1 The *Proceeds of Crime Act 2002*

The *Proceeds of Crime Act 2002* should generally be relied upon to confiscate the proceeds and instruments of Commonwealth indictable offences

Principle

The *Proceeds of Crime Act 2002* (POCA) establishes a scheme for restraining and confiscating the proceeds and instruments of Commonwealth indictable offences. The measures in the POCA are sufficient to allow for forfeiture action in relation to most Commonwealth offences.

Discussion

There is a range of measures within the POCA to deprive criminals of the proceeds and benefits gained from criminal conduct, and to prevent the reinvestment of those proceeds and benefits in further criminal activities. These include:

- confiscation of the proceeds and instruments of crime following a person's conviction for a Commonwealth indictable offence
- a non-conviction based stream under which confiscation action can be taken independently of the prosecution process, where the Court is satisfied that:
  - a person has committed a serious offence, or
  - the property is proceeds of an indictable offence or the instrument of a serious offence
- pecuniary penalty orders, which require a person to pay an amount equal to the profit derived from a crime
- literary proceeds orders, which require a person to pay the literary proceeds that he or she has derived from commercial exploitation of their notoriety from having committed a Commonwealth indictable offence or foreign indictable offence, and

[49] See Report 4/2010, pp 135-136, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2010/index.htm>.

- unexplained wealth orders, which require a person to pay a proportion of their wealth, where they cannot satisfy a court that that wealth was legitimately acquired.

All POCA actions are civil proceedings. The Commonwealth Director of Public Prosecutions (CDPP) is responsible for taking confiscation action under the POCA.

The POCA also contains a range of provisions to safeguard the interests of innocent third parties, including orders to exclude property from restraint or forfeiture, compensation orders and hardship orders. A court can also require the CDPP to give an undertaking as to costs and damages as a condition of making a restraining order over property.

3.4.2 Developing new forfeiture provisions

> Generally, new forfeiture provisions should be consistent with the powers and safeguards available in the *Proceeds of Crime Act 2002*

Principle

Sometimes it may be necessary to include additional forfeiture provisions in a specific piece of legislation to enable confiscation of a particular type of item. Where additional forfeiture provisions are needed, the powers and safeguards in those provisions should be consistent with the POCA. There should be clear justification for provisions that go beyond this.

Discussion

The POCA has been drafted to meet the public interests in ensuring that criminals are deprived of the benefits of their crime and in avoiding the unfair punishment of innocent parties. It includes a range of provisions to safeguard the interests of innocent parties, as well as ensuring appropriate judicial oversight of proceeds of crime orders. New forfeiture provisions should be consistent with the safeguards in the POCA, including:

- forfeitable property should be seized under a warrant – eg section 228[50]
- a court should be able to refuse to make an order restraining property where the applicant fails to give the court an undertaking with respect to the payment of damages or costs for the making and operation of the order – eg section 21
- the decision to forfeit property should be made by a court – eg sections 47, 48 and 49
- a person with an interest in the property should be given written notice of an application to forfeit that property – eg section 61
- an affected person should be able to appear and give evidence at a hearing to forfeit property – eg section 64
- an innocent party should be able to have their property excluded from a forfeiture order – eg sections 29, 73 and 94

[50] The Scrutiny of Bills Committee is likely to be critical of provisions that allow for goods to be seized (prior to forfeiture) without a warrant. For example, see the Committee's comment on the Customs Legislation Amendment Bill (No.1) 2002, Report 9/2002, pp 369-375, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2002/index.htm>.

- a person should be able to be compensated for innocently held interest in property that is subsequently forfeited – eg sections 77 and 94A
- a court should be able to make an order relieving a person's dependants from any hardship caused by a decision to forfeit the person's property – eg section 72
- if a forfeiture order is not made or discharged, property should be returned to the person – eg sections 88, 260 and 262, and
- property should not be dealt with or disposed of until forfeiture is finalised and the time for lodging an appeal has lapsed (or any appeal has been finally determined), unless dealing with the property is permitted by another order of the court – eg section 69.

In some circumstances, a confiscation regime may go beyond the POCA model. For example, the forfeiture provisions of the *Fisheries Management Act 1991* were created to manage the particular problems posed by unlawful fishing by foreign vessels by overriding third party interests in the forfeited vessel, even where these parties had no role in the illegal conduct. Similarly, Part 1E of the Crimes Act was introduced to provide a more immediate mechanism for forfeiting child abuse material, which it is a criminal offence to possess.

The Scrutiny of Bills Committee is likely to be critical of forfeiture provisions that trespass unduly on personal rights and liberties. Clear justification should be provided for a forfeiture regime that goes beyond the POCA model.

CHAPTER 4—DEFENCES

OVERVIEW

4.1 Defences generally

The Criminal Code contains defences that automatically apply to Commonwealth criminal offences. These defences are discussed further below.

In addition to these defences, the Criminal Code allows other laws that create offences to also create associated specific defences (offence-specific defences). These apply in addition to Criminal Code defences. The circumstances where it may be justified to create an offence-specific defence are set out in Part 4.3 of this Guide.

4.2 Criminal Code defences

4.2.1 What are the Criminal Code defences?

Where possible, avoid replicating Criminal Code defences

Principle

The Criminal Code contains defences that apply automatically to Commonwealth offences. Instructing agencies should avoid replicating Criminal Code defences.

Discussion

The Criminal Code defences outlined below have been carefully defined and apply to all Commonwealth offences. Consequently, the matters covered by these defences should not be included in individual offence-specific defences.

The Criminal Code defences of general application are:

- **mistake or ignorance of fact** – applies to fault elements other than negligence (section 9.1)

- **ignorance of subordinate legislation that was not available** (section 9.4)
- **claim of right over property** – applies to elements relating to property (section 9.5)
- **duress** (section 10.2)
- **sudden or extraordinary emergency** (section 10.3)
- **self-defence** (section 10.4), and
- **lawful authority** (section 10.5).

The Criminal Code contains additional defences that apply to strict and absolute liability offences:

- **intervening conduct or event** (section 10.1), and
- **mistake of fact** – strict liability only (section 9.2).

The Criminal Code also contains other generally applicable provisions that relate to lack of criminal responsibility, which are:

- **offences by children** (sections 7.1-7.2)
- **mental impairment** (section 7.3), and
- **intoxication** (sections 8.1-8.5).

4.2.2 Mistake or ignorance of the law and the Criminal Code

An express provision should be included if mistake or ignorance of the law is to be a defence

Principle

Subsection 9.3(1) of the Criminal Code provides that mistake or ignorance of statute law that creates or affects an offence is not a defence. Subsection 9.3(1) can only be displaced if the Act is expressed to have the contrary effect.

Discussion

Subsection 9.3(1) of the Criminal Code provides that a person can be criminally responsible for an offence even if he or she is mistaken about, or ignorant of, the existence or content of an Act that creates the offence or affects the scope or operation of the offence. This provision ensures that people cannot avoid criminal liability by being wilfully blind to the law and how it applies to them. In most instances it will be appropriate for subsection 9.3(1) to apply to an offence.

However, if it is necessary to displace subsection 9.3(1) to achieve the policy objectives of the legislation, please talk to your drafter about including an appropriate provision in your legislation to that effect.

4.3 Offence-specific defences

4.3.1 When are offence-specific defences appropriate?

A matter should only be included in a defence in certain circumstances

Principle

Offence-specific defences reverse the fundamental principle of criminal law that the prosecution must prove every element of the offence. Therefore, a matter should only be included in an offence-specific defence, as opposed to being specified as an element of the offence, where:

- it is peculiarly within the knowledge of the defendant, and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

Where it is intended to place the burden of proof on the defendant by creating an offence-specific defence, this should be clear on the face of the legislation. The explanatory material should also explain the reasons for placing the burden of proof on the defendant.

Discussion

It is a fundamental and long-standing principle of criminal law that a defendant is presumed to be innocent and that the prosecution must prove every element of an offence relevant to the person's guilt. A defence reverses the burden of proof that would usually apply in an offence, by requiring the defendant to discharge the burden of proof for one or more elements. Depending on the burden that is imposed, a defence requires the defendant to *raise evidence* about the matter (an evidential burden) or to *positively prove* the matter (a legal burden).[51] Consequently, it is only appropriate to place an issue in a defence in certain circumstances.

The fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant. If an element of the offence is difficult for the prosecution to prove, imposing a burden of proof on the defendant in respect of that element may place the defendant in a position in which he or she would also find it difficult to produce the information needed to avoid conviction. This would generally be unjust. However, where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence.

Creating a defence is also more readily justified if:

- the matter in question is not central to the question of culpability for the offence
- the offence carries a relatively low penalty, or
- the conduct proscribed by the offence poses a grave danger to public health or safety.

[51] Further information on the difference between 'evidential burdens' and 'legal burdens' can be found at subpart 4.3.2 of this Guide.

The Scrutiny of Bills Committee will usually comment adversely on a Bill that places the burden of proof on a defendant.[52] However, the Committee has indicated that it may be appropriate for the burden of proof to be placed on a defendant where the facts in relation to the defence might be said to be peculiarly within the knowledge of the defendant, or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused.[53]

The Committee also indicated that provisions imposing the burden of proof on the defendant should be kept to a minimum, take into account the principles in this Guide, and that the Explanatory Memorandum should describe the reason for placing the burden of proof on the defendant.[54]

4.3.2 What burden of proof should apply to an offence-specific defence?

An evidential burden of proof should generally apply to a defence

Principle

The Criminal Code codifies principles of proof for Commonwealth offences. Under the Criminal Code, a defendant will usually only bear an evidential burden in relation to the proof of a defence, unless the law expresses otherwise.

Placing a legal burden of proof on a defendant should be kept to a minimum.

Discussion

The Criminal Code codifies the following principles of proof for Commonwealth criminal offences.

- The prosecution must prove each element of an offence beyond reasonable doubt (sections 13.1-13.2).
- Where the law imposes a burden of proof on the defendant, it is an evidential burden, unless the law expresses otherwise (sections 13.3 and 13.4).
- Words of exception, exemption, excuse, qualification or justification will place an evidential burden of proof on the defendant (section 13.3).
- In the case of a standard 'evidential burden' defence, the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (section 13.3). If the defendant discharges an evidential burden, the prosecution must disprove those matters beyond reasonable doubt (section 13.1).
- The defendant will only bear a 'legal burden' of proof if the law expressly specifies that the burden of proof in relation to the matter is a legal burden, requires the

[52] See the Senate Standing Committee for the Scrutiny of Bills' comments at para 2.56 in *The Work of the Committee during the 41st Parliament November 2004 - October 2007*, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/work41/index.htm>.

[53] Senate Standing Committee for the Scrutiny of Bills, Report 4/2010, p 134, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2010/index.htm>.

[54] The Committee expressed similar comments in Reports 5/2010 at p 191-192 and 3/2010 at p 71.

defendant to prove the matter, or creates a presumption that the matter exists unless the contrary is proved (section 13.4).

- A legal burden of proof on the defendant must be discharged on the balance of probabilities (section 13.5).

An evidential burden is easier for a defendant to discharge, and does not completely displace the prosecutor's burden (only defers that burden). Thus as a general rule, the default position in section 13.3 of the Criminal Code (as outlined above) should apply and the defendant should bear an evidential burden of proof for an offence-specific defence, unless there are good reasons to depart from this position. Where a defendant is required to discharge a legal burden of proof, the explanatory material should justify why a legal burden of proof has been imposed instead of an evidential burden.

The Scrutiny of Bills Committee has previously stated that provisions that place a legal burden of proof on a defendant should be kept to a minimum (see Report 3/2010 at page 71, and 5/2010 at page 191).[55]

4.3.3 Reasonable excuse

The defence of 'reasonable excuse' should generally be avoided

Principle

An offence-specific defence of 'reasonable excuse' should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences.

Discussion

The defence of reasonable excuse is too open-ended. It is difficult to rely on because it is unclear what needs to be established. Equally, it may be difficult for the prosecution to respond to the defence, if raised.

