2010

LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

Standing Committee on Legal Affairs of the Sixth Legislative Assembly
Strict and Absolute Liability Offences

GOVERNMENT RESPONSE

Circulated by authority of the
Attorney General
Simon Corbell MLA

TABLE OF CONTENTS

1. Executive Summary

The Standing Committee on Legal Affairs has consistently expressed concerns about strict liability offences proposed in Bills and about the prevalence of strict liability offences on the ACT statute book.

Between October 2005 and February 2008 the Committee conducted an inquiry into the use of strict and absolute liability offences in the ACT.

The Committee's report re-states arguments it has made, and the Government has made, on many occasions. In essence, the Committee and the Government have assessed strict liability offences against fundamental criminal justice and human rights principles from a different point of view. The Government has no argument with the fundamentals.

The Government would like to advance the debate in two areas.

Firstly, in the twenty first century strict liability offences are a normal part of the legal framework of democratic states. Offences that shift a burden of defence upon defendants do not inherently offend human rights, as has been found by courts in Europe, the UK and Canada. Strict liability offences are a significant component of modern legal systems — they are not inherently wrong.

Strict liability offences are the foundation of the Territory's 27 infringement notice schemes and the Road Transport infringement notice scheme.

Secondly, the Government believes that the test that should be applied to answer the question of whether a strict liability offence is justifiable is the 'licensing approach' articulated in Canadian jurisprudence.

The licensing approach justifies strict liability offences on the basis that the offence applies to people who choose to engage in a regulated activity, or are on notice that they are engaging in a regulated activity. The Government believes this test is a good starting point to ascertain if a proposed offence can be considered suitable for strict liability.

The Government's answers to the Committee's Recommendations are fully set out in part 3.6 of this Response. This executive summary provides a short response to each Recommendation:

Recommendation 1

The Attorney-General undertake an 'audit' of the statute book to determine a) the prevalence of strict and absolute liability offences on the ACT statute book and b) the appropriateness of characterising offences as ones of strict or absolute liability.

Response

The Government does not agree to undertake an audit of the statue book to analyse strict liability offences.

Since 2004 over 65% of Territory offences have been harmonised with the commencement of the *Criminal Code 2002* in the context of the normal review and re-making of laws. The natural regeneration of the statute book is a better means of reviewing the appropriateness of offences rather than an audit undertaken out of a policy context. However, the Government will review the offences of particular Acts that are not planned to be reviewed over the next few years, such as road transport legislation.

Recommendation 2

The audit also identify offences in terms of the penalty provided for so that an analysis can be made of the prevalence of the seriousness of strict and absolute liability in ACT law.

Response

Consistent with the response to Recommendation one, the Government does not agree with this approach.

Recommendation 3

The Office of Parliamentary Counsel develop and implement guiding principles for the drafting of offence provisions in legislation.

Response

The Government agrees that a new guide for framing offences is necessary. The Government has drafted a guide, which is at Appendix C to this Response. The Government collaborated closely with Parliamentary Counsel to develop the guide. The Government and Parliamentary Counsel agreed that that it would be inappropriate for Parliamentary Counsel to be responsible for drafting a guide which would in effect determine Government policy on offence construction.

The Government believes the guide substantially meets the points raised in Scrutiny Committee Report 38, October 2003.

Recommendation 4

The Committee recommends that consideration be given to the likely impact of draft legislation on individuals prior to enactment, with provisions containing a knowledge or intent element if any potential impacts are unreasonably or unfairly detrimental to an individual.

Response

The Government agrees with this Recommendation. The Recommendation is consistent with the Government's current practice. The apex of this practice is human rights certification. The Government recognises that the Assembly, the Committee and the Government may hold different judgements as to what is unreasonable or unfair.

The Government agrees that more can be done to raise the quality of all explanatory statements justifying strict liability in Government Bills. The guide for framing offences will assist in this task.

In response to the overall critique of strict liability offences by the Committee's report, Government policy will be that new strict liability offences drafted by the Government cannot have a penalty of imprisonment without a defence of 'reasonable steps', 'due diligence' or other commensurate defence.

Recommendation 5

A similar provision to section 9.4(2)(c) of the *Criminal Code* (Cth), which provides a defence based on mistake or ignorance of subordinate legislation, be inserted into the ACT Criminal Code.

Response

The Commonwealth provision cited by the Committee is only a defence to a prosecution if a subordinate law relevant to an offence was not publically notified at the time of the prosecution.

The Government has ascertained that the protection contemplated by the Committee is already provided by the *Legislation Act 2001.* In the Territory, statutory laws, including subordinate laws, only have legal force if they are notified.

Recommendation 6

Offence provisions should be drafted to make it absolutely clear which party bears the burden of proof and what kind of burden of proof is required.

Response

The Government agrees with this Recommendation. It is now Government policy that all new Government Bills that contain offences with specific defences will explicitly identify any reverse burdens of proof upon the defendant and state the standard of the burden. The Government will also discuss section 59 of the *Criminal Code 2002* with the national Model Criminal Law Officers Committee with the aim of resolving the conflicting policy intentions of the that section.

The Government notes that the defence of mistake of fact applies to strict liability offences, and the burden upon the defence to meet this defence is evidentiary.

2. Background

The Standing Committee on Legal Affairs of the Sixth Legislative Assembly (2004–2008) (the Committee) performing the duties of a scrutiny of bills and subordinate legislation committee has voiced concerns over what it describes as an increasing prevalence of strict liability offences on the statute book of the Australian Capital Territory (ACT), and the effect that such offences could have on an accused person.

In October 2005, the Committee decided to conduct an inquiry into the use of strict and absolute liability offences in the ACT. The Committee determined that it would inquire into and report on the merit of making certain offences ones of absolute or strict liability; and the criteria used to characterise an offence, or an element of an offence, as appropriate for absolute or strict liability.

In February 2008, the Committee released a report into the use of strict and absolute liability offences in the ACT, titled Standing Committee on Legal Affairs Strict and Absolute Liability Offences Report No. 7 (the Report). In this Report, the Committee made six Recommendations for the Government to consider:

1. The Attorney-General undertake an 'audit' of the statute book to determine a) the prevalence of strict and absolute liability offences on the ACT statute book and b) the appropriateness of characterising offences as ones of strict or absolute liability.
2. The audit also identify offences in terms of the penalty provided for so that an analysis can be made of the prevalence of the seriousness of strict and absolute liability in ACT law.
3. The Office of Parliamentary Counsel develop and implement guiding principles for the drafting of offence provisions in legislation.
4. The Committee recommends that consideration be given to the likely impact of draft legislation on individuals prior to enactment, with provisions containing a knowledge or intent element if any potential impacts are unreasonably or unfairly detrimental to an individual.
5. A similar provision to section 9.4 (2) (c) of the Criminal Code (Cth), which provides a defence based on mistake or ignorance of subordinate legislation, be inserted into the ACT Criminal Code.
6. Offence provisions should be drafted to make it absolutely clear which party bears the burden of proof and what kind of burden of proof is required.[1]

In providing a response to the Committee's Report and Recommendations, the Government believes it is necessary for a broader examination of the reasons why jurisdictions, including the ACT, utilise strict liability offences. There needs to be an analysis of why, in the Committee's view, there is an increasing prevalence of strict liability offences.

[1] *Strict and Absolute Liability Offences*; Standing Committee on Legal Affairs; report 7; February 2008; page v.

As part of this discussion, the Government would like to point out that the committee has repeatedly based much of its argument on the Commonwealth Senate's perspective on strict liability offences. While this is natural given that the Commonwealth is also a Criminal Code jurisdiction like the ACT, it needs to be acknowledged that the Commonwealth is a different body politic to the ACT.

The Commonwealth exercises different functions to the ACT — namely commonwealth functions, whereas the ACT is a unique body politic that exercises the functions of both State and municipal governments. (This unique status is examined later in greater detail). On this basis alone, comparing the responsibilities of ACT Government in the ACT to that in the Commonwealth is not comparing like with like.

It is more appropriate to compare the ACT to the standards set by other States and Territories to prescribe strict liability offences. The Committee itself has acknowledged this disparity in the size and operations between the ACT and the Commonwealth in the Report at paragraph 2.46 where the Committee discussed the increase in subordinate legislation in recent years and drew the distinction between the amount produced by the Commonwealth, and the amount produced by the ACT:

> The Productivity Commission, in a report called Regulation and its Review 2003–04, noted that there were now 1700 regulations introduced in the Commonwealth jurisdiction during 2003–2004 and 1800 in 2002–2003. The ACT, a much smaller jurisdiction, has introduced almost 350 legislative instruments and disallowable instruments each year over the past few years.[2]

This Government Response and the proposed Guide for Framing Offences, aim to provide the Assembly with a clear framework of Government policy for the creation of strict liability offences.

3. Issues

3.1 What is the theory and purpose of strict liability?

An offence is called 'strict liability' or 'absolute liability' when there are no fault elements for all of the physical elements of an offence. The absence of fault elements means that it is enough to convict a person if it is proven beyond reasonable doubt that the defendant did the prohibited act irrespective of intention. An offence might also be interpreted as strict liability if critical elements of the offence have no fault elements.

In the ACT, there are two essential features of a strict liability offence. First, there is no requirement to prove a fault element, such as intention or recklessness. It is sufficient to show that the defendant did the prohibited act.

[2] *Strict and Absolute Liability Offences*; Standing Committee on Legal Affairs; report 7; February 2008; page 18.

For instance, it is a strict liability offence to exceed the speed limit whether or not the driver intended to drive faster than the speed limit.

The second distinguishing feature is that the defence of reasonable mistake of fact applies. So if the driver checks the speedometer to check they are not speeding but the dial is faulty, the person is not liable because the offence occurred due to a reasonable mistake of fact. Other defences can also apply, but the defence of mistake of fact inherently applies through section 36 of the *Criminal Code 2002* (the Code).

Strict liability offences are a modern statutory construct that are being used with increasing frequency. Indeed, criminal law is "increasingly characterised by a move from the still dominant image of common law general principles, the presumption of *mens rea* and the burden of proof on the prosecution, to the actuality of an increasing swathe of statutory offences created by legislatures, which found liability in strict terms either minimising fault elements or restricting them to defences of honest and reasonable mistake which must be made out at an evidentiary level by the defence".[3]

The reason for the growth in strict liability offences is a result of the increasingly complex nature of modern day society. This point has been eloquently put by Cory J in the Canadian case of *R v Wholesale Travel Inc* (*Wholsesale*):

> While some regulatory legislation such as that pertaining to the content of food and drink dates back to the Middle Ages, the number and significance of regulatory offences increased greatly with the onset of the Industrial Revolution. Unfettered industrialization had led to abuses. Regulations were therefore enacted to protect the vulnerable -- particularly the children, men and women who laboured long hours in dangerous and unhealthy surroundings. Without these regulations, many would have died. It later became necessary to regulate the manufactured products themselves and, still later, the discharge of effluent resulting from the manufacturing process. There is no doubt that regulatory offences were originally, and still are, designed to protect those who are unable to protect themselves.[4]

The increasing prevalence of regulatory legislation — some of which contain strict liability offences — is also determined by community expectations of what activities should be regulated. As the values of a community change over time, "the degree of moral blameworthiness attaching to certain conduct may change as well".[5] As the moral blameworthiness of an action increases, the community's desire for increased regulation of that activity will also increase.

