

**Information Paper for LegCo Bills Committee on
Lands (Miscellaneous Provisions) Amendment Bill 2002
Meeting on 19 September 2002**

**TO PROVIDE FURTHER INFORMATION ON CERTAIN MATTERS
ARISING FROM THE BILLS COMMITTEE MEETING ON 5 JULY 2002**

Introduction

At the Bills Committee meeting held on 5 July 2002, members requested the Administration to provide further information on certain issues to facilitate consideration of the Bill. This Information Paper provides such information, with each ensuing section corresponding to the issues raised in the manner described below.

2. The section **Overseas Legislation** provides information on the issues:
 - (a) Overseas legislation relating to the control of street excavations and whether criminal liabilities would be imposed on those who contravene the relevant provisions, including the government and a person doing anything in the course of carrying out his duties as a public officer in the service of the government.
 - (b) Overseas legislation relating to the exemption of criminal liabilities on the government or a person doing anything in the course of carrying out his duties as public officer in the service of the government.
3. The section **Criminal Records and Prison Sentence** provides information on the issues:
 - (a) Factors of consideration for imposing a criminal record in respect of an offence involving excavation in unleased land.
 - (b) Repealing the imprisonment term for offences relating to excavations in unleased land.

4. The section **Outsourcing the Administration of the Excavation Permit System** provides information on the issue of contracting out the control of excavations in unleased land.

5. The section **Past Cases and the Proposed Reporting Mechanism** provides information on the issues:

- (a) Operation of the reporting mechanism, and follow-up actions to be taken by the Administration upon receiving a report from the Authority by the Secretary.
- (b) Number of reports received by the Secretary and the course of disciplinary actions taken by the Administration against the concerned public officers in the last three years.

6. The section **Derivation of Economic Costs Relating to Street Excavations** provides information on how the economic costs relating to street excavations are derived.

Overseas Legislations

7. We enquired several overseas countries, and we got response in various degree of detail from the following: Singapore, Sweden, Germany, Japan, France, South Korea, New Zealand, Australia, United States and the United Kingdom.

8. We must emphasize that we are not fully conversant with the legal systems of overseas countries, in particular those countries other than common law jurisdictions. Even when we are provided with a copy of the relevant legislation, we may not be able to interpret it accurately. Their concept about 'criminal liability' or 'criminal liability of civil servants in the course of their discharging of their public duties' may be very different from ours. All advice provided to us were via consulates in Hong Kong. Our questions were translated into their own language by their consulate staff for passing to their relevant authorities, and answers from their countries were translated back to English. Where copies of legislations were provided to us, they were in their own language, and in Hong Kong, we could only translate them as a non-technical document by local translators. Without full grasp of the foreign legal system, and after so may translations, we cannot guarantee any accurate conclusion can be drawn from those

examples – unless we spend a lot of resources hiring the relevant legal experts for individual countries and spend a much longer time on the study. We therefore propose that we should concentrate on the leading common law jurisdictions whose legal material is available to us.

9. Findings by the Department of Justice show that all countries studied have some form of legislation controlling street excavations. For most countries studied, such as South Korea, Japan, Singapore, UK, USA and New Zealand, contravening the legislation is a criminal liability, except for Germany for which no data is available. The information on criminal liability in overseas excavation legislation, including criminal liability of government and public officers is at Annex A and exemptions of criminal liability on government and public officers is at Annex B.

10. We recommend that we should not continue to drag on the question of government liability or liability of civil servants in this Bill. The wider question of government liability or liability of civil servants in general should be considered as a separate exercise so as not to hamper the passage of this Bill, as the public has high expectation about implementation of measures to control street excavations. When one examines the current Bill, one can discover that the question of liability of government or civil servant is not significant, as in practice the only contraventions that can be committed by government is section 10(3) - breaching of EP conditions to be observed by the permittee which results in a fine. Section 10(2) – excavation without a permit is most unlikely to be contravened by government, as there is no commercial interest to induce a government department to excavate without an excavation permit (EP). Even when government as a permittee is made criminally liable under section 10Q(1) – provision of safety precautions and support, only a fine can be applied, as government, like any company permit holder, cannot be jailed. Now, fining government is meaningless as the money to pay the fine is from the public coffers. The reporting mechanism, which is a statutory procedure ensuring these matters are brought to the attention of and dealt with by the Secretary for the Environment, Transport and Works, is a much more effective deterrent for government servants.

Criminal Records and Prison Sentence

11. When a person is convicted in court, the following types of records may be generated:

- a) A record about the conviction in the court files, which is merely a record of the court proceedings.
- b) A record is made by the prosecuting department, which will be provided to the Court in future prosecutions of the same person or company, so as to let the court have reference when deciding an appropriate sentence. Normally the police will record the offence for more serious crimes other than summary offences (such as traffic offences), or, when it is requested by some other department when that other department considers the offence is serious enough to warrant such a procedure (such as ICAC may request the police to record on their behalf etc. of a person convicted of bribery). If there is an offence recorded by the police in this manner, then it will be reflected when a person is applying for a 'Certification of No Criminal Conviction', and a person's future opportunity with respect to employment or migration may depend on the views of his prospective employer or the immigration authorities concerned.

12. For possible convictions under this Bill, namely:

- a) under section 10(2), excavating without an EP,
- b) under section 10(3), contravening the conditions of an EP; and
- c) under section 10Q(1), failing to provide safety precautions or providing adequate support,

we have no intention of requesting the police to record the offence. Director of Highways will always make a record of the conviction of the company concerned so that it can be produced for the Court's reference when sentencing as in 11(b) above. Records of 11(a) above are always present whenever court proceedings are involved.

13. Prison sentence has been present in the Land (Miscellaneous Provisions) Ordinance since a very long time ago. Prison sentence in the Bill is only associated with sections 10(2) and 10Q(1). For 10(2), the prison sentence will never be enforced against permittees but is to be used against those excavating without a permit. This is necessary, as we need to prevent individuals from digging unauthorised on a road as part of the process of maintaining order and protection of

public property. For 10Q(1), as it is related to safety, we need to have an effective deterrent and a means to punish the individuals involved, if they can ever be found through extensive investigations.

14. The factors of consideration for laying criminal charge in respect of an offence in excavation of unleased land will be the same as any other crimes, namely, the sufficiency of the evidence collected and whether it is in the public interest to prosecute.

Outsourcing the Administration of the Excavation Permit System

15. The administration of the EP system can be divided into the issuance of EP's and enforcement of EP conditions.

16. For EP's issued by Highways Departments, there cannot be much economy gained from outsourcing the activities associated with the issuance by taking advantage of the difference in salary levels of government and non-government staff. The reason being that even if the paper work of EP issuance is outsourced, a lot of resources are still required in Highways Department to monitor the activities of the private agent. Besides paper work, the current staff also carries out a lot of liaison and negotiation with other government departments. This work cannot possibly be carried out by a private agent as efficiently and authoritatively as by government.