The conduct intended to be covered by the defence of reasonable excuse may also be covered by the Criminal Code defences of general application in Part 2.3 of the Criminal Code, such as duress, mistake or ignorance of fact, intervening conduct or event, and lawful authority. Generally, reliance should be placed on Criminal Code defences, or (if these are insufficient) offence-specific defences adapted to the particular circumstances should be applied.

[55] These reports are available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2010/index.htm>.

CHAPTER 5—PRESUMPTIONS, AVERMENTS AND EVIDENTIARY CERTIFICATES

OVERVIEW

5.1 Presumptions

The use of presumptions should be kept to a minimum

Principle

The inclusion of presumptions in relation to offences should be kept to a minimum. This is because they place a legal burden on a defendant (see subpart 4.3.2 of this Guide). Where it is intended for a presumption to be created, this should be clear on the face of the legislation. The considerations relevant to whether a presumption should be included in an offence are the same as those applying to an offence-specific defence (see subpart 4.3.1).

Discussion

A presumption is a statement of facts that are taken to exist unless proven otherwise.[56]

Under section 13.4 of the Criminal Code, an express presumption places a legal burden on the defendant. This means that the defendant is required to rebut the presumption on the balance of probabilities. As such, presumptions have a similar effect to defences, and are only appropriate in certain circumstances.

The Scrutiny of Bills Committee is of the view that presumptions should be kept to a minimum and justification for them provided in the Explanatory Memorandum.[57]

5.2 Averments

Impose strict limits on the use of averment provisions

[56] See for example, sections 72.35 and 475.1B of the Criminal Code.

[57] See the Senate Standing Committee for the Scrutiny of Bills' comments at p 14 of Alert Digest 3/2010, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/alerts/2010/index.htm>.

Principle

An averment is a statement of fact submitted by the prosecutor in criminal proceedings.

Averment provisions should only be used in limited circumstances as they remove from the prosecution the usual burden of establishing the facts that may constitute an offence. This raises significant issues of fairness for the defendant.

Discussion

Averment provisions permit an allegation of fact, or of mixed fact and law, to discharge the prosecutor's evidential burden in relation to a matter. An averment is prima facie evidence of the facts alleged, in the absence of evidence to the contrary. However, averments do not reverse the burden of proof (*R v Hush; Ex parte Devanny* (1932) 48 CLR 487).

Averments detract from the presumption of innocence and their use has generally been confined to formal or technical matters, or where matters are peculiarly within the defendant's knowledge. Their use in Commonwealth law is comparatively rare.

Permission for the prosecution to make an averment must be expressly provided for in legislation (see for example the *Customs Act 1901*, section 255).

Where it is necessary for legislation to provide for the use of an averment, these provisions must be framed in accordance with section 13.6 of the Criminal Code, which provides that averments cannot be used:

- to aver any fault element of an offence (ie a defendant's intention, knowledge, recklessness or negligence), and
- for offences punishable by imprisonment.

A court may decline to give effect to an averment that is cast too broadly or where it covers matters that would otherwise be inadmissible.[58]

5.3 Evidentiary certificates

Limits should be placed on the use of evidentiary certificate provisions

Principle

An evidentiary certificate allows third parties to criminal proceedings to provide the court with evidence.

Evidentiary certificate provisions are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute but that would be difficult to prove under the normal evidential rules, and should be subject to safeguards.[59]

[58] See ALRC, *Customs and Excise*, Report 60, Volume II, para 12.4, available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/60/>.

[59] This is a general rule only. There are instances where the use of evidentiary certificates goes beyond formal or technical matters. For example, sections 58B and 58C of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* provide for evidentiary certificates in relation to substantive matters.

The Criminal Justice Division should be consulted on proposals where an evidentiary certificate would form conclusive evidence of the matters stated therein.

The Evidence and Legislative Frameworks Section in the Access to Justice Division of the Attorney-General's Department should also be consulted on evidentiary certificate provisions.

Discussion

Evidentiary certificate provisions are made to facilitate proof of certain types of matters.

Evidentiary certificates should generally only be used to settle formal or technical matters of fact that would be difficult to prove by adducing admissible evidence. It is generally unacceptable to use evidentiary certificates to cover questions of law, which are for the courts to determine.

An example of the use of a certificate for a 'formal' matter is a certificate indicating that a notice was duly issued or served, or that a particular place is, for example, a Customs place. An example of a technical notice is one indicating the outcome of a scientific analysis and the details of when and where that analysis occurred.

Evidentiary certificate provisions should generally specify that the certificates are prima facie evidence of the matters stated in it, and allow an opportunity for evidence of contrary matters to be adduced.

In many cases it will be beyond the power of the Federal Parliament to enact provisions that specify that the certificate is conclusive proof of the matters stated in it. Requiring courts to exclude evidence to the contrary in this way can destroy any reasonable chance to place the complete facts before the court. However, conclusive certificates may be appropriate in limited circumstances where they cover technical matters that are sufficiently removed from the main facts at issue. An example of a provision permitting the use of conclusive certificates is subsection 18(2) of the *Telecommunications (Interception and Access) Act 1979*. These certificates only cover the technical steps taken to enable the transfer of telecommunications data to law enforcement agencies.

Legislation that provides for the use of an evidentiary certificate should provide that it be issued by a responsible officer who is independent of the prosecution, not by a prosecutor.

Procedural safeguards have generally been included with provisions for evidentiary certificates directed to a technical/scientific context. This recognises that the use of evidentiary certificates will only be effective if a court is confident that the certificate can be relied on.

CHAPTER 6—INFRINGEMENT NOTICES

OVERVIEW

6.1 Infringement notices

6.1.1 What is an infringement notice?

Infringement notice provisions supplement offence and civil penalty provisions to provide an alternative to prosecution for an offence or litigation of a civil matter.

While the focus of this Chapter is on infringement notice schemes that apply to offences, an infringement notice scheme can also apply to civil penalty provisions.

An infringement notice is a notice issued by an authority, either in person or through the post, setting out the particulars of an alleged contravention of an offence or civil penalty provision.

The infringement notice will give the person to whom the notice is issued the option to pay the fine specified in the notice in full, or elect to have the offence heard by a court.

Notices are generally issued for minor offences that are regulatory in nature, such as failing to comply with reporting obligations, respond to a notice or provide information.

Further information on infringement notices can be found in the ALRC Report 95: *Principled Regulation: Federal Civil and Administrative Penalties in Australia*.[60]

6.1.2 Scheme should be authorised by the primary legislation

Primary legislation should provide for any intended scheme

Principle

If an infringement notice scheme is intended to be included in Regulations, the primary legislation should include an express regulation-making power providing for this.

Discussion

An express regulation-making power in the primary legislation will avoid the possibility that a court might consider that a general regulation-making power does not provide authority for an infringement notice scheme. Examples of provisions conferring authority for an infringement notice scheme to be created by Regulations are sections 111 and 176 of the *Airports Act 1996*.

[60] This report is available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>.

6.2 When are infringement notice schemes appropriate?

6.2.1 Types of offences that are suitable for an infringement notice scheme

Schemes should only apply to minor offences with strict or absolute liability, and where a high volume of contraventions is expected

Principle

An infringement notice scheme may be employed for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective. The offences should be such that an enforcement officer can easily make an assessment of guilt or innocence.

An infringement notice scheme should generally only apply to strict or absolute liability offences (see Subpart 2.2.6 of this Guide).

Discussion

Serious offences should be prosecuted in court and should not be capable of being excused by an administrative assessment.

The efficacy of an infringement notice scheme depends on the reliability of the assessments made by the enforcement officers as to whether an offence has occurred. To ensure accuracy, these assessments should be based on straightforward and objective criteria rather than complex legal distinctions.

Offences to which an infringement scheme applies should not require proof of fault. Proof of fault often involves a complex assessment of the available evidence to establish the state of mind of the person at the time of committing the offence.[61] Fault cannot be established by looking at straightforward objective criteria and consequently it is rarely possible to assess the likely guilt or innocence of a person with the level of certainty required when issuing an infringement notice.

Both the Scrutiny of Bills Committee and the Committee on Regulations and Ordinances have accepted that strict liability is appropriate for offences that are to be subject to infringement notice schemes (see page 525 of Report 17/2000, page 285 of Report 6/2002, page 9 of Report 1/2005, and page 11 of Report 1/2007).[62]

6.2.2 Specifying offences to which a scheme applies

Offences should be specified

Principle

Infringement notice provisions should specify the offences to which the scheme applies.

[61] For a greater explanation of fault, see Subpart 2.2.3.

[62] These reports are available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2010/index.htm>.

Discussion

It is essential for enforcement officers to issue notices with confidence and for those subject to regulation to know their legal position. For a precedent, see regulation 14.02 and Schedule 10 of the *Environmental Protection and Biodiversity Conservation Regulations 2000*.

6.3 Amounts payable under infringement notice schemes

The amount payable under an infringement notice scheme should not exceed 12 penalty units for a natural person or 60 penalty units for a body corporate

Principle

Infringement notice provisions should specify the amount that may be payable under an infringement notice for each offence to which the scheme applies.

The amount payable under an infringement notice scheme should generally not exceed 12 penalty units for a natural person or 60 penalty units for a body corporate.[63]

Infringement notice provisions should generally ensure that the amount payable under a notice for a **natural person** is 1/5th of the maximum penalty that a court could impose on the person under the relevant offence provision, but not more than 12 penalty units.

Infringement notice provisions should generally ensure that the amount payable under a notice for a **body corporate** is 1/5th of the maximum penalty that a court could impose on a body corporate under the offence provision, but not more than 60 penalty units.

The amount specified should also be a set amount, ie the officer issuing the notice should not have discretion as to the amount that may be specified in the notice.

Discussion

If the amount payable under an infringement notice is too low it will be an inadequate deterrent and may simply be paid by the guilty and innocent alike as a cost of doing business. If an amount is too high, it will not provide any incentive for a guilty defendant to avoid the matter going to court. Specifying a set amount also ensures that infringement notices are issued consistently. This avoids allegations that notice recipients are being treated disproportionately or inequitably, and prevents the perception that a deal can be done to pay a lesser amount.

The 1/5 ratio has usually been applied in Commonwealth legislation, subject to occasional examples where a lower 1/10 ratio has been considered appropriate.

The 'corporate multiplier' in subsection 4B(3) of the Crimes Act (discussed in Subpart 3.1.4) does not apply to an amount payable under an infringement notice, therefore the higher infringement notice amount for a body corporate needs to be stated explicitly.

[63] Note: 12 penalty units represents 1/5 of the maximum penalty that should be imposed for a strict liability offence, namely 60 penalty units for an individual.

6.4 Who should be able to issue a notice?

6.4.1 Authorised officers

Notices should only be issued by an authorised officer who belongs to a specified class of persons

Principle

An infringement notice provision should state that an infringement notice may only be issued by an officer authorised to exercise that power. Authorised officers should belong to a specified class of persons.

Discussion

The legitimacy of an infringement notice scheme depends on the existence of a properly managed process for the issuing of notices. This includes ensuring that notices are only issued by those authorised to issue notices and that there is proper accountability for the exercise for those powers.[64]

A common approach is to require that the person issuing the notice possess special attributes, qualifications or qualities. A provision that allows 'a person' or 'an APS employee' to issue a notice is likely to be inappropriate.

Further, if the power to issue a notice can be delegated, the delegation should be restricted to persons of suitable seniority and expertise. The Scrutiny of Bills Committee has been critical of provisions that allow the power to issue infringement notices to be delegated to 'any person'. The Committee's view is that the infringement notice legislation 'or a related publicly available document' should 'restrict the class of potential delegates to officers of relevant seniority and expertise'.[65]

6.4.2 Public sector accountability

Infringement notice powers should be subject to full public sector accountability

Principle

If a person outside the Australian Public Service is to be authorised to issue an infringement notice or exercise any other power under an infringement notice scheme, that person should attract the same accountability as an Australian Public Service employee in the exercise of that power.