---

[3] Brown, David; Farrier, David, Egger, Sandra; and McNamara, Luke; "*Brown, Farrier, Neal and Weisbrot's Criminal Laws: materials and commentary on criminal law and process in New South Wales*"; The Federation press; Sydney ; 2001; page 24.
[4] Cory J (judgement of L'Heureux Dube and Cory JJ); *R. v. Wholesale Travel Group Inc*. 1991 CarswellOnt 117 Supreme Court of Canada, 1991 [1991] 3 S.C.R. 154, paragraph 18.
[5] Cory J (judgement of L'Heureux Dube and Cory JJ); *R. v. Wholesale Travel Group Inc.* 1991 CarswellOnt 117 Supreme Court of Canada, 1991 [1991] 3 S.C.R. 154; paragraphs 24-27.

An example of this is the increasing regulation of fireworks in all Australian jurisdictions that has occurred over the past 30 years. The sale and detonation of fireworks has become increasingly more and more regulated, and the sale of fireworks to the general public has been increasingly more regulated. Indeed, prior to the June 2009 'cracker night' in the ACT, the Government introduced tighter regulatory legislation which reduced the selling period and times in which fireworks can be let off legally. The Government has since regulated to prohibit the importation, sale or use of fireworks in the Territory.

A further example of community expectations being expressed in legislation can be seen through the increasing regulation of domestic animals. Changing community views have led to regulating ownership of domestic animals in the ACT which includes:

1. the requirement for lifetime dog registration;
2. compulsory microchipping of dogs at point of sale;
3. improved regulation of dangerous and attacking dogs;
4. the requirement to de-sex cats before 3 months of age; and
5. licensing the keeping of multiple cats.[6]

A recent expression of changing community views on what should be regulated is the introduction of an infringement notice scheme under the *Magistrate's Court Act 1930* for offences relating to wasting water. The purpose of this infringement notice scheme is to effectively manage the ACT's water resources — both in terms of ensuring a sustainable source of potable drinking water, as well as ensuring ecological water flows to secure biodiversity in the ACT.

3.2 The Licensing Approach

The ACT as a jurisdiction inherited the laws of England, where common law jurisprudence is the main source of criminal law. This common law jurisprudence had at its foundation distinctions based on the criminality of an action and the sanction afforded to that action.

The English law as carried into Australia also distinguished classes of offences. The distinction between indictable and summary offences remains today. Currently, all of the ACT's strict liability offences are summary offences.

Indictable offences embody a right to be tried by jury. Summary offences are heard by a lower court without a jury. In the past, indictable offences were also characterised as treasons, felonies and misdemeanours.

More commonly the distinction was made between felonies and misdemeanours. Felonies historically held a punishment of death, or mutilation, and forfeiture of land and goods. If a person was not actually killed

[6] From: http://www.tams.act.gov.au/live/pets/domestic_animal_services

by the punishment, or the punishment was commuted, the person was still legally ‘dead’.

Misdemeanours only resulted in punishment of imprisonment or a fine. Those convicted of a misdemeanour retained their property and civil rights.[7]

Like a number of other Australian jurisdictions that have been codified, the ACT’s primary source of criminal law is legislation made by Parliament rather than common law jurisprudence. The old criminal distinctions of felony and misdemeanour were abolished by parliaments decades ago, but the concepts behind these distinctions still resonate in the legislation itself.

A further distinction that can be used to characterise differences between criminal offences can be seen through an examination of the concepts of *mala in se* and *mala prohibita*.

Mala in se crimes are regarded as “wrong independently of the law defining them as criminal”, while *mala prohibita* defines “conduct that is not wrongful independently of the legal regulation that prohibits it”.[8] On this basis, it can also be seen that conduct that constitutes *mala in se* attracts moral condemnation, while the latter does not inherently attract moral condemnation, or not to the same degree.

This distinction or difference has also been categorised in terms of distinguishing between ‘true crimes’ and ‘regulatory crimes’. As Cory J stated in *Wholesale*:

> The common law has long acknowledged a distinction between truly criminal conduct and conduct, otherwise lawful, which is prohibited in the public interest. Earlier, the designations *mala in se* and *mala prohibita* were utilized; today, prohibited acts are generally classified as either crimes or regulatory offences.[9]

These distinctions provide a useful starting point to analyse how society views particular actions and to what degree a law or regulation is required. Although these distinctions are no longer prescribed legal distinctions it is still the case that the concepts behind these distinctions still resonate in the statute book of Anglo-jurisprudence.

Although they are both technically crimes, there remains a different moral acceptance or value that society places upon a person who commits murder, compared to someone who has parked their car longer than the legal period of time. The second example clearly falls within the distinction of *mala prohibita* or ‘regulatory’ offences classification. However, that does not lessen the importance of that offence to the organisation of society.

---

[7] G W Keeton, *The Elementary Principles of Jurisprudence*, *2nd Ed*, Pitman & Sons, 1949, pp. 313–314.

[8] Richard Glover, *Regulatory Offences and Reverse Burdens: The ‘Licensing Approach’*; The Journal of Criminal Law; Volume 71, Part 3, June 2007; page 266.

[9] Cory J (judgement of L’Heureux Dube and Cory JJ); R. *v. Wholesale Travel Group Inc*. 1991 CarswellOnt 117 Supreme Court of Canada, 1991 [1991] 3 S.C.R. 154, at paragraph 17.

There is social acceptance for offences that fall within the *mala prohibita* category as a means to maintain a quality of life for the community as a whole. This acceptance informs the licensing concept for offences are used in a regulatory sense. An explanation of the licensing approach or concept can be found in the majority judgment in *Wholesale*, as articulated by Cory J:

> It has always been thought that there is a rational basis for distinguishing between crimes and regulatory offences. Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.
>
> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.
>
> It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.
>
> It should also be remembered that, as social values change, the degree of moral blameworthiness attaching to certain conduct may change as well.[10]

The licensing approach justifies strict liability offences on the basis that the offence applies to people who choose to engage in regulated activity, or are on notice that they are engaging in a regulated activity. In *Wholesale,* the decision of Cory J considers the justification for modern societies — in this case Canada — adopting the licensing approach to strict liability offences:

---

[10] Cory J (judgement of L'Heureux Dube and Cory JJ); *R. v. Wholesale Travel Group Inc*. 1991 CarswellOnt 117 Supreme Court of Canada, 1991 [1991] 3 S.C.R. 154; paragraphs 24-27.

Those who argue against differential treatment for regulatory offences assert that there is no valid reason to distinguish between the criminal and regulatory accused. Each, it is said, is entitled in law to the same procedural and substantive protections. This view assumes equality of position between criminal and regulatory defendants; that is to say, it assumes that each starts out from a position of equal knowledge, volition and "innocence." The argument against differential treatment further suggests that differentiating between the regulatory and criminal defendants implies the subordination and sacrifice of the regulatory accused to the interests of the community at large. Such a position, it is argued, contravenes our basic concern for individual dignity and our fundamental belief in the importance of the individual. It is these assumptions which the licensing justification challenges.

Criminal law is rooted in the concepts of individual autonomy and free will, and the corollary that each individual is responsible for his or her conduct. It assumes that all persons are free actors, at liberty to choose how to regulate their own actions in relation to others. The criminal law fixes the outer limits of acceptable conduct, constraining individual freedom to a limited degree in order to preserve the freedom of others. Thus, the basis of criminal responsibility is that the accused person has made a deliberate and conscious choice to engage in activity prohibited by the Criminal Code. The accused person who is convicted of an offence will be held responsible for his or her actions, with the result that the opprobrium of society will attach to those acts and any punishment imposed will be considered to be deserved.

The licensing concept rests on the view that those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of that responsibility. Therefore, it is said, those who engage in regulated activity should, as part of the burden of responsible conduct attending participation in the regulated field, be deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere. Foremost among these implied terms is an undertaking that the conduct of the regulated actor will comply with and maintain a certain minimum standard of care.[11]

The nature of the regulated conduct will itself go far to determining whether the licensing argument applies. It is useful to distinguish between conduct which, by virtue of its inherent danger or the risk it engenders for others, would generally alert a reasonable person to the probability that the conduct would be regulated, from that conduct which is so mundane and apparently harmless that no thought would ordinarily be given to its potentially regulated nature. In the latter circumstances, the licensing argument would not apply.[12]

[11] Cory J (judgement of L'Heureux Dube and Cory JJ); *R. v. Wholesale Travel Group Inc*. 1991 CarswellOnt 117 Supreme Court of Canada, 1991 [1991] 3 S.C.R. 154.
[12] Cory J (judgement of L'Heureux Dube and Cory JJ); *R. v. Wholesale Travel Group Inc*. 1991 CarswellOnt 117 Supreme Court of Canada, 1991 [1991] 3 S.C.R. 154, paragraphs 52-3, 55 & 58.

Richard Glover has suggested that the licensing approach provides a "novel method" for resolving the problem of reverse burdens.[13] Glover further submits that this approach has two distinct merits:

> First it is a sounder method for defining regulatory offences that the conventional approach, which concentrates on moral stigma and blame — a variable criterion that can be contentious and thus uncertain. The second and … more important merit is that the 'licensing approach' is a useful method for determining the validity of a reverse legal burdens in a more consistent and certain way than has been achieved by recent case law. Gravamen analysis, far from being a means of concentrating on the true substance of an offence tends to distort its meaning and, as such tends to mislead courts. It is a recipe for further inconsistency in the case law relating to burdens of proof. By way of contrast, it is submitted that the 'licensing approach' would provide a higher degree of certainty for the courts when considering the validity of a reverse legal burden.[14]

In many respects, the ACT Government and many other Governments apply this test intuitively to activities that require regulation in the ACT as it responds to the community expectations. This Government response aims to place this test into a stated policy for assisting scrutiny of strict liability.

3.3 Presumption of Innocence

The *Human Rights Act 2004* (HR Act) requires that all ACT laws are interpreted, as far as possible, in a way that is consistent with the human rights protected in the Act.

In respect of the use of strict liability offences in the ACT, a number of rights contained in the HR Act are engaged. These are the right to a fair trial which states that "[e]veryone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing",[15] and the "right to be presumed innocent until proved guilty according to law".[16]

It has also been found that the use of strict liability offences engages the right in section 18(1) of the HR Act — which states that "everyone has the right to liberty and security of person. In particular, no one may be arbitrarily arrested or detained".[17]

Strict and absolute liabilities intersect with the right to fair trial under section 21 of the HR Act. Although the right is engaged, strict and absolute liability is not prohibited by the HR Act. It is important that the strict or absolute liability

[13] Richard Glover, *Regulatory Offences and Reverse Burdens: The 'Licensing Approach'*; The Journal of Criminal Law; Volume 71, Part 3, June 2007; page 277.
[14] Richard Glover, *Regulatory Offences and Reverse Burdens: The 'Licensing Approach'*; The Journal of Criminal Law; Volume 71, Part 3, June 2007; page 27.
[15] Section 21 (1) *Human Rights Act 2004*
[16] Section 22 (1) *Human Rights Act 2004*
[17] Section 18 (1) *Human Rights Act 2004*

is reasonable within the specific context of the offence, and demonstrably justifiable in a free and democratic society.

