立法會
Legislative Council

立法會CB(2)467/05-06(02)號文件

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2005年11月28日司法及法律事務委員會會議

立法會秘書處擬備的背景資料簡介

有關向政府施加刑事法律責任的問題

目的

本文件旨在提供背景資料，闡述立法會議員過往就有關向政府施加刑事法律責任的問題所作的討論。

背景

2. 當局於2002年4月24日向立法會提交《2002年土地(雜項條文)(修訂)條例草案》，立法會成立了法案委員會加以研究。在商議條例草案的過程中，法案委員會部分委員對條例草案的建議表示關注。根據建議，如有政府或任何公職人員在執行公職責任時違反對政府具約束力的法例條文，應豁免其刑事法律責任。法案委員會認為，就處理公職人員違反法例規定的機制而言，實有需要研究與之有關的事項，以確保一個公平制度得以維持。

3. 在2002年10月4日內務委員會會議上，議員一致認為，由於所涉事項屬藉法律施加刑事法律責任的整體政策的一部分，因此交由司法及法律事務委員會("事務委員會")跟進該等事項，會較恰當。事務委員會在2002年10月28日的會議上同意成立工作小組，負責有關的預備工作，以便事務委員會考慮該等事項。

過往的討論

4. 當局在提交《2002年土地(雜項條文)(修訂)條例草案》前，曾在2001年12月至2002年3月期間的4次會議上，就掘路工程的收費及處罰制度建議諮詢規劃地政及工程事務委員會。部分委員對免除政府部門及公職人員接受施加於私營機構的罰則表示關注。

5. 此外，多個法案委員會都曾在討論時就政府或公職人員違反法例條文的刑事法律責任提出疑問。該等法案委員會有部分委員曾就有關法例對政府或公職人員的適用情況提出疑問。他們認為，政府應與私營機構一樣，受相同法例規定所規管，不應獲得豁免而無須受刑事檢控。該等法案委員會是 ——

(a) 《1992年水污染管制(修訂)條例草案》委員會；

(b) 《海岸公園條例草案》委員會；

(c) 《環境影響評估條例草案》委員會；及

(d) 《2001年噪音管制(修訂)條例草案》委員會。

6. 議員可參閱**附件A**，以瞭解該等委員會的委員提出的關注事項詳情及政府當局的回應。

工作小組的商議過程

<u>官方豁免權 —— 普通法的推定</u>

7. 根據一項普通法推定，官方不受任何法規所約束，除非該法規明文規定官方須受其約束，或除非可從該法規中推斷其必然含意，認定有關的立法原意，是該法規對官方具約束力。有關豁免權也稱為官方豁免權。

8. 關於法例條文對香港特別行政區("香港特區")政府的適用情況，《釋義及通則條例》(第1章)第66(1)條已訂明該普通法推定 ——

> "除非條例明文訂定，或由於必然含意顯示"國家"須受約束，否則任何條例(不論條例是在1997年7月1日之前、當日或之後制定的)在一切情況下均不影響"國家"的權利，對"國家"亦不具約束力。"

根據該條例，"國家"的定義包括香港特區政府。該條例附表8第2條訂明，在任何條文中對官方的提述(在文意並非第1條所指明者的情況下)，須解釋為對香港特區政府的提述。

9. 在商議過程中，工作小組曾與律政司討論，應就所有法例還是只就新制定的法例推翻該普通法推定。律政司相信，並無任何理據要將政府無須承擔刑事法律責任這項推定全部推翻。關於應否只就日後制定的法例推翻這項推定的問題，律政司認為，在實施上，這會造成很多問題，包括適用於政府的法例會長時期存在雙軌制度的情況。

海外地區的做法

10. 工作小組亦曾研究下列司法管轄區的政府及公職人員的刑事法律責任情況 ——

(a) 普通法司法管轄區 —— 英格蘭與威爾斯、澳洲、加拿大及新西蘭；及

(b) 非普通法司法管轄區 —— 法國、德國和日本。

針對政府部門違反法例的報告機制

11. 工作小組察悉，若公職人員執行服務政府的職責時違反法例條文，當局一般是按照自1980年代起實施的報告機制處理。在報告機制下，如違規情況持續，或很可能會再發生，政務司司長或有關的政策局局長須視乎情況，確保有關方面會採取最佳的切實可行的步驟，遏止該違例情況或避免該違例事項再發生；如有公職人員行為失當，則會受到紀律處分。

12. 工作小組察悉，在1999年至2003年3月期間，因涉及違反環保法例而向政務司司長報告的個案共有156宗。截至2003年8月，當局並無對在執行職務期間違反環保法例的公職人員採取紀律行動。

13. 律政司認為，報告機制成效理想，對公職人員的阻嚇作用亦遠較其他方法大。因此，並無需要對現行制度作出重大改變。

工作小組的建議

14. 工作小組已向事務委員會提交報告，供其於2004年6月28日的會議上考慮。

15. 工作小組察悉，英國的官方立場，是在立法機會出現時逐步廢除官方豁免權。工作小組亦察悉，就規範性質的罪行而言，應否廢除官方豁免權的問題，實質上屬政策事宜，與基本憲法原則無關。英國採取了一個務實做法，在14項法令中加入法例條文，訂明官方無須就違反有關法令而負上刑事法律責任，惟高等法院可宣布官方構成違反法例條文的作為或不作為屬不合法。

16. 工作小組又察悉，新西蘭制定《2002年官方機構(刑事責任)法令》(《官方刑責法令》)，令當局可在官方機構(包括政府部門)違反指明罪行時向其提出檢控；同時亦察悉法庭於2003年就當局根據《官方刑責法令》提出的兩項檢控所作的裁決。在該兩宗案件中，被告人(分別為"官方機構"及"官方專上學院")被法庭裁定觸犯《1992年職業健康和安全法令》所訂的罪行，並判處罰款。

17. 鑒於官方豁免權仍繼續在香港實行，工作小組建議要求政府當局考慮 ——

(a) 就規範性質的罪行而言，當局應在立法機會出現時，按個別情況，並作為政策問題，廢除官方豁免權；及

(b) 英國及新西蘭在廢除官方豁免權方面所制訂的替代做法。

18. 請議員參閱**附件B**所載工作小組的報告。

政府當局對向政府及公職人員施加刑事法律責任的立場

19. 政府當局回應工作小組的建議時表示 ——

(a) 香港法律中並無先例能夠清楚而明確地訂明政府或政府部門可受刑事檢控。為執行法例規定而在法院進行檢控有違政府的一貫做法，並會引發程序和成效方面的複雜問題，例如政府部門是否具有法人身份；這亦涉及一個政府部門能否檢控另一政府部門的法律政策問題。此外，若政府須對違反法例條文負上刑事法律責任，由於不可能對政府判處監禁，只可判處罰款。但政府繳交罰款的金錢取自公帑，向政府罰款並無意義；

(b) 現行的報告機制一直行之有效，也就是說，違反法例條文的行為會被揭發，並有效處理。因此，並無需要對現行制度作出根本改變。然而，政府當局會根據事務委員會的意見，建議有關決策局在有需要時如何進一步改善現行的報告機制；

(c) 採用英國宣布某事項不合法的做法，政府當局認為目前還不是時候。據政府當局所知，至今還沒有任何案件涉及這方面的宣布，即法庭曾作出宣布或有人向法庭申請作出宣布。政府當局不相信英國這種宣布不合法的法定制度，會比香港的報告機制更為有效；及

(d) 至於新西蘭《官方刑責法令》所訂限制較大的做法，政府當局並不認為現時是採用這種做法的時候。《官方刑責法令》於2002年10月針對特定背景制定，其應用範圍狹窄、限制頗大，只涵蓋《1991年建築物法令》及《1992年職業健康和安全法令》中與安全有關的罪行。包括英國在內的大部分普通法司法管轄區都沒有採用這個做法。截至2004年6月初為止，根據《官方刑責法令》提出檢控的案件只有兩宗。因此，既然有關這法令運作的經驗有限，香港不宜採用這個做法。

事務委員會就工作小組報告所作的討論

2004年6月28日的會議

20. 事務委員會於2004年6月28日的會議上討論工作小組的報告。一名委員表示不同意政府當局所持觀點，即政府繳交罰款的金錢取自公帑，向政府罰款並無意義。她又質疑香港的報告機制能否有效遏止公職人員違反法律的行為。該委員認為，此事項應從確保公職人員維持高尚操守此觀點著眼。如有公職人員違反法例條文，並干犯規範性質的罪行，該名人員可為該項不法行為負上個人責任，並應接受適當的懲罰及紀律處分，包括罰款或減薪。

21. 另一名委員指出，因涉及違反環保法例而根據現行報告機制向政務司司長報告的個案共有156宗，但有關公職人員並未受到紀律行動處分。

22. 香港大律師公會同意工作小組的觀點，即官方轄免權問題應從法律政策的角度加以檢討。大律師公會認為，不論英國憲法或香港特區的《基本法》，均未有通過法例確立官方豁免權。對有關機關施加刑事法律責任，可加強公眾及該等機關的服務使用者的信心。大律師公會贊同政府當局應從政策的角度處理此事，並按個別案件的情況決定轄免法律責任是否合理。

23. 香港律師會認為，當局宜就政府的刑事法律責任問題制訂清晰明確的政策，此政策可作為行政部門及公職人員在執行公職時的有用指引。

24. 政府當局回應工作小組的建議時，大致上重申其在上文第19段所述的立場。

25. 事務委員會通過工作小組的報告，並同意於2004至05年度會期跟進此事。

2004年11月9日的會議

26. 事務委員會於2004年11月9日的會議上考慮有關此事的未來路向。委員察悉，工作小組之前進行商議時，律政司亦有參與。不過，由於此事項大體上牽涉到政府所有政策事項，委員同意此事應交由政務司司長辦公室跟進。

27. 事務委員會2004年6月28日及11月9日會議紀要的相關摘錄，分別載於**附件C及D**。

最新情況

28. 政務司司長考慮此事後，決定將各界提出的事項交由政制事務局局長跟進。政制事務局已與相關的政策局及部門研究有關事項，並會於2005年11月28日的會議上，向事務委員會作出簡報。

立法會秘書處
議會事務部2
2005年11月23日

附件A

立法會轄下委員會在2002年11月之前就有關政府或公職人員違反法例條文的刑事法律責任問題所作的討論

《1992年水污染管制(修訂)條例草案》(在1992年12月9日提交立法局)

法案委員會在商議過程中，曾就《水污染管制條例》對政府適用的情況提出問題。

2. 立法會法律顧問解釋，除若干例外情況外，該條例對官方具約束力。根據該條例第47條，官方或任何人為官方服務而在執行職責過程中，無須就作出的排放或廢物或污染物料的沉積而承擔刑事法律責任。不過，有關方面可向政府或有關人士提出民事訴訟。第47條亦訂明，政務司司長須採取適當行動及補救措施，以處理有關的違規事項。至於涉及排放或沉積行動的個別公務員，法律顧問表示，若有關行為是該等公務員在執行公職責任時作出的，則官方便須就該等行為承擔最終責任。就此，當局不能對有關的公務員施加刑罰。

3. 法案委員會認為，公務員觸犯《水污染管制條例》所訂有關作出排放或沉積的罪行而須承擔的刑事法律責任問題，並不屬於條例草案的範圍，但值得相關事務委員會再作研究。

《海岸公園條例草案》(在1994年11月23日提交立法局)

