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Panel on Administration of Justice and Legal Services

Background brief prepared by the Legislative Council Secretariat for meeting on 28 November 2005

Issues relating to the imposition of criminal liabilities on the Government

Purpose

This paper provides background information on the past discussions of Members of the Legislative Council (LegCo) on issues relating to the imposition of criminal liabilities on the Government.

Background

2. The Land (Miscellaneous Provisions) (Amendment) Bill 2002 was introduced into LegCo on 24 April 2002 and a Bills Committee was formed to study the Bill. In the course of deliberating the Bill, some members of the Bills Committee expressed concern that the Bill proposed to exempt the Government or any public officers from criminal liability for contravention of legislative provisions binding on the Government while performing public duties. The Bills Committee considered that there was a need to study issues relating to the mechanism for dealing with contravention of statutory requirements by public officers to ensure that a fair system was maintained.

3. At the House Committee meeting on 4 October 2002, it was agreed that as the issues involved were part of the overall policy on the imposition of criminal liability in legislation, it would be more appropriate for the Panel on Administration of Justice and Legal Services (AJLS Panel) to follow up the issues. The AJLS Panel agreed at its meeting on 28 October 2002 to form a working group to undertake preparatory work to facilitate the Panel's consideration of the issues.

Past discussions

4. Before introduction of the Land (Miscellaneous Provisions) (Amendment) Bill 2002, the Panel on Planning, Lands and Works was consulted on the proposed charging and penalty system for street excavation works at four meetings held between December 2001 and March 2002. Some members expressed concern that

Government departments and officers were exempt from the penalties imposed on the private sector.

5. In addition, issues relating to criminal liability of the Government or public officers for contravention of legislative provisions were raised during discussions of a number of Bills Committees. Some members of these Bills Committees raised questions concerning application of the legislation concerned to the Government or public officers. They considered that the Government should be subject to the same statutory requirements like any other private sector body and should not be exempt from criminal proceedings. The Bills Committees are –

(a) Bills Committee on Water Pollution Control (Amendment) Bill 1992;

(b) Bills Committee on Marine Parks Bill;

(c) Bills Committee on Environmental Impact Assessment Bill; and

(d) Bills Committee on Noise Control (Amendment) Bill 2001.

6. Members are requested to refer to **Annex A** for details of the concerns raised by members of these committees and the Administration's response.

Deliberation of the Working Group

Crown immunity - common law presumption

7. 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. Such immunity is also referred to as Crown immunity.

8. Regarding application of ordinances to the Government of the Hong Kong Special Administrative Region (HKSAR), the common law presumption is provided for in section 66(1) of the Interpretation and General Clauses Ordinance (Cap. 1), which states that –

> "No Ordinance (whether enacted before, on or after 1 July 1997) shall in any manner whatsoever affect the right of or be binding on the State unless it is therein expressly provided or unless it appears by necessary implication that the State is bound thereby.".

"State" is defined in the Ordinance as including the Government of HKSAR. Section 2 of Schedule 8 to the Ordinance provides that any reference in any provision to the Crown (in contexts other than those specified in section 1) shall be construed as a reference to the Government of HKSAR.

9. In the course of its deliberation, the Working Group had discussed with the Department of Justice (DOJ) whether the common law presumption should be reversed in respect of all legislation or newly enacted legislation. DOJ did not believe that there was any justification for an across-the-board reversal of the presumption against criminal liability of the Government. On reversal of the presumption in relation to future legislation only, DOJ considered that such a reversal would give rise to practical consequences, such as the existence of a dual regime for the application of legislation to the Government for a long period of time.

Overseas practices

10. The Working Group had also examined the position of criminal liability of the Government and public officers in the following jurisdictions –

(a) common law jurisdictions - England and Wales, Australia, Canada, and New Zealand (NZ); and

(b) non-common law jurisdictions - France, Germany and Japan.

Reporting mechanism on contraventions committed by Government departments

11. The Working Group had noted that the general approach with regard to breach of statutory provisions by a public officer in the course of discharging duties in the service of the Government was to resort to the reporting mechanism which had been introduced since the 1980s. Under the reporting mechanism, if the contravention was continuing or was likely to recur, the Chief Secretary for Administration (CS) or the relevant policy secretary, as appropriate, should ensure that the best practicable steps were taken to stop the contravention or avoid the recurrence, as the case might be. In cases where a public officer had committed misconduct, the officer would be subject to disciplinary action.

12. The Working Group had also noted that between 1999 to March 2003, a total of 156 cases of contravention of environmental legislation were reported to CS. As at August 2003, no disciplinary actions had been taken against public officers for contraventions of environmental legislation in the course of carrying out their duties.

13. DOJ considered that the reporting mechanism was working satisfactorily and was a much more effective deterrent for public officers. Hence, there was no need for a radical change to the existing system.

Recommendations of the Working Group

14. The Working Group submitted its report to the AJLS Panel for consideration at the Panel meeting on 28 June 2004.

15. The Working Group had noted that the official position in the United Kingdom (UK) was that Crown immunity was being removed as legislative opportunities arose. The Working Group had also noted that in the context of regulatory offences, whether Crown immunity should be removed was essentially a matter of policy and not a matter of fundamental constitutional principle. A practical step taken by UK was the enactment in 14 Acts a statutory provision which expressly stated that the Crown shall not be criminally liable for the contravention of the Acts by the Crown, but provided that the High Court might declare unlawful any act or omission of the Crown which constituted such a contravention.

16. The Working Group had also noted the enactment in NZ of the Crown Organisations (Criminal Liability) Act 2002 (COCLA), which enabled the prosecution of Crown organisations including a government department for specified offences, and the court's rulings on two prosecutions brought under COCLA in 2003. In both cases, the defendants, which were "Crown organization" or "Crown Tertiary Institution", had been ruled by the court that they committed an offence under the Health and Safety in Employment Act 1992 and were fined.

17. With respect to the continuing operation of Crown immunity in Hong Kong, the Working Group had recommended that the Administration be requested to consider –

(a) in respect of regulatory offences, that Crown immunity should be removed as a matter of policy on a case-by-case basis and when legislative opportunities arise; and

(b) the development of alternative approaches taken in UK and NZ in removing Crown immunity.