Strict liability also engages the presumption of innocence, because these types of offences can be interpreted as using reverse onus of proof. A reverse onus may be defined as:

> … a burden on the defendant to prove some matter the effect of which is that he is not guilty of the offence charged. Such an onus might relate to criminal liability on different ways. It might require the defendant to prove the absence of one of the elements of the *actus reus* of the offence, or the absence of a specified *mens rea*, or the existence of a defence. There is one reverse onus at common law, and that is the general defence of insanity. In all other cases, reverse onuses are statutory, imposed by express words or by necessary implication.[18]

This tension between the use of reverse onuses of proof in strict liability offences which engages the right to the presumption of innocence, can be summarised as follows:

> The problem which then arises is that on the face of it the reverse onus is inconsistent with the presumption [of innocence]. Unless the presumption can be qualified it would seem to require the prosecution to prove any and all matters comprising the guilt of the defendant. This in turn presents a difficulty for a court in upholding a reverse onus because under section 6 of the HRA [UK] it is unlawful for it to act in a way which is incompatible with a convention right.[19]

This tension also exists in the ACT, but the Government agrees with the view that while strict liability offences engages the presumption of innocence, strict liability offences are not inherently incompatible with human rights.

This view is supported by the ACT Court of Appeal in the case of *Hausmann v Shute*[20] where Chief Justice Higgins and Justice Connolly stated that there "is nothing in the Human Rights Act which prevents the legislature from enacting offences of strict liability".[21]

The matter of strict liability offences has been explored in great detail by the justice systems of Europe, the United Kingdom and Canada. There is significant international case law that indicates that human rights and strict liability are not mutually exclusive, and that use of strict liability offences is compatible with a human rights jurisdiction.

---

[18] Dennis, Ian; "*Reverse onuses and the presumption of innocence: In search of Principle*"; The Criminal Law Review; December 2005, page 901-2.
[19] Dennis, Ian; "*Reverse onuses and the presumption of innocence: In search of Principle*"; The Criminal Law Review; December 2005, page 902.
[20] *Hausmann v Shute* [2007] ACTCA 5 (5 April 2007).
[21] *Hausmann v Shute*, [2007] ACTCA 5 (5 April 2007); at paragraph 37.

Section 31 of the HR Act allows Territory officials and courts to draw on sources of international law and judgments of foreign and international courts for guidance on how to interpret what human rights mean in the ACT.

An examination of international human rights jurisprudence provides strong grounds for reaching the conclusion that strict liability offences constructed in an appropriate way may still be compatible with human rights.

3.3.1 European Court of Human Rights Jurisprudence:

The European Court of Human Rights has considered whether a strict liability offence is in breach the presumption of innocence *Salabiaku v France.*[22]

In this case, Salabiaku was charged with the criminal offence of unlawful importation of narcotics and a customs offence of smuggling prohibited goods. He was accorded the benefit of doubt on the first charge and was acquitted, but was convicted on the second offence which was a strict liability offence. He appealed to the European Court of Human Rights on the grounds that this offence was in breach of the presumption of innocence in Article 6(2) of the European Convention of Human Rights, which states that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.

The Court unanimously concluded that there was no violation of article 6(2) of the Convention (presumption of innocence). The Court held that Art 6(2) of the Convention does not state an absolute right:

> Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider…, paragraph 2 of Article 6 (art. 6-2) merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1 (art. 6-1).
>
> Article 6 para. 2 (art. 6-2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[23]

The Court went on to hold the presumption of innocence can be qualified provided that two criteria are fulfilled — the first is "whether the reverse onus is imposed in pursuance of a legitimate aim", and the second criteria is whether the reverse onus "is proportionate to the achievement of that aim".[24]

---

[22] *Salabiaku v France 10519/83 [1988] ECHR 19 (7 October 1988)*
[23] *Salabiaku v France; 10519/83 [1988] ECHR 19 (7 October 1988); at paragraph 28.*
[24] Dennis, Ian; "*Reverse onuses and the presumption of innocence: In search of Principle*"; The Criminal Law Review; December 2005, page 902.

3.3.2 United Kingdom Jurisprudence

The leading case in the United Kingdom that considers whether strict liability offences breach article 6(2) of the European Convention on Human Rights is *Sheldrake v Director of Public Prosecutions & Attorney General's Reference (No 4 of 2002).*[25]

In this case, the House of Lords decided that European human rights jurisprudence did not 'outlaw presumptions of fact of law' incorporated into an offence, but required that Member States should ensure that offences should be kept within reasonable limits and should not be arbitrary. The Court also held that it was open to states to define the constituent elements of a criminal offence, including the exclusion of the requirement of *mens rea*.

The House of Lords held that the justification and fairness of offences that include reverse burdens on a defendant in a criminal trial had to be judged in the particular context of each case, and that the substance and effect of any presumption adverse to a defendant had to:

- be examined on all of the facts and circumstances;
- be proportionate to the object of the offence;
- provide the defendant with the opportunity to rebut the presumption;
- uphold the court's authority to assess the evidence; and
- weigh up what is at stake and the difficulty for prosecution in the absence of a presumption.

Lord Bingham went on to note that the "task of the Court is never to decide whether the reverse burden should be placed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence".[26]

The House of Lords held that the imposition of a reverse legal burden upon the defendant did not go beyond what was necessary and reasonable, and was not in any way arbitrary. Accordingly, the defendant's conviction of an offence of being 'drunk in charge of a vehicle' resulting from a failure to establish a defence found in the legislation that there was no likelihood of him driving the vehicle while over the limit could not be regarded as unfair:

> It may not be very profitable to debate whether section 5(2) infringes the presumption of innocence. It may be assumed that it does. Plainly the provision is directed to a legitimate object: the prevention of death, injury and damage caused by unfit drivers. Does the provision meet the

[25] *Sheldrake v Director of Public Prosecutions & Attorney General's Reference (No 4 of 2002)* [2004] UKHL 43.
[26] Lord Bingham of Cornhill *Sheldrake v Director of Public Prosecutions & Attorney General's Reference (No 4 of 2002*) [2004] UKHL 43; at paragraph 41.

tests of acceptability identified in the Strasbourg jurisprudence? In my view, it plainly does. I do not regard the burden placed on the defendant as beyond reasonable limits or in any way arbitrary. It is not objectionable to criminalise a defendant's conduct in these circumstances without requiring a prosecutor to prove criminal intent. The defendant has a full opportunity to show that there was no likelihood of his driving, a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecutor to prove, beyond reasonable doubt, that he would. I do not think that imposition of a legal burden went beyond what was necessary. If a driver tries and fails to establish a defence under section 5(2), I would not regard the resulting conviction as unfair, as the House held that it might or would be in *R v Lambert* [2002] 2 AC 545. I find no reason to conclude that the conviction of Mr Sheldrake was tainted by any hint of unfairness.[27]

3.3.3 Canadian Jurisprudence

In criminal law in Canada, the obligatory defence to a strict liability offence is due diligence – or a lack of negligence on a balance of probabilities. Once the prosecution has "proved the wrongful act beyond a reasonable doubt, the fault element of negligence is presumed, unless the accused can demonstrate that it took reasonable care or acted under a reasonable mistake of fact."[28]

Commentators have said that in "placing the onus on the accused to establish the due diligence defence to a regulatory offence also creates incentives on those individuals and corporations who enter a regulated field to take reasonable precautions to prevent harms."[29]

The defence of due diligence for strict liability offences was discussed at length in the case of *Sault Ste. Marie*[30], with the key tenets summarised by Cory J in the case of *Wholesale*:

> The *Sault Ste. Marie* ([1978] 2 S.C.R. 1299) case recognised strict liability as a middle ground between full *mens rea* and absolute liability. Where the offence is one of strict liability, the Crown is required to prove neither *mens rea* nor negligence; conviction may follow merely upon proof beyond a reasonable doubt of the proscribed act. However, it is open to the defendant to avoid liability by proving on a balance of probabilities that all due care was taken. This is the hallmark of the strict liability offence: the defence of due diligence.[31]

The leading case in Canada that considers whether a strict liability offence breaches the presumption of innocence is *Wholesale.*[32] In this case, the

---

[27] Lord Bingham of Cornhill *Sheldrake v Director of Public Prosecutions & Attorney General's Reference (No 4 of 2002)* [2004] UKHL 43; at paragraph 41.
[28] Roach, Kent; *Criminal Law*, *Third Edition*; Ontario, Canada, 2004, at page 195.
[29] Roach, Kent; *Criminal Law*, *Third Edition*; Ontario, Canada, 2004, at page 15.
[30] *Sault Ste. Marie* ([1978] 2 S.C.R. 1299).
[31] Cory J (judgement of L'Heureux Dube and Cory JJ); *R. v. Wholesale Travel Group Inc*. 1991 CarswellOnt 117 Supreme Court of Canada, 1991 [1991] 3 S.C.R. 154, paragraph 22.
[32] *R v Wholesale Travel Group Inc*. [1991] 3 S.C.R. 154].

Canadian Supreme Court considered whether strict or absolute liability offences punishable by imprisonment violate section 7 of the Canadian Charter of Rights and Freedoms. Section 7 of the Charter provides that no one may be deprived of their liberty except in accordance with the fundamental principles of justice.

In this case, the Court held that strict liability offences engage the right to the presumption of innocence. However, the Court unanimously held that strict liability offences do not violate s. 7 of the Charter when a due diligence defence is available:

> . . . the appellant's claim that strict liability offences violate s. 7 of the Charter cannot succeed. The requirements of s. 7 are met in the regulatory context by the imposition of liability based on a negligence standard. Therefore, no violation of s. 7 results from the imposition of strict liability.[33]

Justice Cory went on to say that:

> As with the s. 7 challenge, licensing considerations support the conclusion that strict liability does not violate s. 11(d) of the Charter. The licensing argument attributes to the regulated actor knowledge and acceptance, not only of the standard of reasonable care itself, but also of the responsibility to establish on a balance of probabilities the exercise of reasonable care. Acceptance of this burden is an implied term and a pre-condition of being allowed to engage in activity falling within the regulated sphere. Regulated actors are taken to understand that, should they be unable to discharge this burden, an inference of negligence will be drawn from the fact that the proscribed result has occurred.
>
> I wish to emphasize, however, that the difference in the scope and meaning of s. 11(d) in the regulatory context does not imply that the presumption of innocence is meaningless for a regulated accused. The Crown must still prove the *actus reus* of regulatory offences beyond a reasonable doubt. Thus, the Crown must prove that the accused polluted the river, sold adulterated food, or published a false advertisement. However, once having established this beyond a reasonable doubt, the Crown is presumptively relieved of having to prove anything further. Fault is presumed from the bringing about of the proscribed result, and the onus shifts to the defendant to establish reasonable care on a balance of probabilities.
>
> For these reasons, I conclude that the presumption of innocence as guaranteed in s. 11(d) of the Charter is not violated by strict liability offences as defined in Sault Ste. Marie. The imposition of a reverse persuasive onus on the accused to establish due diligence on a balance of probabilities does not run counter to the presumption of

[33] *R v Wholesale Travel Group Inc*. [1991] 3 S.C.R. 154], at page 106.

innocence, notwithstanding the fact that the same reversal of onus would violate s. 11(d) in the criminal context.[34]

The factors considered in these cases have been summarised succinctly by Ian Dennis when he states that:

> When a challenge is made to the compatibility of a reverse onus the present law requires a three-stage process of decision making.
>
> 1. Interpretation of the statute: does the provision in question, interpreted in accordance with the ordinary principles of construction, place a burden on the accused? If so, is it a legal or evidential burden? If it is evidential no further inquiry need be made about the compatibility with Article 6 (2). If it is a legal burden, the court must move to stage 2 to assess the question of compatibility.
> 2. Justification of the reverse onus: does the provision in question serve a legitimate aim and is it proportionate to that aim? If the answer is Yes, the provision is an acceptable qualification to the presumption of innocence. The defendant will then bear the burden of proof on the matter in question, although to a lower standard of proof than the prosecution (namely the balance of probabilities). If the answer is No the court must move to stage 3.
> 3. Reading down the provision: if the reverse legal burden cannot be justified can the court 'read down' the burden to an evidential one, using section 3. of the HRA [UK]? If it can it should do so. If it cannot the court should make a declaration of incompatibility of the provision under section 4 of the HRA [UK].[35]

The Government believes that this three-stage process of decision making should be factored into the regulatory legislation that is introduced and in operation in the ACT.