4. 條例草案原先並無《海岸公園條例》對政府適用情況的條文。法案委員會曾提出該條例對政府的約束力及官方豁免權等問題。法案委員會亦注意到，在1995年1月19日的質詢總督時間中，法案委員會主席就政府對《郊野公園條例》引用官方豁免權，進行新界東南堆填區計劃，嚴重破壞環境一事提出質詢。當時的總督回答質詢時解釋，政府受所有環保條例(如《空氣污染管制條例》)約束。於1976年制定的《郊野公園條例》並無約束官方之意。不過，政府亦贊同有需要更新改善該條例，並應檢討有關官方豁免權的事項。

5. 政府當局與法案委員會進一步討論後，同意提交委員會審議階段修正案，賦予《海岸公園條例》約束政府的效力。

6. 法案委員會接納政府當局對《海岸公園條例》第28條所提出的修訂建議。委員並未質疑當局所提有關免除政府及任何執行公職責任的公職人員須就違反該條例的相關規定負上刑事法律責任的理據。

《環境影響評估條例草案》(在1996年1月31日提交立法局)

7. 在商議條例草案的過程中，法案委員會委員關注到，公務員不會受到刑事制裁，而公務員若在執行公職責任時觸犯《環境影響評估條例》("環評條例")所訂罪行，當局亦不會提出刑事檢控，條例草案唯一訂明的，是布政司(現為政務司司長)須採取適當行動補救該違規事項。

8. 對於法案委員會提出的關注事項，政府當局回應時解釋，憲制上，任何人均無須為其在執行公職責任時所做的任何事情負上刑事責任。政府當局亦表示，英國及澳洲在其環境影響評估法例中，亦訂有類似的豁免權條文。此外，政府當局認為，有關環境保護署署長須根據機制向布政司報告公職人員違反環評條例事項的規定已經足夠。為釋除法案委員會的憂慮，政府當局曾向法案委員會承諾，若政府沒有遵守環評條例的規定，布政司會向市民解釋。

《2001年噪音管制(修訂)條例草案》(在2001年6月27日提交立法會)

9. 至於政府或公職人員違反《噪音管制條例》("該條例")的法律責任問題，法案委員會察悉，該條例第38(2)條禁止對政府或任何執行職責的公職人員提出刑事控訴。法案委員會關注到，由於該條例對公營及私營機構同具約束力，第38(2)條所訂的豁免權條文會造成不公平，並認為政府當局應檢討該條文。法案委員會部分委員認為，當局應明確規定違反該條例的公職人員會受紀律處分。

10. 部分就條例草案提交意見書的代表團體亦質疑該豁免權條文是否恰當。香港建造商會("建造商會")認為，若政府部門的身份是受法例約束的服務提供者，便應與其他私營機構一樣，受相同法例規定規管，而不應豁免受到刑事檢控。建造商會亦認為，以營運基金模式運作的政府部門，儘管是與私營機構競爭，但卻享有第38(2)條所訂的控訴豁免權，實有欠公允。

11. 政府當局解釋，政府部門與非政府機構一樣，都必須遵守該條例的法例規定。條例草案訂立機制，規定噪音管制監督向政務司司長報告公職人員違反該條例的事項。政府當局又告知法案委員會，過去從未有過政府部門或公職人員被發現違反該條例的情況。

12. 法案委員會要求政府提高其運作透明度，政府當局回應時答允，若政府部門有違規行為而需要噪音管制監督向政務司司長報告，當局會告知相關的事務委員會。

13. 法案委員會認為，豁免政府部門或公職人員承擔刑事責任的事宜並不屬於條例草案的範圍，不應因此阻延條例草案通過。由於有關事項對政策有廣泛影響，值得另作研究，法案委員會決定要求環境事務委員會跟進。然而，並無紀錄顯示，該事務委員會曾討論此事。

規劃地政及工程事務委員會

14. 在政府當局提交《2002年土地(雜項條文)(修訂)條例草案》前，規劃地政及工程事務委員會曾在2001年12月至2002年3月期間的4次會議上，討論掘路工程的收費及處罰制度建議。

15. 該事務委員會的部分委員認為，為確保公平、法律前人人平等，政府部門及政府人員若違反准許證的條件，不應獲豁免，而應與私營機構的准許證持有人一樣，接受同樣處罰。一名委員指出，政府司機若超速及危險駕駛，即使當時正在執行公職責任，他仍須被檢控。部分委員質疑，規定政府部門及公職人員在違反法例條文後必須呈報的制度，是否有足夠阻嚇作用。不過，另一名委員則認為，作出刑事制裁與否，須視乎所犯罪行的性質及嚴重程度，而非看犯罪者是否公職人員。

16. 規劃地政及工程事務委員會曾邀請不同關注組織及有關人士就擬議制度提出意見，當中部分團體或人士認為，讓政府部門及公職人員無須接受施加於私營機構的罰則，既不公平，亦屬歧視。該等團體或人士亦指出，大部分的掘路工程均由政府部門進行，因此政府部門亦應如私營機構的其他准許證持有人一樣，面對同樣制裁。

政府當局的回應

17. 議員就免除政府及公職人員違反對政府具約束力的法例條文的刑事法律責任一事表示關注，對於議員的關注，政府當局有以下回應 ——

(a) 雖然政府受所有與環境有關的條例約束，但一直都有條文訂明免除政府及執行公共職責的公職人員違反該等條例中若干條文的刑事責任；

(b) 各豁免權條文與現有法例相符，均規定不能對政府提出刑事訴訟；

(c) 當局不會對以公職人員身份執行職責的過程中作出任何事情的人施加刑事法律責任，原因是該人當時是代表公眾利益。不過，政府會就公職人員的任何行為承擔侵權法律責任；及

(d) 根據各相關條例所訂制度，有關的監察當局須向政務司司長報告公職人員執行公職責任時違反法例條文的事項，而政務司司長須採取最佳的切實可行步驟以停止該違例事項或避免該違例事項再發生。上述機制已證實能有效防止公職人員觸犯罪行。

法律顧問的意見

18. 就政府的刑事法律責任問題，《2001年噪音管制(修訂)條例草案》委員會的法律顧問在討論過程中請委員留意以下原則 ——

(a) 根據普通法，官方或政府是公義的維護者，因此原則上不會觸犯任何罪行。按此原則，有關法例不會訂定任何針對官方或政府的罪行；

(b) 一般就內容及應用方面而言，法律必須給予所有處於同一處境的人相同待遇。不過，在部分已裁定的個案中，法庭容許偏離相同待遇的原則，只要可以顯示：

(i) 理智而公正的人承認有真正需要給予不同待遇；

(ii) 為符合有關需要而選擇的特定偏離相同待遇的做法本身是理性的；及

(iii) 該特定的偏離相同待遇的做法與有關需要合乎比例。

立法會秘書處
議會事務部2
2005年11月23日

附件B

立法會
Legislative Council

立法會CB(2)2917/03-04(01)號文件

檔　號：CB2/PL/AJLS/G2

司法及法律事務委員會

研究有關向政府或公職人員施加刑事法律責任的問題工作小組報告

目的

本文件旨在綜述研究有關就政府或公職人員在執行公職責任時違反對政府具約束力的法例條文而向政府或公職人員施加刑事法律責任的問題工作小組的商議工作。本文件亦載列工作小組擬向司法及法律事務委員會提出的建議，以及律政司對建議的回應。

背景

2. 在商議於2002年4月24日提交立法會的《2002年土地(雜項條文)(修訂)條例草案》的過程中，法案委員會部分委員關注到，條例草案對如有政府或任何公職人員在執行公職責任時違反對政府具約束力的法例條文，豁免其刑事法律責任的建議。法案委員會認為有需要就處理公職人員違反法例規定的機制，研究與之有關的事項，以確保一個公平制度得以維持。然而，由於研究所提出的問題，將更廣泛，並與整體刑事司法制度的政策有關，法案委員會建議內務委員會成立小組委員會研究有關事項，或較恰當。

3. 在2002年10月4日內務委員會會議上，議員同意，由於所涉事項屬藉法律施加刑事法律責任的整體政策中的一部分，因此把該等事項交由司法及法律事務委員會跟進較為恰當。

工作小組

4. 司法及法律事務委員會在2002年10月28日的會議上同意成立工作小組，負責有關的預備工作，以便事務委員會考慮該等事項。工作小組的職權範圍如下 ——

> "研究有關就政府或公職人員在執行公職責任時違反對政府具約束力的法例條文而向政府或公職人員施加刑事法律責任的問題，並向事務委員會作出適當建議及提交報告。"

5. 工作小組由吳靄儀議員擔任主席，曾先後舉行4次會議，其中3次與政府當局舉行。工作小組的成員名單載於**附錄I**。工作小組曾研究的文件一覽表載於**附錄II**。

工作小組的商議過程

官方豁免權 —— 普通法的推定

6. 根據一項普通法的推定，官方不受任何法規所約束，除非該法規內明文規定官方須受其約束，或除非可從該法規中推斷其必然含意，認定有關的立法原意，是該法規對官方具約束力。有關豁免權也稱為官方豁免權。

7. 關於法例條文對香港特別行政區("香港特區")政府的適用情況，《釋義及通則條例》(第1章)第66(1)條已訂明該普通法推定 ——

> "除非條例明文訂定，或由於必然含意顯示"國家"須受約束，否則任何條例(不論條例是在1997年7月1日之前、當日或之後制定的)在一切情況下均不影響"國家"的權利，對"國家"亦不具約束力。"。

根據該條例，"國家"的定義包括香港特區政府。該條例附表8第2條訂明，在任何條文中對官方的提述(在文意並非第1條所指明者的情況下)，須解釋為對香港特區政府的提述。

8. 現時，有21條條例明確訂明對政府具約束力，有12條條例則載有不向政府或公職人員施加刑事法律責任的明訂條文。

9. 在商議過程中，工作小組曾與律政司討論，應就所有法例還是只就新制定的法例推翻該普通法推定。律政司相信，並無任何理據要將政府無刑事法律責任這項推定全部推翻。關於只就日後制定的法例推翻這項推定的問題，律政司認為，這會造成多個的實際後果，包括適用於政府的法例會長時期存在雙軌制度的情況。律政司的意見詳載於**附錄III**。

10. 委員亦察悉律政司的意見，即政府應否就某條例負上刑事法律責任，與應否推翻上述推定，為兩項獨立不同的事情。

海外地區的做法

11. 工作小組要求律政司提供資料，說明下列司法管轄區的政府及公職人員，其刑事法律責任的情況 ——

(a) 普通法司法管轄區 —— 英格蘭與威爾斯、澳大利亞、加拿大及新西蘭；及

(b) 非普通法司法管轄區 —— 法國、德國和日本。

律政司提供的有關資料載於**附錄IV**。

政府當局在向政府及公職人員施加刑事法律責任方面的立場

12. 關於政府及公職人員的刑事法律責任問題，工作小組察悉，政府向《2002年土地(雜項條文)(修訂)條例草案》委員會作出的回應中，已反映其立場如下 ——

(a) 香港法律中並無先例能夠清楚而明確地訂明政府或政府部門可受刑事檢控。為執行法例規定而在法院進行檢控有違政府的一貫做法，並會引發程序和成效方面的複雜問題，例如政府部門是否具有法人身份，亦涉及一個政府部門能否檢控另一政府部門的法律政策問題。此外，若政府須對違反法例條文負上刑事法律責任，由於不可能對政府判處監禁，只可判處罰款。但政府繳交罰款的金錢取自公帑，向政府罰款並無意義；

(b) 據政府對其他普通法司法管轄區(澳洲、加拿大及新西蘭)的研究顯示，當地法院一般對於向政府施加刑事法律責任的構思有所保留。若某項法例並無清楚明確的字眼，訂明向政府施加刑事法律責任，法院不會願意裁定有關法例有如此規定；