18. Members are requested to refer to the report of the Working Group in **Annex B**.

The Administration's position on imposition of criminal liability on the Government and public officers

19. In response to the recommendations of the Working Group, the Administration had advised that –

(a) there was no precedent in the Hong Kong legislation which clearly and unequivocally rendered the Government or government departments liable to criminal proceedings. To enforce statutory requirements through the machinery of prosecution in the courts would be a departure from the usual practice, and would raise complex questions of procedure and efficacy e.g. the question of whether a government department had legal personality. It also involved the legal policy as to whether one government department could prosecute another government department. In addition, if the Government was criminally liable for contravention of

statutory provisions, only a fine could be applied as the Government cannot be jailed. Imposing fine on the Government was meaningless as the money to pay for the fine would be from the public coffers;

(b) the existing reporting mechanism had been working satisfactorily so far, i.e., contraventions of statutory provisions were discovered and dealt with effectively. Accordingly, there was no need for a radical change to the existing system. However, the Administration would advise the relevant bureau as regards how, if necessary, the existing reporting mechanism could further be improved in the light of the comment of the AJLS Panel;

(c) the Administration did not believe that this was the time to adopt the UK approach relating to the declaration of unlawfulness. It was not aware of any court case which involved such a declaration, i.e., a declaration was made or an application for a declaration was made. The Administration was not convinced that the UK statutory regime of declaration of unlawfulness was more effective than the reporting mechanism in Hong Kong; and

(d) the Administration did not agree that this was the time to adopt NZ's more restricted approach embodied in COCLA. COCLA was enacted in October 2002 against a special background and its application was narrow and restrictive, covering only safety-related offences contained in the Building Act 1991 and the Health and Safety in Employment Act 1992. Most common law jurisdictions, including UK, had not adopted such an approach. As at early June 2004, only two prosecutions had been brought under the COCLA. Accordingly, it did not appear appropriate for Hong Kong to adopt such an approach given the limited experience of its operation.

Discussions of the AJLS Panel on the report of the Working Group

Meeting on 28 June 2004

20. The report of the Working Group was discussed by the Panel at its meeting on 28 June 2004. A member indicated her disagreement with the Administration's view that it was meaningless to impose a fine on the Government as the money to pay for the fine would be from the public coffer. She also doubted that the reporting mechanism in Hong Kong was an effective deterrent for public officers against violation of the law. This member considered that the issue should be seen from the standpoint of ensuring the maintenance of a high standard of public conduct. If a public officer contravened the provisions of the law and committed regulatory offences, the officer might be personally liable for the unlawful act, and should face appropriate punishment and disciplinary actions, which might include payment of a fine or a pay reduction.

21. Another member pointed out that while a total of 156 cases of contravention of environmental legislation were reported to CS under the existing reporting mechanism, no disciplinary actions had been taken against the public officers concerned.

22. The Hong Kong Bar Association shared the view of the Working Group that the issue of Crown immunity should be reviewed in the context of legal policy. The Bar Association considered that Crown immunity was not entrenched constitutionally, either in UK or in the Basic Law of the HKSAR. Imposing criminal liability on the authorities concerned would enhance the confidence of the public and users of the services provided by the authorities. The Bar Association supported that the Administration should take a policy view on the matter, and decide whether exemptions from liability were justified on a case by case basis.

23. The Law Society of Hong Kong considered that a clearly stated policy regarding the issue of criminal liability of the Government was desirable and would serve as useful guidance for the executive departments and public officers in discharging their public duties.

24. In response to the recommendations of the Working Group, the Administration basically reiterated its position in paragraph 19 above.

25. The Panel endorsed the report of the Working Group and agreed that the matter should be followed up in the 2004-05 session.

Meeting on 9 November 2004

26. The Panel considered the way forward at its meeting on 9 November 2004. Members noted that DOJ had been involved in the previous deliberations with the Working Group. However, as the subject matter involved general Government policy issues, members agreed that the matter should be referred to CS's Office for follow up.

27. The relevant extracts from the minutes of the AJLS Panel meetings on 28 June and 9 November 2004 are in **Annexes C and D** respectively.

Latest position

28. After considering the matter, CS has decided to refer the issues raised to the Secretary for Constitutional Affairs for follow up. The Constitutional Affairs Bureau has studied the issues with the relevant bureaux and departments, and will brief the Panel on its position at the Panel meeting on 28 November 2005.

Council Business Division 2
Legislative Council Secretariat
23 November 2005

Annex A

Discussions by committees of the Legislative Council before November 2002 on issues relating to criminal liability of the Government or public officers for contravention of legislative provisions

Water Pollution Control (Amendment) Bill 1992 (introduced into the Legislative Council (LegCo) on 9 December 1992)

In the course of its deliberations, the Bills Committee raised questions concerning application of the Water Pollution Control Ordinance (WPCO) to the Government.

2. The Legal Adviser to LegCo explained that, subject to certain exceptions, the Ordinance bound the Crown. By virtue of section 47 of the Ordinance, the Crown or any persons carrying out duties in the service of the Crown were not subject to criminal liability for making discharges or deposits of waste or polluting material. However, civil action could be taken against the Crown or the persons concerned. Section 47 also provided that the Chief Secretary for Administration (CS) should take appropriate actions and remedial measures to deal with the contravention. As regards individual civil servants involving in the discharges or deposits, the Legal Adviser said that the Crown would have to take the ultimate responsibility for the acts of the civil servants if such acts had been carried out in the course of their public duties. In this connection, no criminal penalty could be imposed on the civil servants concerned.

3. The Bills Committee considered that the issue of criminal liability of civil servants committing offences relating to discharges or deposits under WPCO was outside the ambit of the Bill but deserved further study by the relevant Panels.

Marine Parks Bill (introduced into LegCo on 23 November 1994)

4. The Bill originally contained no provisions on the application of the Marine Parks Ordinance (MPO) to the Government. Issues regarding the binding effect of MPO on the Government and Crown immunity were raised by the Bills Committee. The Bills Committee also noted that during the Governor's Question Time on 19 January 1995, the Chairman of the Bills Committee raised questions concerning the Government invoking Crown immunity from the Country Parks Ordinance to proceed with the project of the South East New Territories Landfill which caused substantial damage to the environment. In response to the questions, the then Governor explained, inter alia, that the Government was bound by all environmental legislation, such as the Air Pollution Control Ordinance. The Country Parks Ordinance, which was enacted back in 1976, was not intended to bind the Crown. However, the Government accepted that there was a need to

update and improve the Ordinance and that the issue of Crown immunity should be reviewed.

5. After further discussions with the Bills Committee, the Administration agreed to move Committee Stage amendments to the effect that MPO should bind the Government.

6. The amendments proposed by the Administration (section 28 of MPO) were accepted by the Bills Committee. Members did not raise queries as to the grounds for exempting the Government and any public officer in the course of performing public duties from criminal liability for breach of the relevant provisions of MPO.

Environmental Impact Assessment Bill (introduced into LegCo on 31 January 1996)

7. In deliberating on the Bill, members of the Bills Committee were concerned that criminal sanctions did not apply to civil servants and criminal proceedings might not be taken against them for committing offences under the Environmental Impact Assessment Ordinance (EIAO) in the course of carrying out their official duties, although the Bill provided that CS should take necessary actions to remedy the breach.

8. In response to the concerns expressed by the Bills Committee, the Administration explained that constitutionally criminal liability would not be imposed upon a person doing anything in the course of carrying out his official duties. The Administration also advised that the United Kingdom and Australia had similar immunity provisions in their EIA legislation. Moreover, the Administration considered that the mechanism under which the Director of Environmental Protection would report breaches of EIAO by public officers to CS was satisfactory. To address the Bills Committee's concern, the Administration had made an undertaking to the Bills Committee that CS would explain to the public should Government fail to comply with the provisions of EIAO.