17. Highways Department have sought the views of the utility undertakers. Generally, they do not support outsourcing of the law enforcement part of the EP system (that is, audit inspection and prosecution), as they have no confidence in the impartiality of the private agent. We believe that law enforcement is a basic function of any government that should not be outsourced on a commercial basis. To do so will bring about the problem of corruption and lack of public credibility. Not only the decision to prosecute cannot be contracted out, audit inspections and investigations are particularly unsuitable to be undertaken by private agents. Unlike any other data collection activities, which may be verified later by third parties, audit inspections and investigations often involve on the spot judgment and decision of law enforcement which errors or non-performance of duty cannot be remedied or subject to surveillance. Separate enactment is also required if investigative powers are to be provided to the private agent.

18. For EP's issued by Lands Department, the number of EP's involved is relatively small, and those EP's usually involve excavation works on unleased government lands in remote areas. Their issuance and enforcement have always been part of the work of the existing staff. There can be no significant advantage gained from outsourcing.

Past Cases and the Proposed Reporting Mechanism

19. In the past, before the Bill, there was no system or statutory requirement whereby contravention of the Land (Miscellaneous Provisions) Ordinance by government departments or government officers are to be reported to the Secretary for Works. In fact, there was no incident of government departments or government officers contravening any provisions of the ordinance as their contractors carried out all street excavations and EP's were issued to these government contractors direct or as part of the works order (i.e. contractors became permit holders, not the departments).

20. But this does not mean that government was adopting a laissez faire attitude towards the performance of government departments or their contractors in street excavations. Firstly, departments were required to supervise their own excavation works. Highways Departments had always been monitoring closely the situation, subject to limitation of resources. All street excavations by government contractors were subject to the same system of application procedures, coordination and monitoring by Highways Departments as private utility undertakers. Under-performance by government departments with respect to street excavation were brought to the attention of Director of Highways, and he had personally written to the directors of the departments concerned, with copies circulated to Secretary for Works. Secretary for Works had made use of various opportunities, when meeting face to face with directors of works departments with poor performance in street excavations, required them to improve the situation. Relative to the scale and complexity of street excavations due to shortage of underground space arising from the ever-increasing population density in recent years, we have seen gradual improvement of performance of government contractors over the last few years.

21. In the Land (Miscellaneous Provisions) (Amendment) Bill 2002, section 3 provides for that if a public officer, in the course of carrying out his public duty, contravenes a provision under the new section 4 of the Bill and the act is not 'immediately terminated', the 'Authority' can report that to Secretary for the

Environment, Transport and Works who should inquire into the case, and if the contravention is continuing or is likely to recur, he/she should ensure the best practicable steps are taken to stop the contravention or avoid the recurrence, as the case may be.

22. We are still in the process of developing the operational details of the system. Notwithstanding so, as there already exists a comprehensive set of regulations and guidelines governing the behavior of civil servants, all operational details of the reporting mechanism will be developed making use of them.

23. We conceive that within the reporting mechanism there will in principle be: procedures for SETW to set up investigations, involving himself/herself personally, or by delegating to officers of appropriate rank; hearing procedures so that each of both sides can make a representation; procedures for punishing any officers identified to be personally responsible for the contravention, which will be based on the existing Civil Services Regulations, Public Services (Disciplinary) Regulations and Public Services (Administration) Order. If the investigations show that the officer concerned contravenes some other law on a personal capacity at the same time, then that other contravention will be passed to the relevant authorities. SETW will also require the case be made known to all government departments likely to come across similar situation so as to avoid similar mistakes.

24. It must be realized that the reporting system can impose quite a severe penalty on government officers contravening the Ordinance. Under the Bill, offences likely to be committed by the Permittee of an EP are only punishable by a fine as the Permittees are often companies or government departments. In the case of a private company, payment of the fine by the company as the permittee may settle the case, and whether its staff is punished by the company for that is a matter for the company to decide. In case of government, paying of fines by departments is meaningless, and therefore we propose the reporting mechanism. The reporting mechanism can result in investigations pinpointing the individual officer involved, and have him punished, albeit not by the court.

Derivation of Economic Costs Relating to Street Excavations

25. Before we go into detail to explain the derivation, it must be realized that economic cost associated with street excavations consist of may components, besides the 'time charge' of traffic delays, there are such as lost of business to road

side shops, lost of amenity, inconvenience, increase of traffic accidents. We selected here the time charge from traffic delay as a basis for estimating economic cost but leaving the other components out because there are relatively mature mathematical models for the calculation of traffic delay. Also, the charging of economic cost proposed on this basis is considered to be relative fair (i.e. can differentiate the effect of delay on various types of roads), realistic (i.e. the level of charges is not beyond the capability of those affected to pay, if they have to pay at all), and have the necessary deterrent effect. Therefore, the level of the economic charges proposed in the Bill is notional.

26. All roads of Hong Kong are classified into 3 categories based on some EXISTING criteria for the assessment of economic charges, they are:

Category 1 – Strategic Streets – comprises all strategic roads which basically include all ‘red and pink routes’ as listed in Highways Department’s Technical Circular No. 5/2001, and as all expressways are either red or pink routes, they are caught by this category. (e.g. Pok Fu Lam Road north bound at Pokfield Road, Jockey Club Road at Lung Sum Avenue, Salisbury Road at Kowloon Park Drive).

Category 2 – Sensitive Streets – includes all traffic sensitive roads, other than Category 1 above, where any excavation would normally require a Traffic Impact Assessment or Day Time Ban will be imposed (as listed in Appendix to Guidance Notes No. RD/GN/021), or where any closure of a lane will result in major traffic problems. (e.g.: Castle Peak Road at Tai Po Road, Chatham Road South at Austin Road, King’s Road at Hing Fat Street).

Category 3 – Remaining Streets – includes all roads other than Categories 1 and 2. (e.g. Tak Yip Street (Yuen Long), Lockhart Road eastbound at Stewart Road, Cheung Sha Wan Road at Yen Chow Street).

27. For each category of road, samples were selected for computer study (as it is impractical nor necessary to study all roads). A transport modeling package capable of reporting the total travel time for all vehicles passing through a defined road section under different network conditions was used in the derivation of economic cost in money term based upon the ‘value of time’. For each sample selected, a model run was conducted for the normal road network, and a second run was carried out with a road network suitably modified to reflect the loss of road

capacity resulting from the excavation works. By comparing the total travel time through the road section for the scenarios with and without the excavation works, a delay value was derived. This delay at each sample was converted to an economic loss in dollars per day by application of a “value of time” factor (\$197.6 /car/ hour) used in the Comprehensive Transport Study.

