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Legislative Council

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Paper for the House Committee meeting on 4 October 2002

Matters relating to the imposition of criminal liabilities on the Government

Purpose

This paper seeks Members' view on the way forward for dealing with matters relating to the imposition of criminal liabilities on the Government or any public officers in respect of their contravention of legislative provisions while performing official duties.

Background

2. In the course of deliberating the Noise Control (Amendment) Bill 2001, some members expressed concern about the existing section 38 of the Noise Control Ordinance (Cap. 400) (NCO) and similar provisions in other ordinances which did not impose criminal liability on the Government or any public officers in respect of their contravention of legislative provisions while performing official duties. However, as the issue is outside the scope of the Bill, members decided that it should be taken up separately at other forums.

3. The matter of imposition of criminal liabilities on the Government or any public officers in respect of their contravention of legislative provisions while performing official duties was again raised at the Bills Committee on Land (Miscellaneous Provisions) (Amendment) Bill 2002 (the Bills Committee) since the said Bill also contains a provision similar to the existing section 38 of NCO.

Exemption of Government's criminal liability in Land (Miscellaneous Provisions) (Amendment) Bill 2002

4. The Land (Miscellaneous Provisions) (Amendment) Bill 2002 (the Bill) amends the Land (Miscellaneous Provisions) Ordinance (Cap. 28) with the object of improving the regulation of excavation in unleased land. Part III of the Ordinance would be substituted by new provisions on matters including the control of

excavations in unleased land and provision of safety precautions and support. It is set out in the new section 2A (clause 3 of the Bill) that "Part III does not have effect to permit proceedings to be taken against, or to impose any criminal liability 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" (**Appendix I**). The new section 10 in Part III, in particular, revises the penalty for making or maintaining an excavation in unleased land in contravention of the conditions of the relevant permit. It also defines the liability of a permittee for the breach of conditions of the permit concerned. The maximum fine for making or maintaining an excavation without a permit or in breach of a permit condition will be increased from \$5,000 to \$50,000 to reflect the inflation over the past 30 years. Liability to 6 months imprisonment will remain the same.

5. The Administration is of the view that the question of liability of Government or public officer, as presently drafted in the Bill, is not significant, as in practice the only contravention that can be committed by the Government is in the breaching of excavation permit conditions to be observed by the permittee, which only results in a fine (new section 10(3)). The Administration also sees no commercial interest to induce a government department to excavate without an excavation permit (new section 10(2)). As regards the permittee's obligation under the new section 10Q(1) to provide safety precautions and support to adjacent structures or erections, the offence will only result in a fine as the Government, like any company permit holder, cannot be imprisoned. The Administration's view is that imposing fine on the Government is meaningless as the money to pay the fine would be from the public coffers. The proposed reporting mechanism, which is a statutory procedure ensuring that these matters are brought to the attention of and dealt with by the Secretary for the Environment, Transport and Works, would be a much more effective deterrent for public officers.

6. The Bills Committee considers that it is of paramount importance to ensure that a fair system is maintained. There is a need to examine issues relating to the mechanism for dealing with contravention of statutory requirements by public officers. However, as the examination would raise questions of wider policy concerns relating to the criminal justice system as a whole, the Bills Committee considers that it might be more appropriate for the House Committee to consider setting up a subcommittee to examine the subject matter.

7. In response to the request of the Bills Committee, the Administration had provided a paper on the overview of the criminal liability of the Crown in various common law jurisdictions. The information is in **Appendix II**.

Recommendations

8. Members are invited to consider whether it is more appropriate for the House Committee to set up a subcommittee to follow up on matters relating to the imposition

of criminal liabilities on the Government or any public officers in respect of their contravention of legislative provisions while performing official duties.

Council Business Division 1
Legislative Council Secretariat
25 September 2002

Appendix I

LAND (MISCELLANEOUS PROVISIONS) (AMENDMENT) BILL 2002

3. Section added

The following is added—

“2A. Application to Government

(1) Subject to this section, Part III binds the Government so far as it relates to an excavation in unleased land which is a street maintained by the Highways Department.

(2) Part III does not have effect to permit proceedings to be taken against, or to impose any criminal liability 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.

(3) If the Authority considers that a public officer, in carrying out his duties in the service of the Government, has done an act or made an omission in contravention of Part III, the Authority shall, if the act or omission is not immediately terminated to his satisfaction, report the matter to the Secretary for Works.

(4) On receiving a report under subsection (3), the Secretary for Works shall inquire into the matter and, if his inquiry shows that a public officer is continuing to contravene Part III or is likely to contravene that Part again, the Secretary for Works shall ensure that the best practicable steps are taken to stop the contravention or avoid the recurrence (as the case may be).”

4. Part substituted

Part III is repealed and the following substituted—

“PART III

EXCAVATION IN UNLEASED LAND

8. Interpretation

- (1) For the purpose of this Part and the Schedule—
- “carriageway” (車路) means a street or part of a street over which the public has a right of way for the passage of motor vehicles;
- “initial period” (首段期間) means the initial period mentioned in section 10B(3);
- “street” (街道) includes any slope not used or frequented by the public or to which the public do not have access or are not permitted to have access;

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

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⁴¹ See n 34 and n 36 above.