3.4 The Concept of the Regulatory Pyramid

The degree of regulation present in modern day society was succinctly put by Justice Cory writing for the majority in *Wholesale* when he said that:

> It is difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole. From cradle to grave, we are protected by regulations; they apply to the doctors attending our entry into this world and to the morticians present at our departure. Every day, from waking to sleeping, we profit from regulatory measures which we often take for granted. On rising, we use various forms of energy whose safe distribution and use are governed by regulation. The trains, buses and other vehicles that get us to work are regulated for our safety. The food we eat and the beverages we drink are subject to regulation for the protection of our health.

---

[34] *R v Wholesale Travel Group Inc*. [1991] 3 S.C.R. 154], at pages 114-115.

[35] Dennis, Ian; "*Reverse onuses and the presumption of innocence: In search of Principle*"; The Criminal *Law Review*; December 2005, at page 905.

In short, regulation is absolutely essential for our protection and well-being as individuals, and for the effective functioning of society. It is properly present throughout our lives. The more complex the activity, the greater the need for and the greater our reliance upon regulation and its enforcement. For example, most people would have no idea what regulations are required for air transport or how they should be enforced. Of necessity, society relies on government regulation for its safety.[36]

Contemporary regulatory theory refers to the 'enforcement pyramid' as a means to maximise compliance with Government regulation. In essence, the choice of action to address non-compliance starts with education and persuasion, then escalates to actions that involve sanctions, and finally leads to the ultimate sanction.[37] See Figure 1, for example.

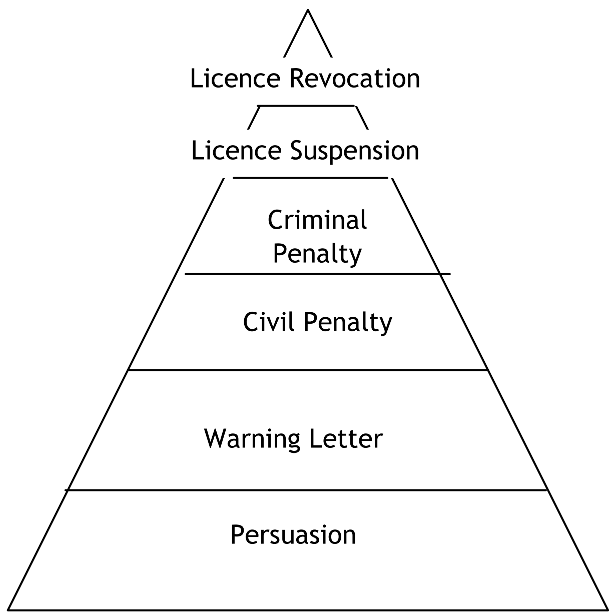

Figure 1: Pyramid Strategies of Responsive Regulation:
The proportion of space at each layer represents the proportion of enforcement activity at that level. After: Figure 2.1, Ayres, Ian, and Braithwaite, John, *Responsive Regulation: Transcending the Deregulation Debate*; Oxford University Press; Oxford, 1992, page 35.

A 'key tenet' of the concept of responsive regulation is that conventional criminal prosecution, located at the top of an 'enforcement pyramid', can (and should) only be used sparingly" so that it is 'reserved' for those situations where responses at the lower (and more common) level of the pyramid (e.g. persuasion, warnings and civil penalties) have proven ineffective.[38] This is consistent with the observations of Bronitt and McSherry cited by the Committee at paragraph 2.38 of the Committee report.

[36] Cory J (judgement of L'Heureux Dube and Cory JJ); *R. v. Wholesale Travel Group Inc*. 1991 CarswellOnt 117 Supreme Court of Canada, 1991 [1991] 3 S.C.R. 154; at paragraph 32-3.
[37] Ayres & Braithwaite, *Response Regulation,* Oxford University Press, 1992.
[38] Brown, David; Farrier, David, Egger, Sandra; and McNamara, Luke; "*Brown, Farrier, Neal and Weisbrot's Criminal* Laws: materials and commentary on criminal law and process in New South Wales"; The Federation press; Sydney; 2001; page 27.

Ayres and Braithwaite have described the operation of the pyramid contained in Figure 1 as:

> …compliance is most likely when the regulatory agency displays an explicit enforcement pyramid. ... Most regulatory action occurs at the base of the pyramid where initially attempts are made to coax compliance by persuasion. The next phase of enforcement escalation is a warning letter; if this fails to secure compliance civil monetary penalties are imposed; if this fails, criminal prosecution ensures; if this fails the plant is shut down or a licence to operative is suspended; if this fails, the licence to do business is revoked. The form of the enforcement pyramid is the subject of the theory, not the content of the particular pyramid.[39]

Contemporary regulatory theory has grown and developed "primarily in relation to regulatory spheres in which 'conventional' forms of punitive criminal law regulation have been absent or ineffective, including corporate business activity, workplace safety and environmental protection."[40]

Theorists in this arena argue that a variety of escalating sanctions assist to address non-compliance improves the ability to regulate the behaviour.[41] However, the form of sanctions that are possible depend upon the nature of the regulated activity and the degree of licensing or authorisation involved. Offences are one of the most common forms of sanction in laws of a regulatory nature.

The Government is conscious of the need to develop appropriate means of addressing non-compliant behaviour without always resorting to the creation of offences. However, there are limitations to the tools in many areas of regulation that do not involve a formal licensing process.

One means of resolving the tension between criminal justice principles and the social need to create laws that sanction regulated activity or behaviour that meets the *mala prohibita* test would be to construct new classes of offences in law.

As discussed earlier, English law as carried into Australia distinguished classes of offences. The distinction between indictable and summary offences remains today. Currently, all of the ACT's strict liability offences are summary offences.

As discussed earlier, historically, English law distinguishes indictable offences and summary offences. In the past, indictable offences were also characterised as treasons, felonies and misdemeanours.

---

[39] http://www.austlii.edu.au/au/other/alrc/publications/reports/95/03.The_Purposes_of_Penalties.html#fn25#fn25

[40] Brown, David; Farrier, David, Egger, Sandra; and McNamara, Luke; "*Brown, Farrier, Neal and Weisbrot's Criminal Laws: materials and commentary on criminal law and process in New South Wales*"; The Federation press; Sydney; 2001; page 27.

[41] Ayres & Braithwaite, *Response Regulation*, Oxford University Press, 1992.

In France, criminal law and procedure has a tripartite distinction of offences based seriousness. The classes of offences are: crimes, misdemeanours, and violations.

Under the French Penal Code, crimes can incur penalties of 20 years imprisonment; misdemeanours five years imprisonment; and violations two years imprisonment. "However, in practice, sentence length is generally ten years for crimes, three years for misdemeanours, and one year for violations."[42]

The ACT could revert to old legal distinctions of laws, or create new legal distinctions of laws, to reflect higher and lower thresholds of moral stigma.

However, this reform would require a fundamental change to the ACT's laws, which in turn would require significant resources to achieve. Indeed, in a jurisdiction the size of the ACT, with its inherited Anglo jurisprudence and the HR Act, there are limitations on what the government can do to change regulatory structures without changing the entire justice system. As the current law stands, the fact that strict liability offences are summary offences already connotes a lower threshold of moral stigma. This is further reflected in strict liability offences generally attracting lower penalties than offences that have a higher threshold of moral stigma attached to them, such as assault or murder.

3.5 What has been happening in the ACT in relation to strict liability offences?

In their report and in scrutiny comments, the Committee has often highlighted the 'prevalence' and 'increase' in the use of strict liability offences in the ACT statute book. The Government acknowledges this increase in strict liability offences over the past decade. However, the Government points out that some of this increase is a result of the Code being introduced, and the codification of previous existing offences. Before the Code was introduced, there was no general requirement to state whether strict or absolute liability applied to an offence. It was left to the courts to determine the intentions of the legislature based on factors like the nature of the offence and the statute concerned, and the language of the offence and the penalty that should be applied.

In discussing the prevalence of strict liability offences in the ACT, the Committee has often listed a number of areas in which it considers it has seen an expansion in the use of strict liability offences, such as traffic safety, workplace safety, occupational health and protecting the environment.[43] Appendix A lists 131 ACT statutes that are assessed as having strict liability offences in order of the year that they were made.

---

[42] Jacques Borricand, *World Factbook of Criminal Justice Systems*, US Dept of Justice, webpage, accessed July 2009, p. 2.

[43] *Strict and Absolute Liability Offences*; Standing Committee on Legal Affairs; report 7; February 2008; page 17.

The Government notes Recommendation 1 of the Committee, but does not agree to conduct an audit of the ACT statute book to determine both the prevalence and appropriateness of strict and absolute liability offences in the ACT. Accordingly, the Government does not agree to the Committee's second Recommendation either.

Apart from the resources required to undertake such an audit, the Government believes that these Recommendations of the Committee do not acknowledge the significant body of laws that have been re-made since the Code and the HR Act commenced.

In addition, the Government does not believe that the results of auditing the ACT statute book justifies undertaking the process. The outcome will only produce a number of strict or absolute liability offences that are on the statute book. This figure will either increase or decrease as legislation is introduced or repealed. Such an audit will not indicate whether the use of such offences is appropriate or proportionate in the context of the legislation or the policy rationale that underpins the legislation.

3.5.1 Issue of Prevalence and Listing of strict liability offences

The Government believes that it is more appropriate to examine the reasons that have led to an apparent increase in the use of strict liability offences. The Committee's approach of analysing the strict liability offences from the perspective of what it describes as the increasing prevalence of such offences on the statute book is of limited value. Such analysis does not consider the reasons *why* there has been a growth of regulatory laws in recent times. Indeed, a question that the Committee could have considered was why there has been an increase in the number of strict liability offences in all Australian jurisdictions.