28. It is known that an excavation is causing most delay when it is near a road junction, or at the midstream in case of a dual bound single lane road, and the delay is minimal when it is multi-lane road (counted in one direction). Based on historical figures, it is found that applying a factor of 0.78 to the average of the samples obtained for multi-lane roads and near junctions of dual bound single lane roads, and 0.22 for mid-stream of dual bound single lane roads obtained for each category can take into account all situations.

Environment, Transport and Works Bureau
September 2002

OVERSEAS LEGISLATION – STREET EXCAVATIONS

No.	Country	Any legislation controlling street excavations?	Is it criminal?	Civil servants criminally liable?
1.	Singapore	Yes, the Street Works Act (Chapter 320A, Section 53, Regulations 4 and 32).	Yes.	The Act applies to private utilities carrying out works on public streets. It does not bind the Government or its officers.
2.	The UK	Yes, section 131 of the Highways Act 1980.	Yes.	The Act does not say it binds the Crown. Therefore, the Crown is not bound by the Act. There is no provision in the Act stating that civil servants in discharging their public duties are liable for any contravention of the Act.
3.	The USA	Yes, sections 11.28.020 and 11.28.130 of the Vancouver Municipal Code of the Washington State.	Yes.	The Code does not say it binds the State. According to section 11.28.020 of the Code, no permit will be required on a public works contract with the city of Vancouver. It follows that civil servants carrying out public works do not need a permit to do so. They therefore will not commit any offence under the Code.
4.	Australia	Yes, the Roads Act 1993 of the New South Wales Consolidated Acts.	No, only civil liability is imposed. See section 102 of the Act.	No.

No.	Country	Any legislation controlling street excavations?	Is it criminal?	Civil servants criminally liable?
5.	New Zealand	Yes, sections 24 and 26 of the Electricity Act 1992 and section 357 of the Local Government Act 1974.	Yes.	Section 3 of the Electricity Act 1992 states that the Act binds the Crown. There is no such provision in the Local Government Act 1974. According to section 27 of the Interpretation Act 1999, no enactment binds the Crown unless the enactment expressly provides that the Crown is bound by the enactment. It therefore seems that the Government and its officers are not exempted from the Electricity Act 1992 but are exempted from the Local Government Act 1974.

The relevant provisions of the above-mentioned legislation are attached hereto as items A1 to A5 respectively.

STREET WORKS ACT
(CHAPTER 320A, SECTION 53)
STREET WORKS (WORKS ON PUBLIC STREETS)
REGULATIONS

Works not to be carried out without Authority's approval.

4. No person shall commence or carry out, or permit or authorise the commencement or carrying out of, any works on a public street unless he has obtained the approval of the Authority for the works to be carried out.

Offence.

32. Any person who —

- (a) contravenes or fails to comply with any of these Regulations or with any condition imposed or any notice or direction given by the Authority or by an employee or officer thereof under these Regulations; or
- (b) obstructs an employee or officer of the Authority in the exercise of his powers under regulation 29,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$2,000 or to imprisonment for a term not exceeding 6 months or to both and, in the case of a continuing offence, to a further fine not exceeding \$100 for every day during which the offence continues after conviction.

131 Penalty for damaging highway etc

- (1) If a person, without lawful authority or excuse—
- (a) makes a ditch or excavation in a highway which consists of or comprises a carriageway, or
 - (b) removes any soil or turf from any part of a highway, except for the purpose of improving the highway and with the consent of the highway authority for the highway, or
 - (c) deposits anything whatsoever on a highway so as to damage the highway, or
 - (d) lights any fire, or discharges any firearm or firework, within 50 feet from the centre of a highway which consists of or comprises a carriageway, and in consequence thereof the highway is damaged,

he is guilty of an offence.

(2) If a person without lawful authority or excuse pulls down or obliterates a traffic sign placed on or over a highway, or a milestone or direction post (not being a traffic sign) so placed, he is guilty of an offence; but it is a defence in any proceedings under this subsection to show that the traffic sign, milestone or post was not lawfully so placed.

(3) A person guilty of an offence under this section is liable to a fine not exceeding [level 3 on the standard scale].

NOTES

The reference to level 3 on the standard scale in sub-s (3) is substituted by virtue of the Criminal Justice Act 1982, ss 38, 46, Vol 27, title Magistrates, for the original words “£20 or, in the case of a second or subsequent conviction under this section, to a fine not exceeding £50”. Enhanced penalties are abolished by s 35 of the 1982 Act and the higher penalty is now the relevant penalty for the purposes of that section on any summary conviction of this offence.

Person. See the note to s 6 ante.

Consent. For general provisions as to consents, see ss 320–322 post.

Highway authority. See ss 1–9 ante, and the notes thereto.

Deposits anything whatsoever. Cf s 148(c) post, relating to depositing anything to the interruption of any user of the highway, and s 161(1) post, relating to depositing anything so as to injure or endanger a user of the highway.

Lights any fire, etc. Cf s 161(2) post, relating to lighting fires, etc, so as to injure, interrupt or endanger a user of the highway, and see s 161A post. The throwing of fireworks in the highway also is prohibited under the Explosives Act 1875, s 80, Vol 17, title Explosives. See also the Metropolitan Police Act 1839, s 54(15) (firearms, bonfires and fireworks), and the Town Police Clauses Act 1847, s 28, both Vol 38, title Road Traffic.

Within 50 feet. It is thought that this distance should be measured in a straight line on a horizontal plane; see the Interpretation Act 1978, s 8, Vol 41, title Statutes.

Guilty of an offence. Offences are punishable on summary conviction, see s 310 post.

Offences under sub-s (1)(a) above are not continuing offences. Proceedings must therefore be taken within six months (Magistrates’ Courts Act 1980, s 127(1), Vol 27, title Magistrates) of the completion of the ditch, etc (*Coggins v Bennett* (1877) 2 CPD 568), or, perhaps, of the time when the damage becomes substantial (*Hyde v Entwistle* (1884) 52 LT 760).

Offences under this section are offences of strict liability; see *Greenwich LBC v Millcroft Construction Ltd* (1986) 150 JP 645.

As to the punishment of criminal damage generally, see the Criminal Damage Act 1971, Vol 12, title Criminal Law.

Pulls down, etc. Sub-s (2) above is extended by the Countryside Act 1968, s 27(6), (7) ante.

Standard scale. See the note to s 46 ante.

Definitions. For “highway”, see s 328(1), (2) post; for “carriageway”, see s 329(1) post; by virtue of s 329(1) post, for “traffic sign”, see the Road Traffic Regulation Act 1984, s 64, Vol 38, title Road Traffic.

項 A3- 美國
Item A3 – The USA

Chapter 11.28 EXCAVATIONS*

Section 11.28.130 Penalties for violations.