(c) 個別公職人員犯了危險駕駛、謀殺、貪污等罪行，會受到刑事制裁；及

(d) 若公職人員執行服務政府的職責時違反法例條文，當局一般是按照於1980年代已制訂的報告機制處理。在報告機制下，如違規情況持續，或相當可能會再發生，政務司司長或有關的政策局局長須確保會採取最佳的切實可行步驟以阻止該違例事項或避免該違例事項發生，視屬何情況而定。行為失當的公職人員會受到紀律處分。

針對政府部門違反法例的報告機制

13. 律政司認為，上文第12(d)段所述的報告機制成效理想，對公職人員的阻嚇作用亦遠較其他方法大。因此，並無需要對現行制度作出重大改變。

14. 根據此報告機制，有關不同部門違反法例條文的報告如不屬於單一政策局的職權範圍，該報告便應向政務司司長提交。否則，該

報告應提交予相關的政策局局長。應工作小組的要求，環境保護署已提供資料，說明自1999年起政府部門及私營機構違反7項環境保護條例的情況及就該等個案採取的行動。

15. 工作小組察悉，在1999年至2003年3月期間，向政務司司長報告的個案共有156宗。截至2003年8月，當局並未對在執行職務期間違反7項環境保護條例的公職人員採取任何紀律行動。在私營機構方面，由1999年至2003年(截至8月)各年間，分別有1 681、1 689、1 041、772及313宗被定罪的違例個案。部分屢次違反法例者不單被罰款，更被判監(由7天至4個月不等，但通常都獲緩刑)。從1997年至今，共有9宗案件被定罪，被告人被判處監禁。

英國官方豁免權的現行情況及該國採用的另一做法

英國官方豁免權的現行情況

16. 工作小組察悉由艾塞克斯郡大學法律系的Mr Maurice Sunkin於2003撰寫的題為"英國法律中的官方刑事法律責任豁免權"的文章(**附錄V**)。該文章試圖從英國憲法角度，就與官方刑事法律責任豁免權有關的原則提供一個簡明的概覽，以期藉此釋除部分圍繞這課題的奧秘，並找出問題較多的地方。

17. 文章解釋，官方對刑事法律責任的豁免權源自封建制度，特別是君主擔當司法者的角色，以及領主在其自設的法庭內不受控告的規定。這種豁免權常與"帝王永不犯錯"的諺語連在一起，是官方(Crown)古老特權僅餘的少數保護屏障之一。所引致的結果，是官方豁免權與現代的本國憲法概念，以及發展中與政府刑事行為豁免權有關的國際法原則格格不入。這可導致厚此薄彼、互相矛盾的情況，而且所給人的印象，是當私人團體及在其他範疇的公營部門要承擔刑事法律責任時，中央政府會保護本身的利益。此外，這亦可能造成對官方人員"缺乏紀律"的容忍，鼓吹"草率行事"的作風。對此等問題的承認，已令此豁免權在若干刑事法例中被廢除或修訂，而以補救錯失的方法取代。現行較為普遍的做法似乎是採用一個折衷辦法，即官方團體須遵守有關標準，若該等團體未有遵守有關標準，則可能會令其被當局按法定程序宣布其未有遵守有關標準，但不會提出刑事檢控。

18. 文章又指出，君主所享有的刑事法律責任豁免權，是其個人的豁免權，即君主本身既享有個人的豁免權，而君主制作為一個制度，該豁免權亦屬"個人"的豁免權。原則上，君主的代表或代理人並不能單憑其為君主服務而享有這項豁免權。

19. 文章在結論中表示，就規範性質的罪行而言，應否廢除官方豁免權的問題，實質上屬政策事宜，而非建基於任何基本憲法原則。平等、透明度及問責的原則，再加上宜就此問題作出有效糾正的訴求，均成為廢除這豁免權的理據。大體上，這觀點似乎為英國政府所接納。

20. 工作小組亦察悉 ——

(a) 英國政府目前的官方立場是，在立法機會出現時逐步廢除官方豁免權(於1999年11月4日由當時的國務大臣(內閣辦公室)Lord Falconer of Thoroton對有關官方豁免權的國會質詢所作的答覆(載於**附錄VI**))；及

(b) 英國政府成立了一個跨部門工作小組，以研究國家的刑事訴訟程序豁免權(政制事務部政務次官於2003年11月20日對國會質詢所作的答覆(載於**附錄VII**))。

英國採用的另一做法

21. 應工作小組的要求，律政司已就上述文章提述的英國做法(上文第17段)提供進一步資料。該做法包括制定法例條文，訂明官方無須就違反有關法令而負上刑事法律責任，惟高等法院可宣布該項違反法例條文的作為或不作為屬不合法。

22. 按照這做法，官方團體若未有遵守某些標準，可能會令其被當局按法定程序宣布其未有遵守有關標準，但不會對其作出刑事檢控。屬宣布性質的判決的本質，在於其訂明各方的權利或法律地位，而沒有對該等權利和法律地位作出任何改變；但在適當的情況下，除該項判決外，可有其他補救措施作為補充。該等宣布的優點在於，這是一項有效方法，補救政府當局(包括部長和官方受僱人，近期更發展至包括官方本身)任何種類的越權行為。這做法在實行上是有效的，因為宣布官方因違反某項法例規定而導致其有關作為或不作為屬不合法，很明顯在政治上會對政府造成尷尬。任何奉行法治的政府都負有責任採取行動，糾正有關情況。

23. 律政司提供臚列了英國該等法例條文及可根據該等條文申請對官方行為作此宣布的人士的清單(該清單並非詳盡無遺)載於**附錄VIII**。根據律政司所作的研究，截至2004年6月初，英國並無訴訟案件導致法庭須作此類宣布。

新西蘭採用的另一做法

24. 律政司又告知工作小組，新西蘭已於2002年10月通過《2002年官方機構(刑事法律責任)法令》("《官方刑責法令》")，以實施新西蘭的皇家調查委員會就當地一座觀景台倒塌事件進行調查後在報告中提出的建議。制定該法令的目的之一，是令當局可根據《1991年建築物法令》("《建築物法令》")及《1992年職業健康和安全法令》("《職業安全法令》")所訂定的罪行，對官方機構(包括政府部門)提出檢控。《官方刑責法令》載有多項與該等檢控有關的條文，例如有關若干官方機構的法人身份、進行檢控的法律程序、解除官方豁免權，以及支付法庭判處的賠償等事宜的條文。《官方刑責法令》於2002年10月17日生效。

25. 《官方刑責法令》第6條訂明，凡官方機構觸犯《建築物法令》第80條的罪行，或《職業安全法令》第49或50條的罪行，可被檢控。

26. 就違反《建築物法令》第80條或《職業安全法令》第49或50條的刑罰而言，官方機構若被裁定違反上述條文有罪，並不會被判罰款。然而，該官方機構可被命令向受害人作出賠償，或須履行有關的補救令。

27. 律政司進一步告知工作小組，新西蘭司法部於2004年6月初告知律政司，該國根據《官方刑責法令》提出檢控的案件至今共有兩宗。第一宗的被告人為奧達哥大學，就《官方刑責法令》而言，該大學屬"官方機構"。法庭於2003年11月24日指被告人身為僱主，其一名僱員在工作地方使用商業攪拌器導致大姆指骨折，而被告人未有採取所有實際可行的步驟確保該名僱員的安全，裁定被告人觸犯《職業安全法令》有罪，判處罰款4,500元。

28. 在第二宗案件中，被告人為Te Wananga O Aotearoa Te Kuratini O Nga Waka(一間官方專上學院)。法庭於2003年12月5日指被告人身為僱主，其一名僱員在建造獨木舟時從梯上墮下引致多處受傷，而被告人未有採取所有實際可行的步驟確保該名僱員的安全，裁定被告人觸犯《職業安全法令》有罪，判處罰款7,500元，並命令其向受害人賠償1,500元。

29. 據律政司瞭解，根據《官方刑責法令》第8(4)條，官方機構不會被判罰款，但在上述兩宗案件中的被告人被判罰款一事，與律政司所理解的不符。新西蘭司法部回應律政司的查詢時確認，官方機構不可被判罰款。新西蘭勞工署表示，就Te Wananga O Aotearoa一案而言，有關方面已要求法庭再度審理該案，以便將法庭的命令部分取消(即保留賠償令而取消罰款)。新西蘭勞工署預期，以奧達哥大學為被告人的案件亦會以同樣手法處理。

30. 鑒於新西蘭制定《官方刑責法令》後，可因官方機構(包括政府部門)違反指明的罪行而對其提出檢控，工作小組認為政府當局應研究應否在香港採用類似該法令的做法。

31. 律政司認為，大部分普通法司法管轄區(包括英國)均沒有採用類似《官方刑責法令》的做法。該法令是基於特殊背景制定，適用範圍狹窄，並有諸多限制，所涵蓋的範圍，亦只包括《建築物法令》及《職業安全法令》所訂與安全及健康有關的罪行。鑒於新西蘭執行該法令的經驗有限，香港未必適合跟隨採用這項《官方刑責法令》所訂諸多限制的做法。

32. 律政司認為，是否有需要改善針對政府及公職人員的執法程序，應由有關的政策局按個別情況考慮，並在需要時徵詢律政司的法律意見。除施加刑事法律責任外，亦有其他針對政府違反法定條文的補救方案，例如英國的做法(上文第21至23段)。

工作小組的建議

33. 工作小組察悉，英國現時的正式立場，是在立法機會出現時逐步廢除官方豁免權。工作小組亦察悉，就規範性質的罪行而言，應否廢除官方豁免權的問題，實質上屬政策事宜，而與基本憲法原則無關。英國採取的一個務實做法，是在14項法令中加入法例條文，訂明官方無須就違反有關法令而負上刑事法律責任，惟高等法院可宣布該項違反法例條文的作為或不作為屬不合法。

34. 工作小組又察悉，新西蘭制定《官方刑責法令》，令當局可就官方機構(包括政府部門)在違反若干指明罪行時向其提出檢控；同時亦察悉法庭最近根據該法令所作的兩宗裁決。

35. 鑒於官方豁免權仍繼續在香港實行，工作小組建議要求政府當局考慮 ——

(a) 就規範性質的罪行而言，當局應在立法機會出現時，按個別情況，並作為政策問題，廢除官方豁免權；及

(b) 英國及新西蘭在廢除官方豁免權方面所發展的替代做法。

36. 政府當局對工作小組提出的建議所作回應載於**附錄IX**。

徵詢意見

37. 謹請委員就工作小組的建議提出意見。

立法會秘書處
議會事務部2
2004年6月24日

立法會
司法及法律事務委員會

研究有關向政府或公職人員
施加刑事法律責任的問題工作小組

委員名單

主席	吳靄儀議員
委員	李柱銘議員, SC, JP 涂謹申議員 劉慧卿議員, JP 譚耀宗議員, GBS, JP 余若薇議員, SC, JP (總數：6位議員)
秘書	馬朱雪履女士
法律顧問	張炳鑫先生
日期	2002年10月28日

附錄II

司法及法律事務委員會

研究有關向政府或公職人員施加刑事法律責任的問題工作小組閉門會議

相關文件

(A) 有關豁免政府或公職人員刑事法律責任的海外做法

立法會CB(2)1414/02-03(02)號文件附錄IX ——	律政司於2002年9月擬備的"英格蘭及威爾斯、澳大利亞、加拿大，以及新西蘭的官方刑事法律責任概覽"文件
立法會CB(2)2845/02-03(02)號文件第6至7段及附件B ——	有關新西蘭最新發展情況的資料
立法會CB(2)179/03-04(01)號文件第6段 ——	有關"政府及公職人員的刑事法律責任在德國的情況"的資料
立法會CB(2)660/03-04(01)及CB(2)2782/03-04(02)號文件 ——	有關"新西蘭情況 —— 《2002年官方機構(刑事責任)法令》"及兩宗檢控案件的文件
立法會CB(2)660/03-04(02)及CB(2)2782/03-04(01)號文件 ——	有關"政府及公職人員的刑事責任在日本的情況"的文件
立法會CB(2)751/03-04(01)號文件 ——	英國《1990年食物安全法令》第54條及英國《1998年核爆(禁止及檢查)法令》第14條的摘錄
立法會CB(2)751/03-04(02)號文件 ——	有關"可向法庭申請聲明書聲明官方任何作為或不作為構成違反有關法定條文者為非法的人士"的列表