There is no value in simply 'listing' the areas that are regulated with strict liability offences without any qualitative analysis of course and context. Rather, the Government believes that it is more effective to question why there has been an increase in the use of strict liability offences and the regulation of society.

There are a number of factors that provide an insight into the increase in strict liability offences in the ACT. The first is the changing nature and increased complexity of modern day society. Regulatory offences have evolved and increased in number as society itself — particularly in the first world — has become more complicated and sophisticated in its operation. As part of this, there are greater expectations placed upon individuals within that community to ensure the good and effective operation of the community as a whole.

Examples of these increasing expectations can be seen through the number of infringement notice schemes that have been created under the Magistrates Court system since 2003. Infringement notice schemes require strict liability as a basis for their existence. These infringement notice schemes cover numerous activities that the community expects to be regulated, which includes:

- The collection of money for charities, including requiring proper management and administration of collections;
- The activities of street hawkers, to ensure that people carrying on business as hawkers in a public place do not have a significant adverse effect on public safety, free movement of people and vehicles, accessibility of premises and public amenities;
- The various occupations relating to the construction industry in the ACT;
- Domestic animal identification and registration, including the duties of owners, carers and keepers;
- The sale of food for human consumption;.
- The planning and land system that in the ACT;
- activities relating to the sale of motor vehicles and the licensing of motor vehicle dealers; and
- The sustainable management of water resources.

The complete list of 27 infringement notice schemes currently under the *Magistrates Court Act 1930* can be found at Appendix B.

The increase in number and the diversity of activities that are regulated in the ACT can also be explained through the 'evolution of offences' as a result of changing societal views. A clear example of this is the changing society views towards tobacco smoking and the legislative response that have resulted from this change in society views. For example, it is now illegal to smoke in workplaces, or on public transport modes such as buses and trains, while this behaviour was acceptable in Australia in the 1970s.

3.5.2 Structure of the ACT as a body politic

Another factor as to why regulation has increased in the ACT relates to the nature of the ACT as a body politic itself. That is, the ACT is a unique jurisdiction in Australia in that it carries out both State and municipal functions in the one body politic.

The ACT Government conducts both State government functions such as the provision of health care and education, and road transport and driver licensing, as well as municipal or local government functions such as domestic animal registration, and rubbish collection. The ACT is also unique in that the Commonwealth empowers the ACT in section 26 of the *ACT (Self Government) Act 1998* (Cth) to entrench legislation by manner and form.[44]

This complexity in such a small jurisdiction informs the number of strict liability offences in the ACT. The ACT has a suite of laws that are comparable to States that have State and municipal functions of Government. The size of the ACT does not mean there are fewer things to regulate.

Indeed, if the operation and work of a local council alone is to be examined, it becomes clear that the increase that the ACT has experienced in relation to

[44] Carney, Gerard; *The Constitutional Systems of the Australian States and Territories*; Cambridge University Press; Melbourne; 2006; page, 204.

the number of strict liability offences and infringement notice schemes since the commencement of the Code in 2003 is proportionate to other areas that exercise local government functions.

A local council has many responsibilities and powers (under both State and Federal laws) and may make by laws to exercise these powers to ensure that actions of an individual or group do not have an adverse effect on the remainder of the community. Such by laws include but are not limited to, restrictions on waste disposal, parking permit schemes, animal control, road and traffic management and setting fees and charges for services.

Local by laws complement or implement other legislation but are always subservient to State and Federal laws. The matters covered by an individual council vary from one municipality to another but often there is considerable commonality in the approach taken to regulation and the subject matter of the laws.

A comparable in size and population local government area to the ACT is Wollongong City Council. This Council oversees approximately 28 different laws and regulations which deal with a variety of issues including car parking, alcohol free zones, graffiti, heritage, trees, noise complaints, library funding, pollution. These laws are managed by relevant State government agencies that include the Department of Environment and Conservation, Department of Local Government, Department of Planning, Roads and Traffic Authority.

Local Councils also manage many infringement notices. The 2007–2008 Wollongong City Council Annual Report indicated that the majority of infringement notices was made up of parking infringements (11,054) but also included animal (96), tree inspection (32), and environmental infringement notices (29).[45]

The issue of the prevalence of strict liability offences is being analysed from a perspective that does not appreciate the growth of regulatory laws and the ambit of laws that rely upon regulatory offences and infringement notices. Indeed, the breadth of what was regulated at the time of those 'old' criminal distinctions and principles discussed above from what is now regulated is vastly different. The body of regulatory law has grown significantly along with the community's expectation that regulation will occur. A simple example of this can be seen through the increase and community acceptance of environmental regulation over the past two decades.

3.5.3 Harmonisation process

The ACT is in the unique situation where commencement of the Code has meant that previous common law offences need to be codified to ensure consistency with the application of law and policy intent. While this process did occur naturally to a degree as a result of agencies reviewing their legislation, the Government purposefully undertook a process of 'harmonisation' to ensure that existing offences were codified.

[45] From http://www.wollongong.nsw.gov.au/documents/Annual_Report_2007-08.pdf

A by-product of the harmonisation process was that it was necessary to interpret and recast common law offences as strict or absolute liability offences. This process naturally represented an identifiable increase in the numbers of these offences on the ACT statute book.

The Government has ceased this method of harmonisation as it was not an effective use of time and resources and did not result in the best outcome for the ACT. Essentially, the process divorced the offence construction process from the context of the policy rationale for the offence.

This process of ‘translating’ common law offences into Code ‘language’ is not an easy process, and often resulted in offences being remade without agencies having the time to undertake the necessary policy considerations to ensure that the recasting of the offence was effective and appropriate. This led to some offences being created afresh, and not in the context of the policy informing the Acts.

Since 2004 when the Government embarked on harmonisation of offences with the Criminal Code methodology, Parliamentary Council’s Office have indicated that over 65% of ACT offences have been harmonised. The majority of this work has been done in the context of the normal review and re-making of laws. In other words the natural regeneration of the statute book has already done the lion’s share of harmonisation. Based upon the drafting work projected for the next few years, it is expected that a considerable number of remaining offences will also be re-made over that period.

Consequently, the Government not agree to Recommendation one of the Committee report, which asks the Attorney to audit the statute book for the prevalence of strict and absolute liability offences and the appropriateness of characterising offences as strict or absolute. The reason for this is that the ‘natural evolution’ of the statute book is achieving better harmonisation than the separate process of remaking offences separate from the policy decisions, and this process should be allowed to continue.

Also, the Government points out that the Assembly has been considering these issues on a Bill by Bill basis since the enactment of the Code. Under the Code method, all new strict liability offences must be clearly identified as such. The Government concedes that it can improve the discussion about the reasons why strict liability is necessary in the Explanatory Statements for these offences, but these issues are deliberated as part of the Assembly’s consideration of Bills.

The Government agrees that it will need to identify particular areas of law that need to be reviewed closer to the codification date, which is 1 July 2013. As the next deadline approaches, the Department of Justice and Community Safety will work with the Parliamentary Counsel’s Office and any other agency to audit the pieces of legislation on the statute book that have not been reviewed or remade since 2003. At this stage it is foreshadowed that this will only be a handful of acts in the area of road transport regulation.

3.5.4 Scrutiny Process and Guidelines

While there may be elements of the community, and even members of the Committee who hold concerns about the impact that these offences might have on members of the community, the Government can highlight a number of protections and safeguards that are currently built into the structure of the ACT. These include the introduction of offence construction guidelines, internal and external scrutiny processes, the role of the Legislative Assembly, the role of the courts and the protections contained in the HR Act itself.

The Government agrees to Recommendation 3 of the Committee's Report — *that guiding principles for the drafting of offence provisions in legislation are developed*. However, this needs to be qualified, as it is not appropriate for Parliamentary Counsel to settle Government policy on offence construction.

Under the direction of the Attorney General, the Legislation and Policy Branch within the Department of Justice and Community Safety has developed a set of guidelines for offence construction in the ACT for use by Government agencies. This guide has been developed in collaboration with Parliamentary Counsel's Office and the Human Rights Unit in the Legislation and Policy Branch. A copy of the guide is at Appendix C.

The Government takes this opportunity to assure the Assembly that this guideline document reaffirms the current position of the Government in relation to the limitations on penalties associated with strict liability offences.

With the release of the guide, Departments and agencies will be able to consider the appropriate construction of their own legislation by consulting the guide at an early stage in policy development. JACS will continue to facilitate the effective application of the Guidelines as new legislation is considered by Departments and agencies. JACS will provide a support role as opposed to a principle role in the application of the Guidelines. Departments will be responsible for ensuring that the Guidelines are observed in framing future legislation.

The release and use of the guide by all ACT Government agencies will also improve the internal scrutiny process by encouraging agencies to determine the right regulatory framework prior to drafting offences.

The Government agrees with Recommendation four — *that consideration be given to the likely impact of draft legislation on individuals prior to enactment, with provisions containing a knowledge or intent element if any potential impacts are unreasonably or unfairly detrimental to an individual*.

The Government would like to point out that this Recommendation of the committee reflects the current internal processes of scrutiny conducted by the Department of Justice and Community Safety in respect of all new pieces of legislation. The Committee's Recommendation may give the impression that considerations of unreasonableness and unfairness are not inherent in the Government's scrutiny process.

The apex of the Government's scrutiny process is Human Rights certification. The threshold of fairness and reasonableness set by the HR Act is of an international standard. The internal scrutiny process that the government has undertaken — particularly since the commencement of the HR Act — has improved significantly.

As part of this internal scrutiny process, the Legislation and Policy Branch of the Department of Justice and Community Service undertakes a dual role in scrutinising all government proposed legislation in terms of compliance with the HR Act, and general criminal law principles of the ACT.

The Government would also like to acknowledge the scrutiny role that the Members of the Legislative Assembly and the Committee system has in respect of all primary and secondary legislation that is introduced into the Legislative Assembly.

Members of the Legislative Assembly, as representatives of the community, have a responsibility to scrutinise legislation to ensure that it is consistent with existing legislation in the ACT, and most importantly, that the legislation is consistent with good governance of the ACT.

If it is decided that a piece of legislation requires further revision or examination than can be afforded in the Chamber, the piece of legislation can be referred to the committee process for that additional scrutiny.

It must also be remembered, that once a piece of legislation has been made, this act in itself does not prohibit the legislation from being reviewed at some point in the future. Central to this revision process — and a further aspect of scrutinising legislation — is the role that the courts play in determining whether, for example, 'a burden enacted by Parliament unjustifiably infringes the presumption of innocence'.[46]

3.6 Future defences and burdens

The government notes that the use of strict liability offences as part of the licensing concept in the ACT engages the presumption of innocence and the right to fair trial. It is commonly accepted that the presumption of innocence is "perceived as a fundamental principle", that many would say is "the foundational principle of criminal process".[47]

Strict liability offences engage the right to the presumption of innocence because to defend the offence, the onus of proof falls upon the defendant rather than the prosecution. However, as discussed above, there is significant body of jurisprudence that indicates that strict liability offences and reverse onuses of proof are compatible with human rights so long as the offence is proportionate and the engagement of the presumption of innocence is relevant to the aim of the offence.