Any person who shall violate or fail to comply with any of the provisions of this chapter, or who shall counsel, aid, or abet any such violation or failure to comply, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than three hundred dollars or by imprisonment for a period of not more than ninety days, or by both such fine and imprisonment. Each day any such person shall continue to violate or fail to comply with any of the provisions of this chapter shall be deemed to be a separate offense. (Ord. M-481 § 13, 1959)

Section 11.28.020 Excavations without permit prohibited--Exceptions.

It is unlawful for any person to cut, open, excavate or in any manner disturb the surface of any street, alley, sidewalk, curb or other structure thereon without first obtaining a permit to do so; except in the case of emergency, a public or private utility may make such cuts prior to obtaining a permit. No permit will be required on a public works contract with the city of Vancouver. (Ord. M-481 § 2, 1959)

項 A4- 澳洲
Item A4 - Australia



New South Wales Consolidated Acts

ROADS ACT 1993 - SECT 102

102 Liability for damage to public road

(1) A person who causes damage to a public road, or to any road work on a public road or any traffic control facility on a road or road related area within the meaning of the Road Transport (General) Act 1999 (other than a road or road related area that is the subject of a declaration made under section 9 (1) (b) of that Act relating to all of the provisions of that Act), is liable to pay to the appropriate roads authority the cost incurred by that authority in making good the damage.

(2) If damage referred to in this section is caused by a motor vehicle or vessel, the owner and the driver of the motor vehicle or, as the case may be, the owner and the master of the vessel are jointly and severally liable for the damage.

(3) This section does not apply to ordinary wear and tear caused by reasonable use of a public road.

(4) This section applies to tollways and to private roads that are classified roads in the same way as it applies to public roads.

Division 2 Off-road traffic hazards _

Electricity Act 1992 122
Commenced: 18 Dec 1992, Part I
I: Preliminary Provisions
3 Act to bind the Crown

3. Act to bind the Crown---This Act binds the Crown.

Electricity Act 1992 122
Commenced: 1 Apr 1993

III: Powers and Duties of Electricity Operators and Other Owners of Electrical Works
24 Construction or maintenance of works on roads

24. Construction or maintenance of works on roads---(1) Except as provided in subsection (2) of this section, an electricity operator may from time to time construct and maintain works in, on, along, over, across, or under any road, and for any of these purposes may---

- (a) Open or break up any road;
- (b) Alter the position of---
 - (i) Any pipe (not being a main) for the supply of water or gas; or
 - (ii) Any telecommunications line; or
 - (iii) Any works---
that are constructed in, on, along, over, across, or under that road;
- (c) Alter, repair, or remove any works so constructed or maintained, or any part of any such works.

(2) No electricity operator shall exercise the powers contained in subsection (1) of this section otherwise than in accordance with such reasonable conditions as may be prescribed by---

- (a) The local authority or other body or person having jurisdiction over the road; and
- (b) The owner of the pipe, telecommunications line, or works, as the case may require.

(3) Without limiting the generality of subsection (2) of this section, a local authority or other body or person having jurisdiction over a road may impose under that subsection, in relation to any work undertaken by any electricity operator, a condition requiring the electricity operator to meet the reasonable costs and expenses of that local authority or other body or person---

- (a) In processing any notice given under section 25 (1) of this Act by the electricity operator in relation to the work;
- (b) In supervising the carrying out of the work, where such supervision is necessary in the circumstances of the case.

(4) Nothing in subsection (1) of this section applies in respect of the construction of any works intended to convey electricity at a voltage of more than 110 KV and a capacity of more than 100 MVA.

Cf. 1987, No. 116, s. 15; 1988, No. 164, s. 16

Interpretation Act 1999 085
Commenced: 1 November 1999
4: Application of Legislation to the Crown
27 Enactments not binding on the Crown

PART 4

Application of Legislation to the Crown

27. Enactments not binding on the Crown--- No enactment binds the Crown unless the enactment expressly provides that the Crown is bound by the enactment.

Cf. 1924. s. 5 (k)

Local Government Act 1974 066

Commenced: 1 Dec 1974

XXI: Roads (other than Regional Roads), Service Lanes, and Access Ways
Safety Provisions as to Roads

357 Penalties for damage to roads

[357. Penalties for damage to roads---(1) Every person commits an offence who, not being authorised by the council or by or under any Act,---

- (a) Encroaches on a road by making or erecting any building, fence, ditch, or other obstacle or work of any kind upon, over, or under the road, or by planting any tree or shrub thereon; or
- (b) Places or leaves on a road, any timber, earth, stones, or other thing; or
- (c) Digs up, removes, or alters in any way the soil or surface or scarp of a road; or
- (d) Damages or, except with the consent of the council, removes or alters any gate or cattle stop lawfully erected across any road; or
- (e) Allows any water, tailings, or sludge, or any filthy or noisome matter, to flow from any building or land in his occupation on to a road; or
- (f) Wilfully or negligently causes or allows any oil, or any liquid harmful to sealed or paved road surfaces or likely to create a danger to vehicles on such surfaces, to escape on to any road having a sealed or paved surface; or
- (g) Causes or permits any timber or other heavy material, not being wholly raised above the ground on wheels, to be dragged on a road; or
- (h) Causes or negligently allows any retaining wall, foundation wall, or fence erected on any land, or any batter or slope of earth, or any building, erection, material, or thing, to give way or fall so as to damage or obstruct a road; or
- (i) Digs up or removes any stone, gravel, sand, or other material from a river bed within 50 metres of a bridge or ford on any road or any dam on which a road is constructed; or
- (j) Does or causes or permits to be done any act whatsoever by which any damage is caused to a road or any work or thing in, on, or under the same,---

and is liable to a fine not exceeding \$200 and, where the offence is a continuing one, to a further fine not exceeding \$20 for every day on which the offence has continued and may be ordered to pay the cost incurred by the council in removing any such encroachment, obstruction, or matter, or in repairing any damage caused as aforesaid:

Provided that no fine shall be imposed unless the information is laid by authority of the council or by an officer thereof.

[[(2) The Council shall not authorise or suffer any encroachment on a road if the encroachment would or might interfere with or in any way obstruct the right of the Crown, or of any person so authorised by any Act, to construct, place, maintain, alter, remove, or otherwise deal with any electric wires, telephone wires, telegraph wires, pneumatic tubes, or gas pipes on, over, or under the road, except with the prior written consent of the Minister of the Crown, the person, or principal administrative officer of the body, who or which is responsible for any such services or utilities.]]

Cf. 1928, No. 12, s. 168; 1954, No. 76, s. 199; 1956, No. 64, s. 206; 1968, No. 123, s. 18; 1968, No. 124, s. 18

Subs. (2) was substituted for the former subs. (2) by s. 18 of the Local Government Amendment Act 1988.

Electricity Act 1992 122
Commenced: 1 Apr 1993

III: Powers and Duties of Electricity Operators and Other Owners of Electrical Works
26 Offence

26. Offence---(1) Every electricity operator commits an offence and is liable on summary conviction to a fine not exceeding \$10,000 who fails to comply with section 24 or section 25 of this Act.