Discussion

Persons not employed by the Australian Public Service should be subject to the same level of accountability as provided for by the *Administrative Decisions (Judicial Review)*

[64] For a precedent, see *Civil Aviation Regulations 1988*, regulation 6.

[65] See Report 20/1999, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/1999/index.htm>.

Act 1977, *Archives Act 1983*, *Freedom of Information Act 1982*, *Ombudsman Act 1976*, and *Privacy Act 1988*. The requirements of the *Public Service Act 1999* Code of Conduct should also be applicable. This can be achieved through legislation and/or the terms of the contract for service.

This is consistent with recommendation 22-3 in the ALRC Report 95: *Principled Regulation: Federal Civil and Administrative Penalties in Australia*.[66]

6.5 When should an infringement notice be issued?

6.5.1 Discretion

Issuing notices should be discretionary and based on 'reasonable grounds to believe'

Principle

Infringement notice provisions should provide that an authorised person may issue an infringement notice if he or she has reasonable grounds to believe that a person has committed an offence that is subject to the scheme.

Discussion

Requiring 'reasonable' grounds underpins the legitimacy of the imposition of the notice. Discretion as to whether to issue a notice is necessary as it may be undesirable or inappropriate to issue notices in certain situations, for example where a person has taken steps to remedy a breach or where it would be more appropriate to commence a prosecution. For a precedent, see the *Civil Aviation Regulations 1988*, regulation 296B and paragraph 296J(a).

6.5.2 Timing

Notices should be issued within 12 months

Principle

The infringement notice provisions should limit the ability to issue notices to within 12 months of the alleged offence.

Discussion

A defendant should not be required to produce evidence to defend a minor charge that occurred more than a year previously. In any case, the limitation period for offences covered by an infringement notice scheme will often expire after one year under section 15B of the Crimes Act.

For precedents, see the infringement notice provisions in section 129B of the *Excise Act 1901*, regulation 8.03(4) of the *Airports (Environment Protection) Regulations 1997*, and regulation 14.03(4) of the *Environment Protection and Biodiversity Conservation Regulations 2000*.

[66] This report is available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>.

The Regulations and Ordinances Committee is likely to criticise an infringement notice scheme that allows a notice to be issued more than 12 months after the offence.[67]

6.6 What should be in infringement notice provisions?

6.6.1 Contents of notices

Provisions should specify what must be included in a notice

Principle

The infringement notice provisions should specify that an infringement notice must:

- be uniquely identifiable (eg carry an identification number)
- name the person to whom it is to be issued (or otherwise enable the identity of the defendant to be ascertained)
- identify the authorised officer by whom it is issued
- identify the alleged offence (including the offence provision) and the time, nature and place of its alleged commission
- identify the amount to be paid and the maximum penalty if prosecuted
- explain how payment may be made and how the issuing agency may be contacted
- explain that the person issued with the notice may elect not to pay the amount and face prosecution, but that prosecution can be averted and liability discharged by making the prescribed payment within 28 days or within any further period permitted by the authorised person (a maximum period for payment of fewer than 28 days may be used where there is a demonstrated need for more rapid enforcement (eg quarantine matters)), and
- explain the person's right to seek withdrawal of the notice (see Part 6.8 of this Guide).

Discussion

The legitimacy and enforceability of an infringement notice depends on making the rights and obligations of the person served with the notice clear. A person who is served with a notice may also be more likely to comply with the notice if he or she is aware of his or her rights and the benefits of compliance. For precedents, see regulation 14.03 of the *Environment Protection and Biodiversity Conservation Regulations 2000*, regulation 5.03 of the *Airports (Building Control) Regulations 1996*, and regulation 63 of the *Quarantine Regulations 2000*.

[67] See Annual Report 1998-99, p 13, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/reports.htm>.

6.6.2 Continuing offences

If the offence to which the notice relates is continuing, the notice must state the date of the suspected offence

Principle

An infringement notice must state the date(s) of the suspected offence for which it was issued.

Discussion

An infringement notice can be issued for a continuing offence, such as a continued failure to lodge an annual report. However, an infringement notice for a continuing offence has the potential to cause uncertainty as to whether payment will entirely extinguish liability.

If a continuing offence is subject to an infringement notice provision, that provision should specify that the notice must state:

- the date(s) of the suspected offence(s)
- the offence for which it was issued, and
- that if the contravention continues beyond the date of the offence specified in the notice (or the last of those dates), a fresh liability will arise even if the notice is paid.

6.6.3 What is not required in infringement notice provisions

Method of service need not be specified

Principle

It is not necessary for infringement notice provisions to set out the method of serving a notice.

Discussion

Section 28A of the *Acts Interpretation Act 1901* specifies the means by which a document may by served under Commonwealth law. If an instructing agency wants to depart from the specified means under section 28A of the Act to better suit the particular circumstances, it will need to provide justification in the explanatory material.

6.7 Review of a decision to issue an infringement notice

A decision to issue a notice should not be subject to merits review

Principle

There should be no external merits review of a decision to issue an infringement notice.

Discussion

The decision to issue an infringement notice is not a decision to impose a penalty, as it is not a final or operative determination of substantive rights. For this reason, the ALRC concluded that the exclusion of external merits review of a decision to issue an infringement notice is acceptable.[68] For the same reasons, a decision to withdraw an infringement notice should also not be reviewable – see Part 6.8 of this Guide.

In Report 10/2000, the Scrutiny of Bills Committee accepted the Assistant Treasurer's reasoning that a decision by the CEO of the Australian Customs Service under the Excise Amendment (Compliance Improvement) Bill 2000 to withdraw an infringement notice was the corollary of the discretion of whether to prosecute, which is not a reviewable decision.[69]

6.8 Withdrawal of an infringement notice

6.8.1 Withdrawing a notice

Notice may be withdrawn

Principle

Infringement notice provisions should state that an authorised officer may withdraw a notice by serving written notice of the withdrawal on the person served with the notice.

Discussion

Notices may be withdrawn where new facts come to light which either suggest the person served with the notice did not commit the offence, or that the offence forms part of a more serious course of criminal conduct that should be prosecuted. Alternatively, there may be an error in the notice.

For a precedent of a withdrawal provision, see the *Civil Aviation Regulations 1988*, subregulations 296C(1) and (2). Inclusion of a withdrawal power is consistent with recommendations 12-4 and 15-1 in ALRC Report 95: *Principled Regulation: Federal Civil and Administrative Penalties in Australia*.[70] In Chapter 15 of its report, the ALRC recommended that a range of matters should be dealt with in a withdrawal notice.

Withdrawal of a notice should not preclude the issue of another notice for the same conduct if required (eg where a notice was withdrawn due to an error in that notice, a new replacement notice should be able to be issued).

The Scrutiny of Bills Committee has indicated that a decision to withdraw an infringement notice need not be the subject of a review (see subpart 6.7 of this Guide for

[68] ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95, para 12.31, available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>.

[69] Senate Standing Committee for the Scrutiny of Bills, Report 10/2000, pp 274-5, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm>.

[70] This report is available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>.

the reasons why a decision to issue or withdraw a notice should not be subject to merits review).

6.8.2 Refund of money paid

Scheme should contain an express provision for a refund

Principle

Infringement notice provisions should state that if the prescribed amount is paid, and the notice is subsequently withdrawn, the amount paid must be refunded.

Discussion

Without an express provision, an agency may have no legal authority to make a refund. For a precedent, see the *Civil Aviation Regulations 1988*, subregulation 296C(3).

6.8.3 Representations to withdraw a notice

The notice should indicate the right to make representations

Principle

The infringement notice should indicate that the person issued with the notice may make representations as to why the notice should be withdrawn. Any representations must be taken into account by the issuing officer, provided those representations are made within a reasonable timeframe.

The infringement notice may indicate some of the grounds upon which the discretion to withdraw the notice may be exercised (see for example subregulation 296C(2) of the *Civil Aviation Regulations 1988*).

Discussion

A person or body corporate should be entitled to make representations as to why their infringement notice should be withdrawn. Representations allow for a person who receives a notice to refute the allegations or raise any relevant concerns. This can potentially prevent future legal proceedings in cases where a person has a valid defence.

6.9 Consequences of choosing to pay (or not pay) an infringement notice

6.9.1 Discharge of liability

Payment results in discharge of liability

Principle

Infringement notice provisions should state that if the infringement notice amount is paid within the required time and the notice is not withdrawn:

- any liability of the person for the offence specified in the notice is discharged (including for other notices issued for the same instance of that specified offence)
- further proceedings cannot be taken against the person for the offence, and
- the person is not regarded as having been convicted of the offence.

Discussion

These rules are central to the purposes of an infringement notice scheme. For a precedent, see the *Civil Aviation Regulations 1988*, regulations 296F and 296H.

6.9.2 Payment not an admission

Payment is not an admission of guilt

Principle

Infringement notice provisions should state that payment of an amount by a person under an infringement notice should not be taken for any purpose to be an admission by that person of any liability for the alleged commission of the offence or contravention.

Discussion

This principle is drawn from recommendation 12.8 of the ALRC Report 95: *Principled Regulation: Federal Civil and Administrative Penalties in Australia*.[71] If payment constitutes an admission, the incentive to pay is reduced.

6.9.3 Non-payment

A person has the right to choose to have the matter dealt with by a court

Principle

Infringement notice provisions should state that a person to whom an infringement notice is issued has the right to choose to have the matter dealt with by a court. Direct enforcement of the notice by any other means should not be permitted.

[71] This report is available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>.

The legislation should also provide that a person is liable to be prosecuted for an offence for which a notice is served if payment is not made in the required time.

Discussion

These rules are central to the purposes of an infringement notice scheme. For a precedent, see the *Civil Aviation Regulations 1988*, paragraphs 296J(b) and (c).

6.9.4 Sentencing discretion of the court

A scheme should not limit a court's discretion

Principle

Infringement notice provisions should state that the infringement notice scheme does not limit a court's discretion to determine the fine to be imposed on a person convicted of an offence subject to the scheme.

Discussion

This principle is implicit but should be included for the avoidance of doubt. For a precedent, see the *Civil Aviation Regulations 1988*, paragraph 296J(d).

6.10 Additional provisions that may be included in an infringement notice scheme

Additional provisions may be included in an infringement notice scheme to clarify the operation of the scheme

Principle

In some cases, legislation governing an infringement notice scheme has addressed some additional matters. These may be useful in some cases.

Discussion

Examples of additional provisions that might be included in a scheme are as follows.

Administrative double jeopardy

Where it is possible that a single contravention might be captured under two or more offences, it may be desirable to include a provision stating that a notice may only be directed to one offence constituting a contravention. ALRC Report 95: *Principled Regulation: Federal Civil and Administrative Penalties in Australia*[72] recommended this as a standard provision (recommendation 12-8(g)).

[72] This report is available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>.

Payment by instalment

It may be appropriate to allow for payment by instalment. The ALRC Report 95: *Principled Regulation: Federal Civil and Administrative Penalties in Australia* recommended this as a standard provision (recommendations 12-8(m) and 31-2).[73]

Evidential certificates

Legislation may provide for a certificate, signed by an authorised officer, to constitute prima facie evidence of a refusal to allow extra time for payment and/or of a person's failure to make a payment (see for example regulation 296G of the *Civil Aviation Regulations 1988*). Such provisions can assist in efficiently establishing these matters in court.

[73] This report is available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>.

CHAPTER 7—COERCIVE POWERS GENERALLY

OVERVIEW

7.1 What are coercive powers?

Coercive powers are powers conferred by statute on government agencies to enable them to obtain information and to perform their functions.

These include powers to:

- enter and search premises, and seize evidential material (Chapter 8 of this Guide)
- issue notices compelling a person to answer questions or to produce information or documents (Chapter 9 of this Guide)
- arrest, restrain or detain a person (Part 10.1 of this Guide)
- require a person to provide their name and address (Part 10.2 of this Guide), and
- conduct personal search powers (Part 10.3 of this Guide).