[46] From Sheldrake, Lord Bingham.
[47] Dennis, Ian; "*Reverse onuses and the presumption of innocence: In search of Principle*"; *The Criminal Law Review*; December 2005; page 903.

Despite this, the Government acknowledges that further steps can be taken to ensure that the use of strict liability offences and offences with reverse burdens in the ACT inherently meet these requirements and therefore do not have a disproportionate impact upon members of the community. On this basis, the government agrees in-principle with Recommendation six of the Committee — *that offence provisions should be drafted to make it absolutely clear which party bears the burden of proof and what kind of burden of proof is required*.

The Government agrees that all new Government Bills that contain offences with specific defences should explicitly identify any burdens of proof upon the defendant and state the standard of the burden.

Sections 58 and 59 of the Code are provisions which contain the interpretation and application of evidentiary and legal burdens of proof for defendants in criminal offences. The sections currently read as if to stipulate that a legal burden upon the defendant must be explicitly identified. However, the drafting of section 59(b) implies that the use of the word 'prove' will also achieve this result.

As a consequence, any offence that uses the word 'prove' is interpreted as a legal burden unless a further provision is included that denotes the standard is an evidentiary burden. This situation places great limitations upon the word 'prove' for drafting purposes. The government concedes that 'reclaiming' the word 'prove' as a general drafting word would help clarify the legal meaning of the word and prevent accidental drafting of a reverse onus of proof.

To address this issue, the Government proposes that the Department of Justice and Community Safety consult with the national Model Criminal Law Officers Committee to craft an appropriate resolution. In the meantime, it will be Government policy that new offences with a reverse burden of proof will be explicitly identified on the face of the offence.

The Government does not intend to re-state the defence of mistake of fact and its requisite evidentiary burden for every strict liability offence. An explicit statement of burden would only be included if the offence has a particular defence included in its construction.

3.6.1 Strict liability: new mental elements?

In response to the overall critique of strict liability offences by the Committee's report, the Government proposes to adopt a policy that new strict liability offences drafted by the Government cannot carry a penalty of imprisonment without a defence of 'reasonable steps', 'due diligence' or other commensurate defence.

In Canada, strict liability offences require the prosecution to prove the prohibited act beyond reasonable doubt, "but then gives the accused an opportunity to prove due diligence or absence of negligence on a balance of probabilities".[48]

---

[48] Roach, *Criminal Law, 3rd ed*, Irwin Law, 2004, p. 193.

The defence of 'due diligence' as a requirement for strict liability offences equates to a mental element of 'negligence' for these offences in Canadian law.

Justice Cory in *R v Wholesale* discussed the concept of due diligence as it occurs in Canadian jurisprudence, summarising the case of *Sault Ste. Marie* – which recognised strict liability as a middle ground between full *mens rea* and absolute liability.[49] For more detail on judicial interpretation of 'due diligence', please refer to the earlier discussion on Canadian jurisprudence.

In Canada the defence must prove a defence of due diligence, or lack of negligence, to a standard of balance of probabilities.[50] The accused must be given an opportunity to establish due diligence.

In Australia the notion of strict liability offences holding a mental element of negligence, or requiring a defence of due diligence has not attracted significant discussion. However, the defence of 'mistake of fact' as defence has been discussed in some cases, see for example *Thomas v King* where Justice Dixon said:

> [I]n the distinction between mistakes of fact and of law, a mistake as to the existence of a compound event consisting of law and fact is in general one of face and not mistake of law. [51]

The High Court also considered mistake of fact in the case of Ostrowski *v Palmer,*[52] where the respondent who was a professional fisherman believed that he had a licence to fish in an area that was closed. In this case the Court held that a mistaken belief as to a matter of fact may be a defence pursuant to section 24 of the Commonwealth Criminal Code and the phrase 'state of things in section 24 of the Commonwealth Criminal Code' requires that attention be directed to the elements of the offence and to the facts relevant to those elements.

There is some suggestion that 'mistake of fact' may be a mental element to an offence. In *He Kaw Teh*, Justice Dawson discussed 'mistake of fact' this way:

> Thus at common law, because intent is an ingredient of a crime, it must be proved by the prosecution and a mistaken belief in facts which are inconsistent with the required intent does not have to be based upon reasonable grounds. Either the accused has a guilty mind or he does not, and if an honest belief, whether reasonable or not, points to the absence of the required intent, then the prosecution fails to prove its case: see *R v Morgan* [1976] AC 182. But the position is different with statutory offences containing no mental element to be proved as an ingredient of the offence. There, if the offence is not one of absolute liability, honest and reasonable mistake survives by implication as a basis of exculpation. It is,

[49] Justices Cory and L'Heureux Dube, *R v Wholesale Travel Group Inc* [1991] 3 S.C.R. 154, at paragraph 22.
[50] Roach, *Criminal Law, 3rd ed*, Irwin Law, 2004, p. 195.
[51] (1937) 59 CLR 279 at paragraph 306.
[52] [2004] HCA 30.

> therefore, understandable why it continues to be referred to as a defence: it must normally be raised by the accused upon evidence adduced by him. It is also understandable in the current context of statutory interpretation (whatever may have been the explanation in a wider, historical setting) why the mistake to be exculpatory must be not only honest but also based upon reasonable grounds. For it is one thing to attribute to the legislature an intention to retain, as part of an offence, a mental element which does not have to be proved by the prosecution but may be negated by proof of a mistaken belief held upon reasonable grounds. It is another thing to say that the legislature intended a mistaken belief, however unreasonable, to have the same effect. I readily admit that there is an element of rationalization in this explanation, but I think that it puts the emphasis in the right place. The defence of honest and reasonable mistake stems from the common law requirement of a guilty mind and it is not, as it is sometimes put, a defence based solely or even primarily upon the absence of negligence . . . [53]

In *Potts v West* Chief Justice Higgins considered that mistake of fact may be considered a fault element at common law:[54]

> Even if an offence does not require *mens rea* in the sense of positive intention to act unlawfully, there remains, at common law, a fault element. That is, that the existence of an honest and reasonable mistake, not as to the meaning of the law (or indeed the existence of a legal obligation) but as to some relevant fact, will exculpate the accused person.
>
> That follows from *Proudman v Dayman* (1943) 67 CLR 536 per Dixon J, at 540-1:
>
>> There may be no longer any presumption that *mens rea*, in the sense of a specific state of mind, whether of motive, intention, knowledge or advertence, is an ingredient in an offence created by a modern statute; but to concede that the weakening of the older understanding of the rule of interpretation has left us with no prima facie presumption that some mental element is implied in the definition of any new statutory offence does not mean that the rule that honest and reasonable mistake is prima facie admissible as an exculpation has lost its application also.

The Government believes the question of whether strict liability offences have a mental element of negligence, or be deemed to have a mental element of negligence, should be left to higher courts to consider. Whether mistake of fact is a mental element should also be left for courts to consider. At present the High Court has interpreted statutory offences that are explicitly constructed as strict liability offences in a manner that does not imply, or deem, a default mental element to the offence.

[53] *He Kaw Teh v R* 157 CLR 523, at 592
[54] *Potts v West* [2005] ACTSC 140, at paras 43 & 44.

However, the Government's policy will be to require a defence of 'due diligence', reasonable steps, or some other commensurate defence, if the offence holds a penalty of imprisonment.

3.6.2 Defences for subordinate law not notified

In respect of the Committee's Recommendation 5, the Government believes that this is unnecessary. The Commonwealth provision cited by the Committee is only a defence to a prosecution if a subordinate law relevant to an offence was not publically notified at the time.

The protection that the Committee contemplates in this Recommendation is already achieved by the *Legislation Act 2001* which provides that a statutory law is not enforceable unless it is notified and provides that a subordinate law is beyond power if it exceeds the power of a statute. (see sections 12, 42, 62 and the definition of 'law' in the *Legislation Act 2001*). The definition of 'law' in the ACT Code also includes subordinate legislation, which removes any doubt that the provisions of the *Legislation Act 2001* apply.

While the Government notes that there can be a significant period of time between the legislation being made and being notified in the Commonwealth, this is not the case in the ACT. As soon as a piece of primary legislation is settled by the Legislative Assembly Secretariat it is placed upon the Legislation Register in accordance with the Legislation Act. Subordinate legislation such as regulations are also notified on the legislation register shortly after they are made.

While there is a possibility that a piece of legislation could commence before it can be notified, and a person commits an offence under that legislation, the *Legislation Act 2001* protection still applies.

3.6.3 Defences already included in the Criminal Code

The Government points out that in making this Recommendation; the Committee has not given consideration to the defences that are found in the Code, which include:

1. Mistake of fact — strict liability offences only — under section 36, mistake of fact is a defence open to a defendant only if the person considered whether or not facts existed and was under a mistaken but reasonable belief about the facts. If those facts had existed, the conduct would not have constituted an offence. Mistake of fact applies to strict liability offences only. It has no application to absolute liability (section 24).
2. Intervening conduct or event — it is a defence if the conduct in question is the result of an act of another person, or non-human activity, over which the defendant had no control and against which they could not reasonably be expected to guard. The defence is only relevant to offences, or physical elements, involving strict liability or absolute liability, because the circumstances that make up the defence would negate any fault element (section 39).
3. Duress — a person has a defence if the conduct in question was carried out under duress. For conduct to have been carried out under duress the person must have reasonably believed that a

threat has been made that will be carried out unless an offence is committed, that there is no reasonable way to render the threat ineffective and that the conduct is a reasonable response to the threat (section 40(2)).

4. SOURCES

Books/Articles

Ayres & Braithwaite, *Response Regulation*, Oxford University Press, 1992.

Brown, David; Farrier, David, Egger, Sandra; and McNamara, Luke; "*Brown, Farrier, Neal and Weisbrot's Criminal* Laws: materials and commentary on criminal law and process in New South Wales"; The Federation press; Sydney; 2001.

Carney, Gerard; *The Constitutional Systems of the Australian States and Territories;* Cambridge University Press; Melbourne; 2006.

Dennis, Ian, "Reverse onuses and the presumption of innocence: In search of Principle"; *The Criminal Law Review*; December 2005.

Glover, Richard, Regulatory Offences and Reverse Burdens: The 'Licensing Approach'; The Journal of Criminal Law; Volume 71, Part 3, June 2007.

Keeton, G W, *The Elementary Principles of Jurisprudence,* 2nd Ed, Pitman & Sons, 1949.

Roach, Kent; *Criminal Law*, *Third Edition*; Ontario, Canada, 2004.

Case Law

Hausmann v Schute [2007] ACTCA 5 (5 April 2007)

He Kaw Teh v R 157 CLR 523

Ostrowski v Palmer [2004] HCA 30

Potts v West [2005] ACTSC 140

R v Wholesale Travel Group Inc [1991] 3 S.C.R. 154

Salabiaku v France 10519/83 [1988] ECHR 19 (7 October 1988)

Sault Ste. Marie ([1978] 2 S.C.R. 1299)

*Sheldrake v Director of Public Prosecutions & Attorney General's Reference (No 4 of 2002) [*2004] UKHL 43

Thomas v King

Legislation

ACT (Self Government) Act 1998 (Cth)

Human Rights Act 2004

Legislation Act 2001

Magistrate's Court Act 1930

Other

Strict and Absolute Liability Offences; Standing Committee on Legal Affairs; report 7; February 2008; page 17.