立法會CB(2)1277/03-04(01)號文件	—— 政府當局所提供題為"英國的做法概要 —— 法院可宣布構成違反法例條文的官方作為或不作為屬不合法"的文件
立法會CB(2)1420/03-04(01)號文件	—— Mr Maurice Sunkin所撰寫有關"英國法律中的官方刑事法律責任豁免權"的文章
立法會CB(2)1551/03-04(01)號文件	—— 政府當局所提供有關"政府及公職人員違反法例條文的刑事法律責任在法國的情況"的文件
立法會CB(2)2782/03-04(03)及(04)號文件	—— 與官方豁免權多項事項有關的英國國會議事錄摘錄

(B) 政府及公職人員的刑事法律責任

立法會CB(2)2845/02-03(02)號文件附件D及附件E	—— 明文規定對政府具約束力的21條條例一覽表
立法會CB(2)179/03-04(01)號文件附錄甲	—— 律政司所擬備有關"把政府不受法規約束的推定予以逆轉的正反論據"的文件

(C) 違反與環境有關的法例

立法會CB(2)2845/02-03(02)號文件第11段及附件C	—— 有關違反與污染有關法例而尚待糾正個案數目的資料
立法會CB(2)2931/02-03(01)號文件	—— 臚列了21宗政府部門違反《水污染管制條例》中有關條文的個案的列表，該等個案已向政務司司長報告(在立法會CB(2)2845/02-03(02)號文件第11(c)段提述)

立法會CB(2)179/03-04(01)號文件附錄乙	—— 環境保護署所擬備有關"執行環境法例"的文件(機密)
立法會CB(2)179/03-04(01)號文件第5段	—— 有關"就公職人員採取紀律行動"的資料

立法會秘書處
議會事務部2
2004年6月24日

推翻普通法的推定

就所有法例推翻有關推定方面，律政司曾請委員參閱新西蘭司法部於2001年6月發表的"《2001年釋義法令》第28條所要求的報告"，當中臚列了推翻該項推定的正反論據。新西蘭司法部並不支持將該普通法推定推翻。律政司認為，其中不少論據同樣適用於香港的情況。

2. 律政司贊同報告所載新西蘭司法部的意見 ——

> "就所有法例(包括現行法例)都將推定推翻，會對政府構成財政及其他風險，除非政府在將推定推翻之前，已對所有法例進行全面評估。若沒有作出事前評估，則官方可能會受原本大有理由免受其約束的法例所約束。評估該等風險的範圍和程度，相當可能會是一項艱巨而需要大量資源的工作。"

3. 律政司相信，並無任何理據要將政府的刑事法律責任推定全面推翻。政府作為行政權擁有人及獲得公眾授權的一方，與其他人士的另一方，處極為不同的位置。因此，必須承認的是，為了維持良好管治，政府在某些情況下是需要擁有若干特別權力和豁免權的。若把現有的推定推翻，所引起的問題可能會比解決到的問題為多。將《釋義及通則條例》(第1章)第66條中的推定予以保留，並按個別情況考慮每一條建議法例的約束力的做法，會更為可取。

4. 律政司解釋，無論如何，將現行的推定推翻，與政府就某條例須負刑事法律責任的程度，並無直接關係。這是因為其他普通法司法管轄區的相關案例法顯示，即使某法規對政府有約束力，政府仍無須負刑事法律責任，除非該法規清楚顯示，立法機構有意訂立政府可被裁定有罪的罪行，則作別論。因此，政府應否就某條例負刑事法律責任，與該項推定應否被推翻，為兩項獨立不同的事情。

5. 關於只就日後的法例將推定推翻的問題，律政司同意，在此情況下，便無須對每一項現行條例進行評估，與該項評估工作相關的風險和資源問題亦不會出現。然而，這種推翻在實踐時會造成下列後果 ——

(a) 就適用於政府的法例而言，長時期會存在雙軌制度；及

(b) 擬備修訂條例時，須特別注意。

6. 律政司進一步指出，根據某條例的制定日期而應用不同的推定，在法律上會引起混亂和不明確的情況。雖然預期現行法例或被合併，或被已包含新"規則"的法例所取代，雙軌制度之下的兩個系統會逐步合併，潛在的困難會因而減少。儘管如此，雙軌制度仍可能會繼續長時期存在。

海外做法

普通法司法管轄區

律政司曾就與豁免政府或為政府服務而執行職責的公職人員的刑事法律責任有關的法例方面，研究數個主要普通法司法管轄區(英格蘭及威爾斯、加拿大、澳大利亞和新西蘭)的情況。大部分普通法司法管轄區對該普通法推定不是予以保留，便是已將之制定為成文法 ——

(a) 英格蘭和威爾斯繼續奉行該普通法的推定；

(b) 在澳大利亞，南澳大利亞州和澳大利亞首都地區已經推翻該普通法的推定，但在昆士蘭州和塔斯馬尼亞州，該推定則已制定為成文法。該普通法的推定仍在其他澳大利亞的司法管轄區內獲保留；

(c) 加拿大卑斯省和愛德華王子島已各自立法推翻該普通法的推定。不過，在加拿大的其他司法管轄區，即加拿大聯邦、艾伯塔、馬尼托巴、新斯科舍、紐芬蘭、安大略、薩斯喀徹溫、新不倫瑞克和魁北克，均已將該推定通過法規確立；及

(d) 該普通法的推定在新西蘭已制定為成文法。

上文應因應律政司所提供有關英格蘭與威爾斯及有關新西蘭的最新情況(分別載於本文件第21至23段及第24至32段)理解。

2. 就官方及官方僱員的豁免權，律政司提出下列觀點及意見 ——

(a) 研究所涵蓋的大部分司法管轄區中，官方不受任何法規約束，除非有法規明文規定官方須受其約束，或除非法規的必然含意指官方須受該法規約束。在部分司法管轄區(例如卑斯省及南澳大利亞州)中，此普通法推定已被推翻，即任何法規均對官方具約束力，除非條文另有規定；

(b) 即使某法例已清楚表明或藉必然含意指明對官方有約束力，官方仍無須負上刑事法律責任，除非有清楚指示，指出立法機構的原意是訂立可裁定官方有罪的罪行，則作別論。雖然部分司法管轄區已推翻該普通法推定，但情況似乎並未因此改變。在南澳大利亞州及澳大利亞首都地區(這些地區已把該普通法的推定推翻)，推翻該普通法推定的有關法例條文都訂明，官方並不會只因此項推定被推翻而負上任何刑事法律責任；

(c) 在檢閱過的各司法管轄區所制定的法例條文中，並無條文向官方本身施加刑事法律責任，儘管有少數條文與官

方的刑事法律責任問題有關，但在這些條文中，那些似乎向代表官方行事的人施加刑責的條文，在所有經檢討的條文中，只佔很低比例；及

(d) 就官方人員而言，單憑該人員是在受僱工作期間行事這個事實，並未能給予該人員官方豁免權。只有在可以證明按法規遵辦會損害官方利益的情況下，他才享有豁免權。

非普通法司法管轄區

3. 應工作小組的要求，律政司亦曾向數個非普通法司法管轄區取得有關其立場的資料。

德國

4. 德國司法部提供以下資料 ——

(a) 法例對於政府及公職人員均具約束力，因為遵守法律的責任於憲法內有明文規定；

(b) 德國刑法沒有就法團、公司、社團等的法律責任作出規定，換言之，只有自然人才會觸犯刑事罪行。德國政府，如任何商業機構一樣，不可能承擔刑事法律責任。因此，執法機關本身無須負刑事法律責任，只有其成員及職員方會負刑事法律責任。然而，根據《德國基本法》，議會成員、公務員及行政機關的其他成員均一律須負刑事法律責任，因此他們能觸犯刑事罪行；及

(c) 公務員的刑事行為可導致其被採取紀律行動。所處刑罰視乎所涉罪行的嚴重程度而定，有關刑罰包括譴責、減薪、免除公職等。無論是否提出刑事檢控，有關方面亦可採取紀律行動。

日本

5. 日本司法部提供以下資料 ——

(a) 一般而言，法例對於政府及公職人員具約束力；

(b) 國家絕不會因違反對國家具約束力的法例條文而須負上刑責；

(c) 日本的法律訂明某些罪行為公職人員所作的不法行為，會被刑事檢控。換言之，該等罪行只有公職人員才可觸犯。公職人員如在執行公務職責時觸犯此類罪行，可以其個人或個別身份被檢控，而不論當局會否或已否對其採取紀律行動；及

(d) 任何公職人員若作出非法行為，無論須負刑責與否，有關當局都可能會對其採取紀律行動。《國家糾正法》規定，任何公職人員若在執行職務時蓄意或疏忽地對他人造成損害，受害人可就有關損害向政府追討賠償。

法國

6. 律政司就法國的情況提供的資料如下 ——

(a) 共和國總統無須為其在執行職務中所作的行為負責，但叛國的情況則除外。議會兩院只有依公開投票的方式、以組成各院的議員的絕對多數作出同一的表決時，才能夠對共和國總統提起公訴。共和國總統由高級法院審判；

(b) 政府成員對於在執行其職務時所作的行為，如其在作出該行為時被認為重罪或者輕罪的，應負刑事法律責任。他們由共和國法院審訊；及

(c) 按一般規定，公務人員須就其觸犯的刑事罪行負上刑事法律責任。除此以外，有部分罪行只適用於公務人員，例如賄賂、挪用公款、虛假記項及偏私等。與此同時，公職人員的上司可對其施予紀律處分，該等處分可與刑事處罰同時執行，但性質有別，因紀律處分並不視為司法行為。

[2004] Public Law

Crown Immunity from Criminal Liability in English Law

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That the Crown is immune from criminal liability is generally considered to be axiomatic. While based on ancient liabilities of the monarch, it is now assumed that government departments and Crown bodies are immune from criminal liability whatever the crime, unless that immunity is removed or diminished by Parliament. This immunity is one of the few remaining bastions of the Crown's ancient privileges, most of which have been whittled away by Parliament, in particular by the Crown Proceedings Act 1947, by extensions of the judicial review jurisdiction, and by the House of Lords in *M v Home Office*.[1] The result is that the immunity is now exceptional and incongruous. As well as sitting uneasily with modern conceptions of domestic constitutional law, this immunity also sits less than comfortably with developing principles of international law concerning sovereign immunity for criminal acts.[2] It can lead to inequalities and inconsistencies,[3] and an impression that central government will protect its own when private bodies and other areas of the public sector[4] are held liable to the criminal law. It might also permit a "lack of discipline" and encourage "sloppy practice".[5] As John Wynne's tragic death while employed at

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[1] [1994] 1 A.C. 377; [1993] 3 All E.R. 537 (to which later page references are made).

[2] *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (Amnesty International intervening) (No.3)* [2000] 1 A.C. 147. See R. Van Alebeek, "The *Pinochet* Case: International Human Rights Law on Trial" [2000] *British Yearbook of International Law* LXXXI 29, esp. p.46; and more generally D. Woodhouse, ed., *The Pinocket Case: A Legal and Constitutional Analysis* (Hart Publishing, Oxford, 2000).