The following parts discuss when it is appropriate to create new coercive powers, as well as the principles and safeguards which should be applied to ensure such powers are used fairly.

7.2 Crimes Act model

Crimes Act principles should be used for new powers where applicable

Principle

New coercive powers should contain equivalent limitations and safeguards to those in the Crimes Act.

Discussion

The Crimes Act contains the powers and safeguards that Parliament has considered appropriate to confer on police for investigating Commonwealth offences, including the most serious offences. The Crimes Act provisions cover:

- entry, search and seizure and 'stop and search' (sections 3E–3U, 3ZR-3ZX and division 4B)
- arrest (sections 3V-3ZD)
- personal search and the taking of identification evidence (sections 3ZE-3ZQ, 3ZR-3ZX)
- age determination (sections 3ZQA-3ZQK)
- controlled operations (Part IAB: sections 15G-15J)
- assumed identities (Part IAC: sections 15K-15LH)
- detention and questioning of suspects (Part IC: sections 23-23W), and
- forensic procedures (Part ID: sections 23WA-23WLA).

These provisions contain well-developed safeguards which should form the basis for safeguards in new powers. These should only be departed from where there is strong justification for doing so.

7.3 Developing new powers and consultation

7.3.1 Basis for new powers

There must be an appropriate basis for new coercive powers

Principle

New coercive powers should only be granted in exceptional circumstances and where existing powers do not adequately address an identified law enforcement need.

Discussion

While coercive powers may be necessary to ensure effective administration of Commonwealth law, the exercise of these powers infringes upon fundamental rights of individuals, including rights to dignity, privacy and the security of premises. Intrusion upon these rights should not occur without due process and is only warranted where the use of the power is in the public interest.[74]

In developing proposals for new coercive powers, agencies should take into account the views of the Scrutiny of Bills Committee in Report 4/2000: *Entry and Search Provisions*

[74] Senate Standing Committee for the Scrutiny of Bills, Report 12/2006, para 1.9, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2006/index.htm>.

in Commonwealth Legislation and Report 12/2006: *Entry, Search and Seizure Provisions in Commonwealth Legislation.*[75]

The Committee has stated that it expects the development of legislation allowing the use of coercive powers to be 'preceded by careful consideration of all practicable avenues balanced against consideration of the implications for individual rights and liberties'.[76]

The Committee has also indicated that 'proposals for the inclusion of such powers in legislation should be accompanied by detailed explanation and justification in the Explanatory Memorandum and also by appropriate safeguards'.[77]

7.3.2 Consultation with the Australian Federal Police (AFP)

Agencies that do not have a developed investigative capacity should consult the AFP

Principle

Agencies that do not already have a developed investigative capacity should consult the AFP in the early stages of developing proposals for the use of coercive powers.

Discussion

The exercise of coercive powers is generally limited to agencies with developed investigative capacity (in most cases, the AFP).

Any proposal to confer new powers on the AFP should be discussed with the AFP at an early stage. The agency should consider, in consultation with the AFP, how best to meet the policy principles outlined in this Guide.

Agencies that do not have a developed investigative capacity should also consider consulting the AFP on alternative options, which may include:

- negotiating service agreements to provide for 'liaise-assist' referrals to the AFP, for example, to request assistance with the execution of section 3E search warrants under the Crimes Act, or
- out-posting an AFP agent for the purpose of developing an investigative capability and acting as a conduit for referrals to the AFP (but not to execute search warrants).

Agencies should also consider whether it may be more appropriate to rely on less intrusive powers, as discussed in Chapter 9 of this Guide.

[75] These reports are available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2006/index.htm>.

[76] Senate Standing Committee for the Scrutiny of Bills, Report 12/2006, para 3.18, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2006/index.htm>.

[77] Senate Standing Committee for the Scrutiny of Bills, Report 12/2006, para 3.23, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2006/index.htm>.

7.3.3 Development of guidelines

Agencies should develop guidelines for the appropriate exercise of coercive powers

Principle

Commonwealth agencies that exercise coercive powers should develop guidelines for the appropriate use of those powers.

Discussion

Coercive powers must be exercised not only in accordance with legislation, but also fairly and responsibly. The Scrutiny of Bills Committee has recommended that legislation allowing the use of coercive powers should be supported by guidelines.[78]

Where it is proposed to give new powers to an agency with a developed investigative capacity, that agency should consider whether existing internal guidelines are appropriate and adapted to the exercise of the new powers, or whether new guidelines should be developed.

Agencies without a developed investigative capacity should consider developing an internal governance framework in consultation with the AFP, outlining matters including, but not limited to:

- how officers will be trained to exercise the powers, and how skills will be maintained
- how operational risks associated with exercising coercive powers (including encountering violence/resistance in gaining entry to premises, finding evidence of other offences) will be managed, and
- how those exercising the powers will be supported, including through resources such as tools for the forensic analysis of documents and exhibit rooms, and by personnel suitably trained in planning and executing searches and acting as exhibit/property officers.

Agencies should also consider incorporating the principles outlined in the ARC's Report 48, *The Coercive Information-gathering Powers of Government*[79] into their procedures. The report describes best practice approaches to the use of coercive powers, including:

- keeping written records of decisions to exercise coercive powers, including information on who authorised decisions to exercise the power, and the basis on which the decision was made (principle 3), and

[78] Senate Standing Committee for the Scrutiny of Bills, Report 4/2000, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm>.

[79] This Report is available at <http://www.arc.ag.gov.au/Documents/a00Final+Version+-+Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf>.

- regularly publishing information on the agency's use of powers (to the extent that it is appropriate to do so) to engender community confidence and facilitate internal and external scrutiny of the use of the powers (principles 4 and 18).

7.3.4 Coercive powers in principal legislation

Coercive powers should generally be contained in the parent Act, rather than in subordinate legislation

Principle

Coercive powers should generally be contained in an Act, rather than in subordinate legislation. However, inclusion of such powers in Regulations may be appropriate in certain circumstances.

Discussion

Including coercive powers in the parent Act, rather than in subordinate legislation, ensures that the scope and effect of these powers is clear to the Government, the Parliament and those subject to the powers.

However, providing for such powers in Regulations may be appropriate in certain circumstances, including where the parent legislation makes express provision for the creation of the power under Regulations (eg paragraph 66(2)(c) of the *Great Barrier Reef Marine Park Act 1975*), or where the objectives of the parent legislation will be frustrated unless the powers are created under regulation (eg because of rapidly changing circumstances).

Coercive powers contained in subordinate legislation must be drafted in accordance with the same principles applying to provisions in parent legislation contained in this Guide.

7.4 Who should be allowed to exercise coercive powers?

7.4.1 Powers to be exercised by specified, appropriately qualified persons

Legislation should specify that coercive powers can only be exercised by a specified person or class of persons

Principle

Legislation conferring coercive powers should require that these powers only be exercised by an appropriately qualified person or class of persons.

Discussion

The Scrutiny of Bills Committee has been critical of provisions that confer coercive powers on a recipient classified simply as 'a person' or as a member of a particular Department or organisation, on the basis that such provisions fail to limit or categorise those who may be authorised to carry out the power. The Committee has stated that

specifying certain required attributes or qualifications provides reassurance against possible abuses of power.[80]

Appropriate limitations on coercive powers may be included by way of reference to particular attributes, qualifications or training the person should possess, or by reference to such persons as holders of nominated offices or positions.

The Committee has stated that powers should not be conferred on a particular person or group of persons 'simply because it is the most economically or administratively advantageous option'.[81]

7.4.2 Accountability measures for non-police officers

Authorised officers must be accountable for the exercise of coercive powers

Principle

If persons other than police officers are granted coercive powers under Commonwealth legislation, there must be proper accountability for the exercise of those powers.

Discussion

While the ability to exercise coercive powers should generally be restricted to sworn police officers, it may be necessary to extend these powers to other persons or agencies in certain circumstances. Where powers are granted to people other than police officers, steps should be taken to ensure that those exercising the powers are subject to proper accountability mechanisms.

Commonwealth employees

The Scrutiny of Bills Committee has indicated that, where powers are to be granted to non-police officers, it is preferable to confer these powers on Commonwealth employees. These officers are subject to a range of accountability mechanisms by virtue of their employment,[82] as well any obligations contained in the legislation conferring the power.

Where the agency does not have a developed investigative capacity, the agency should develop an internal framework to govern the exercise of coercive powers. This framework should demonstrate how officers will be held accountable for exercising powers under the proposed scheme. Measures should include both internal mechanisms (such as complaints management systems and processes to ensure compliance with professional standards) and external oversight (eg by the Ombudsman or the Commissioner for Law Enforcement Integrity).

[80] Senate Standing Committee for the Scrutiny of Bills, Report 2/2007, p 21. See also Report 8/1999 at p 103, Report 10/1999 at p 262, Report 11/1999 at p 308 and Report 20/1999 at p 506.

[81] Senate Standing Committee for the Scrutiny of Bills, Report 4/2000, para 1.53, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm>.

[82] APS employees exercising coercive powers are subject to a range of legislation including the *Privacy Act 1988*, the *Freedom of Information Act 1982*, the *Public Service Act 1999* and the *Ombudsman Act 1976*.

Agencies should also be able to demonstrate that there are measures in place to ensure officers exercising the powers have received the necessary training, possess the requisite skills and have continuing access to assistance, advice and support.

Agencies with existing capacity, skills and resources to exercise coercive powers should consider whether current frameworks for ensuring accountability are appropriate and adapted to the proposed new legislation and whether the proposed measures comply with the principles in this Guide.

Non-government employees

In rare circumstances, it may be necessary for an agency to give coercive powers to non-government employees, particularly in circumstances where special expertise or training is required. For example, the Australian Prudential Regulation Authority may appoint technical specialists or barristers to conduct examinations on behalf of an inspector under the *Superannuation Industry (Supervision) Act 1993*.[83]

The Scrutiny of Bills Committee will closely consider proposals to confer such powers on persons outside Government, and will look for mechanisms in proposed legislation that ensure appropriate limitations on powers and proper accountability.

[83] Sections 257 and 258.

CHAPTER 8—ENTRY, SEARCH AND SEIZURE

OVERVIEW

8.1 When is entry appropriate?

There must be a proper basis for entry

Principle

Legislation should only authorise entry to premises by consent or under a warrant. Any departure from this general rule requires compelling justification.

New powers should only be considered where existing powers do not adequately address an identified enforcement need.[84]

[84] See Principle 2 of Administrative Review Council, *The Coercive Information-gathering Powers of Government Agencies*, Report 48, available at <http://www.arc.ag.gov.au/Documents/a00Final+Version+-+Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf>.

Discussion

Under common law, a police officer or other investigator cannot enter and search the premises of a person without consent. An occupier of premises is entitled to decide who may enter the premises unless some other consideration overrides that right.

This common law position has been modified in all Australian jurisdictions by enacting specific legislation that authorises what would otherwise constitute trespass.

A warrant is the most common mechanism for authorising entry to premises. However, the Commonwealth Parliament has accepted powers to enter premises without consent or warrant in certain limited circumstances (see part 8.6 of this Guide).

8.2 Entry by consent

8.2.1 Consent should be informed

Consent to an entry should be genuine, informed and explicit

Principle

Where legislation provides for entry and search with consent, it should make clear that the consent must be genuine, informed and ongoing consent.

Discussion

In addition to protecting individual property rights, this principle promotes effective enforcement. Clear and genuine consent underpins the validity of actions taken by investigating officers and the admissibility of any evidence obtained from the search.

For examples, see section 81 of the *ACIS Administration Act 1999*, Division 91 of the *Aged Care Act 1997*, and section 31 of the *Imported Food Control Act 1992*.

Where entry to particular premises is needed on an ongoing basis, it may be necessary to specifically provide for consent to remain in force for a specified period (eg two weeks) unless revoked. For example, see the monitoring powers in sections 214AA–214B of the *Customs Act 1901*.