ACT Department of Territory and Municipal Services:
http://www.tams.act.gov.au/live/pets/domestic_animal_services

Barricade, Jacques, World Factbook of Criminal Justice Systems, US Dept of Justice, webpage, accessed July 2009.

Wollongong City Council Website:
http://www.wollongong.nsw.gov.au/documents/Annual_Report_2007-08.pdf

ACT Legislation with strict liability offences — numbered in chronological order

1. Contractors Debts Act 1897
2. Crimes Act 1900
3. Trustee Act 1925
4. Tobacco Act 1927
5. City of Canberra Arms Act 1932
6. Roads and Public Places Act 1937
7. Workers Compensation Act 1951
8. Mercantile Law Act 1962
9. Business Names Act 1963
10. Partnership Act 1963
11. Electricity Safety Act 1971
12. Annual Leave Act 1973
13. Liquor Act 1975
14. Lakes Act 1976
15. Long Service Leave Act 1976
16. Sale of Motor Vehicles Act 1977
17. Fuels Control Act 1979
18. Nature Conservation Act 1980
19. Long Service Leave (Building and Construction Industry) Act 1981
20. Notaries Public Act 1984
21. Occupational Health and Safety Act 1989
22. Clinical Waste Act 1990
23. Evidence (Miscellaneous Provisions) Act 1991
24. Animal Welfare Act 1992
25. Prostitution Act 1992
26. Adoption Regulation 1993
27. Boxing Control Act 1993
28. Intoxicated People (Care and Protection) Act 1994
29. Mental Health (Treatment and Care) Act 1994
30. Classification (Publications, Films and Computer Games) (Enforcement) Act 1995
31. Auditor-General Act 1996
32. Firearms Act 1996
33. Uncollected Goods Act 1996
34. Births, Deaths and Marriages Registration Act 1997
35. Coroners Act 1997
36. Environment Protection Act 1997
37. Public Health Act 1997
38. Residential Tenancies Act 1997
39. Building and Construction Industry Training Levy Act 1999

40.	Duties Act 1999
41.	Long Service Leave (Contract Cleaning Industry) Act 1999
42.	Road Transport (Vehicle Registration) Act 1999
43.	Domestic Animals Act 2000
44.	First Home Owner Grant Act 2000
45.	Fisheries Act 2000
46.	Major Events Security Act 2000
47.	Public Health Regulation 2000
48.	Road Transport (Driver Licensing) Regulation 2000
49.	Road Transport (General) Regulation 2000
50.	Road Transport (Safety and Traffic Management) Regulation 2000
51.	Utilities Act 2000
52.	Water and Sewerage Act 2000
53.	Animal Welfare Regulation 2001
54.	Community Title Act 2001
55.	Domestic Animals Regulation 2001
56.	Fisheries Regulation 2001
57.	Gas Safety Regulation 2001
58.	Road Transport (Public Passenger Services) Act 2001
59.	Waste Minimisation Act 2001
60.	Waste Minimisation Regulation 2001
61.	Water and Sewerage Regulation 2001
62.	Civil Law (Wrongs) Act 2002
63.	Cooperatives Act 2002
64.	Criminal Code 2002
65.	Plant Diseases Act 2002
66.	Road Transport (Public Passenger Services) Regulation 2002
67.	Workers Compensation Regulation 2002
68.	Agents Act 2003
69.	Cemeteries and Crematoria Act 2003
70.	Cemeteries and Crematoria Regulation 2003
71.	Charitable Collections Act 2003
72.	Charitable Collections Regulation 2003
73.	Civil Law (Sale of Residential Property) Act 2003
74.	Confiscation of Criminal Assets Act 2003
75.	Cooperatives Regulation 2003
76.	Gene Technology Act 2003
77.	Hawkers Act 2003
78.	Security Industry Act 2003
79.	Smoking (Prohibition in Enclosed Public Places) Act 2003
80.	Training and Tertiary Education Act 2003
81.	Architects Act 2004

82. Building Act 2004
83. Civil Law (Sale of Residential Property) Regulation 2004
84. Construction Occupations (Licensing) Act 2004
85. Construction Occupations (Licensing) Regulation 2004
86. Dangerous Substances (Explosives) Regulation 2004
87. Dangerous Substances (General) Regulation 2004
88. Dangerous Substances Act 2004
89. Education Act 2004
90. Electricity (Greenhouse Gas Emissions) Act 2004
91. Emergencies Act 2004
92. Emergencies Regulation 2004
93. Gaming Machine Act 2004
94. Gaming Machine Regulation 2004
95. Health Professionals Act 2004
96. Health Professionals Regulation 2004
97. Hemp Fibre Industry Facilitation Act 2004
98. Heritage Act 2004
99. Litter Act 2004
100. Rates Act 2004
101. Utilities (Electricity Restrictions) Regulation 2004
102. Animal Diseases Act 2005
103. Crimes (Sentencing) Act 2005
104. Criminal Code Harmonisation Act 2005
105. Environment Protection Regulation 2005
106. Human Rights Commission Act 2005
107. Pest Plants and Animals Act 2005
108. Stock Act 2005
109. Tree Protection Act 2005
110. Utilities (Gas Restrictions) Regulation 2005
111. Water Efficiency Labelling and Standards Act 2005
112. Animal Diseases Regulation 2006
113. Casino Control Act 2006
114. Legal Profession Act 2006
115. Motor Sport (Public Safety) Act 2006
116. Radiation Protection Act 2006
117. Terrorism (Extraordinary Temporary Powers) Act 2006
118. Utilities (Water Conservation) Regulation 2006
119. Corrections Management Act 2007
120. Occupational Health and Safety (General) Regulation 2007
121. Planning and Development Act 2007
122. Surveyors Act 2007
123. Water Resources Act 2007

124. Building (General) Regulation 2008
125. Children and Young People Act 2008
126. Firearms Regulation 2008
127. Medicines, Poisons and Therapeutic Goods Act 2008
128. Planning and Development Regulation 2008
129. Road Transport (Third-Party Insurance) Regulation 2008
130. Work Safety Act 2008
131. Dangerous Substances and Litter (Dumping) Legislation Amendment Act 2009

<u>**Subject Matter of Infringement Notices under the *Magistrates Court Act 1930***</u>

1. *<u>Magistrates Court (Agents Infringement Notices) Regulation 2003</u>*
    a. Infringement notices for offences against the *Agents Act*.
    b. The purpose of the Act is to regulate agents. An agent for the purposes of the Act includes a person who carries on business as a business agent, an employment agent, a real estate agent, a stock and station agent or a travel agent but does not include an executor or administrator of an estate, a trustee of the deceased, the public trustee etc.

2. *<u>Magistrates Court (Building Infringement Notices) Regulation 2003</u>*
    a. Infringement offences under the *Building Act 2004* and *Building (General) Regulation 2008*.
    b. The purpose of the Act is to regulate buildings and building work.

3. *<u>Magistrates Court (Charitable Collections Infringement Notices) Regulation 2003</u>*
    a. Infringement notices for offences (by individuals and corporations) against the *Charitable Collections Act*.
    b. The purpose of the Act is to regulate collections for charities while promoting proper management and administration of collections, ensuring proper record-keeping and auditing of accounts and public access to information about collections.

4. *<u>Magistrates Court (Security Industry Infringement Notices) Regulations 2003</u>*
    a. Infringement notices for offences against the *Security Industry Act 2003*.
    b. The purpose of the Act is to regulate security activity. Security activity includes acting as a bodyguard, crowd controller, patrolling or guarding property, installing, maintaining, monitoring, repairing or servicing security equipment (s 7(1) *Security Industry Act 2003*).

5. *<u>Magistrates Court (Sale of Residential Property Infringement Notices) Regulation 2004</u>*
    a. Infringement notices for offences (by individuals and corporations) against the *Civil Law (Sale of Residential Property) Act 2003.*
    b. The act applies to a contract, or proposed contract, for the sale of residential property.

6. *<u>Magistrates Court (Hawkers Infringement Notices) Regulation 2003</u>*
    a. Infringement notices for offences (by individuals and corporations) against the *Hawkers Act 2003.*
    b. The *Hawking Act* ensures that people carrying on business as hawkers in a public place do not have a significant adverse effect on public safety, free movement of people and vehicles, accessibility of premises and public amenities.

7. *Magistrates Court (Construction Occupations Infringement Notices) Regulation 2004*
    a. Infringement notices for offences against the *Construction (Occupations) Licensing Act 2004*.
    b. The purpose of the Act is to regulate construction occupations.

8. *Magistrates Court (Lakes Infringement Notices) Regulations 2004*
    a. Infringement notices for offences (by individuals and corporations) against the *Lakes Act 1976.*
    b. The act provides for the administration, control and use of certain lakes.

9. *Magistrates Court (Fisheries Infringement Notices) Regulations 2004*
    a. Infringement notices for offences (by individuals and corporations) against the *Fisheries Act 2000* and *Fisheries Regulations 2001.*
    b. The legislation regulates the management of fisheries with the objective of conserving native fish species, managing sustainably the fisheries within the ACT, providing viable recreational fishing and cooperating with other Australian jurisdictions in sustaining fisheries and protecting native fish species.

10. *Magistrates Court (Litter Infringement Notices) Regulation 2004*
    a. Infringement notices for offences (by individuals and corporations) against the *Litter Act 2004.*
    b. The objectives of the Act include enhancement of the natural and built environment by regulating the depositing of litter (or other material that may become litter) and to facilitate the removal of litter.

11. *Magistrates Court (Crimes Infringement Notices) Regulation 2008*
    a. Infringement notices for offences (by individuals and corporations) against the *Crimes Act 1900.*

12. *Magistrates Court (Workers Compensation Infringement Notices) Regulation 2006*
    a. Infringement notices for offences (by individuals and corporations) against the *Workers Compensation Act 1951.*
    b. The purpose of the Act is to compensate workers for injuries arising out of or in the course of their employment.

13. *Magistrates Court (Dangerous Substances Infringement Notices) Regulation 2004*
    a. Infringement notices for offences (by individuals and corporations) against the *Dangerous Substances Act 2004*, *Dangerous Substances (Explosives) Regulation 2004*; and the *Dangerous Substances (General) Regulation 2004*.
    b. The purpose of the legislation is to protect the health and safety of people, and to protect property and the environment from damage, from the hazards associated with dangerous substances.

14. *Magistrates Court (Domestic Animals Infringement Notices) Regulation 2005*
    a. Infringement notices for offences (by individuals and corporations) against the *Domestic Animals Act 2000.*
    b. The purpose of the Act is to provide for the identification and registration of certain animals and the duties of owners, carers and keepers.

15. *Magistrates Court (Environment Protection Infringement Notices) Regulation 2005*
    a. Infringement notices for offences (by individuals and corporations) against the *Environment Protection Act 1997* and *Environment Protection Regulation 2005.*
    b. The purpose of the legislation is to provide for the protection of the environment.