(2) In addition to any fine imposed pursuant to subsection (1) of this section, the Court may make such order relating to compensation as it thinks fit.

Cf. 1987, No. 116, s. 15B; 1988, No. 164, s. 16

OVERSEAS LEGISLATION – EXEMPTION OF CRIMINAL LIABILITY OF GOVERNMENT AND PUBLIC OFFICERS

Overview of the criminal liability of the Crown

- By Department of Justice

Introduction

1. This paper has been prepared in response to the request of the Bills Committee relating to the Land (Miscellaneous Provisions) (Amendment) Bill 2002. As requested, it provides “information on overseas legislation relating to the exemption of criminal liabilities on the Government or a person doing anything in the course of carrying out his duties as a public officer in the service of the Government”.
2. In this paper, we will focus on the respective positions in the following common law jurisdictions, namely England and Wales, Australia, Canada and New Zealand, which are leading common law jurisdictions.
3. Our research into these common law jurisdictions indicates that the Crown will not be criminally liable for regulatory offences unless there is a clear indication in the relevant legislation that the legislature intended to create an offence of which the Crown could be guilty. Where the Crown is not criminally liable for a statutory offence, certain persons may, if the relevant conditions are satisfied, benefit from a similar immunity. Accordingly, we submit that the appropriate way to formulate the current issue is in terms of the **imposition** of criminal liability on the Government, rather than the **exemption** of the Government from criminal liability.
4. We will look at (a) under what circumstances at common law the Crown will be bound by a statute; (b) who the Crown is (i.e., Does it include Crown servants, statutory bodies, Crown contractors? (c) under what circumstances the Crown will be criminally liable for a statutory offence; and (d) the respective positions (where applicable, with sample legislation) in various common law jurisdictions.

Crown immunity - common law presumption

5. There is a common law presumption that the Crown is not bound by a statute unless expressly named in the statute, or unless a necessary implication can be drawn from the statute that the Crown was intended to be bound.¹ Such immunity is also referred to as Crown immunity.²
6. What constitutes “necessary implication”? In *Province of Bombay v. Municipal Corporation of Bombay*³, the Privy Council held that the Crown was bound by necessary implication only “if it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be **wholly frustrated** (*emphasis added*) unless the Crown were bound”⁴.
7. In *Bropho v. State of Western Australia*⁵, the Australian High Court relaxed the rule as laid down in the Bombay case. The High Court proposed a purposive approach under which the presumption that the Crown was not to be bound could be displaced if a contrary intention was evident from the purpose, policy or subject matter of the statute, including the circumstances of its enactment.⁶ Under such an approach, the presumption may be displaced even if the purpose of the statute cannot be said to have been “wholly frustrated”.⁷ However, the more stringent Bombay rule still represents the law in England and Canada.⁸

Treatment of the common law presumption in various jurisdictions

8. The common law presumption has been treated differently in various jurisdictions.

¹ Susan Kneebone, “The Crown’s Presumptive Immunity from Statute: New Light in Australia” [1991] PL 361, at p. 361.

² See Halsbury’s Laws of England, Vol. 44(1) (fourth ed. Reissue), at para. 1321.

³ [1947] A.C. 58.

⁴ *ibid.*, at p. 63.

⁵ (1990) 171 C.L.R. 1.

⁶ See Hogg & Monahan, *Liability of the Crown* (Carswell, 2000, 3rd ed.), at Chap. 11.3(e).

⁷ See generally discussion in Duncan Berry, “Crown Immunity from Statute: *Bropho v. The State of Western Australia*” (1993) Statute Law Review 204, at pp. 206-11 (Part II).

⁸ See n 6 above, at Chap. 11.3(e).

- (a) In England and Wales, the common law presumption continues.⁹
- (b) In Australia, the common law presumption has been reversed in South Australia¹⁰ and the Australian Capital Territory¹¹ but it has been codified in Queensland¹² and Tasmania¹³. The common law presumption remains in other Australian jurisdictions.¹⁴
- (c) British Columbia¹⁵ and Prince Edward Island¹⁶ in Canada have each enacted a provision reversing the common law presumption. However, the presumption has been statutorily entrenched in other Canadian jurisdictions, namely federal Canada, Alberta, Manitoba, Nova Scotia, Newfoundland, Ontario, Saskatchewan, New Brunswick and Quebec.¹⁷
- (d) The common law presumption has been codified in New Zealand¹⁸.

Who is the Crown?

- 9. The “Crown”, for the purpose of the presumption, includes the Crown’s ministers and servants (collectively Crown servants) since “it is necessarily by their agency that the Crown’s immunity is enjoyed”.¹⁹

⁹ *ibid.*, at Chap. 11.4(a).

¹⁰ Section 20(1) of the Acts Interpretation Act 1915 provides: “Subject to subsection (2), an Act passed after 20 June 1990 will, unless the contrary intention appears (either expressly or by implication), be taken to bind the Crown, but not so as to impose any criminal liability on the Crown.”

¹¹ Section 7 of the Interpretation Act 1967 provides “(1) Each Act binds the Crown to the extent it is capable of doing so unless it or another Act provides otherwise. ... (3) Criminal liability is not imposed on the Crown by reason only that an Act binds the Crown”.

¹² Section 13 of the Acts Interpretation Act 1954 provides: “No Act passed after the commencement of this Act shall be binding on the Crown or derogate from any prerogative right of the Crown unless express words are included in the Act for that purpose.”

¹³ Section 6(6) of the Acts Interpretation Act 1931 provides “No Act shall be binding on the Crown or derogate from any prerogative right of the Crown unless express words are included therein for that purpose”.

¹⁴ See n 6 above, at Chap. 11.4(a).

¹⁵ Section 14 of the Interpretation Act provides: “(1) Unless it specifically provides otherwise, an enactment is binding on the government. (2) Despite subsection (1), an enactment that would bind or affect the government in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements, as defined in the Assessment Act, does not bind or affect the government.”

¹⁶ Section 14(1) of the Interpretation Act provides “Unless an Act otherwise specifically provides, every Act and every regulation made thereunder, is binding on Her Majesty.”

¹⁷ See n 6 above, at Chap. 11.4(a).

¹⁸ Section 27 of the Interpretation Act 1999 provides: “No enactment binds the Crown unless the enactment expressly provides that the Crown is bound by the enactment.”

¹⁹ Wade, *Administrative Law* (Oxford University Press, 2000), at p. 820. See also Halsbury’s Laws of England, Vol. 44(1) (fourth ed. Reissue), para. 1321.