Noise Control (Amendment) Bill 2001 (introduced into LegCo on 27 June 2001)

9. Regarding liability of the Government or public officers for contravention of the Noise Control Ordinance (NCO), the Bills Committee noted that section 38(2) of NCO barred criminal proceedings against the Government or any public officers while acting in the course of duty. The Bills Committee was concerned that the immunity provision in section 38(2) created unfairness since NCO bound both the public and private sectors. It considered that the Administration should review the provision. Some members of the Bills Committee opined that it should be made specific that public officers in breach of NCO would be subject to disciplinary action.

10. Some deputations which made submissions on the Bill also queried the propriety of the immunity provision. The Hong Kong Construction Association (HKCA) expressed the view that when government departments were acting as a service provider bound by legislation, they should be subject to the same statutory requirements like any other private sector body and should not be exempt from criminal proceedings. HKCA also considered it unfair that government departments operating as Trading Funds also enjoyed immunity from prosecutions provided under section 38(2) even though they were competing with the private sector for business.

11. The Administration explained that government departments had to comply with the statutory requirements of NCO as did the non-government sectors. The Bill provided for a mechanism under which the Noise Control Authority would report contravention of NCO by public officers to CS. The Administration further advised the Bills Committee that there had not been any case where government departments or public officers were found to be in breach of NCO.

12. In response to the Bills Committee's call for greater transparency in the operation of the Government, the Administration undertook to notify the relevant Panels where government departments had committed breaches which required the Authority to make a report to CS.

13. The Bills Committee took the view that the issue of exemption of the Government or public officers from criminal liability was not within the ambit of the Bill and therefore should not delay the passage of the Bill. As the issue involved wide policy implications and deserved further study separately, the Bills Committee decided that the Panel on Environmental Affairs should be requested to follow up the issue. There is not record, however, that the Panel has discussed the issue.

Panel on Planning, Lands and Works (PLW Panel)

14. The PLW Panel discussed the proposed charging and penalty system for street excavation works at four meetings held between December 2001 and March 2002 before introduction of the Land (Miscellaneous Provisions) (Amendment) Bill 2002.

15. Some Panel members expressed the view that to ensure fairness and equality before the law, government departments and officers contravening the excavation permit conditions should not be exempt from the same penalties as those imposed on permittees in the private sector. A member had pointed out that government drivers would be liable to prosecution for speeding and dangerous driving even though the offence was committed in the course of performing official duties. Some members questioned whether the reporting system for breach of statutory

provisions by government departments and public officers would be a sufficient deterrent. Another member, however, considered that whether there should be criminal sanctions should depend on the nature and seriousness of the offence, and not on whether the person committing the offence was a public officer.

16. Some concern groups and stakeholders invited by the PLW Panel to give views on the proposed system concurred that exempting government departments and public officers from the penalties imposed on the private sector was unfair and discriminatory. They also pointed out that a major proportion of road excavation works had been undertaken by government departments; hence government departments should be subject to the sanctions in the same way as any other permittees in the private sector.

Responses of the Administration

17. The Administration made the following responses to the concerns raised by Members about exemption of the Government and public officers from criminal liabilities for contravening legislative provisions binding on the Government -

(a) while the Government was bound by all environment-related Ordinances, it had been a consistent approach to have express provisions exempting the Government and public officers from criminal liabilities for contravention of certain provisions of the Ordinances in the course of carrying out public duties;

(b) the immunity provisions were in line with existing legislation under which no criminal proceedings could be instituted against the Government;

(c) criminal liability would not be imposed upon a person doing anything in the course of carrying out his duties as a public officer because he was representing public interest at the time. Nevertheless, the Government would be liable in tort for any act of public officers; and

(d) the system prescribed in the relevant Ordinances under which the Authority concerned would report breaches of statutory provisions by public officers in the course of carrying out public duties to CS, who should then take the best practicable steps to stop the contravention or avoid recurrence had proven to be effective in preventing offences committed by public officers.

Advice of legal adviser

18. Concerning the issue of criminal liability of the Government, the legal

adviser to the Bills Committee on Noise Control (Amendment) Bill 2001 drew members' attention to the following principles in the course of discussion -

(a) under the common law, the Crown or the Government was the defender of justice and therefore in principle would not commit any crime. Under this principle, no offence was provided for against the Crown or Government; and

(b) generally, in its content and application, the law must give identical treatment to all who were in the same position. However, in some decided cases, the Court would allow a departure from the principle of identical treatment if it could be shown that :

(i) sensible and fair-minded people would recognise a genuine need for some difference in treatment;

(ii) the difference embodied in the particular departure selected to meet that need was itself rational; and

(iii) the particular departure was proportionate to that need.

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Annex B

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Panel on Administration of Justice and Legal Services

Report of Working group to study issues relating to imposition of criminal liability on the Government or public officers

PURPOSE

This paper summarises the deliberation of the Working Group to study issues relating to the imposition of criminal liability on the Government or public officers in the course of discharging their public duties for contravening any legislative provisions binding on the Government. The paper also sets out the recommendation of the Working Group to be made to the Panel on Administration of Justice and Legal Services (AJLS Panel) and the response of the Department of Justice (DoJ) to the recommendation.

BACKGROUND

2. In the course of deliberating the Land (Miscellaneous Provisions) (Amendment) Bill 2002, which was introduced into the Legislative Council on 24 April 2002, some members of the Bills Committee expressed concern that the Bill proposed to exempt the Government or any public officers from criminal liability for contravention of legislative provisions binding on the Government while performing public duties. The Bills Committee considered that there was a need to study issues relating to the mechanism for dealing with contravention of statutory requirements by public officers to ensure that a fair system was maintained. However, as the study would raise questions of wider policy concerns relating to the criminal justice system as a whole, the Bills Committee recommended that it might be appropriate for the House Committee to set up a subcommittee to study the issues.

3. At the House Committee meeting on 4 October 2002, it was agreed that as the issues involved were part of the overall policy on the imposition of criminal liability in legislation, it would be more appropriate for the AJLS Panel to follow up the issues.

THE WORKING GROUP

4. The AJLS Panel agreed at its meeting on 28 October 2002 to form a working group to undertake preparatory work to facilitate the Panel's consideration of the issues. The terms of reference of the Working Group is as follows -

> "To study issues relating to the imposition of criminal liability on the Government or public officers in the course of discharging their public duties for contravening any legislative provisions binding on the Government, and to report to the Panel with recommendations where appropriate."

5. Under the chairmanship of Hon Margaret NG, the Working Group has held four meetings, three of which were held with the Administration. The membership list of the Working Group is in **Appendix I**. A list of the relevant papers considered by the Working Group is in **Appendix II**.