8.2.2 Refusal of consent

Refusal of consent or cooperation should not be an offence

Principle

Where legislation provides for entry to premises with consent, there should not be a requirement to cooperate with the officer/inspector, and failure to cooperate should not be an offence.

Discussion

Requiring cooperation or penalising non-cooperation is inconsistent with the notion of consent. The Scrutiny of Bills Committee considers that legislation should provide for withdrawal of consent without disadvantage.[85]

8.3 Entry under force of law/warrant

A search warrant authorises the holder to enter and search private premises and to seize evidential material.

8.3.1 Notification of entry

Occupier must be given warrant and informed of rights

Principle

Provisions allowing entry and search of premises should require that the occupier be given a copy of any warrant and be informed, ideally in writing, of his or her rights and responsibilities. These requirements should only be able to be waived in limited circumstances (eg where there are reasonable grounds to believe compliance would endanger a person's safety).

Discussion

This reflects the position of the Scrutiny of Bills Committee.[86] If there are grounds for not including these protections in a proposed scheme, those grounds should be made clear in the Explanatory Memorandum to the Bill.

The written notice provided to the occupier should be in plain language and should explain the relevant legislative provisions rather than merely reproducing them. See **ANNEXURE B** of this Guide for an illustration of what such a notice might look like.

In addition to these requirements, the Scrutiny of Bills Committee considers that an occupier should be given a genuine opportunity to have an independent third party, legal adviser or friend present throughout the search.[87] The Committee is likely to require justification for any departure from this position.

[85] Senate Standing Committee for the Scrutiny of Bills, Report 4/2000, para 1.38-1.39, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm>.

[86] Senate Standing Committee for the Scrutiny of Bills, Report 4/2000, para 1.68, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm> and Report 12/2006, para 3.53, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2006/index.htm>.

[87] Senate Standing Committee for the Scrutiny of Bills, Report 4/2000, para 1.68, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm>.

8.3.2 Identification to occupier of premises

Officers exercising entry or search powers must identify themselves to the occupier of the premises except in exceptional circumstances

Principle

Where legislation provides for entry and search of premises, it should also provide that the officer carrying out the entry and search must identify themselves to the occupier of the premises, except in exceptional circumstances.

Discussion

The Scrutiny of Bills Committee has recommended that officers exercising entry and search powers under a warrant should be required to identify themselves prior to executing the warrant. Such requirements should only be waived in exceptional circumstances, such as where the warrant authorises the exercise of covert search powers.[88]

This identification should be provided in the form of an identity card displaying a recent photograph of the officer, which the officer is required to show the occupier before entry.[89]

To ensure the integrity of such identity cards, it may be appropriate to include provisions making it an offence for an authorised officer to fail to return an identity card on ceasing to be an authorised officer, subject to a defence of loss or destruction.[90]

8.3.3 Failure to provide facilities and assistance

An offence of failing to provide facilities and assistance should carry a maximum penalty of 30 penalty units

Principle

Legislation may provide that it is an offence to fail to provide reasonable facilities and assistance to an officer who is on premises under a warrant.

Discussion

Where a valid search is being carried out, it is appropriate to require an occupier to provide reasonable facilities. This supports the effective exercise of search powers.

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[88] Senate Standing Committee for the Scrutiny of Bills, Report 12/2006, para 3.53, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2006/index.htm>.

[89] Senate Standing Committee for the Scrutiny of Bills, Report 4/2000, para 1.66, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm>. The Committee has commented adversely on proposed provisions that do not stipulate that a photograph must be included on the identity card: Senate Standing Committee for the Scrutiny of Bills, Annual Report 1995/6, p 27.

[90] For a precedent, see section 35 of the *Building Energy Efficiency Disclosure Act 2010*.

An offence of this kind should carry a maximum penalty of 30 penalty units (150 penalty units for a body corporate). Precedents include: section 91 of the *ACIS Administration Act 1999*; section 155 of the *Education Services for Overseas Students Act 2000*; section 53 of the *Fuel Quality Standards Act 2000*; section 123 of the *Renewable Energy (Electricity) Act 2000*; and section 31 of the *Tradex Scheme Act 1999*.

8.3.4 Use of force

Reasonable force may be used to execute warrant

Principle

Legislation should only allow an authorised officer to use such force against things or persons as is necessary and reasonable to execute a warrant (see part 7.4 of this Guide for a discussion on authorised officers) and where a need for such powers can be identified.

Discussion

Where legislation provides that an authorised officer may obtain assistance to enter premises and execute powers under a warrant, the powers to be granted to the person assisting will depend on whether that person is also an authorised officer. If the person assisting is not an authorised officer, then that person should only be authorised to use force against 'things', not 'persons'.

The use of force against property by a person assisting may be necessary, for example, where the assistant is an expert safe cracker. Use of force against persons should be confined to those with a high level of training and accountability and not to persons playing an assisting role.[91]

The inclusion of any use of force power for the execution of search warrants should be accompanied by an explanation and justification in the Explanatory Memorandum and discussion of proposed accompanying safeguards that the agency intends to implement.

Force against persons and things should be examined and justified separately. Generally it will be easier for an agency to demonstrate a need for a provision authorising the use of force against things to execute a search warrant, namely force to open a door, break a lock on a cabinet during the execution of a warrant. In contrast, it may be more difficult to demonstrate a need for a provision authorising the use of force against persons for regulatory regimes governing compliance.

8.4 Issuing a warrant

8.4.1 Who should issue a warrant?

Warrants issued by magistrates in a personal capacity

[91] Precedents for use of force provisions include section 3G, *Crimes Act 1914*; section 66AK, *Quarantine Act 1908*; subsection 418(1), *Environment Protection and Biodiversity Conservation Act 1999*; and section 38J, *Mutual Assistance in Criminal Matters Act 1987*.

Principle

The power to issue a search warrant should be conferred on magistrates acting in their personal capacity.

Discussion

The Scrutiny of Bills Committee has taken the view that Ministers, justices of the peace and departmental officers should not have warrant issuing powers.[92] The greater independence of magistrates and the fact that they are not responsible for enforcement outcomes ensures rigour in the warrant issuing process.

Having a magistrate act in a personal capacity ensures that there is no prospect for conflict between judicial and non-judicial functions. A separate provision is not necessary where a power or function relates to a criminal matter, because this is covered by a general provision in section 4AAA of the Crimes Act.

Monitoring warrant issuing powers should also be accompanied by a provision stating that a magistrate acts in a personal capacity in issuing a warrant. Monitoring by warrant can ascertain whether a particular statutory scheme is being complied with, irrespective of whether that scheme is enforced by a civil penalty or a criminal offence regime. (Monitoring warrants are discussed in Part 8.7 of this Guide.)

8.4.2 Remote warrants

Remote warrants should be based on section 3R of the Crimes Act

Principle

Where legislation provides for the issue of a search warrant or monitoring warrant to enter premises, it is usually desirable to allow for the issue of a warrant by telephone or other electronic means. At a minimum, such a provision should contain the safeguards and requirements contained in the remote warrant provision of the Crimes Act (section 3R).[93]

Discussion

Issuing warrants by telephone or other electronic means allows a warrant to be obtained urgently in circumstances where it is not practical to obtain a warrant in person, eg in a remote locality.

Section 3R of the Crimes Act contains the following safeguards relating to the issuing of remote warrants:

- remote warrants can be issued only in urgent cases, where the delay would frustrate the effective execution of the warrant

[92] Senate Standing Committee for the Scrutiny of Bills, Report 4/2000, para 1.48, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm>.

[93] Senate Standing Committee for the Scrutiny of Bills, Report 12/2006, para 3.34, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2006/index.htm>.

- a remote warrant application must contain all the information required in an ordinary application for a warrant (see Subpart 8.4.3 below)
- the issuing officer may require oral communication to the extent practicable, and
- in any material court proceeding, the court is to presume that the exercise of power involved in granting the warrant was not authorised unless the contrary can be proved. This means that the onus is on the prosecution to demonstrate that remote warrant application was valid.

8.4.3 Safeguards in the Crimes Act

At a minimum, use the safeguards in the Crimes Act

Principle

The safeguards in the Crimes Act should be considered a minimum when drafting new provisions for the issuing of search warrants.

Discussion

The search and entry powers in the Crimes Act define the minimum obligation that should normally apply to search warrant powers conferred in other contexts.

The Crimes Act contains the safeguards that Parliament has considered appropriate to confer on police for investigating Commonwealth offences, including the most serious offences. Safeguards around the issuing of warrants include:

- the threshold which must be met before a warrant can be issued – 'reasonable grounds for suspecting there is, or there may be within the next 72 hours, evidential material at the premises' – subsection 3E(1)
- the information which the warrant must contain – subsection 3E(5), and
- the activities which are authorised by a search warrant – section 3F.

8.5 Seizure

8.5.1 Warrant required for seizure

Seizure by warrant, with interim power to secure if necessary

Principle

Seizure should only be allowed under a warrant, even if entry and search without warrant are permitted. Where entry is allowed under a monitoring warrant or without a search warrant, the legislation may provide that items may be secured, pending a search warrant application.

Discussion

Seizure is a significant coercive power and the Commonwealth has consistently taken the approach that it should require authorisation under a search warrant. An example of a

power to secure an item pending issue of a warrant authorising seizure is in subsection 90-4(2) of the *Aged Care Act 1997*.

There is a very limited range of circumstances where it may be appropriate to allow officers the ability to seize pending issue of warrant. The Scrutiny of Bills Committee regards that entry onto premises without consent may be reasonable in situations of emergency, serious danger to public health, or where national security is involved.[94] Seizure in such circumstances would only be appropriate where reasonably necessary to resolve a situation of immediate emergency.

8.5.2 Retention of seized material

Retention of seized material should be limited

Principle

Seized material should be retained only as long as necessary and be subject to a time limit.

Discussion

Those who have been investigated should have all seized material returned to them, subject to established limits relating to the non-return of unlawful items such as narcotics and proceeds of crime. Generally, an upper limit of 60 days should attach to the retention of seized items, with provision to extend this period where necessary. A longer retention period should not be specified unless it is clearly justified.

8.5.3 Review of seized material

Seized material to be reviewed regularly for relevance

Principle

Seized material should be reviewed on a regular basis. Where it is no longer required for investigation or prosecution, the material should be returned or destroyed as appropriate in a timely manner.

Discussion

This principle is consistent with the recommendations of the Scrutiny of Bills Committee.[95] It is particularly important that seized material be reviewed regularly for relevance where there is no time limit specified in the legislation for the retention of seized material.

[94] Senate Standing Committee for the Scrutiny of Bills, Report 4/2000, para 1.44, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm>.

[95] Senate Standing Committee for the Scrutiny of Bills, Report 12/2006, para 4.61, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2006/index.htm>.

8.5.4 Material related to a different offence

Clarify any power to seize material related to a different offence

Principle

Legislation should be explicit where it confers the power to seize material related to an offence other than that for which a warrant was issued. In such instances, it should clearly define the extent of that power and how it can be exercised.

Discussion

In order to provide proper authority for the seizure of material, legislation should clearly define whether the seizure power is restricted to offences under the Act for which the warrant was issued. If the power to seize material relating to a different offence extends to offences under one or more different Acts, the warrant should give specific authority for that extended coverage.

In such instances, the legislation should also require that warrants include clear information on the extent of the seizure powers authorised under a warrant and whether these powers extend to material related to a different offence to that specified in the warrant (for example, see subsection 3E(6) of the Crimes Act). Provision may also be made for how material seized in relation to an offence under another Act is to be dealt with (for example, if material seized by a regulatory agency is relevant to a Commonwealth offence, that it be provided to the AFP as soon as practicable or within a specified timeframe).

8.5.5 Limits on use and derivative use of seized material

Place limits on use and derivative use of seized material

Principle

Where legislation confers seizure powers, consideration should be given to including limits on the use and derivative use (use for secondary purposes) of incidentally seized material.

Discussion

The Scrutiny of Bills Committee recommends that limits be placed on the use and derivative use that can be made of material seized incidentally, particularly information accessed under stored communications warrants.[96] Instructing agencies should take account of the Committee's views when developing proposals for seizure provisions.