The test of the availability of Crown immunity to such servants is whether or not the application of the relevant statute would prejudice the Crown.²⁰ Immunity may extend to statutory bodies if they are considered as Crown agents.²¹ Occasionally, Crown contractors have been held to be entitled to Crown immunity.²²

10. (a) Crown servants

In relation to an officer of the Crown, the mere fact that the officer is acting in the course of employment will not entitle the officer to Crown immunity.²³ He will be entitled to immunity only if it can also be established that compliance with the statute would prejudice the Crown.²⁴

(b) Statutory bodies

At common law, whether or not a statutory body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over the body. A statutory body will be an agent of the Crown only if it is fairly closely controlled by the executive. Any substantial measure of independent discretion enjoyed by the body will negate the claim of the status as an agent of the Crown. "Control" here means *de jure* control, not *de facto* control, i.e., it is the degree of control that the executive government is legally entitled to exercise, not the degree of control that is actually exercised that matters. For example, if the head of a statutory body is a minister, then it is clear that the executive government is controlling the body and, therefore, the body is an agent of the Crown.²⁵

²⁰ See n 6 above, at Chap. 11.15.

²¹ *ibid.*, at Chap. 12.1.

²² *ibid.*, at Chap. 11.15(d).

²³ *ibid.*, at Chap. 11.15(c).

²⁴ *ibid.*, at Chap. 11.15(c) at p. 318. Hogg & Monahan submit that obedience to superior orders ought not to be enough to demonstrate the existence of prejudice to the Crown, that a Crown servant ought to share Crown immunity only if the breach of the relevant statute was an unavoidable necessity in order to pursue an important Crown purpose, and that the existence of superior orders would have no more than evidentiary value in establishing the force of the necessity and the importance of the purpose.

²⁵ *ibid.*, at Chap. 12.2(b).

If a statute stipulates that a statutory body is to be “an agent of the Crown”, then the body will be an agent of the Crown. Such a stipulation is usually conclusive. However, if the stipulation is interpreted as designating an entity as an agent of the Crown for limited or specific purposes only, then the body may not be treated as a Crown agent if it is not acting within the scope of its designation.²⁶

Where a statutory body is a Crown agent, if it is acting within its statutory purposes, then it will be entitled to the same immunity as what the Crown itself is entitled to.²⁷

(c) Crown contractors

There are cases in which it was held that Crown immunity was available to persons (e.g. independent contractors) who were not Crown agents. The availability of Crown immunity to such persons depends on whether or not there is prejudice to the Crown.²⁸

Criminal liability of the Crown

11. Relevant case law indicates that it is possible that the Crown may become criminally liable. However, even where a statute expressly or by necessary implication binds the Crown, the Crown will not be criminally liable unless there is clear indication that the legislature intended to create an offence of which the Crown could be guilty.²⁹ The decision in *Canadian Broadcasting Corporation v. Attorney General for Ontario*

²⁶ *ibid.*, at Chap. 12.3(a).

²⁷ *ibid.*, at Chap. 11.15(b).

²⁸ *ibid.*, at Chap. 11.15(d). However, Hogg & Monahan are of the view that these cases were wrongly decided as they think that there was insufficient prejudice to the Crown in the facts of the cases to warrant the grant of immunity.

²⁹ See generally the discussion on *Cain v. Doyle* (1946) 72 CLR 409, *Canadian Broadcasting Corporation v. Attorney General for Ontario* [1959] S.C.R. 188, *Southland Acclimatisation Society v. Anderson* [1978] 1 N.Z.L.R. 838 and *State Authorities Superannuation Board v. Commissioner of State Taxation for the State of Western Australia* 140 A.L.R. 129 in Hogg & Monahan (see n 6 above, at Chap. 11.14). See also n 7 above, at pp. 218-21 (Part VI).

[1959] S.C.R. 188 may throw some light upon what does **not** amount to such clear indication. In that case, the Canadian Broadcasting Corporation was charged with committing an offence under the Lord's Day Act and it was held that the Lord's Day Act did not apply to the corporation. The fact that certain Crown services were expressly exempt from the statute's application did not mean that other such services were bound by it. It seems that where a statute provides that some of its punitive provisions do not apply to the Crown, it does not follow that the Crown will be criminally liable under other punitive provisions.³⁰

Criminal liability of Crown servants, statutory bodies and other persons

12. If the Crown personally is not criminally liable, then the relevant Crown servant, statutory body or person will share such immunity as long as the corresponding requirements set out in paragraph 10 above are satisfied.³¹

13. In South Australia (where the common law presumption has been statutorily reversed), the above position has been codified. Section 20 of the Acts Interpretation Act 1915 provides:
 - “(1) Subject to subsection (2), an Act passed after 20 June 1990 will, unless the contrary intention appears (either expressly or by implication), be taken to bind the Crown, **but not so as to impose any criminal liability on the Crown.** [*emphasis added*]³²

 - (2) Where an Act passed after 20 June 1990 amends an Act passed before that date, the question whether the amendment binds the Crown will be determined in accordance with principles applicable to the interpretation of Acts passed before 20 June 1990.

 - (3) Where an Act or a provision of an Act (whether passed before or

³⁰ See Halsbury's Laws of England, Vol. 44(1) (fourth ed. Reissue), at para. 1321 where it is said “It is not proper to infer, by applying the *expressio unius* principle, that because certain provisions of an Act are stated not to bind the Crown, therefore the remainder are intended to do so”.

³¹ See n 6 above, at Chap. 11.15.

³² Text of legislation in bold typeface appearing in the rest of the paper indicates emphasis added by the author.

after 20 June 1990) binds the Crown but not so as to impose any criminal liability on the Crown, **the Crown's immunity from criminal liability extends (unless the contrary intention is expressed) to an agent of the Crown in respect of an act within the scope of the agents obligations.**

- (4) Where an Act or a provision of an Act (whether passed before or after 20 June 1990) does not bind the Crown, **the Crown's immunity extends (unless the contrary intention is expressed) to an agent of the Crown in respect of an act within the scope of the agent's obligations.**
- (5) For the purposes of this section-
- (a) a reference to the Crown extends not only to the Crown in right of this State but also (so far as the legislative power of the State permits) to the Crown in any other capacity;
 - (b) a reference to an agent of the Crown extends to an instrumentality, officer or employee of the Crown or a contractor or other person who carries out functions on behalf of the Crown;
 - (c) an agent acts within the scope of the agent's obligations if the act is reasonably required for carrying out of obligations or functions imposed on, or assigned to, the agent.”

Accordingly, section 20 makes it clear that the fact that an act is taken to bind the Crown does not mean that criminal liability is to be imposed on the Crown. It also clarifies the circumstances in which a person benefits from Crown immunity.