[3] As Sir Stephen Sedley has written, the immunity leads to "such absurd lacunae as the supposed inability of environmental health officers to prosecute National Health Service hospitals for having cockroaches in their kitchens": "The Crown in its Own Courts", in C. Forsyth and I. Hare, eds. *The Golden Metwand and the Crooked Cord: Administrative Law Essays in honour of Sir William Wade QC* (Clarendon Press, Oxford, 1997), p.254.

[4] Crown immunity, of course, does not apply to public bodies that are not part of the Crown, such as local authorities.

[5] Public Accounts Second Report, *Health and Safety in*

the Royal Mint in June 2001 displayed, the existence of the immunity can also generate public outrage and a widespread sense of injustice.[6]

Recognition of these (and other) problems has led to the immunity being removed or modified in the context of certain statutory crimes. This process has occurred on an ad hoc basis using a variety of remedial techniques. While these have included removing bodies from the scope of the immunity[7] and imposing full criminal liability,[8] the more popular current method appears to be a compromise approach whereby the Crown body is expected to comply with standards, but failure to do so will open it to proceedings for a declaration of non-compliance, rather than criminal prosecution.[9] The government has proposed that this approach be taken in relation to the offence of corporate killing.[10] The government has also announced its intention to remove Crown immunity from statutory health and safety enforcement. Significantly, where immunity has been removed those affected seem able to cope with the consequences. Indeed, the NHS Executive has put on record that the health service has "consistently improved its performance since the lifting of Crown Immunity".[11]

While piecemeal changes have occurred in relation to statutory crimes, little has been done to tackle the Crown's more general immunity to common law crimes. The lack of enthusiasm within official circles for such an enterprise is hardly surprising. After all governments rarely have much to gain by removing their own immunities. The task is not made more attractive by the weight of history that now forces itself upon principles of Crown immunity. More important perhaps is the problem of knowing what would replace the immunity. Would removal, for example, necessitate a new regime for imposing criminal liability upon government and officials and if so, could this be safely left to the courts[12] or would a comprehensive new legislative framework be needed?

It is certainly the case that this immunity has received scant attention from commentators[13] and (not surprisingly) by judges with the result that outside

General, *Report on Trusts' Compliance with Legislation and Guidance*, para.22 concerning QQ 22, 73 and 1.

[6] The House of Commons Select Committee on Public Accounts in its Fourteenth Report, *Royal Mint Trading Fund 2001–02 Accounts* (2002–03 HC 588) considered the circumstances surrounding the death of David Wynne and reiterated that, "it is unacceptable that the Mint should hide behind Crown immunity . . . ".

[7] The National Health Service (Amendment) Act 1986 removed Crown immunity from NHS bodies in relation to food and health and safety legislation. This was taken further by the National Health Service and Community Care Act 1990.

[8] *e.g.* National Minimum Wage Act, s.36.

[9] *e.g.* Food Safety Act, s.54; Environmental Protection Act 1990, s.159; Environment Act 1995, s.115.

[10] Home Office, *Reforming the Law on Involuntary Manslaughter: the Government's Proposals* (May 23, 2000), para.3.2.8. For criticism of this proposal, see Centre for Corporate Accountability, *www.corporate accountability.org/responses/hom/ccahocrown.htm*, paras 6.18–6.28.

[11] See n.5 above.

[12] If so, would this expose government and officials to politically motivated or vexatious prosecutions?

[13] Unusually, A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law* (13th ed., Pearson, Harlow, 2003) does touch upon the immunity at p.251. The authors comment, rather enigmatically that: "The question has arisen whether the Crown enjoys immunity from criminal liability".

government this is a rarely considered and poorly understood area of constitutional law. My purpose in this article is modest. It is to attempt to provide a brief overview of principles relating to Crown immunity from criminal liability from the perspective of English constitutional law[14] in the hope that some of the mystique that surrounds this topic may be removed and the more problematic areas identified. My starting point is that this immunity should only be permitted where it can be positively justified. The first task in determining whether the immunity can be justified is to delineate its scope and essential characteristics. This article will go some way in undertaking these tasks.

At the outset it should be made clear that I will say little about regulatory crimes in general. This is because in my view removal of Crown immunity in relation to such crimes poses no substantial constitutional issues. Writing over 50 years ago, W. Freidmann commented that:

> There is nothing shocking in the suggestion that the Crown—whether it acts through a government department or through a separate corporation—should be subject to [regulatory offences] . . . the liability of the Crown and other public authorities to fines must be seen, not as a means of making them suffer financially, but as a means of ensuring a standard of public conduct at least equal to that which the Crown demands of its subjects.[15]

The same sentiment is expressed by Professor Harry Whitmore[16]:

> Under the older law, any question of criminal liability of the Crown could hardly have arisen, but modern criminal law contains a multitude of administrative offences . . . these are labelled as part of the "criminal law" mainly . . . because the sanctions are typically criminal law sanctions . . . and because enforcement proceedings are taken . . . in . . . "criminal courts". But their nature is really quite different from common law crimes . . . they are means of regulating community conduct by reference to developing and sophisticated conceptions of social justice and of economic needs. Most of the older criminal law is based on relatively simple notions of moral fault—most of the new administrative offences are based on social regulation to achieve ends, often disputed, based on theories as to how complex, modern community should be developed. If the Crown is to be obliged (or is to oblige itself) to move towards these same ends, it seems highly desirable that it, its servants and agents, should be subject to the necessary sanctions.

It may be noted that the Court of Appeal recently distinguished between

[14] See M. Andenas and D. Fairgrieve, "Reforming Crown Immunity: the Comparative Law Perspective" [2003] P.L. 730.

[15] W. Freidmann, *Law and Social Change in Contemporary Britain* (1951), pp.107–108.

"true" crimes and regulatory offences in *Davies v Health and Safety Executive*.[17]

While there is much current debate surrounding Crown immunity from criminal liability in the context of regulatory offences and while the issue is of considerable practical importance, the reality is that immunity in this area is essentially a question of policy and is dictated by no constitutional doctrine. Whether these regulatory offences extend to Crown bodies is a matter of statutory interpretation applying the presumption that the Crown will only be bound by legislation where this is expressly provided or necessarily implied.[18] While it might be argued that this presumption reflects the ability of the Crown in Parliament to waive the Crown's immunity from criminal liability before the courts, the jurisdictional immunity from criminal liability is quite distinct from the interpretative presumption that statutes do not bind the Crown. It has been emphasised that this presumption is now no more than a rule of statutory construction.[19]

Having said this, the interplay between the immunity and the rule of interpretation is of importance where crimes are established, or codified, by statute.[20] Another article could be written on this topic, but in passing it may be noted that, while there is very little English case law on the matter, the decision in the Canadian case, *Saskatchewan v Fenwick*, is instructive.[21] Here it was held that the Crown could be prosecuted by an individual for failing to comply with provisions of the Labour Standards Act (an Act that was expressly applicable to the Crown). Although this was a private prosecution, Maurice J. accepted that legislation could enable one department of the Crown to prosecute another department thereby indicating that to this extent the principle of the indivisibility of the Crown is not absolute. He also accepted that while under the legislation the Crown could not be imprisoned or fined, that did not mean that a conviction "could not be registered against the Crown under the Act". Moreover, even if the Crown did enjoy immunity if its agents contravene provisions of the Act, they would be acting beyond the scope of their agency and would not possess an immunity.

[17] [2002] EWCA Crim 2949; [2003] I.C.R. 586. The Court of Appeal held that the Health and Safety at Work Act 1974, s.40, which imposes a burden of proof on a defendant, is compatible with the ECHR. For criticism of this decision see J. Cooper and S. Antrobus, "Criminal Regulatory Offences: Two Tier Justice?" (2003) 153 N.L.J. 352

[18] See generally, F. Bennion, *Statutory Interpretation* (2nd ed., Butterworths, London, 1993), pp.118–123, where it is pointed out that this presumption is rooted in the principle that law made by the Crown is made for subjects and does not bind the Crown. Note that Chitty said that the Crown is "impliedly bound by statutes passed for the public good . . . or to prevent . . . wrong": *Prerogatives of the Crown* (1820) p.382, but this is not now considered to be accurate.

[19] See Lord MacDermott in *Madras Electric Supply Corp Ltd v Boarland* [1955] A.C. 667 at 685.

[20] See, *e.g. Cooper v Hawkins* [1904] 2 K.B. 164. The Crown is not expressly bound by the provisions of the Offences Against the Persons Act 1861; although the Act does apply to individuals, including ministers in their personal capacity, the fact that the Act does not apply to the Crown may mean that a minister or other Crown servant could not be liable in their official capacity, see further below. See also observations of the Centre for Corporate Accountability (n.10 above) in relation to the reform of the law of manslaughter, para.6.19.

[21] [1983] 3 W.W.R.153; *cf. Cain v Doyle* (1946) 72 D.L.R. 409.

The legal basis for the immunity and its scope: who and what is protected by the immunity?

As indicated above, the origins of the Crown's immunity from criminal liability are rooted in feudalism and in particular in the monarch's role as dispenser of justice and in the inability to sue a lord in his own courts. The immunity is often linked to the maxim that the "King can do no wrong". More specifically, it has been said that the imposition of criminal liability upon the Crown would offend the fundamental idea that the criminal law protects the King's peace, that the Crown cannot be both prosecutor and defendant, that fines cannot be paid by the Crown to itself; and, that if imprisonment were a possibility, the Crown could not be imprisoned.[22] Such things may be thought impossible because the Crown is indivisible and not subject to the coercive jurisdiction of the courts. Whether these propositions can sustain this immunity in our modern setting is as *Saskatchewan v Fenwick* suggests, to say the least, questionable.[23] Nonetheless the expression the "King can do no wrong" deserves some comment.

The King can do no wrong[24]

This is one of those wonderfully ambiguous expressions that can carry two precisely contradictory meanings. On the one hand it may be taken to mean that the King has no legal power to do what is wrong and on the other it may be taken to mean that whatever the King does is legally right. The former meaning was that preferred by the medieval lawyers. It indicated that the King had no legal power to do wrong, for although under no man, he was under God and the law.[25] In this sense the maxim speaks for accountability to the law rather than for immunity from its application. The second and opposite meaning suggested that if whatever the King does is right, there can be no question of the King committing criminal acts, or being subject to criminal proceedings. This was essentially the Stuart version[26] and it rests on a conception of sovereign power that was swept away by the revolutionary settlement, and which now fits uneasily with modern notions of constitutional monarchy in a democracy.[27] The discomfort associated with Crown immunities is an indication of this uneasy fit.

What is the Crown for the purpose of the immunity from criminal liability?

There has been much debate about the meaning of the Crown. It is well known that in *Town Investments Ltd v Department of the Environment*[28] Lord

[22] See Latham C.J. in *Cain v Doyle, ibid.*

[23] See *e.g.* M. Freedland, "The Crown and the Changing Nature of Government" in M. Sunkin and S. Payne, eds, *The Nature of the Crown* (Oxford University Press, 1999), Ch.5, where Freedland argues that the indivisibility of the Crown is now a legal fiction.

[24] From the Latin *rex non potest peccare* (2 Rolle R. 304).

[25] *ibid.* 70. 1 Bract. 5; 12 Co.Rep. 65.

[26] D.L. Keir and F.H. Lawson, *Cases in Constitutional Law* (6th ed. by F.H. Lawson and D.J. Bentley, Oxford, 1979), p.72.

[27] See Sedley, n.3 above.

[28] [1978] A.C. 359 and Lord Woolf in *M*, n.1 above.