DELIBERATION OF THE WORKING GROUP

Crown immunity - common law presumption

6. 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. Such immunity is also referred to as Crown immunity.

7. Regarding application of ordinances to the Government of the Hong Kong Special Administrative Region (HKSAR), the common law presumption is provided for in section 66(1) of the Interpretation and General Clauses Ordinance (Cap. 1), which states that -

> "No Ordinance (whether enacted before, on or after 1 July 1997) shall in any manner whatsoever affect the right of or be binding on the State unless it is therein expressly provided or unless it appears by necessary implication that the State is bound thereby.".

"State" is defined in the Ordinance as including the Government of HKSAR. Section 2 of Schedule 8 to the Ordinance provides that any reference in any provision to the Crown (in contexts other than those specified in section 1) shall be construed as a reference to the Government of HKSAR.

8. At present, there are 21 ordinances which expressly state that they bind the Government. There are 12 ordinances which contain express provisions not to impose criminal liability on the Government and public officers.

9. In the course of its deliberation, the Working Group has discussed with DoJ whether the common law presumption should be reversed in respect of all legislation or newly enacted legislation. DoJ does not believe that there is any justification for an across-the-board reversal of the presumption against criminal liability of the Government. On reversal of the presumption in relation to future legislation only, DoJ considers that such a reversal will give rise to practical consequences, such as the existence of a dual regime for the application of legislation to the Government for a long period of time. The views of DoJ are detailed in **Appendix III**.

10. Members have also noted the view of DoJ that whether or not the Government should be criminally liable under a certain ordinance, and whether or not the presumption should be reversed, are two separate issues.

Overseas practices

11. The Working Group has requested DoJ to provide information on the position of criminal liability of the Government and public officers in the following jurisdictions -

(a) common law jurisdictions - England and Wales, Australia, Canada, and New Zealand; and

(b) non-common law jurisdictions - France, Germany and Japan.

The relevant information provided by DoJ is in **Appendix IV**.

The Administration's position on imposition of criminal liability on the Government and public officers

12. On the issue of criminal liability on the Government and public officers, the Working Group has noted the Administration's position, as reflected in its responses to the Bills Committee on the Land (Miscellaneous Provisions) (Amendment) Bill 2002, as follows -

(a) there is no precedent in the Hong Kong legislation which clearly and unequivocally renders the Government or government departments liable to criminal proceedings. To enforce statutory requirements through the machinery of prosecution in the courts would be a departure from the usual practice, and would raise complex questions of procedure and efficacy e.g. the question of whether a government department had legal personality. It also involves the legal policy as to whether one government department could prosecute another government department. In addition, if the Government is criminally liable for contravention of statutory provisions, only a fine could be applied as the Government cannot

be jailed. Imposing fine on the Government is meaningless as the money to pay for the fine would be from the public coffers;

(b) from the Administration's research on other common law jurisdictions (Australia, Canada and New Zealand), it is revealed that the courts have, in general, reservations over the idea of imposing criminal liability on the Government. The courts are reluctant to hold that a particular piece of legislation imposes such criminal liability in the absence of clear and unequivocal words to that effect;

(c) individual public officers are subject to criminal sanction in cases of dangerous driving, murder, corruption etc.; and

(d) the general approach with regard to breach of statutory provisions by a public officer in the course of discharging duties in the service of the Government is to resort to the reporting mechanism which has been introduced sine the 1980s. Under the reporting mechanism, if the contravention is continuing or is likely to recur, the Chief Secretary for Administration (CS) or the relevant policy secretary, as appropriate, should ensure that the best practicable steps are taken to stop the contravention or avoid the recurrence, as the case may be. In cases where a public officer has committed misconduct, the officer would be subject to disciplinary action.

Reporting mechanism on contraventions committed by Government departments

13. DoJ considers that the reporting mechanism referred to in paragraph 12(d) above is working satisfactorily and is a much more effective deterrent for public officers. Hence, there is no need for a radical change to the existing system.

14. Under the reporting mechanism, reports on contravention of statutory provisions committed by different departments which do not fall under one policy bureau should be made to CS. Otherwise, such reports should be made to the relevant policy secretary. In response to the request of the Working Group, the Environment Protection Department has provided information on contraventions of seven environmental ordinances by Government departments and the private sector since 1999 and the actions taken on these cases.

15. The Working Group has noted that between 1999 to March 2003, a total of 156 cases were reported to CS. As at August 2003, no disciplinary actions have been taken against public officers for contraventions of the seven environmental ordinances in the course of carrying out their duties. In the private sector, there were 1,681, 1,689, 1,041, 772 and 313 convictions in the years from 1999 to 2003 (up to August) respectively. Some persistent offenders had not only been fined

but also sentenced to imprisonment terms (ranging from seven days to four months though normally suspended for imprisonment). Since 1997, there were a total of nine convicted cases with imprisonment sentence.

Present position on Crown immunity and alternative approach adopted in the United Kingdom

Present position on Crown immunity in the United Kingdom

16. The Working Group has noted an article entitled "Crown Immunity from Criminal Liability in England Law" written by Mr Maurice Sunkin, Department of Law, University of Essex in 2003 (**Appendix V**). The article attempts to provide a brief overview of principles relating to Crown immunity from criminal liability from the perspective of English constitutional law in the hope that some of the mystique that surrounds this topic may be removed and the more problematic areas identified.

17. The article explains that the origins of the Crown 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". This is one of the few remaining bastions of the Crown's ancient privileges. The result is that the Crown immunity is now sitting uneasily with modern conceptions of domestic constitutional law and developing principles of international law concerning sovereign immunity for criminal acts. It can lead to inequalities and inconsistencies, and an impression that central government will protect its own when private bodies and other areas of the public sector are held liable to the criminal law. It might also permit a "lack of discipline" and encourage "sloppy practice". Recognition of these 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. 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.

18. The article also states that the monarch's immunity from criminal liability is a personal immunity both in the sense that it is an immunity of the person who is the monarch and that it is an immunity that is "personal" to the monarchy as an institution. In principle, it cannot be assumed by a representative or an agent of the monarchy solely on the basis that they perform services for the monarch.

19. In its conclusion, the article states that in the context of regulatory offences, whether Crown immunity should be removed is essentially a matter of policy and is not dictated by any fundamental constitutional principle. 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 United Kingdom Government.

20. The Working Group has also noted that -

(a) the official position of the United Kingdom Government is that Crown immunity is being removed as legislative opportunities arise, (reply given by Lord Falconer of Thoroton, the then Minister of State (Cabinet Office), to a Parliamentary Question on Crown immunity on 4 November 1999 in **Appendix VI** refers); and

(b) the United Kingdom Government has established an inter-departmental working group to consider the State's immunity from criminal proceedings (reply given by the Under Secretary of State, Department for Constitutional Affairs, to a Parliamentary Question on 20 November 2003 in **Appendix VII** refers).