14. The position in Australian Capital Territory³³ (where the common law

³³ Section 7 of the Interpretation Act 1967 of Australian Capital Territory provides: “(1) Each Act binds the Crown to the extent that it is capable of doing so unless it or another Act provides otherwise. ... (3) Criminal liability is not imposed on the Crown by reason only that an Act binds the Crown. (4) Where an Act - (a) does not bind the Crown; or (b) binds the Crown but not so as to impose criminal liability on the Crown; then, unless

presumption has also been statutorily reversed) in this aspect is similar to that in South Australia as set out in paragraph 13 above.

Criminal liability of the Crown in England and Wales

15. English statutes deal with the criminal liability of the Crown in various ways.³⁴ Examples of the relevant clauses are set out below.

16. Relevant provisions of section 167 of the New Roads and Street Works Act 1991 provide:

“(4) The provisions of Parts III and IV of this Act (street works in England and Wales and road works in Scotland) **bind the Crown.**

(5) **Nothing in subsection (4)** shall be construed as authorizing the bringing of proceedings for a **criminal offence against a person acting on behalf of the Crown.**”

Accordingly, Crown agents will not be criminally liable. As there is no provision in the Act clearly imposing criminal liability on the Crown, the Crown itself will not be criminally liable (please refer to paragraph 11 above).

17. Relevant provisions of section 63 of the Data Protection Act 1998 provide:

“(1) This Act **binds the Crown.**

(2) For the purposes of this Act **each government department shall be treated as a person separate from any other government**

it or another Act provides otherwise, the same degree of immunity extends to an agent of the Crown in respect of an act or omission in that capacity within the scope of his or her authority. (5) In subsection (4) - "agent" includes an instrumentality, officer or employee of the Crown and a contractor or other person who performs a function on behalf of the Crown.

³⁴ We did searches in September 2002 on LexisNexis (using “Statutes and Statutory Instruments of England and Wales” as the source). We used search terms of “crown w/18 offence” and “crown w/18 criminal! liab!”. We got 300 hits (a hit, in this context, means a section of an enactment) in total. We found only 39 hits which were related to the issue of Crown’s criminal liability and only a number of such hits appear to impose criminal liability on persons acting on behalf of the Crown. We are not aware of any statutory provisions which impose criminal liability on the Crown itself.

department.

- (3) Where the purposes for which and the manner in which any personal data are, or are to be, processed are determined by any person acting on behalf of the Royal Household, the Duchy of Lancaster or the Duchy of Cornwall, the data controller in respect of those data for the purposes of this Act shall be -
- (a) in relation to the Royal Household, the Keeper of the Privy Purse,
 - (b) in relation to the Duchy of Lancaster, such person as the Chancellor of the Duchy appoints, and
 - (c) in relation to the Duchy of Cornwall, such person as the Duke of Cornwall, or the possessor for the time being of the Duchy of Cornwall, appoints.

...

- (5) **Neither a government department nor a person who is a data controller by virtue of subsection (3) shall be liable to prosecution under this Act, but section 55 and paragraph 12 of Schedule 9 shall apply to a person in the service of the Crown as they apply to any other person.”**

This Act makes it clear that the relevant government department or certain data controllers would not be liable for criminal prosecution under the Act. However, it applies certain specific offences to persons in the service of the Crown. These offences are section 55, which creates the offence of unlawful obtaining of personal data; and paragraph 12 of Schedule 9, which creates the offence of obstructing the execution of a warrant issued under the Schedule. As there is no provision in the Act clearly imposing criminal liability on the Crown, the Crown itself will not be criminally liable (please refer to paragraph 11 above).

18. Relevant provisions of section 73 of the Competition Act 1998 provide:

- “(1) Any provision made by or under this Act **binds the Crown** except that -
- (a) **the Crown is not criminally liable** as a result of any such provision;
 - (b) **the Crown is not liable for any penalty** under any such provision; and
 - (c) nothing in this Act affects Her Majesty in her private capacity.
- (2) **Subsection (1)(a) does not affect the application** of any provision of this Act in relation to **persons in the public service of the Crown.**”

The Crown itself is not criminally liable. This fact, however, does not affect the application of the Act to persons in the public service of the Crown. The relevant extracts³⁵ of the parliamentary debate about the bill seem to support such an interpretation.

19. Relevant provisions of section 54 of the Food Safety Act 1990 provide:

- “(1) Subject to the provisions of this section, the provisions of this Act and of regulations and orders made under it shall **bind the Crown**.
- (2) **No contravention by the Crown** of any provision of this Act or of any regulations or order made under it **shall make the Crown criminally liable**; but the High Court or, in Scotland, the Court of Session may, on the application of an enforcement authority, declare unlawful any act or omission of the Crown which constitutes such a contravention.

³⁵ Extracts of the debate (for 23 June 1998 (morning)) of the Standing Committee G of the House of Commons about Clause 72 of the Competition Bill, per Mr. Griffiths’ speech.

- (3) **Notwithstanding anything in subsection (2) above, the provisions of this Act and of regulations and orders made under it shall apply to persons in the public service of the Crown as they apply to other persons.”**

The Crown itself is not criminally liable. This fact, however, does not affect the application of the Act to persons in the public service of the Crown.

20. Section 59(5) of the Terrorism Act 2000 provides:

“Nothing in this section imposes criminal liability on any person acting on behalf of, or holding office under, the Crown.”

Section 119(1) provides:

“The Secretary of State may make regulations providing for any of sections 15 to 23 and 39 to apply to persons in the public service of the Crown.”

As sections 15 to 23 and section 39 are offence-creating sections, it seems that while section 59(5) exempts persons acting on behalf of, or holding office under, the Crown from criminal liability, section 119(1) gives power to the Secretary of State to take away such exemption in relation to certain offences committed by persons who are in the public service of the Crown. However, as there is no provision in the Act clearly imposing criminal liability on the Crown, the Crown itself will not be criminally liable (please refer to paragraph 11 above).

Criminal liability of the Crown in Australia

21. As mentioned in paragraph 8(b) above, in South Australia, the common law presumption has been reversed by section 20(1) of the Acts Interpretation Act 1915. In spite of the reversal, section 20(1) of the Acts Interpretation Act 1915 expressly states that criminal liability is not imposed on the Crown by reason of the reversal. Accordingly, the

Crown will not be criminally liable unless there is clear indication in the relevant statute that the legislature intended to create an offence of which the Crown could be guilty. It is worthwhile to note that as mentioned in paragraph 13 above, it is expressly provided in section 20(3) to section 20(5) that Crown immunity will be available to Crown agents under certain circumstances.

22. South Australian statutes deal with the criminal liability of the Crown in various ways.³⁶ Examples are set out below.

(a) Relevant provisions of section 4 of the Retirement Villages Act 1987 provide:

“(1) Subject to this section -

(a) ...

(b) this Act **binds the Crown** in right of this State and (so far as the legislative power of the State permits) the Crown in any other capacity, **but not so as to impose criminal liability on the Crown.**”

The above section makes it clear that even though the Act is binding on the Crown, it does not have the effect of imposing criminal liability on the Crown.