For a discussion of use and derivative use immunity, see Subparts 9.5.5 and 9.5.6 of this Guide.

[96] At para 4.60 of *Entry, Search and Seizure Provisions in Commonwealth Legislation*, Report 12/2006, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2006/index.htm>.

8.6 Entry and search without a warrant

Limited circumstances where consent or a warrant may not be necessary

Principle

A warrant is the most common mechanism for authorising entry to premises. However, the Commonwealth Parliament has accepted powers to enter premises without express consent or a warrant in certain limited circumstances.

Discussion

The Scrutiny of Bills Committee has stated that entry without consent or judicial warrant should only be allowed in a very limited range of circumstances.[97] In the past, these circumstances have included the following.

Licensed premises

A person who obtains a licence or registration for non-residential premises can be taken to accept entry to those premises by an inspector for the purpose of ensuring compliance with licence or registration conditions.[98]

The applicable legislation should impose as a condition of all licences consent to entry onto non-residential premises where the licensed activity happens. The Scrutiny of Bills Committee has endorsed this approach.[99]

Funding or levy

A person who receives Government financial assistance or is required to pay a levy for any activity connected with premises can be taken to accept entry by an inspector for the purpose of ensuring compliance with legislative requirements.

The Scrutiny of Bills Committee has taken the view that entry on this basis should only occur where the person was informed of the entry power by a plain English written notice when receiving the assistance or becoming liable to pay the levy.[100]

Conveyances

Entry and search of vehicles, vessels and aircraft has been permitted without a warrant. A search without a warrant will only be permitted where the inherent mobility of the particular conveyance means that there may not be time, or it would be impractical, to obtain a warrant.

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[97] See *Report on the 38th Parliament*, 1999, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/work38/report/contents.htm>.

[98] See section 51, *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*, and section 10D, *Export Control Act 1982*.

[99] Report 4/2000, para 1.42, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm>.

[100] Report 4/2000, paras 1.41, 1.59-1.60, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm>.

Taxation legislation

Taxation legislation[101] frequently includes provisions along the following lines:

> **Access to premises etc.**
>
> *Powers of authorised officers*
>
> (1) For the purposes of this Act, an authorised officer:
>
> (a) may, at any reasonably time, enter and remain on any land or premises; and
>
> (b) is entitled to full and free access at any reasonable time to all documents; and
>
> (c) may inspect, examine, make copies of, or take extracts from, any documents.

It has been accepted that access provisions administered by the Tax Commissioner should replicate this model. In part, this is to ensure taxation officials have consistent powers under all tax legislation.

However, the Scrutiny of Bills Committee has commented adversely on the breadth of entry, search and seizure power in taxation legislation.[102]

Exceptional circumstances

The Scrutiny of Bills Committee has stated that legislation should authorise entry without consent or warrant only in 'situations of emergency, serious danger to public health, or where national security is involved.'[103] Powers of entry and search without a warrant are only appropriate in exceptional circumstances.[104] Where these powers are provided for, senior executive authorisation should be required and rigorous reporting requirements should be imposed. This helps to ensure a sufficient level of accountability is maintained.

Strong justification is required for such powers and should be provided in the Explanatory Memorandum to the Bill.

The Scrutiny of Bills Committee is of the view that such authorisation should only be sought if avenues for obtaining a warrant by remote means have proven absolutely impractical in the particular circumstances. It further recommended that in these circumstances, senior executive authorisation be required together with reporting requirements.

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[101] Some examples include section 263 of the *Income Tax Assessment Act 1936*, section 38 of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* and section 26 of the *Termination Payments Tax (Assessment and Collection) Act 1997*.

[102] See for example, *The Work of the Committee during the 39th Parliament November 1998-October 2001*, pp 38-42, Report 8/1999, pp 181-83; Alert Digest 6/2000, p32.

[103] Report 4/2000 *Inquiry into Entry and Search Provisions in Commonwealth Legislation*, paras 1.36 and 1.44, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm>.

[104] In certain circumstances, national security and health considerations will outweigh the need for an entry/search/seizure warrants. A health example is section 46B of the *Therapeutics Goods Act 1989*. A national security example is the amendments of the *Australian Federal Police Act 1979*, made by the *Australian Protective Service Amendment Act 2003*.

8.7 Monitoring warrants

Monitoring warrants should follow the established principles

Principle

A monitoring warrant regime may be appropriate where it is necessary to monitor or audit compliance with legislative requirements.

A monitoring warrant differs from a search warrant, which is used to investigate suspected offences. A monitoring warrant scheme may be useful where there is a need to monitor compliance with legislation in circumstances where no offence is suspected.

A set of principles for framing monitoring warrant provisions has been followed in Commonwealth legislation for several years. This has been designed to ensure a broad range of powers is available to facilitate effective monitoring, without raising concerns about improper use of these powers.

This approach should continue to be followed unless there are clear reasons for departure.

Discussion

The leading precedents are Part 11 of the *Gene Technology Act 2000* and Part 8 of the *ACIS Administration Act 1999*. These precedents include the following features:

- Only a magistrate should be empowered to issue a monitoring warrant.
- A magistrate should be empowered to issue a monitoring warrant where he or she is satisfied that it is reasonably necessary for an authorised officer to have access to the premises to monitor compliance with the relevant legislation.[105]
- The warrant should specify the premises to which it authorises entry.
- Powers to enter vehicles, vessels or aircraft should be subject to the same grounds as powers to enter premises.
- The powers exercisable under a monitoring warrant should include the power to enter premises and to search for relevant records.
- Additional powers (eg to take samples) should be included as necessary.
- Where an authorised officer has reasonable grounds to believe that evidence of an offence would be lost, destroyed or tampered with by the time a search warrant is obtained, there should be a power to secure the evidence pending an application for a search/seizure warrant.[106]

[105] See also Principle 1 of the Administrative Review Council Report 48, *The Coercive Information-gathering Powers of Government Agencies*, p 11, available at <http://www.arc.ag.gov.au/Documents/a00Final+Version+-+Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf>.

[106] See subsection 90-4(2) of the *Aged Care Act 1997*.

- Failure to produce documents or answer questions in accordance with a monitoring warrant should be an offence. The maximum penalty should generally be 30 penalty units or 6 months imprisonment.[107]

The ARC has published best practice principles about the use of monitoring warrants in Report 48, *The Coercive Information-gathering Powers of Government Agencies*.[108] Although these are principles of administrative procedure (not legislative requirements), they are nonetheless useful for agencies to consider in framing their internal procedures and guidelines.

The Scrutiny of Bills Committee has expressed the view that monitoring warrant powers can be conferred:

- where a person has accepted a commercial benefit, subject to being monitored by this means
- where a person is subject under legislation to a 'commercial levy in relation to a serious matter, in circumstances where the legislation provides for this in specific terms', or
- in relation to matters 'which are serious, cannot otherwise be checked, and where the powers are used with maturity and are proportionate to the benefit gained'.[109]

[107] See section 48, *Therapeutic Goods Act 1989*; subsection 92-7, *Aged Care Act 1997*; section 32AJ, *Civil Aviation Act 1988*; section 32, *Motor Vehicle Standards Act 1989*; section 83, *ACIS Administration Act 1999*; section 30, *Imported Food Control Act 1992* and section 237, *Airports Act 1996*.

[108] See, in particular, Principles 1 and 2.

[109] Report 4/2000, paras 1.59-1.61, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm>.

CHAPTER 9—NOTICES TO PRODUCE OR ATTEND

OVERVIEW

9.1 When should a notice to produce or attend be issued?

A ‘notice to produce or attend’ provision is a legislative provision that allows an enforcement or regulatory agency to require a person to produce information or documents, or to appear before an officer of an agency at a hearing to answer questions. This is a common enforcement mechanism used to assist in the administration of Commonwealth legislation.

9.1.1 Grounds for issuing a notice

The threshold for issuing a notice should be 'reasonable grounds to believe'

Principle

A notice to produce or attend should only be issued where the issuer reasonably believes that the person required to produce documents or information or answer questions has custody or control of documents, information or knowledge, which will assist the effective administration of the relevant legislative scheme.

Discussion

The 'reasonable grounds to believe' threshold ensures there is proper justification for subjecting a person to coercive notice to produce or attendance powers. This threshold reflects Principle 1 of the ARC's Report 48, *The Coercive Information-gathering Powers of Government Agencies*.[110]

9.2 Who can issue a notice?

Authority to issue notices should be conferred on a Department head or equivalent, but may be delegated

Principle

The authority to issue notices to produce or attend should be conferred on a Secretary of a Department or equivalent, for example the Commissioner of Taxation. Authority to issue notices can be delegated, though it should generally not be delegated lower than members of the Senior Executive Service.

Discussion

Notices to produce or attend are coercive powers of investigation, sometimes accompanied by criminal consequences for a person who does not comply with a notice. Therefore, it is important that the issue of notices is considered by senior members of agencies.

It may be appropriate to delegate the power to issue notices where an agency would use the power frequently or where it would be overly onerous to seek the approval of the head of the agency each time a notice was issued. It may be appropriate to provide that the authority to issue notices should generally be delegated no lower than to members of the Senior Executive Service. If information-gathering powers are exercised by an entity, the power to issue notices to produce or attend may be conferred on the entity – for example, see subsection 306D(2) of the *Migration Act 1958*.

[110] This report is available at: <http://www.arc.ag.gov.au/Documents/a00Final+Version+-+Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf>.

9.3 What should be in a notice?

9.3.1 Notice should be in writing

Notice should be in writing

Principle

A power to issue a notice to produce or attend should provide that all notices must be in writing.

Discussion

A written notice to produce or attend ensures a person is aware of his or her rights and obligations in relation to the notice. Requiring notices to be in writing also facilitates successful prosecution for non-compliance with such a notice.

Issuing a notice electronically (eg by email) may be used as an alternative means of notification provided that adequate systems for proving receipt are in place.[111]

For examples of provisions requiring that notices to produce or attend be issued in writing, see subsection 306D(2) of the *Migration Act 1958*, or section 51 of the *Australian Meat and Live-stock Industry Act 1997*.

9.3.2 Notice recipient

Notice should be issued to a person

Principle

A notice to produce or attend should be issued to a 'person' rather than, for example, to a 'person, employer or agency'.

Discussion

Requiring notices to be issued to a 'person' (which can be either a natural person or a corporation) ensures that it is clear who bears the obligation to comply with the notice and who will be liable for non-compliance.

For examples, see the section 54 of the *Aboriginal Land Rights (Northern Territory) Act 1976* or section 45 of the *Interstate Road Transport Act 1985*.

[111] Electronic notices are generally authorised under section 9 of the *Electronic Transations Act 1999*, subject to the Commonwealth provisions which are specifically exempted (*Electronic Transaction Regulations 2000*, Schedule 1).

9.3.3 Notice must contain relevant details

Notice must contain all relevant details

Principle

A notice to produce information or documents must state:

- the nature of the information or documents required to be produced
- to whom the information or documents are to be provided
- how the information or documents are to be provided, and
- the deadline for compliance.

A notice to attend must state the time and place of the hearing, and should also state that the person may be accompanied by a lawyer, and whether other third parties may also attend the hearing.

Discussion

Including all relevant details in a notice ensures that a person who receives a notice is aware of his or her legal rights and obligations in relation to the notice. The legitimacy and enforceability of notices to produce or attend depends on ensuring the rights and obligations of the person served with the notice are clearly outlined. For an example, see subsection 306D(2) of the *Migration Act 1958*.

A notice to produce may specify that the information or documents are to be given to a person other than the issuer of the notice – see for example subsection 54AA(1) of the *Veterans' Entitlements Act 1986*.

9.3.4 Time for compliance

A person should be given a minimum of 14 days to comply with a notice

Principle

The legislation establishing the notice to produce or attend powers should allow a person at least 14 days to comply with a notice.