Alternative approach adopted in the United Kingdom

21. At the request of the Working Group, DoJ has provided further information on the approach adopted in the United Kingdom referred to in the article (paragraph 17 above). The approach entails the enactment of a statutory provision that expressly states that the Crown shall not be criminally liable for the contravention of the relevant Act by the Crown, but provides that the High Court may declare unlawful any act or omission of the Crown which constitutes such a contravention.

22. Under such an approach, the failure of the Crown body to comply with certain standards will open it to proceedings for a declaration of non-compliance, rather than criminal prosecution. The essence of a declaratory judgment is that it states the rights or legal position of the parties as they stand, without changing them in any way, though it may be supplemented by other remedies in suitable cases. The merit of the declaration is that it is an efficient remedy against ultra vires action by governmental authorities of all kinds, including ministers and servants of the Crown, and in its latest development, the Crown itself. The approach is in practice effective because a declaration that the Crown has contravened a statutory requirement and thereby committed an unlawful act or omission would clearly be a political embarrassment to the Government. Any Government that is committed to the rule of law would feel obliged to take steps to rectify the situation.

23. A non-exhaustive list of the United Kingdom statutory provisions and the person who may apply for such a declaration under these provisions provided by DoJ is in **Appendix VIII**. According to the search conducted by DoJ as at the beginning of June 2004, there is no UK court case in which the court made such a declaration.

Alternative approach adopted in New Zealand

24. DoJ has also advised the Working Group that the Crown Organisations (Criminal Liability) Act 2002 (COCLA) was enacted in New Zealand in October 2002 to implement the recommendations of the report of the Royal Commission of Inquiry into the collapse of a viewing platform. COCLA enables, inter alia, the prosecution of Crown organisations (which includes a government department) for offences under the Building Act 1991 (BA) and the Health and Safety in Employment Act 1992 (HSEA). COCLA sets out various provisions in relation to such prosecution, e.g. provisions concerning the legal status of certain Crown organisations, the conduct of proceedings in a prosecution, the disapplication of Crown immunity, and the payment of compensation imposed by a court, etc. COCLA commenced operation on 17 October 2002.

25. Section 6 of the COCLA provides that a Crown organisation may be prosecuted for an offence against section 80 of the BA, and an offence against section 49 or section 50 of the HSEA.

26. In relation to the penalties which may be imposed for offences against section 80 of the BA or sections 49 or 50 of the HSEA, a Crown organisation will not be fined on conviction of an offence. However, such a Crown organisation may be liable to be ordered to make reparation to a victim or may be liable to a remedial order.

27. DoJ has further advised the Working Group that as informed by the New Zealand Ministry of Justice (NZMOJ) in early June 2004, there have been two prosecutions brought under COCLA. In the first case, the defendant is the University of Otago which, for the purpose of COCLA, is deemed to be a "Crown organisation". The court ruled on 24 November 2003 that the defendant, being an employer, committed an offence under HSEA for failing to take all practicable steps to ensure the safety of an employee who had a fractured thumb while using a commercial mixer in his place of work. The defendant was fined $4,500.

28. In the second case, the defendant is Te Wananga O Aotearoa Te Kuratini O Nga Waka (a Crown Tertiary Institution). The court ruled on 5 December 2003 that the defendant, being an employer, committed an offence under HSEA for failing to take all practicable steps to ensure the safety of an employee who suffered multiple injuries after falling off a ladder while building a waka. The defendant was fined $7,500 and ordered to make a reparation of $1,500 to the victim.

29. The fact that the defendant in each of the two cases was fined is contrary to DoJ's understanding that pursuant to section 8(4) of the COCLA, a Crown organisation will not be fined. In response to the enquiry of DoJ, NZMOJ has confirmed that a Crown Organisation cannot be fined. The New Zealand Department of Labour has advised that in the case involving Te Wananga O

Aotearoa, a request has been made to the Court for the matter to be recalled so that the Court's orders can be partially set aside (i.e., the reparation order will remain but the fine will not). The New Zealand Department of Labour anticipates that a similar approach will be taken in respect of the case in which the University of Otago is the defendant.

30. Given the enactment of COCLA which enables the prosecution of Crown organisations (which include a government department) for specified offences, the Working Group considers that adopting an approach similar to COCLA in Hong Kong should be explored by the Administration.

31. DoJ is of the view that most common law jurisdictions, including the United Kingdom, have not adopted an approach similar to COCLA. COCLA was enacted against a special background and its application was narrow and restrictive, covering only safety and health related offences contained in BA and HSEA. It may not be appropriate for Hong Kong to adopt the New Zealand's more restrictive approach, embodied in COCLA, given the limited experience of its operation.

32. DoJ considers that the possible need for improved enforcement procedures in respect of the Government and public officers should be considered on a case-by-case basis by the relevant policy bureau, with necessary legal advice from DoJ. Apart from criminal liability, other options to provide remedy in respect of contravention of statutory provisions by the Government are available, such as the approach in the United Kingdom (paragraphs 21-23 above).

RECOMMENDATION OF THE WORKING GROUP

33. The Working Group has noted that the official position in the United Kingdom is that Crown immunity is being removed as legislative opportunities arise. The Working Group has also noted that in the context of regulatory offences, whether Crown immunity should be removed is essentially a matter of policy and not a matter of fundamental constitutional principle. A practical step taken by the United Kingdom is the enactment in 14 Acts a statutory provision which expressly states that the Crown shall not be criminally liable for the contravention of the Acts by the Crown, but provides that the High Court may declare unlawful any act or omission of the Crown which constitutes such a contravention.

34. The Working Group has also noted the enactment in New Zealand of COCLA, which enables the prosecution of Crown organisations including a government department for specified offences, and the two recent court's rulings on COCLA.

35. With respect to the continuing operation of Crown immunity in Hong Kong, the Working Group recommends that the Administration be requested to consider -

(a) in respect of regulatory offences, that Crown immunity should be removed as a matter of policy on a case-by-case basis and when legislative opportunities arise; and

(b) the development of alternative approaches taken in the United Kingdom and New Zealand in removing Crown immunity.