(b) Section 6 of the Environment Protection Act 1993 provides:

“(1) This Act **binds the Crown** in right of the State and also, so far as the legislative power of the State extends, in all its other capacities.

³⁶ We did searches in September 2002 at www.austlii.edu.au (using “South Australian Consolidated Acts” as the source). We used search terms of “crown w/18 offence” and “crown w/18 criminal* liab*”. We got 63 hits (a hit, in this context, means a section of an enactment) in total. We found only 23 hits which were related to the issue of Crown’s criminal liability. None of the provisions we reviewed impose criminal liability on the Crown itself although a number of the provisions returned by the 23 hits appear to impose criminal liability on persons acting on behalf of the Crown.

- (2) **No criminal liability attaches to the Crown itself (as distinct from its agents, instrumentalities, officers and employees) under this Act.”**

It seems that the Crown itself is exempt from criminal liability while Crown agents could be criminally liable.

- (c) Section 5 of the Electricity Act 1996 provides:

“(1) This Act **binds the Crown.**

(2) **Nothing in this Act renders the Crown** in any of its capacities **liable to be prosecuted for an offence.**

(3) For the purposes of this section, **a reference to the Crown extends -**

“(a)” not only to the Crown in right of this State but also (so far as the legislative power of the State permits) to the Crown in any other capacity; and

“(b)” **to an instrumentality of the Crown, and to an officer or employee of the Crown and any contractor or other person who carries out functions on behalf of the Crown.”**

The above section makes it clear that even though the Act is binding on the Crown, it does not have the effect of imposing criminal liability on the Crown or on any person acting on behalf of the Crown.

23. In Queensland, as mentioned in paragraph 8(b) above, section 13 of the Acts Interpretation Act 1954 has reinforced the common law presumption. Under common law, the Crown will not be criminally liable unless there is clear indication in the relevant statute that the legislature intended to create an offence of which the Crown could be guilty.

24. Queensland's statutes deal with the criminal liability of the Crown in various ways. Examples are set out below.

(a) Section 6 of the Biological Control Act 1987 provides:

“(1) This Act **binds the Crown** not only in right of Queensland but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

(2) **Nothing in this Act renders the Crown** in right of Queensland or in any other capacity **liable to be prosecuted for an offence.**”

The above section makes it clear that even though the Act is binding on the Crown, it does not have the effect of imposing criminal liability on the Crown.

(b) Section 69 of the Water Resources Act 1989 provides:

“(1) This division **binds the Crown.**

(2) **Nothing** in this division renders the **Crown liable to be prosecuted for an offence.**

(3) However, **subsection (2) does not prevent an officer, employee or agent of the Crown from being prosecuted for an offence.**”

The above section makes it clear that even though part of the Act is binding on the Crown, it does not have the effect of imposing criminal liability on the Crown. Crown agents, however, could be criminally liable.

Criminal liability of the Crown in Canada

25. As mentioned in paragraph 8(c) above, section 14(1) of the Interpretation Act has reversed the common law presumption in British Columbia. However, the Interpretation Act is silent on whether or not criminal liability is imposed on the Crown. Accordingly, applying the common law principle concerning the criminal liability of the Crown, notwithstanding the reversal of the presumption, the position in British Columbia seems to be that the Crown will not be criminally liable unless there is clear indication in the relevant statute that the legislature intended to create an offence of which the Crown could be guilty.
26. We are not aware of any statutory provisions in British Columbia which expressly deal with the criminal liability of the Crown.³⁷
27. In relation to federal Canada, section 17 of the Interpretation Act of Canada provides:
- “No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.”**
- As the effect of section 17 of the Interpretation Act of Canada is to entrench the common law presumption, the position in federal Canada in relation to the criminal liability of the Crown is that the Crown will not be criminally liable unless there is clear indication in the relevant statute that the legislature intended to create an offence of which the Crown could be guilty.
28. We are not aware of any federal statutory provisions which expressly deal with the criminal liability of the Crown.³⁸

³⁷ We did searches on 1st, 2nd and 8th August 2002 at www.qp.gov.bc.ca (The Revised Statutes and Consolidated Regulations of British Columbia). We used keywords such as “offence”, “criminal liability” and “government”. The search function at the site returned the whole act (therefore there were numerous hits) instead of the relevant section. We sampled the acts and did not find any provisions which expressly dealt with the criminal liability of the Crown.

³⁸ We did searches on 1st, 2nd and 8th August 2002 at www.canlii.org (Canadian Legal Information Institute) and LexisNexis (using Canada Federal Legislation as the source). We used keywords such as “offence”, “criminal

Criminal liability of the Crown in New Zealand

29. As mentioned in paragraph 8(d) above, the common law presumption has been codified in section 27 of the Interpretation Act 1999. The position in New Zealand in relation to the criminal liability of the Crown is that the Crown will not be criminally liable unless there is clear indication in the relevant statute that the legislature intended to create an offence of which the Crown could be guilty.³⁹
30. We are not aware of any statutory provisions in New Zealand which expressly deal with the criminal liability of the Crown.⁴⁰

Summary

31. In most of the jurisdictions which we have researched into, the Crown is not bound by a statute unless the statute expressly states that the Crown is bound by it or unless the Crown is bound by the statute by necessary implication. In some jurisdictions (e.g., British Columbia and South Australia), the common law presumption has been reversed such that a statute is binding on the Crown unless it provides otherwise.
32. If a statute does not bind the Crown, the Crown will not be criminally liable for offences created by it. However, even if a statute expressly or by necessary implication binds the Crown, the Crown will not be criminally liable unless there is clear indication that the legislature intended to create an offence of which the Crown could be guilty. The fact that the common law presumption as set out in paragraph 5 above has been reversed in some jurisdictions (e.g., British Columbia and South Australia) does not seem to have changed this position. In South Australia and Australian Capital Territory (where the common law presumption has been reversed), the relevant statutory provision which

liability” and “majesty”. We did not find any provisions which expressly dealt with the criminal liability of the Crown.

³⁹ *Southland Acclimatisation Society v. Anderson* [1978] 1 N.Z.L.R. 838 (see n 29 above) is a decision of the Supreme Court of New Zealand.

⁴⁰ We have not found any website at which useful searches for New Zealand’s legislation can be conducted.

reverses the common law presumption expressly provides that criminal liability is not imposed on the Crown by reason only of such a reversal.

33. We have sampled statutory provisions enacted in various jurisdictions. A small number of them are related to the issue of the criminal liability of the Crown and among such provisions, those which appear to impose criminal liability on persons acting (in various capacities) on behalf of the Crown amount to a very small percentage of the total number of provisions reviewed.⁴¹ We have not found any provisions which impose criminal liability on the Crown itself.

Department of Justice
10 September 2002

[#56494v1]

⁴¹ See n 34 and n 36 above.