Discussion

This principle applies to both notices to produce and notices to attend. For a notice to produce, the person should be given at least 14 days to produce the required information or documents. For a notice to attend, the person should be given the notice at least 14 days in advance of the hearing date stipulated in the notice.

Depending on the circumstances, a person/corporation may need to examine a large quantity of records to identify the information or documents required to be produced under a notice. Contingencies such as ill-health, the pressures of running a business and the potential need to seek legal and/or business advice mean that 14 days is considered

the minimum time in which a response can reasonably be expected. This is especially important where criminal penalties attach to non-compliance.

For an example of a notice scheme specifying a minimum 14-day time for compliance, see subsection 306D(5) of the *Migration Act 1958*.

In cases where there is a threat that evidence may be destroyed before the expiry of the compliance period specified, it may be appropriate to rely on the search warrant regime in the Crimes Act.

9.4 Failure to comply with a notice

9.4.1 Non-compliance offence

The penalty for non-compliance should be six months imprisonment and/or a 30 penalty unit fine

Principle

If non-compliance with a notice to produce or attend is to be an offence, the maximum penalty for non-compliance should generally be six months imprisonment and/or a fine of 30 penalty units.

Discussion

A maximum penalty of six months and/or 30 penalty units for non-compliance is the penalty that has most frequently been imposed for offences of this kind. For an example of this penalty, see subsection 167(3) of the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* or section 211 of the *Proceeds of Crime Act 2002*. Non-compliance with a notice can also be enforced by a civil penalty provision.

9.4.2 Contempt of court

Enforcement by contempt proceedings must be justified

Principle

An alternative and stricter penalty for non-compliance with a notice is to give a court the power to order a person to comply with the notice. If the person then fails to comply with the order of the court to comply with the notice, the person can be dealt with as if he or she was in contempt of the court.

Discussion

The court order/contempt mechanism will be more easily justified in cases where:

- the critical regulatory or enforcement functions performed by an agency will be frustrated by a person refusing to comply with a notice in a timely manner
- there is a strong incentive for a person to withhold information because providing the required information may expose the person to serious civil or criminal penalties or sanctions

- defendants have significant financial resources at their disposal, or
- the public interest requires that persons be prevented from frustrating criminal investigations by withholding information to defeat the interests of justice.

For examples of notice to produce or attend schemes where non-compliance with a notice is dealt with as contempt of court, see section 70 of the *Australian Securities and Investments Commission Act 2001*, section 289 of the *Superannuation Industry (Supervision) Act 1993*, and section 119 of the *Retirement Savings Account Act 1997*.

9.5 Safeguards

9.5.1 Privilege against self-incrimination

A natural person will be protected by the privilege against self-incrimination unless the privilege is overridden by legislation

Principle

The common law privilege against self-incrimination will protect a natural person complying with a requirement to disclose information or documents under a notice to produce or attend, unless the privilege is expressly or impliedly overridden.

Discussion

The privilege against self-incrimination is enshrined in common law in Australia and provides that a person cannot be required to give information that would tend to incriminate him or herself: *Sorby v The Commonwealth* (1983) 152 CLR 281. The privilege is relevant for regulatory schemes because it entitles a person to refuse to answer a question put to him or her by an authorised officer under a regulatory scheme on the basis that he or she may incriminate him or herself: *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

9.5.2 When does privilege against self-incrimination not apply?

The privilege against self-incrimination does not apply in certain circumstances

Principle

There are three main circumstances in which the privilege against self-incrimination does not apply:

- where it is alleged that a person has given false or misleading information
- where a person voluntarily provides information or documents, and
- to bodies corporate.

Discussion

The privilege against self-incrimination does not extend to situations where it is alleged that a person has given false or misleading information. Sections 137.1 and 137.2 of the

Criminal Code create offences for providing false or misleading information or documents that have general application, but legislation may create offences for giving false or misleading information for the purposes of a particular Act.

The privilege against self-incrimination also does not apply where a person voluntarily provides such information – it only applies to situations where a person is required to give evidence that tends to incriminate him or herself.

This privilege only applies to natural persons and does not extend to bodies corporate. This is established in common law, see: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 and *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503. If legislation applying to bodies corporate is silent on the issue of self-incrimination, the privilege will only extend to natural persons.

9.5.3 When is it appropriate to override privilege against self incrimination?

The privilege against self-incrimination may be overridden by legislation where there is clear justification for doing so

Principle

Legislation can provide that the privilege against self-incrimination does not apply. However, there should be clear policy justification for doing so.

Discussion

The privilege can be overridden by legislation providing that, for example, a person is not excused from producing information or documents or answering a question on the grounds that doing so would incriminate him or herself. If the privilege is to be overridden, legislation should specify this clearly. For an example of this, see the *Migration Act 1958*, section 306J.

It may be appropriate to override the privilege where its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence. For example, section 83 of the *Tobacco Plain Packaging Act 2011* provides that the privilege against self-incrimination does not apply to the coercive information-gathering powers contained in subsection 58(2) or 80(2) of that Act.

The Evidence and Legislative Frameworks Section in the Access to Justice Division has policy responsibility for issues relating to the use of evidence in civil and criminal trials in relation to Commonwealth legislation, including the use of self-incriminating evidence. This Section should be consulted about proposed legislation that would remove the privilege against self-incrimination.

The Scrutiny of Bills Committee has made several comments about the privilege against self-incrimination.[112] The Committee recognises that the privilege can be overridden, but given that removing the privilege represents a serious loss of personal liberty for

[112] See for example the Committee's report, *The Work of the Committee during the 39th Parliament November 1998 - October 2001*, pp 27-28, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/completed_inquiries/index.htm>.

persons who are subject to questioning, the Committee will question whether there is a public benefit in the removal of the principle that outweighs the loss. The Committee has also stated that the interest of having government fully informed by requiring a person to disclose information that may incriminate him or herself will prevail more easily when the use of that information is constrained.

The explanatory material should explain why the privilege against self-incrimination has been overridden.

9.5.4 Constraints on the use of incriminating evidence

If the privilege against self-incrimination is overridden, the use of incriminating evidence should be constrained

Principle

If the privilege against self-incrimination is to be overridden, it is usual to include a 'use' immunity or a 'use and derivative use' immunity provision, which provides some degree of protection for the rights of individuals.

Discussion

Removing the privilege against self-incrimination represents a significant loss of personal liberty for an individual who is forced to give evidence that would tend to incriminate him or herself. As such, it is usual to provide some degree of protection by constraining what the evidence can be used for. This is done by providing for either or both a use and derivative use immunity:

- 'use' immunity – self-incriminatory information or documents provided by a person cannot be used in subsequent proceedings against that person, but can be used to investigate unlawful conduct by that person and third parties, and
- 'derivative use' immunity – self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person but can be used to investigate third parties.

Derivative use immunity cannot apply unless a use immunity is also provided for in the legislation.

As noted above, the Scrutiny of Bills Committee has recognised that removing the privilege represents a serious loss of personal liberty for persons who are subject to questioning, and the Committee will question whether there is a public benefit in the removal of the principle that outweighs the loss of personal liberty. The Committee will be less critical of legislation that proposes to remove the privilege where the legislation provides constraints on the use of self-incriminating evidence by either 'use' immunity or 'use and derivative use' immunity provisions. For example, the Child Support Legislation Amendment Bill (No. 2) 2000 was amended to include a use/derivative use immunity as a result of concerns expressed by the Committee (Alert Digest 12/2000, pages 8-10).[113]

[113] This Alert Digest is available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/alerts/2000/index.htm>.

The Committee will not view the inclusion of use and/or derivative use immunities as sufficient safeguards justifying the privilege being removed in all cases. The Committee has commented that provisions removing the privilege should only be enacted for 'serious offences and to situations where they are absolutely necessary', see Alert Digest 4/2000, pages 12, 20; Alert Digest 6/2000, page 31.[114]

When considering the choice between preserving the privilege against self-incrimination and removing the privilege but including a 'use' and a 'derivative use' immunity, consideration should be given to which approach would be likely, in practice, to lead to the most information being obtained and being able to be used for regulatory purposes. If the privilege is removed and 'use/derivative use' immunity is provided, it should be borne in mind that this will prevent information coercively obtained from a person from being used to gather other evidence against that person. In some cases, it may be more effective to preserve the privilege against self-incrimination and rely on voluntary disclosure of self-incriminatory information or documents, relying on the search warrant regime in the Crimes Act where necessary, as the privilege will not apply in these situations.

9.5.5 Use immunity

'Use' immunity protects a person who is required to give self-incriminating evidence from that evidence being used against him or her in court

Principle

'Use' immunity may be claimed by a person who is required to answer questions which would tend to incriminate or expose him or herself to a penalty. The effect of a 'use' immunity provision is that any information or evidence given that would tend to incriminate the person may not be used against him or her directly in court.

Discussion

By way of example, if Person A provides a document that would tend to indicate that he had committed a particular offence, that document cannot be used against him directly in court, but information in the document can be used to uncover other evidence against him or third parties in relation to that offence or other offences.

If the privilege against self-incrimination is removed, it is usual to provide at least a 'use' immunity provision as some form of protection, if not also a 'derivative use' immunity provision.

If a person claims a 'use' immunity, any evidence or information the person gives that would tend to incriminate him or herself cannot be used against him or her. The information can, however, be used to gather other evidence against that person. The information can also be used against a third party, for example an employer, partner or alleged accomplice of the person.

[114] These Alert Digests are available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/alerts/2000/index.htm>.

The Scrutiny of Bills Committee has approved legislation that provides a 'use' immunity and not also a 'derivative use' immunity in limited circumstances only – generally where the offences for which the evidence would be used are very serious and where providing a 'derivative use' immunity would significantly undermine investigatory functions carried out under the relevant legislation. For examples of legislation providing only a 'use' immunity, see section 198 of the *Proceeds of Crime Act 2002* or section 169 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

More circumscribed immunities have also been accepted for legislation governing the Australian Securities and Investment Commission, the Australian Competition and Consumer Commission and the Australian Prudential Regulation Authority, who regulate the activities of bodies corporate but exercise information-gathering powers against natural persons. Generally, the information-gathering powers conferred on these agencies remove the privilege against self-incrimination, make no provision for derivative use immunity and only provide for use immunity for answers to questions and not for the production of documents (for examples, see section 68 of the *Australian Securities and Investment Commission Act 2001* or section 159 of the *Competition and Consumer Act 2010*).

These limited immunities have been accepted due to the particular difficulties of corporate regulation – it was accepted that a full 'use' and 'derivative use' immunity would unacceptably fetter the investigation and prosecution of corporate misconduct offences. For example, see the comments made by the Scrutiny of Bills Committee on proposed subsection 154R(4) of the *Trade Practices Act 1974* (now the *Competition and Consumer Act 2010*), which removed the privilege against self-incrimination and did not provide derivative use immunity.[115]

Legislation may specify that self-incriminating evidence given under a 'use' immunity may be used in proceedings alleging that the person has given false or misleading information or has not properly complied with the notice. For an example of this, see subsection 169(2) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

9.5.6 Derivative use immunity

'Derivative use' immunity protects a person who is required to give self-incriminating evidence from that evidence being used to gather other evidence against that person

Principle

The effect of a 'derivative use' immunity provision is that any information or evidence given that would tend to incriminate the person may not be used to gather other evidence against that person. The derivative use immunity builds on, and therefore cannot exist separately to, use immunity.

[115] Senate Standing Committee for the Scrutiny of Bills, Report 11/2005, pp 226-228, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2005/index.htm>.

Discussion

By way of example, if Person A provides a document that would tend to indicate that he had committed a particular offence, that document cannot be used to gather further evidence against him, but it may be used to investigate other persons.

As this type of immunity prevents evidence from being used to gather other evidence against that person, the 'derivative use' immunity provides a broader protection than the 'use' immunity.

An example of legislation providing a 'derivative use' immunity can be found at section 140XG of the *Migration Act 1958*.