Diplock said that "the Crown" is now used in a "fictional sense" to refer to "the government", including "all of the ministers . . : and parliamentary secretaries under whose direction the administrative work of government is carried on".[29] If this is correct, could it be that the Crown's immunity from the criminal law is enjoyed by the government as well as by ministers and officials?[30] Sir William Wade describes the statements in *Town Investments* as being aberrations that appear "bizarre".[31] He says that in truth the Crown means simply the Queen.[32] On this basis, is it only the Queen that possesses immunity from criminal liability? If this is so, why is it assumed that Crown bodies possess immunity? It is to such issues that I now turn.

The immunity from criminal liability is a personal immunity of the monarch

At its core the immunity is a personal immunity of the monarch from criminal process[33] and consequently criminal liability.[34] It is one of several immunities and privileges[35] which owe their origin to the monarch's status in the feudal system. Dicey famously illustrated the immunity when describing the maxim that the King can do no wrong. This, he said[36]:

> . . . means, . . . that by no proceeding known to law can the Queen be made personally responsible for any act done by her; if (to give an absurd example) the Queen were herself to shoot the Premier through the head, no court in England could take cognizance of the act.

Dicey's graphic example illustrates the apparent absolute nature of the monarch's immunity: it appears to extend to the most audacious and serious criminal actions.[37] Whether the common law immunity would be sufficient to protect a monarch who committed such criminal acts, of course, is another matter entirely. Certainly our constitutional history shows that ways can be found to try, convict and execute a King for being a "tyrant, traitor and murderer". Nonetheless, leaving aside such exceptional events the common law does appear to confer an absolute immunity upon the monarch that makes

[29] *Town Investments Ltd*, n.28 above, at 381. In the same case Lord Simon said that "the Crown" includes all ministers and central government officials.

[30] In *M* Lord Woolf distinguished the *Town Investments* case, indicating that it would not be appropriate to apply the approach adopted in the decision to actions in tort ([1993] 3 All E.R. 537 at 558b-c). Likewise, it is unlikely that the decision offers much assistance in the context of criminal liability.

[31] Sir William Wade, "The Crown, Ministers and Officials: Legal Status and Liability" in Sunkin and Payne, n.23 above, p.25.

[32] *ibid* p.24, citing the Interpretation Act 1889, s.30.

[33] Glanville Williams, *Criminal Law: The General Part* (Stevens, London, 1961), para.257.

[34] The Crown Proceedings Act 1947, s.40(1) perpetuated the immunity in tort of the sovereign in his or her private capacity.

[35] Note also the inability to compel the monarch to give evidence, an issue recently highlighted by the collapse of the trial of Paul Burrell, Princess Diana's former butler, on which see D. Pannick, "Turning Queen's Evidence" [2003] P.L. 201.

[36] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., Macmillan, London, 1959), p.25.

[37] See below, discussion of head of state immunity in international law, and compare the immunity of former heads of state and diplomats whose immunity is not absolute, but functional: *ratione materiae*.

no distinction between crimes or the context in which they are committed.[38] Although not absolutely clear, it appears that the monarch's immunity extends to crimes under customary international law.[39] However, under treaty the immunity would not protect a monarch responsible for committing crimes within the jurisdiction of the International Criminal Court.[40]

While there is insufficient space for a detailed discussion of the issue, the "personal" nature of the monarch's immunity is worth commenting on. International lawyers will refer to this as an immunity *ratione personae*: it is a status immunity[41] enjoyed by the person who is the monarch, because they are the monarch. In this regard it is the domestic equivalent of the immunity conferred upon heads of state by international law.[42] However, the common law immunity with which we are concerned does not exactly mirror the international doctrine and the purpose of these immunities, though similar, is not identical. The common law immunity of the monarch protects the institution of the monarchy, but in our system it no longer protects the integrity of the state. The common law draws no clear division between the private and public aspects of the monarch, but the immunity is a personal immunity both in the sense that it is an immunity of the person who is monarch while they are monarch[43] and in the sense that it is an immunity that is "personal" to the monarchy as an institution. In principle, it cannot be assumed[44] by a representative, or an agent, of the monarchy solely on the basis that they

[38] *e.g.* it draws no distinction between a crime committed during the course of official duties and a crime committed at other times. *Cf.* the immunity that international law permits former heads of state, which is said to be limited *ratione materiae* to crimes committed during the course of official functions.

[39] There are dicta to suggest the immunity might not protect those guilty of the most serious international crimes. However, *cf.* the decision of the International Court of Justice in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* February 14, 2002; A. Cassesse, "When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v Belgium Case" (2002) 13 E.J.I.L. 853. *Cf. Al Adsani v Government of Kuwait* (1996) 107 I.L.R. 536 where the Court of Appeal recognised state immunity in civil proceedings involving a criminal matter; the issue in this case was taken to the European Court of Human Rights which held that the immunity did not constitute a violation of Art.6: *Al-Adsani v UK* (2002) 34 E.H.R.R. 11.

[40] Art.27 of the Rome Statute of the International Criminal Court provides that neither national nor international immunities shall act as a barrier to the court's jurisdiction over heads of state and others. There may, however, be practical problems in securing cooperation with respect to the waiver of immunities under Art.98 of the Rome Statute.

[41] *cf.* Lord Millet in *Ex p. Pinochet (No.3)*, n.2 above, at 171c.

[42] The immunity conferred by international law on heads of state probably owes its origins to common law principles relating to sovereign immunity: J.L. Mallory, "Resolving the Confusion over Head of State Immunity: the Defined Rights of Kings" (1986) 86 *Columbia Law Review* 169 at 170. See also Lord Browne-Wilkinson in *Ex p Pinochet (No.3)* [2000] 1 A.C. 147 at 201.

[43] It is unlikely that a former monarch would retain absolute immunity for crimes committed while monarch. Although unclear, the position of a former monarch might be analogous to the position of a former head of state in international law. In this context it may be noted that the majority of their Lordships in *Ex p. Pinochet (No.1)* and *(No.3)* appeared expressly or implicitly to agree with Lord Nicholls, when he said in *Ex p. Pinochet (No.1)* that: "international law has made plain that certain types of conduct, including torture and hostage taking, are not acceptable conduct on the part of anyone. This applies as much to heads of State, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law": [2000] 1 A.C. 61 at 109. See also N.S. Rodley, "Breaking the Cycle of Impunity for Gross Violations of Human Rights: The Pinochet Case in Perspective" (2000) 69 *Nordic Journal of International Law* 11–26; A. Cassesse, n.39 above.

[44] Whether the immunity can be conferred upon a representative or agent is another matter.

perform services for the monarch.[45] By contrast, the international law immunity of heads of state is personal in the first sense, but not in the second. It is an immunity of the person who is head of state as "the personal embodiment of the State itself".[46] The result is that it is an immunity of the state, but not of any individual or single institution within the state. This is reflected in the principle that the immunity can only be waived by the state.[47]

The personal immunity of the monarch does not extend to the monarch's servants or agents

Over 350 years ago Hale wrote:

> [T]he king . . . is not subject to the coercive power of the law in respect of the sacredness and sublimity of his person, the instruments and ministers that are the immediate actors of such unlawful things are subject to the coercive power of the law. For the king's act in such case being void doth not justify or defend the instruments. This is one of the principal reasons of the maxim in law that the king can do no wrong.[48]

Lord Woolf made essentially the same point in *M v Home Office* when he said that: "the fact that the sovereign can do no wrong does not mean that a servant of the Crown can do no wrong".[49] There is an abundance of authority for this.[50] Indeed, Sir William Wade says that "the immunity of the Crown was only tolerable because it did not extend to ministers and Crown Officers, who were liable personally in law for anything unlawful that they did; and it made no difference that they were acting in an official capacity".[51]

While neither Lord Woolf nor Sir William Wade refer specifically to criminal acts[52] there is no doubt that if prosecuted[53] and found guilty servants of the Crown will incur *personal* criminal liability for their crimes, even when committed during the course of their official actions. At common law this would apply to any minister or servant of the Crown, including members of the security services and soldiers.[54] The reason is that servants of the Crown do not possess the monarch's personal immunity from criminal liability, even

[45] *cf. BMA v Greater Glasgow Health Board* [1989] A.C. 1211; *Pfizer Corp v Ministry of Health* [1965] A.C. 512.

[46] Lord Millett, *Ex p. Pinochet (No.3)*, at 269.

[47] The immunity at the heart of the *Pinochet* decisions was Chile's, not Pinochet's.

[48] *Hale's Prerogatives of the King* (Seldon Society, London, 1976), p.15. See also Earl Jowitt, *Dictionary of English Law* (Sweet and Maxwell, London, 1959) 1558, where the maxim that the King can do no wrong is said to mean that "it is not to be presumed that the king will do or sanction anything contrary to the law, to which he is subject". Nonetheless, "if an evil act is done, it, though emanating from the king personally, will be imputed to his ministers, for whose acts the king is in no way responsible".

[49] *M*, n.1 above, at 551.

[50] In addition to Hale, n.48 above, see also Anson, *Law and Custom of the Constitution* (Clarendon Press, Oxford, 1907) Vol.11, p.46.

[51] *ibid.* pp.25–26.

[52] Hale, n.48 above, does, however, refer to the law's coercive power.

[53] On whether members of the security services should be prosecuted for crimes, see Sir John Donaldson M.R. in *Att-Gen v Guardian Newspapers (No.2)* [1990] 1 A.C.109 at 190.

[54] *e.g. R. v Clegg* [1995] 1 A.C. 482.

when serving the Crown. The law treats them in precisely the same way as it treats anyone else. As Anson expressed it:

> Our constitution has never recognised any distinction between those citizens who are and those citizens who are not officers of the State in respect of the law which governs their conduct or the jurisdiction which deals with them.[55]

Here again we can see that the personal nature of the immunity attaches to the institution of the monarch, but not to services performed for the monarch.[56]

Personal liability but "official" immunity?

It has been said that traditionally it is by asserting the *personal* liability of officials that the status of the Crown is reconciled with the rule of law.[57] Unfortunately it cannot be stated with confidence that this reconciliation is yet complete in the context of criminal liability. This is because the imposition of personal liability is not always sufficient to reflect any official and/or institutional responsibility that may exist when crimes are committed while the Crown is being served. Punishing the "instrument" (to borrow from Hale) is clearly not the same as finding the modern equivalent of the monarch culpable. This point demands further consideration.

Halsbury's Laws tells us, without citing authority, that Crown servants (including ministers and civil servants) "*it seems*" are not liable for crimes committed in their representative (*official*) capacity.[58] While the meaning of this statement is not absolutely certain, as we have just seen, it cannot be that Crown servants are personally immune from crimes committed while they are in the service of the Crown. Rather its meaning appears to be that servants of the Crown seem to be immune from crimes committed in their *capacity as* servants of the Crown. In other words David Blunkett might be personally liable for any crime committed whilst serving the Crown, but as Secretary of State he would be immune. If this is correct there is personal liability, but "official" immunity.

This position is consistent with conventional thinking, at least in terms of the monarch's immunity. As Hale indicated, the King remained immune while the "instruments" by which he acted could be prosecuted. How this personal immunity of the monarch could be assumed to confer an official immunity upon the Crown in its more general and fictional sense, in other words upon ministers as ministers and upon government departments and Crown bodies, is, of course, one of the great tricks of our constitutional history. The willingness of the judges to accept the fiction of the Crown as government clearly played

[55] *Law and Custom of the Constitution*, n.50 above.

[56] *cf. BMA v Greater Glasgow Health Board* and *Pfizer Corp v Ministry of Health*, n.45 above.

[57] M. Loughlin, "The State, the Crown and the Law" in Sunkin and Payne (n.23 above), p.72 citing H.W.R. Wade and C.F. Forsyth, *Administrative Law* (now 8th ed., Oxford University Press, 2000), pp.803–804.