36. The response of the Administration to the recommendation of the Working Group is in **Appendix IX.**

ADVICE SOUGHT

37. Members' views are sought on the recommendation of the Working Group.

Council Business Division 2
Legislative Council Secretariat
24 June 2004

Appendix I

Panel on Administration of Justice and Legal Services

Working Group to study issues relating to imposition of criminal liability on the Government or public officers

Membership List

Chairman	Hon Margaret NG
Members	Hon Martin LEE Chu-ming, SC, JP Hon James TO Kun-sun Hon Emily LAU Wai-hing, JP Hon TAM Yiu-chung, GBS, JP Hon Audrey EU Yuet-mee, SC, JP (Total : 6 Members)
Clerk	Mrs Percy MA
Legal Adviser	Mr Arthur CHEUNG
Date	28 October 2002

Appendix II

Panel on Administration of Justice and Legal Services

Working Group to study issues relating to imposition of criminal liability on the Government or public officers

Relevant Papers/Documents

(A) Overseas practices relating to exemption of criminal liability of the Government or public officers

Appendix IX of LC Paper No. CB(2)1414/02-03(02)	--	Paper on "Overview of the criminal liability of the Crown in England and Wales, Australia, Canada and New Zealand" prepared by Department of Justice in September 2002
Paragraph 6 - 7 and Annex B of LC Paper No. CB(2)2845/02-03(02)	--	Information on latest development of the position in New Zealand
Paragraph 6 of LC Paper No. CB(2)179/03-04(01)	--	Information on "Position of the criminal liability of the Government and public officers in Germany"
LC Papers Nos. CB(2)660/03-04(01) and CB(2)2782/03-04(02)	--	Paper on "Position in New Zealand - Crown Organisations (Criminal Liability) Act 2002" and two prosecution cases
LC Papers Nos. CB(2)660/03-04(02) and CB(2)2782/03-04(01)	--	Paper on "Position in Japan relating to the criminal liability of the Government and public officers"
LC Paper No. CB(2)751/03-04(01)	--	An extract of section 54 of the UK Food Safety Act 1990 and section 14 of the UK Nuclear Explosions (Prohibition and Inspections) Act 1998
LC Paper No. CB(2)751/03-04(02)	--	A table on "Person who may make an application to the court for a declaration declaring unlawful any act or omission of the Crown which constitutes a contravention of the relevant statutory provision"

LC Paper No. CB(2)1277/03-04(01)	--	Paper on "An overview of the approach adopted in the United Kingdom - the court may declare unlawful an act or omission of the Crown which contravenes a statutory provision"
LC Paper No. CB(2)1420/03-04(01)	--	An article written by Mr Maurice Sunkin on "Crown Immunity from Criminal Liability in English Law"
LC Paper No. CB(2)1551/03-04(01)	--	Paper on "Criminal liability of the government and public officers in respect of contraventions of legislative provisions in France"
LC Paper Nos. CB(2)2782/03-04(03) and (04)	--	Extracts from Hansard of the UK Parliament on various issues relating to Crown immunity

(B) Criminal liability on the Government and public officers

Annexes D and E of LC Paper No. CB(2)2845/02-03(02)	--	A list of the 21 Ordinances which expressly state that they bind the Government
Appendix A of LC Paper No. CB(2)179/03-04(01)	--	Paper on "Arguments for and against reversing the presumption against the Government being bound by statutes" prepared by Department of Justice

(C) Contraventions of environment-related legislation

Paragraph 11 and Annex C of LC Paper No. CB(2)2845/02-03(02)	--	Information on number of outstanding contraventions of environment-related legislation pending rectification
LC Paper No. CB(2)2931/02-03(01)	--	A table of 21 contraventions of the relevant provisions of the Water Pollution Control Ordinance by Government department which had been reported to the Chief Secretary for Administration (referred to in paragraph 11(c) of LC Paper No. CB(2)2845/02-03(02))

Appendix B of LC Paper No. CB(2)179/03-04(01)	--	Paper prepared by Environmental Protection Department on "Enforcement of Environmental Laws" (Confidential)
Paragraph 5 of LC Paper No. CB(2)179/03-04(01)	--	Information on "Disciplinary actions taken against public officers"

Council Business Division 2
Legislative Council Secretariat
24 June 2004

Appendix III

Reversal of common law presumption

On reversal of presumption in respect of all legislation, DoJ has referred members to the "Report Required by Section 28 of the Interpretation Act (2001)" published by the New Zealand Ministry of Justice in June 2001 which sets out both the arguments in favour of and against reversing the presumption. The New Zealand Ministry of Justice did not support the reversal of the common law presumption. DoJ considers that many of these arguments are equally applicable in the Hong Kong context.

2. DoJ shares the view of the New Zealand Ministry of Justice as set out in the Report -

> "Reversing the presumption in respect of all legislation (including existing legislation) would create fiscal and other risks to the Government unless a global assessment of all legislation is taken prior to the change being made. Without such a prior assessment being made, the Crown may well find itself bound by legislation for which there is good reason for it to be immune. Assessing the scope and extent of the risks is likely to be a difficult and resource intensive project."

3. DoJ does not believe that there is any justification for an across-the-board reversal of the presumption against criminal liability of the Government. The Government, as a holder of executive power and public authority on the one hand and other persons on the other, are in very different positions. It must be accepted that there are some circumstances in which the Government needs certain special powers and immunities in order to maintain good governance. A reversal of the current presumption might cause more problems than it solves. It is more preferable that the presumption reflected in section 66 of the Interpretation and General Clauses Ordinance (Cap. 1) be retained and that the binding effect of any proposed legislation be considered on a case by case basis.

4. DoJ has explained that in any event, a reversal of the current presumption would not have any direct bearing on the issue of the extent to which the Government is criminally liable under a particular ordinance. The reason is that relevant case law from other common law jurisdictions indicates that even if a statute is binding on the Government, the Government will not be criminally liable unless there is a clear indication that the legislature intended to create an offence of which the Government could be guilty. Accordingly, whether or not the Government should be criminally liable under a certain ordinance and whether or not the presumption should be reversed are two separate issues.

5. On the question of reversal of the presumption in relation to future legislation only, DoJ agrees that under such circumstances, there would be no need to perform the exercise of assessing all existing legislation. Accordingly, the risks and resource implications associated with such an exercise will not arise. However, such a reversal will give rise to the following practical consequences -

(a) there would be a dual regime for the application of legislation to the Government for a long period of time; and

(b) special attention would have to be given to amendment Ordinances.

6. DoJ has further pointed out that the application of different presumptions depending on the date of enactment of a particular ordinance could cause legal confusion and uncertainty. While it is expected that potential difficulties would diminish as the two systems under the dual regime would merge when existing ordinances were consolidated or replaced with measures incorporating the new "rule", there could be a long period of time in which the dual regime will continue to exist.

Appendix IV

Overseas practices

Common law jurisdictions

The Department of Justice (DoJ) has conducted a research into the position in several leading common law jurisdictions (England and Wales, Canada, Australia and New Zealand) on legislation relating to the exemption of criminal liabilities of the government or public officers carrying out their duties in the service of the government. The majority of the common law jurisdictions have either retained or codified the common law presumption -

(a) in England and Wales, the common law presumption continues;

(b) in Australia, the common law presumption has been reversed in South Australia and the Australian Capital Territory but it has been codified in Queensland and Tasmania. The common law presumption remains in other Australian jurisdictions;

(c) British Columbia and Prince Edward Island 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; and

(d) the common law presumption has been codified in New Zealand.

The above should be read subject to the updates provided by DoJ as set out in paragraphs 21 to 23 of this paper (in relation to England and Wales) and in paragraphs 24 to 32 of this paper (in relation to New Zealand).