As stated in Subpart 9.5.4, the presence of a 'derivative use' immunity provision may not be enough for the Scrutiny of Bills Committee to regard the removal of the privilege against self-incrimination as justified. The Committee will consider whether the public benefit of removing the privilege would outweigh the loss of personal liberty to persons required to give evidence that would tend to incriminate themselves.

9.5.7 Disputes about privilege

Only a court can resolve any dispute about privilege

Principle

If a dispute arises between a Commonwealth agency demanding information from a person and the person claiming the privilege against self-incrimination, the matter will be determined by a court.

Discussion

A court is best placed to adjudicate a contested claim of the privilege against self-incrimination. A person's claim of the privilege cannot be treated as definitive, nor should the Commonwealth (including a separate Commonwealth agency) be able to make a binding determination, because of its conflict of interest. To justify a claim of the privilege, there must be sufficient evidence to satisfy a court that the claim is made out.

There is no need for legislation to specify that disputes about a claim of the privilege will be decided by a court.

9.5.8 Other privileges

The Evidence and Legislative Frameworks Section should be consulted on provisions that remove other types of privileges

Principle

The Evidence and Legislative Frameworks Section in the Access to Justice Division should be consulted on any proposal to override a common law privilege, such as legal professional privilege.

Discussion

Other privileges, such as legal professional privilege, exist in common law in Australia. Legal professional privilege provides that a person may refuse to disclose communications he or she has made with his or her lawyer for the purpose of seeking legal advice or preparing for court proceedings.

The *Evidence Act 1995* also enacts a number of other privileges and immunities, including journalists' privilege, religious confessions and public interest immunity.

The Evidence and Legislative Frameworks Section in the Access to Justice Division should be consulted about proposed legislation that would remove any common law privilege or override any privileges provided for in the Evidence Act.

CHAPTER 10—OTHER TYPES OF COERCIVE POWERS

OVERVIEW

- **10.1 Arrest, restraint and detention**
- **10.2 Power to demand name and address**
- **10.3 Personal search powers**

10.1 Arrest, restraint and detention

Arrest powers should generally not be conferred on persons other than sworn police officers

Principle

Arrest powers should only be granted to sworn police officers unless there are exceptional circumstances which clearly justify extending these powers to non-police.

Discussion

Police are given extensive training and provided with a high level of organisational support for the exercise of arrest powers. This training and support helps to ensure that arrest powers are used effectively and in a manner that does not endanger the officer or the public.

Part IAA, Division 4 of the Crimes Act sets out the scope of police arrest powers. These provisions reflect Parliament's views on the appropriate limits and safeguards for police in conducting arrests in relation to Commonwealth offences, including the most serious offences.

In circumstances where it is necessary to confer arrest powers on persons other than police, such as officers of a regulatory agency, these powers should generally not exceed the limits, or contain fewer safeguards, than those set out in Part IAA, Division 4.

The legislation should also require that apprehended persons be delivered to a police officer or judicial officer immediately following their arrest. Examples of legislation providing for the 'handing over' of apprehended persons to police include section 212 of the *Customs Act 1901*, section 51I of the *Defence Act 1903*, and section 430 of the *Environment Protection and Biodiversity Conservation Act 1999*.

10.2 Power to demand name and address

Provisions requiring persons to provide their name and address on demand must be justified

Principle

Any proposal to make it an offence for a person to fail to provide their name and address on demand should be carefully considered and properly justified.

Discussion

Provisions which require a person to provide his or her name and address on demand are likely to be the subject of significant public and Parliamentary concern regarding the potential for the powers to be used in a manner which infringes civil liberties.

Such provisions have rarely been included in Commonwealth law, apart from in the context of environmental protection legislation. For an example of legislation providing for such a power, see section 444 of the *Environment Protection and Biodiversity Conservation Act 1999.*

10.3 Personal search powers

Personal search powers should only be provided for in exceptional circumstances

Principle

Due to the intrusive nature of personal searches, proposals to grant new powers to search persons (either by frisk, ordinary or strip search) require strong justification.

Where new personal search powers are included in legislation, the Explanatory Memorandum should clearly explain the need for the power in the context provided for in the Bill. The Criminal Justice Division should be consulted at an early stage in relation to proposals allowing for invasive personal searches.

Discussion

Part IAA of the Crimes Act outlines the scope of personal search powers for police investigating Commonwealth offences and the safeguards which police must observe when exercising these powers.

The Scrutiny of Bills Committee has indicated that broader powers should be enacted 'only in exceptional, specific and defined circumstances where Parliament is notified of the exercise of those powers and where those exercising those powers are subject to proper scrutiny.'[116]

[116] Senate Standing Committee for the Scrutiny of Bills, Report 4/2000, para 1.54, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2000/index.htm>.

The Committee has also indicated that Bills including proposed personal search powers should always be accompanied by sufficient justification in the Explanatory Memorandum outlining why the powers are necessary in the circumstances provided for in the Bill. The Committee has noted that it 'does not believe that precedent alone is sufficient reason for pursuing a practice' and that 'the justification for the expansion of intrusive enforcement and investigatory powers should not be considered to be self evident, no matter how beneficial such powers might be in a national security context.'[117]

Personal search powers outside the arrest context are likely to be criticised by the Scrutiny of Bills Committee.[118] Powers to allow personal searches by persons other than police officers are also likely to be criticised.[119]

However, personal search powers have been permitted in rare circumstances. For example, private sector screening officers have been given limited search powers under Part 5, Division 5 of the *Aviation Transport Security Act 2004*. The conferral of these powers is necessary to assist the officers in their task of screening airline passengers for prohibited items (such as weapons) at airports.

[117] Senate Standing Committee for the Scrutiny of Bills, Report 12/2006, pp 288-9, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2006/index.htm>

[118] Senate Standing Committee for the Scrutiny of Bills, Report 1/2002, pp 14-15, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2002/index.htm>.

[119] Senate Standing Committee for the Scrutiny of Bills, Alert Digest 6/2001, pp 43-44

ANNEXURE A

Penalty Comparisons across Commonwealth Legislation

20 - 30 penalty units	
Giving and withholding information	Section 32AJ, *Civil Aviation Act 1988*; s 163A, *Maritime Transport and Offshore Facilities Security Act 2003*; s 9-2, *Aged Care Act 1997*. See also Scrutiny of Bills Committee Report 8/1998, Alert Digests 9/1999 p 32, and 10/1999 p 26.
Failure to keep records	Section 47, *Medical Indemnity Act 2002*; s 240, *Customs Act 1901*; s 160, *Renewable Energy (Electricity) Act 2000*.
6 months imprisonment or 30 penalty units	
Offences by witnesses	Section 112, *Environment Protection and Biodiversity Conservation Act 1999*; s 50, *Productivity Commission Act 1998*.
Tribunal non-attendance - when summonsed	Section 61CY, *Defence Act 1903*; s 370, *Migration Act 1958*.
Intimidation etc of witness	Section 216, *Radiocommunications Act 1992;* s 47, *Productivity Commission Act 1998*.
Victimisation	Subsection 42(1), *Disability Discrimination Act 1992*; s 40YA, *Australian Federal Police Act 1979*; s 256.5, *Private Health Insurance Act 2007*.
Refusal or failure to comply with notice	Section 1061ZZBW, *Social Security Act 1991;* ss 218 and 273, *Proceeds of Crime Act 2002*.
50 - 60 penalty units	
Failure to lodge return/report	Section 36, *Superannuation Industry (Supervision) Act 1993*; s 23C, *Telecommunications (Consumer Protection and Service Standards) Act 1999*; sub-s 53(5), *National Consumer Credit Protection Act 2009*; s 104(3), *Insurance Act 1973*.
Act or omission contravenes a condition of approval	Section 10A(6), *Motor Vehicle Standards Act 1989*; regs 5.11, 5.16 and 5.50, Civil Aviation Regulations.
12 months imprisonment or 60 penalty units	
Making false statements in notices or applications	Sections 209 and 216, *Proceeds of Crime Act 2002*; s 91, *International Criminal Court Act 2002*; s 137.1, Criminal Code.
False representations	Section 151, *Trade Marks Act 1995*; s 132, *Designs Act 2003*; s 29JCA, *Superannuation Industry (Supervision) Act 1993*.

2 years imprisonment or 120 penalty units	
Breach of confidentiality requirement	Subsection 67(8), *Australian Hearing Services Act 1991*; sub-s 16(2), *Customs Administration Act 1985*; s 15, *Data-matching Program (Assistance and Tax) Act 1990*.
Making false statements in applications for warrants	Section 436, *Environment Protection and Biodiversity Conservation Act 1999*; s 203P, *Customs Act 1901*; s 42, *Transport Safety Investigation Act 2003*; s 75, *International War Crimes Tribunals Act 1995*.
Obstruction of a public official	Section 149.1, Criminal Code.
5 years imprisonment or 300 penalty units	
Corruption and abuse of public office	Sections 142.1 and 142.2, Criminal Code.
Importation of prohibited goods	Section 21, *Industrial Chemicals (Notification and Assessment) Act 1989;* s 69B, *Agricultural and Veterinary Chemicals (Administration) Act 1992*; s 303GQ, *Environment Protection and Biodiversity Conservation Act 1999*.
10 years imprisonment or 600 penalty units	
Breach of disease/pest/wildlife control requirements	Section 67, *Quarantine Act 1908*; sub-s 303GF(3), *Environment Protection and Biodiversity Conservation Act 1999*; s 9, *Imported Food Control Act 1992*.
20 years imprisonment or 1200 penalty units	
Certain war crimes	Sections/subsections 268.37(2), 268.38(2), 268.46, 268.66(2), 268.78(2), 268.79(2), 268.80, 268.81, and 268.101, Criminal Code.
Aggravated robbery	Section 132.3, Criminal Code.
Life imprisonment	
Treason	Section 80.1, Criminal Code.
War crimes such as genocide, murder and mutilation	Sections 268.3, 268.70 and 268.71, Criminal Code.
Terrorist acts	Section 101.1, Criminal Code.

ANNEXURE B

IMAGINARY REGULATORY ACT

Search of premises: Rights and responsibilities of the occupier

A search warrant has been issued by a Magistrate, under the provisions of the *Imaginary Regulatory Act*, for these premises. It gives authority and power to an authorised officer to enter and search the premises listed in the search warrant. It also gives the executing officer authority to:

- seize material that may be used as evidence (including the taking of samples)
- take photographs of the premises or things at the premises
- use electronic equipment at the premises (including computer, audio and video equipment)
- obtain assistance as is necessary and reasonable in the circumstances to carry out the warrant
- use such force against persons and things as is necessary and reasonable in the circumstances to carry out the warrant
- move a thing found at the premises to another place for examination or processing for no longer than 48 hours (unless an extension is granted)
- copy data to a disk, tape or similar device if it believed to be evidential material, and
- secure equipment found at the premises for up to 24 hours or until it has been operated by an expert, whichever happens first.

YOUR RIGHTS AND RESPONSIBILITIES

- The executing officer must identify himself or herself to you.
- You are entitled to receive a copy of the search warrant.
- You are entitled to be present while the search is conducted. This right ceases if you impede the search.
- You are entitled to a receipt for any property taken from the premises.
- If anything is to be moved to another place for examination or processing, the executing officer must, if practicable, inform you of where and when the examination or processing will take place and allow you or a representative to be present.
- If damage is caused to equipment on the premises as a result of insufficient care being taken in selecting someone to operate the equipment or insufficient care being taken by that person, you may be entitled to receive compensation.
- If a document, film, computer file or other thing readily copied or a storage device, the information stored in which can be easily copied, is seized, you are entitled to receive a copy of the thing or the information as soon as practicable if you request it.
- If you are dissatisfied with the issue of the warrant or the conduct of the search, you should seek legal advice. This advice may assist you in deciding whether your rights have been infringed and what action to take. If your rights have been infringed, you may be entitled to legal remedy.
- If you have a complaint about alleged misconduct of the officer conducting the search you should contact the complaints unit on [number].
- A complaint may also be lodged with the [Independent Oversight Body], whose contact details are as follows.

[Contact details]