[58] Lord Lester of Herne Hill and D. Oliver, eds, *Halsbury's Laws of England* (4th ed., reissue, Butterworths, London, 1998) Vol.8(2), para.388 (Constitutional Law and Human Rights).

a part, as did criminal law's orthodox emphasis on the wrongdoing of individuals. Other factors may also have combined to create the present apparent "official" immunity of Crown servants and bodies from criminal liability.[59] While not concerned with criminal liability as such, the Court of Appeal's decision in *M*[60] illustrates this approach when, following Lord Diplock in *Town Investments*, it held that proceedings for contempt could lie against the Home Secretary personally, but not against the Crown or the Home Office.

A rather different approach was taken by the House of Lords. Having explained that jurisdiction exists to grant injunctions against ministers of the Crown, Lord Woolf said that if these remedies are not complied with the court may make a finding of contempt "not against the Crown directly, but against a government department or a minister of the Crown in his official capacity"[61] and where the contempt relates to the officer's own default, there may also be a finding of contempt against the minister personally. Where the finding was against the office, "the object is not so much to punish an individual as to vindicate the rule of law"; it would "demonstrate that the government department has interfered with the administration of justice. It will then be up to Parliament to determine what should be the consequence of that finding." This pragmatic response meets the traditional inability to execute court orders against the Crown and recognises that in the present state of the law it is ultimately for Parliament to resolve conflicts between the judicial and executive branches. It also shows that methods can be found to recognise the official liability of ministers and government departments for wrongdoing and that obstacles, such as the absence of personality and the inability of the courts to exercise a coercive jurisdiction against the Crown, are not insurmountable barriers to this being achieved.

While differences exist between a finding of contempt and the application of criminal law more generally, this decision suggests that Crown immunity *per se*[62] should no longer prevent courts from finding that a crime has been committed by government departments, Crown bodies, ministers or others while acting in their official capacity, as well as in their personal capacity. As in the case of contempt, whether such a finding would lead to punishment could be left to Parliament.

A finding of official guilt, however, is patently not the same as conviction in the criminal court, at least in symbolic terms. And many will argue that this pragmatic approach is not an effective substitute for a proper regime for imposing criminal liability upon the institutions of government in relation to

[59] See further Loughlin, n.57 above.

[60] [1992] Q.B. 270, CA.

[61] Lord Woolf said that the difference between the Crown and its servants "is of no practical significance in judicial review proceedings": [1994] 1 A.C. 377 at 407. Loughlin has pointed out that this fictional concept of the Crown is not an adequate alternative to a developed legal concept of the state, n.57 above.

[62] There may be other reasons why the courts may be unwilling to make such a finding, relating, for example, to the substantive nature of the crimes involved and in particular problems of establishing *mens rea* and causation.

their official actions.[63] Indeed, in relation to certain crimes this is already necessary.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984,[64] for instance, in Art.1(1) provides that the pain or suffering occasioned by torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an *official capacity*".[65] Sir Nigel Rodley explains that this language is aimed at catching not only the (usually relatively lowly) policemen or soldier who typically inflicts the torture, but also those who require or allow him to do it by virtue of their superior authority, hierarchical or political. He adds that, "both justice and prudence require their, often greater, responsibility to be acknowledged and their potential involvement to be deterred and condemned".[66]

Here the imposition of official liability is aimed at situations where the crime of torture is carried out under official directions or with official acquiescence. The essential aim is to impose liability on those within the state who are responsible and not just upon the individuals who carry out the acts. While torture is an extreme example, it is likely that other situations exist where the conviction of individuals fails to recognise that crimes are linked to decisions taken at more senior levels or to systemic failings within central government.

Nonetheless, important as it is, the example of torture does not raise the most difficult issues associated with official liability. This is because the crime of torture fits within the orthodox model of criminal liability in the sense that it is committed by individuals acting under or with the express or implicit support of other more senior officials. Official liability is imposed because identifiable officials have encouraged the torture.

A similar situation could apply to Crown bodies using orthodox principles of corporate crime. For instance, it is arguable that incorporated Crown bodies[67] are currently liable under criminal law principles in circumstances where private corporations would be guilty; namely where a person who can be "identified" with, or is the embodiment of, the body has committed an offence. Here the offence will be vicariously attributed to the Crown body.[68] The body is guilty because the individual officer is personally guilty, but a finding of guilt could be taken to signify "official" as well as personal guilt.

[63] As seen above a finding of guilt could lead to a fine being paid from one department to another, and this might be an effective and worthwhile sanction. However, it is likely that findings of guilt would be more important.

[64] The Convention was implemented in the UK by Criminal Justice Act 1988, s.134(1).

[65] Emphasis added. Art.2(3) goes on to say: "An order from a superior officer authority or a public authority may not be invoked as a justification of torture". This latter provision echoes the common law prohibition on relying on superior orders as a defence.

[66] Rodley, n.43 above, at 20.

[67] It is possible that government department might also be responsible on this basis, but their general lack of legal personality could be a problem, despite *M v Home Office*.

[68] *Tesco Supermarkets Ltd v Nattrass* [1972] A.C. 153; J. Gobert, "Corporate Killings at Home and

Even if this is correct, this form of liability would almost certainly suffer the sort of problems that have become evident in the context of corporate crimes, including the difficulty of identifying an appropriate guilty individual and problems of causation.[69] Moreover, this approach is only available where the official wrongdoing can be fitted into the existing anthropomorphic model of criminal law, in other words where individuals are culpable. But as is clear in the private sector, actions that deserve to be called crimes are not always the responsibility of individuals and can be caused by a combination of errors within an organisation for which no identifiable individuals are responsible. Even if Crown bodies are liable to the criminal law applying principles of corporate liability, this liability would only arise where culpability can be located in the acts of individuals. At present it is unlikely that the criminal law is sufficiently developed to impose liability upon Crown bodies for actions of an institutional or systemic nature where no single individual or individuals could be liable.

The current proposals relating to corporate killing, however, do provide one model that could be a basis for a broader system of official criminal liability.[70] Under these a corporation (or more accurately an undertaking) will be guilty of the offence of corporate killing if its management failure was one of the causes of the death. The term "management failure" refers to the way the institution's affairs are managed, that is to say, the way it organises its affairs, and not just to the failings of its managers or the fault of its employees.[71] Here, then, liability is to be based on institutional failings rather than individual culpability. The government has accepted that Crown bodies should be held accountable where death occurs as a result of "a management failure", but has decided that such bodies are to be immune from prosecution.[72] The exclusion of the Crown from the offence of corporate killing has been subject to severe criticism, in particular, by the Centre for Corporate Accountability.[73] It is nonetheless not insignificant that the government has accepted that deaths can result from management failures within government departments and Crown bodies and that where this occurs the bodies should be accountable. This may well provide the seed from which a future regime for imposing official government criminal liability may develop.

Conclusion

This short survey indicates the following. The practical importance of Crown immunity is most often felt in relation to regulatory offences. However, in this

[69] *ibid.* for Gobert's discussion of the prosecution that followed the Southall train crash.

[70] Proposals for a crime of corporate killing were first made by the Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com. 237, 1996). The government proposals were contained in *Reforming the Law on Involuntary Manslaughter: the Government's Proposals* (Home Office, 2000). See Gobert, n.68 above. On May 20, 2003 the Home Secretary announced that a draft Bill on corporate manslaughter would be published and a timetable for legislation announced in the autumn of 2003.

[71] See Gobert, n.68 above, at 78–80.

[72] As in the Food Safety Act 1990, a declaration of non-compliance with appropriate standards may be issued against government department and Crown bodies.

[73] See n.10 above.

context the immunity is essentially a matter of policy and is not dictated by any fundamental constitutional principle. Nonetheless the principles of equality, transparency and accountability, coupled with the desirability of providing effective redress contribute to the case in favour of removing these immunities. This seems to be largely accepted by the government.

That this is so appears clear from the answer given by Lord Falconer of Thoroton to the following question asked by Lord Kennet: "What is the present status of Crown immunity; what bodies and agencies may still claim it; whether it is to be abolished; and, if so, when?"[74] Lord Falconer's answer was that:

> Crown immunity is being removed as legislative opportunities arise. In recent years, Crown immunity has been removed from the NHS and from food safety and environmental legislation, so Crown bodies are subject to similar regulatory requirements to others and to statutory enforcement arrangements. In the Competition Act 1998, Crown bodies were made subject to the prohibition of anti-competitive agreements and the abuse of market power. Crown bodies must comply with the requirements of health and safety legislation, although they are excluded from the provisions for statutory enforcement, including prosecutions and penalties. Continuing immunities should not be used to shelter inadequate standards in areas where the Crown is not at present bound by existing requirements. Crown bodies are expected to comply as though these requirements applied to them.

Important as regulatory offences are, the true constitutional importance of the immunity is felt in relation to common law or "true" crimes and in two contexts. First, in relation to the monarch's personal immunity and second in relation to the "official" immunity that government departments and Crown bodies are assumed to possess.

The monarch's personal immunity is said to protect the person who is King or Queen and the integrity of the monarchy as an institution. Unlike the immunity conferred by international law on heads of state it is not the immunity of the state. In practice the monarch's personal immunity is an archaic throwback that could be limited or removed without damage being caused either to the monarch's or the monarchy's standing. The monarch's personal immunity does not protect ministers and other Crown servants from incurring personal criminal liability for acts committed during the course of their official activities.

The most difficult and most sensitive issue concerns the imposition of criminal liability on offices of the Crown, government departments and Crown bodies *as such*, in other words the imposition of liability for *official* rather than *personal* actions. *M* indicates that the courts may have jurisdiction to make findings of official liability, leaving Parliament to take whatever steps it considers necessary in response. Whether the imposition of actual criminal liability is or could be possible is more complex, raising as it does issues of

substantive criminal law as well as Crown immunity. This is an area in which the courts may well be able to develop the law. However, more comprehensive reform would probably require legislation.

The main options appear to be as follows. The situation could be left as it is with Parliament removing immunities as particular situations require. This, as we have seen is government's preferred option. It enables judgments to be made in particular contexts and thereby minimises the risk of uncertain consequences. It is also cost effective and efficient in terms of parliamentary time. On the other hand, the approach leads to inconsistency and arbitrary distinctions. It also places the onus on those seeking to remove immunity, when the onus ought in principle be on those arguing for special protection. Most importantly, this approach is unlikely to touch the general issue of the Crown's immunity from "true" crimes.

The most radical approach would be to abolish Crown immunity altogether, both in relation to regulatory offences and in relation to common law crimes. Where a case could be made for its retention, for example in relation to key functions of the state, this could be reflected by the conferment of special immunities in defined circumstances. This approach would recognise the exceptional nature of the immunity and would place immunities on a legislative footing. There is much to commend this approach in principle. However, careful thought would need to be given to the consequences of a reform that would have general effect on central government. In particular, the liability regime that would apply once the immunity is removed would need careful consideration. I have touched on some of the problems earlier, but this is a matter that would probably need to be deliberated upon by a body such as the Law Commission.

A speedier and less radical option would be to reduce the immunity to statutory form. This would regularise its constitutional basis.[75] It could also provide an opportunity to create a presumption against immunity that would apply in relation to future statutory offences. Were such a presumption created, in future immunities could only be conferred expressly. This approach would recognise the need to justify immunities and would be in accordance with the general approach in human rights law.

The government has established an inter-departmental working group to consider the general issue of Crown immunity and we must wait to see whether its deliberations lead to any change. One suspects that this may be one of the issues where there is less enthusiasm in some quarters of Whitehall[76] for significant reform than even amongst ministers.

[75] For an example of a suggested codification of Crown immunity, see Institute for Public Policy Research, *The Constitution of the United Kingdom*, (IPPR, London, 1991) which in Ch.4 (Head of State), Art.34.3 provides that: "The Head of State [the Queen and her heirs] is personally entitled to . . . immunity from criminal proceedings in respect of all things done or omitted to be done by the Head of State either in an official or in a private capacity".