2. DoJ has made the following observations and comments relating to immunity of the Crown and Crown servants -

(a) in most of the jurisdictions covered in the research, the Crown is not bound by a statute unless the statute expressly states that the Crown was 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;

(b) 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 has been reversed in some jurisdictions 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 reverses the common law presumption expressly provides that criminal liability is not imposed on the Crown by reason only of such a reversal;

(c) none of the sampled statutory provisions enacted in various jurisdictions imposes criminal liability on the Crown itself although 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 on behalf of the Crown amount to a very small percentage of the total number of provisions reviewed; and

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

Non-common law jurisdictions

3. At the request of the Working Group, DoJ has also obtained information from some non common law jurisdictions on their position.

Germany

4. The Germany's Department of Justice has provided the following information -

(a) legislation is binding on the government and public officers as the duty of abiding by law and justice is expressly stated in the Constitution;

(b) the German Criminal Law makes no provisions for the legal liability of bodies corporate, companies, associations, etc., i.e. only a natural person can commit a criminal offence. The German Government, like any commercial establishment, cannot incur criminal liability. It follows that law enforcement agencies themselves cannot be held responsible and that only their members and staff can be held responsible. Individual members of the parliament, civil servants and other members of the executive power, however, are invariably liable under the Basic Law and can commit a criminal offence; and

(c) criminal acts by civil servants can bring about disciplinary actions. What penalty will be handed down depends on the severity of the offence concerned and such penalty ranges from reprimands, abatement of salary to removal from the public service. Disciplinary actions will be taken in addition to any criminal prosecutions that may be brought.

Japan

5. The Japan's Ministry of Justice has provided the following information -

(a) legislation is in general binding on the Government and public officers;

(b) under no circumstances will the State be criminally liable for contravening a statutory provision (which is binding on the State);

(c) Japanese legislation has some offences in which specified illegal conducts of a public officer are criminalized. In other words, these offences can be committed only by public officers. If a public officer commits such an offence in the course of carrying out his official duties, he may be prosecuted in his personal or individual capacity, regardless of whether any disciplinary action will be or has been taken against him; and

(d) when a public officer carries out an illegal act, he may be subject to disciplinary proceedings regardless of his criminal liability. The State Redress Law provides that if a public officer intentionally or by negligence causes damage to another in carrying out his/her duties, the person who has suffered damage may claim compensation from the Government for such damage.

France

6. The information provided by DoJ in respect of the position on France is as follows -

(a) the President of the Republic shall not be held accountable for actions performed in the exercise of his office except in the case of high treason. He may be indicted only by the two assemblies ruling by an identical vote in open balloting and by an absolute majority of the members of the said assemblies. He shall be tried by the High Court of Justice;

(b) members of the Government shall be criminally liable for actions performed in the exercise of their office and deemed to be crimes or

misdemeanours at the time they were committed. They shall be tried by the Court of Justice of the Republic; and

(c) as a rule, civil servants are criminally liable for penal offences they commit. On top of that, there are some offences specific to civil servants, such as bribery, misappropriation of public funds, false entry, favouritism. In parallel, disciplinary sanctions can be imposed on public officials by their superiors. It can coincide with criminal sanctions, but its nature is different, as it is not considered to be a jurisdictional act.

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

* This article is an expanded version of a paper delivered at the inaugural meeting of the Constitutional Law Group of the British Institute of International and Comparative Law Constitutional Law Group, in London on March 11, 2003 (on which see A. Bradley [2003] P.L. 381). The author would like to thank Tom Cornford, Brigid Hadfield, Karen Hulme, Nigel Rodley and Bob Watt for their helpful comments.

[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 Pinochet 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] ... on 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.

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.

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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.

Appendix VIII

Person who may make an application to the court for a declaration declaring unlawful any act or omission of the Crown which constitutes a contravention of the relevant statutory provision

	UK Statutory Provisions	Who may make an application
1.	Countryside and Rights of Way Act 2000 – section 43	not specified
2.	Transport Act 2000 – section 106	a person appearing to the Court to have an interest
3.	Transport Act 2000 – section 196	a charging authority
4.	Greater London Authority Act 1999 – paragraph 36 of Schedule 23	a charging authority
5.	Greater London Authority Act 1999 – paragraph 37 of Schedule 24	a licensing authority
6.	Nuclear Explosions (Prohibition and Inspections) Act 1998 – section 14	a person appearing to the Court to have an interest
7.	Landmines Act 1998 – section 28	a person appearing to the Court to have an interest
8.	Chemical Weapons Act 1996 – section 37	a person appearing to the Court to have an interest
9.	Environment Act 1995 – section 115	the Environment Agency
10.	Radioactive Substances Act 1993 – section 42	any authority charged with enforcing the provision
11.	Food Safety Act 1990 – section 54	an enforcement authority
12.	Environmental Protection Act 1990 – section 159	any public or local authority charged with enforcing the provision
13.	Pollution Prevention and Control (England and Wales) Regulations 2000 – section 5	a regulator
14.	Transfrontier Shipment of Radioactive Waste Regulations 1993 – section 4	the chief inspector

(a) The Administration's position on the issue of the imposition of criminal liability on the Government and public officers is set out in paragraph 12(a) of the Report. In addition, as mentioned in paragraph 13 of the Report, we are of the view that the existing reporting mechanism has been working satisfactorily so far, i.e., contraventions of statutory provisions were discovered and dealt with effectively. Accordingly, there is no need for a radical change to the existing system. However, we would advise the relevant bureau as regards how, if necessary, the existing reporting mechanism could further be improved in the light of the comment of the AJLS Panel.

(b) We do not believe that this is the time to adopt the UK approach relating to the declaration of unlawfulness. We are not aware of any court case which involves such a declaration, i.e., a declaration was made or an application for a declaration was made. We are not convinced that the UK statutory regime of declaration of unlawfulness is more effective than our reporting mechanism.

(c) We do not agree that this is the time to adopt New Zealand's more restricted approach embodied in the the Crown Organizations (Criminal Liability) Act 2002 ("**COCLA**"). As pointed out in paragraph 31 of the Report, the COCLA was enacted in October 2002 against a special background and its application is narrow and restrictive, covering only safety-related offences contained in the Building Act 1991 and the Health and Safety in Employment Act 1992. Most common law jurisdictions, including the UK, have not adopted such an approach. As at early June 2004, only two prosecutions have been brought under the COCLA. Accordingly, it does not appear appropriate for Hong Kong to adopt such an approach given the limited experience of its operation.

Annex C

Extract from minutes of meeting on
Panel on Administration of Justice and Legal Services on 28 June 2004

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IV. Report of Working Group to study issues relating to imposition of criminal liability on the Government or public officers
(LC Paper No. CB(2)2917/03-04(01))

34. The Chairman recapitulated that in the last legislative session, the Panel had formed a working group to study issues relating to imposition of criminal liability on the Government or public officers in the course of discharging public duties for contravening any legislative provisions binding on the Government (the Working Group). She said that the Working Group had completed its work and prepared a report for the consideration of the Panel (LC Paper No. CB(2)2917/03-04(01)).