[76] *cf.* the internal debates leading to the enactment of the Crown Proceedings Act 1947; see J. Jacob, "The debates Behind the Act: Crown Proceedings Reform, 1922–1947" [1992] P.L. 452–484.

Lords Hansard Written Answers text for 4 Nov 1999

Crown Immunity

Lord Kennet asked Her Majesty's Government:

> What is the present status of Crown immunity; what bodies and agencies may still claim it; whether it is to be abolished; and, if so, when.[HL4439]

Lord Falconer of Thoroton: Crown immunity is being removed as legislative opportunities arise. In recent years, Crown immunity has been removed from the NHS and from food safety and environmental legislation, so Crown bodies are subject to similar regulatory requirements to others and to statutory enforcement arrangements. In the Competition Act 1998, Crown bodies were made subject to the prohibition of anti-competitive agreements and the abuse of market power. Crown bodies must comply with the requirements of health and safety legislation, although they are excluded from the provisions for statutory enforcement, including prosecutions and penalties. Continuing immunities should not be used to shelter inadequate standards in areas where the Crown is not at present bound by existing requirements. Crown bodies are expected to comply as though these requirements applied to them.

Crown Immunity

Huw Irranca-Davies: To ask the Parliamentary Under Secretary of State, Department for Constitutional Affairs, if he will make a statement on the impact of *(a)* the Freedom of Information Act 2000 and *(b)* human rights legislation on disclosure of information from hearings under which access is restricted owing to Crown Property immunity from prosecution. [133075]

Mr. Leslie: Consideration is being given to the issue of the State's immunity from criminal proceedings. Both the Government's consultation paper on the reform of the law on involuntary manslaughter, in May 2000. and 'Revitalising Health and Safety' in June 2000, contained proposals for removing or modifying that immunity.

In the light of the responses to those publications, an inter-departmental working group was established. My noble Friend. the Under Secretary of State, Lord Filkin. will write to the hon. Member when further infomation is available.

附錄 VIII

有權可以向法院提出申請
就官方違反有關法例條文的作為或不作為
宣布該項作為或不作為屬不合法的人士

	英國法例條文	有權提出申請的人士
1.	《2000 年鄉郊及道路通行權法令》－第 43 條	未有指明
2.	《2000 年運輸法令》－第 106 條	法庭認爲具利益的人
3.	《2000 年運輸法令》－第 196 條	收費當局
4.	《1999 年大倫敦主管機構法令》－附表 23 第 36 段	收費當局
5.	《1999 年大倫敦主管機構法令》－附表 24 第 37 段	發牌當局
6.	《1998 年核爆(禁制及檢查)法令》－第 14 條	法庭認爲具利益的人
7.	《1998 年地雷法令》－第 28 條	法庭認爲具利益的人
8.	《1996 年化學武器法令》－第 37 條	法庭認爲具利益的人
9.	《1995 年環境法令》－第 115 條	環境局
10.	《1993 年放射性物質法令》－第 42 條	獲授權可執行法令條文的機構
11.	《1990 年食物安全法令》－第 54 條	執法當局
12.	《1990 年環境保護法令》－第 159 條	獲授權可執行法令條文的任何公共或當地機構
13.	《2000 年防止及管制污染(英格蘭及威爾斯)規例》－第 5 條	監管當局
14.	《1993 年跨國界轉運放射性廢料規例》－第 4 條	總督察

(a) 有關向政府或公職人員施加刑事法律責任的事宜，政府的立場載於報告書第 12(a)段。此外，一如報告書第 13 段所述，我們認爲現行的報告機制一直行之有效，也就是說，違反法例條文的行爲會被發現並予以有效處理。因此，並無需要對現行制度作出根本的改變。然而，我們會根據司法及法律事務委員會的意見，建議有關決策局，在有需要時如何進一步改善現行的報告機制。

(b) 採用英國對某事項宣布不合法的做法，我們認爲目前還不是時候。據我們所知，至今還沒有任何案件涉及這方面的宣布，即法庭曾作出宣布或有人向法庭申請作出宣布。我們不相信英國這種宣布不合法的法定制度，會比香港的報告機制更爲有效。

(c) 至於新西蘭《2002 年官方機構(刑事責任)法令》(《官方機構法令》)中較爲有限度性的做法，我們不贊同現時是採用這種做法的時候。正如報告書第 31 段中指出，《官方機構法令》是針對特定背境於 2002 年 10 月制定，其應用範圍是狹窄和有局限性的，只涵蓋《1991 年建築物法令》及《1992 年職業健康和安全法令》中與安全有關的罪行。包括英國在內的大部分普通法司法管轄區都沒有採用這個做法。截至 2004 年 6 月初爲止，根據《官方機構法令》條文提出檢控的案件只有兩宗。因此，既然從這條法令的運作所得的經驗有限，香港不宜採用這個做法。

附件C

司法及法律事務委員會於2004年6月28日的會議摘錄

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IV. 研究有關向政府或公職人員施加刑事法律責任的問題工作小組報告
(立法會CB(2)2917/03-04(01)號文件)

34. 主席扼要重述，事務委員會在上個立法會會期成立了工作小組，研究有關就政府或公職人員在執行公職責任時違反對政府具約束力的法例條文而向政府或公職人員施加刑事法律責任的問題。她表示工作小組已完成工作，並擬備報告供事務委員會研究(立法會CB(2)2917/03-04(01)號文件)。

35. 主席向委員簡介工作小組的報告，當中詳述其商議事項，重點包括 ——

(a) 香港現時為處理政府部門違例事件而採用的報告機制；

(b) 英國所採用的做法，法院可宣布官方構成違反法例條文的任何作為或不作為屬不合法：

(c) 新西蘭採用的做法，即制定法例，令當局可就某些指定罪行,向官方機構(包括政府部門)提出檢控；

(d) 在向政府及公職人員施加刑事法律責任的問題上，政府的立場；及

(e) 工作小組的建議。

36. 副法律政策專員回應主席時，對政府的立場有如下解釋 ——

(a) 香港法律中並無先例能夠清楚而明確地訂明政府或政府部門可受刑事檢控。為執行法例規定而進行檢控有違政府的一貫做法，並會引發程序和成效方面的複雜問題，例如政府部門是否具有法人身份，亦涉及一個政府部門能否檢控另一政府部門的法律政策問題；

(b) 政府當局曾研究的英國及其他普通法司法管轄區，均沒有廢除官方本身的刑事法律責任豁免權。在若干法例中，更有明文訂定此項轄免權；

(c) 政府當局認為香港現行的報告機制行之有效。在報告機制下，政府部門若違反法例條文，有關情況會向政務司司長或相關的政策局局長呈報，以確保該違規事項得以有效處理。因此，現行制度並無需要作出根本改變。然而，當局會不斷檢討和改善此報告機制；及

(d) 政府當局並不認為目前是採用英國或新西蘭做法的適當時機，亦未察覺英國有任何涉及向法庭申請宣布官方做法不合法的案件。另一方面，新西蘭的做法適用範圍狹窄，限制甚多，而且只涵蓋與安全有關的罪行。直至目前，在新西蘭根據有關法例提出檢控的案件只有兩宗。

37. 就英國方面的情況，副法律政策專員告知委員，英國政府成立了一個跨部門工作小組，以研究國家的刑事訴訟程序豁免權。他表示，政府當局會跟進事件，並在適當時候向事務委員會匯報有關進度。

委員提出的事項

38. 有關工作小組報告第12及13段，余若薇議員表示，她並不同意政府當局所持觀點，即政府繳交罰款的金錢取自公帑，向政府罰款並無意義。她又質疑香港的報告機制能否有效阻止公職人員違反法律的行為。余議員認為，此事項應從能否確保公職人員維持崇高操守此觀點著眼研究。依她之見，如有公職人員違反法例條文或干犯規範性質的罪行，該名人員可為該項不法行為負上個人責任，並應接受適當的懲罰及紀律處分，包括罰款或減薪。

39. 何俊仁議員贊同余若薇議員的觀點。他對新西蘭所採取的做法表示支持。

40. 主席指出，根據政府當局的資料，因涉及違反環保法例而根據現行報告機制向政務司司長報告的個案共有156宗，但當局並未對有關的公職人員採取任何紀律行動。

41. 高級助理法律政策專員回應何俊仁議員時表示，要決定一個法定團體是否政府的代理人，須視乎相關法例條文所載的條款；若根據相關法例，有關的法定團體正執行政府代理人的職能，該團體便享有與政府相同的刑事法律責任豁免權。

42. 主席表示，工作小組認為，就香港而言，是否向政府或公職人員施加刑事法律責任，應屬於在個別情況下所作出的政策事宜，與憲法無關。她指出，英國現時的正式立場，是在立法機會出現時逐步廢除官方豁免權。對於規範性質的罪行，應否廢除官方豁免權的問題，實質上屬政策事宜，而與基本憲法原則無關。在新西蘭，某些具體法例制定後，當局可因官方機構違反與健康和安全有關的法定條文而向其提出檢控。她表示，工作小組同意，英國和新西蘭的最新發展，值得在日後進一步研究。

43. 戴啟思先生回應主席表示，他同意工作小組的觀點，即應將官方豁免權問題視為法律政策檢討。他表示，不論英國憲法或香港特別行政區《基本法》，均未有通過法例確立官方豁免權。在英國，經過多年的法例訂立和法庭裁決，此項豁免權的地位已大不如前。他又指出，香港政府部門所承擔的很多規管職能，在英國均由當地的有關當局承擔，而這些機關均無法律責任豁免權。他認為，對有關機關施加刑事法律責任，可加強公眾及該等機關所提供服務的使用者的信心。他贊同政府當局應從政策的角度處理此事，再按個別情況決定豁免法律責任是否合理。

44. 戴啟思先生又表示，事務委員會日後跟進有關事項時，大律師公會可就這課題提交更詳細的意見書。

45. 馮廣智先生認為，當局宜就政府的刑事法律責任問題制訂清晰明確的政策，此政策可作為行政部門及公職人員在執行公職時的有用指引。

46. 事務委員會通過工作小組在報告第35段提出的建議，即政府當局應考慮 ——

(a) 就規範性質的罪行而言，當局應在立法機會出現時，按個別情況，並作為政策問題，廢除官方豁免權；及

(b) 英國及新西蘭在廢除官方豁免權方面所發展的替代做法。

經辦人／部門	日後路向
事務委員會	47. 事務委員會同意在新立法會會期與政府當局跟進這事項。

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經辦人／部門

附件D

司法及法律事務委員會於2004年11月9日的會議摘錄

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III. 事務委員會的工作計劃

(a) 待議事項

(立法會CB(2)165/04-05(01)號文件——待議事項一覽表

立法會CB(2)165/04-05(02)號文件——於2004至05年度會期事務委員會會議上討論各事項的擬議時間表)

有關向政府施加刑事法律責任的問題
(待議事項一覽表第9項)

7. 主席告知委員，於2004年11月3日與政府當局舉行的會議上，法律政策專員表示，他認為此事項關乎政府的整體政策，並非律政司單方面所能決定。法律政策專員建議邀請政府當局更多相關部門參與處理工作小組的建議。

8. 委員討論日後路向時，同意將此事轉交政務司司長辦公室跟進。委員亦同意要求行政署長告知事務委員會，政府當局在考慮有關事項後，對工作小組的建議有何立場，並提議政府當局與事務委員會討論此事的時間。

(*會後補註*：秘書已於2004年11月12日致函行政署長，以跟進此事。)

秘書 9. 劉慧卿議員表示，應在定出討論時間後，再向委員發出工作小組報告書。

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