35. The Chairman briefed members on the report which detailed the deliberation of the Working Group, highlighting, in particular -

(a) the existing reporting mechanism adopted in Hong Kong to deal with contraventions committed by Government departments;

(b) the approach adopted in the United Kingdom (UK), i.e. the court might declare unlawful any act or omission of the Crown which constituted a contravention;

(c) the approach adopted in New Zealand (NZ), i.e. enactment of legislation which enabled the prosecution of Crown organizations (which included a government department) for specified offences;

(d) the position of the Administration on the issue of criminal liability of the Government and public officers; and

(e) the recommendation of the Working Group.

36. In response to the Chairman, Deputy Solicitor General (DSG) explained the position of the Administration as follows -

(a) there was no precedent in the Hong Kong legislation which clearly and unequivocally rendered the Government or government departments liable to criminal proceedings. To enforce statutory requirements through the machinery of prosecution would be a departure from the usual practice, and would raise complex

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questions of procedure and efficacy, e.g. the question of whether a government department had legal personality. It also involved the legal policy as to whether one government department could prosecute another government department;

(b) immunity of the Crown itself from criminal liability was not removed in UK and other common law jurisdictions which the Administration had studied. The immunity was expressly provided for in certain statutes;

(c) the Administration was of the view that the existing reporting mechanism in Hong Kong had been working satisfactorily. Under the reporting mechanism, contraventions of statutory provisions by Government departments were reported to the Chief Secretary for Administration, or the relevant policy secretary, as appropriate, to ensure that the breaches were dealt with effectively. Accordingly, there was no need for a radical change to the existing system. However, the reporting mechanism would be constantly reviewed and improved; and

(d) the Administration did not believe that this was the time to adopt the approach of UK or NZ. It was not aware of any court case in UK which involved an application for a declaration of unlawfulness. The NZ approach, on the other hand, was narrow and restrictive, covering only safety-related offences. So far, only two prosecutions had been brought under the relevant legislation in NZ.

37. On the situation in UK, DSG informed members that the UK Government had established an inter-departmental working group to consider the State's immunity from criminal proceedings. He said that the Administration would follow up the matter and inform the Panel of the progress in due course.

Issues raised by members

38. Referring to paragraphs 12 and 13 of the Working Group's report, Ms Audrey EU said that she disagreed with the Administration's view that it was meaningless to impose a fine on the Government as the money to pay for the fine would be from the public coffer. She also doubted that the reporting mechanism in Hong Kong was an effective deterrent for public officers against violation of the law. Ms EU considered that the issue should be seen from the standpoint of ensuring the maintenance of a high standard of public conduct. In her view, if a public officer contravened the provisions of the law and committed regulatory offences, the officer might be personally liable for the unlawful act, and should face appropriate punishment and disciplinary actions, which might include payment of a fine or a pay reduction.

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39. Mr Albert HO shared the views of Ms Audrey EU. He said that he was in support of the approach adopted in NZ.

40. The Chairman pointed out that according to the Administration, a total of 156 cases of contravention of environmental legislation were reported to the Chief Secretary for Administration under the existing reporting mechanism. However, no disciplinary actions had been taken against the public officers concerned.

41. In response to Mr Albert HO, Senior Assistant Solicitor General said that whether a certain statutory body was an agent of the Government depended on the terms of the relevant provisions of the legislation; and that if such a statutory body was performing the function of an agent of the Government under the relevant legislation, then it would have the same immunity against criminal liability as that enjoyed by the Government.

42. The Chairman said that the Working Group was of the view that in the context of Hong Kong, imposition of criminal liability on the Government or public officers should be a matter of policy in individual cases, instead of a constitutional issue. She pointed out that the official position in UK was that Crown immunity was being removed as legislative opportunities arose. As far as regulatory offences were concerned, whether Crown immunity should be removed was essentially a matter of policy and not a matter of fundamental constitutional principle. In NZ, specific legislation was enacted to enable prosecution of Crown organizations for contravention of statutory provisions relating to health and safety matters. She said that the Working Group agreed that the latest developments in UK and NZ deserved further study in the future.

43. In response to the Chairman, Mr Philip DYKES said that he shared the view of the Working Group that the issue of Crown immunity should be reviewed in the context of legal policy. He said that Crown immunity was not entrenched constitutionally, either in UK or in the Basic Law of the Hong Kong Special Administrative Region. In UK, the immunity had been eroded over the years by legislation and by decisions of the courts. He further pointed out that many regulatory functions undertaken by Government departments in Hong Kong were undertaken by local authorities in UK, to which no immunity against liability attached. In his view, imposing criminal liability on the authorities concerned would enhance the confidence of the public and users of the services provided by the authorities. He supported that the Administration should take a policy view on the matter, and decide whether exemptions from liability were justified on a case by case basis.

44. Mr DYKES further said that the Bar Association would be prepared to make more detailed submissions on the subject matter when the Panel followed up the relevant issues in future.

45. Mr Duncan FUNG opined that a clearly stated policy regarding the issue

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of criminal liability of the Government was desirable and would serve as useful guidance for the executive departments and public officers in discharging their public duties.

46. The Panel endorsed the recommendation of the Working Group set out in paragraph 35 of its report, namely, that the Administration should consider -

(a) in respect of regulatory offences, that Crown immunity should be removed as a matter of policy on a case-by-case basis and when legislative opportunities arose; and

(b) the development of alternative approaches taken in UK and NZ in removing Crown immunity.

Way forward

Panel

47. The Panel agreed that the issue should be followed up with the Administration in the new legislative session.

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Annex D

Extract from minutes of meeting on
Panel on Administration of Justice and Legal Services on 9 November 2004

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III. Work plan of the Panel

(a) Outstanding items for discussion
(LC Paper No. CB(2)165/04-05(01) – List of outstanding items for discussion

LC Paper No. CB(2)165/04-05(02) – Tentative schedule setting out the items to be discussed at the Panel meetings in the 2004-05 session)

Issues relating to the imposition of criminal liability on the Government
(Item 9 on the outstanding list)

7. The Chairman informed members that at the meeting with the Administration on 3 November 2004, the Solicitor General had expressed the view that the item involved general Government policy issues which were not for the Department of Justice alone to decide. The Solicitor General had suggested that there should be a broader representation of the Administration to deal with the Working Group's recommendation.

8. On discussing the way forward, members agreed that the matter should be referred to the Chief Secretary for Administration's Office for follow-up. Members also agreed to request the Director of Administration to advise the Panel of the position of the Administration on the recommendation of the Working Group after consideration of the relevant issues, and propose a timing for the Administration and the Panel to discuss the matter.

(*Post-meeting note* : The Clerk had followed up the matter by writing to the Director of Administration on 12 November 2004.)

Clerk

9. Ms Emily LAU said that the report of the Working Group should be re-circulated to members when the timing for discussion was fixed.

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