16. *Magistrates Court (Food Infringement Notices) Regulation 2005*
    a. Infringement notices for offences (by individuals and corporations) against the *Food Act 2001.*
    b. The purpose of the Act is to regulate the sale of food for human consumption.

17. *Magistrates Court (Liquor Infringement Notices) Regulation 2008*
    a. Infringement notices for offences (by individuals and corporations) against the *Liquor Act 1975.*
    b. The purpose of the Act is to promote and encourage responsibility in the sale and consumption of liquor through the establishment of a scheme of liquor licences and permits.

18. *Magistrates Court (Nature Conservation Infringement Notices) Regulation 2005*
    a. Infringement notices for offences (by individuals and corporations) against the *Nature Conservation Act 1980.*
    b. The purpose of the Act is to make provision for the protection and conservation of native animals and native plants, and for the reservation of areas for those purposes.

19. *Magistrates Court (Occupational Health and Safety Infringement Notices) Regulation 2004*
    a. Infringement notices for offences (by individuals and corporations) against the *Occupational Health and Safety Act 1989, Occupational Health and Safety Regulation 2007* and *Occupational Health and Safety (Certification of Plant Users and Operators) Regulation 2000.*
    b. The purpose of the legislation is to promote and improve standards of occupational health, safety and welfare of employees in the workplace.

20. *Magistrates Court (Pest Plants and Animals Infringement Notices) Regulation 2005*
    a. Infringement notices for offences (by individuals and corporations) against the *Pest Plants and Animals Act 2005.*

  b. The purpose of the Act is to protect the ACT's land and aquatic resources from threats form pest plants and animals, promote a strategic and sustainable approach to pest management and to identify and manage pest, plants and animals.

21. *Magistrates Court (Planning and Development Infringement Notices) Regulation 2008*
    a. Infringement notices for offences (by individuals and corporations) against the *Planning and Development Act 2007.*
    b. The purpose of the Act is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT that is consistent with the social, environmental and economic aspirations of the people of the ACT and in accordance with sound financial principles.

22. *Magistrates Court (Plant Diseases Infringement Notices) Regulation 2002*
    a. Infringement notices for offences (by individuals and corporations) against the *Plant Diseases Act 2007.*
    b. The purpose of the Act is the control of diseases and pests affecting plants.

23. *Magistrates Court (Sale of Motor Vehicles Infringement Notices) Regulation 2005*
    a. Infringement notices for offences (by individuals and corporations) against the *Sale of Motor Vehicles Act 1977.*
    b. The purpose of the act is to regulate the sale of motor vehicles and the licensing of motor vehicle dealers.

24. *Magistrates Court (Trade Measurement Infringement Notices) Regulation 2002*
    a. Infringement notices for offences against the *Trade Measurement Act 1991, Trade Measurement (Measuring Instruments) Regulation 1991, Trade Measurement (Miscellaneous) Regulation 1991* and *Trade Measurement (Weighbridges) Regulation 1991.*
    b. The purpose of the legislation is to regulate trade measurement in the ACT as part of the scheme for uniform trade measurement legislation throughout Australia.

25. *Magistrates Court (Tree Protection Infringement Notices) Regulation 2006*
    a. Infringement notices for offences (by individuals and corporations) against the *Tree Protection Act 2005.*
    b. The purpose of the Act is the protection of trees and forests in urban areas and by ensuring that trees of value are protected during periods of construction activity and incorporated in design planning and development.

26. *Magistrates Court (Utilities Water Conservation Infringement Notices) Regulation 2006*

a. Infringement notices for offences (by individuals and corporations) against the *Utilities (Water Conservation) Regulation 2006.*
b. The purpose of the Regulation is to conserve water resources of the utility (water supplier) and meet the reasonably foreseeable needs of consumers as well as ensure that water supplied by the utility is used efficiently, adequately protects the interests of consumers. Furthermore the utility must develop any measures in consultation with the environment protection authority.

27. *Magistrates Court (Water Resources Infringement Notices) Regulation 2007*
    a. Infringement notices for offences (by individuals and corporations) against the *Water Resources Act 2007.*
    b. The purpose of the Act is to sustainably manage the water resources of the ACT by ensuring that management and use of water resources of the ACT sustain the physical, economic and social wellbeing of the people of the ACT while protecting the ecosystems that depend on those resources and ensure that the water resources are able to meet the reasonably foreseeable needs of future generations.

Guide for Framing Offences

April 2010

Version 2

Department of Justice and Community Safety

TABLE OF CONTENTS

1. QUICK GUIDE

This guide applies if you are drafting offences, strict liability offences, setting penalties, creating infringement notices (on the spot fines) or creating civil penalties.

There are standard policies and laws that apply to the formation and interpretation of offences. Human rights law, common law and the *Criminal Code 2002* apply to offences and must be considered when drafting an offence.

This part of the guide provides a quick reference to key Government policies on offence construction.

Alternatives

- There is a range of ways of regulating behaviour or imposing a liability on people who contravene a law. It is recommended that administrative and civil models of sanction should be considered before considering a criminal sanction.

Offences

- Offences are constructed of physical elements and fault elements.
- Physical elements comprise of the offending behaviour. A fault element is the mental disposition of the offender contemplated by the offence.
- A standard offence combines both physical and fault elements in a way that is relevant to the offending behaviour.
- The conduct that is to be prohibited should be concisely and clearly described. A court will interpret ambiguous legislation in favour of an accused.
- Offences should only set out matters that are legally necessary.

Reverse burdens

- Placing an onus of proof upon a defendant, instead of the prosecution, is known as reverse onus of proof.
- A reverse onus of proof should only be used where it is justified and proportionate in the context of the *Human Rights Act 2004.*
- Casting a provision as a defence, exception, excuse or qualification to an element of the offence usually has the effect of reversing the onus of proof.
- The use of strict or absolute liability for elements of an offence is a form of reverse onus.

- It is Government policy that new offences containing reverse burdens should explicitly identify the reverse burden and state the threshold of the burden, i.e. whether the burden is evidentiary or legal.
- Agencies must include detailed justification for reverse onus provisions in the explanatory statement for the Bill or regulation.

Strict liability

- An offence is called 'strict liability' or 'absolute liability' when there are no fault elements for all, or some, of the physical elements of an offence.
- It is Government policy that an offence, or element of an offence, that is strict or absolute liability must expressly state that it is strict or absolute liability.
- It is essential that strict liability offences are only made in a context where the person knows, or ought to know, their legal obligations.
- There are criteria for making a strict liability offence in the table on page 26.
- Agencies must include detailed justification for strict liability provisions in the explanatory statement for the Bill or regulation.

Penalties

- Penalties within an Act, and ideally within the ACT statute book, should be in proportion to their respective seriousness.
- Setting of mandatory or minimum penalties, and sentencing guidelines determined by the Legislature, are contrary to Government policy.
- The ratio for maximum penalty units to imprisonment terms is 50 penalty units per 6 months imprisonment.
- The value of penalty units can be found in the *Legislation Act 2001*, and are currently $110 for individuals and $550 for corporations.

Infringement notices

- The only offences suitable for infringement notices are strict or absolute liability offences that have straightforward 'yes or no' criteria. Any offence that has complex legal distinctions is not suitable for an infringement notice.
- The ACT Government has a long-standing policy that the nominal amount on an infringement notice should not exceed 20% of the maximum fine stipulated in the offence.

Civil penalties

- Civil penalties may only be created in a regulatory context. For a civil penalty to be justified the companies or individuals liable for the penalty must be definitively on notice that they are liable if they choose to participate in the regulated activity.

- A description in an Act that something is a 'civil penalty' does not necessarily mean that a court will agree if the court considers that it is substantially criminal.

- Where a regulator has the option of pursuing either a criminal prosecution or a civil action, statutory criteria should be included that govern which course of action the regulator may choose to take.

Civil jurisdiction

- The ACT Civil and Administrative Tribunal (ACAT) provides a forum for the determination of a wide range of civil disputes, requests for review of administrative decisions and professional and occupational disciplinary matters in the Territory.

- In drafting legislation/offences, consideration should be given to which jurisdiction the offence will fall under, and whether the offence falls within the criminal or civil jurisdiction.

- Where the term 'court' is used in this guide, in many instances it is interchangeable with the ACT Court system and the ACAT.

More detail needed?

- If this is the first time you are creating an offence, please look at Parts 2 to 5 of this Guide.

- Please look at Parts 6 to 9 if you are constructing an offence.

- Strict liability offences are offences which traditionally have no mental element. These offences are often used for regulatory and licensing schemes. They are also required to be used for infringement notice schemes, also know as on the spot fines. Constructing these offences is discussed in Part 10.

- Infringement notices are a common tool for regulatory agencies. Infringement notices are an alternative to prosecution and conviction. There are a series of policies that underpin the creation of infringement notice laws. These are covered in Part 13.

- Civil penalties are an alternative to criminal proceedings in the context of regulation and where criminal liability for particular behaviour is not necessary. Civil penalties are discussed in Part 14.

2. OVERVIEW OF THE GUIDE

Purpose of the Guide

This Guide is a resource to assist in the framing of proposed amendments to ACT law.

The Attorney General and the Department of Justice and Community Safety (JACS) has a responsibility for ensuring that the ACT has a coherent criminal justice system including offences, penalty and enforcement provisions. The Attorney General also has a critical role to ensure the system and the laws are compatible with the ACT *Human Rights Act 2004*.

Over the years, JACS has collated principles and precedents relevant to the framing of offences. This Guide consolidates that material.

Within JACS, the Legislation & Policy Branch is primarily responsible for advising on the framing of offence, penalty and enforcement provisions. The Branch also advises on legal policy matters that affect the whole of Territory, such as coherence of the criminal justice system.

It is suggested that officers consult the Legislation & Policy Branch on all proposals which impact on the criminal law, especially proposals that:

- create new criminal offences and impose pecuniary or imprisonment penalties;
- increase existing penalties;
- deal with investigation and prosecution powers, such as search and seizure provisions;
- authorise the detention of any person;
- have consequences for convictions, such as provisions that propose to limit a person’s employment opportunities because of past convictions; and
- propose any changes to, or new, infringement notice offences.

3. GENERAL RESOURCES

This guide draws on a number of sources relevant to the framing of legislative provisions. There are specific references to key resources in the guide.

Guides relating to the general framing of legislative provisions that will be of value are as follows:

Legislation Handbook

http://www.cmd.act.gov.au/__data/assets/pdf_file/0006/1599/ACTGov_legislation_handbook.pdf

The Legislation Handbook sets out overarching requirements that agencies must meet when preparing Bills.

Australian Law Reform Commission Reports

www.alrc.gov.au

The Australian Law Reform Commission has published a number of reports concerning the framing of criminal offence, civil penalty and enforcement provisions.

While these reports are not binding on or directed to the Territory they contain information relevant to the development of legislation generally.

Of most relevance is the report entitled *Principled Regulation* (ALRC Report 95, March 2003). This report examines forms of sanction that provide an alternative to criminal offences, including infringement notice schemes, civil penalties and enforceable undertakings. It is a useful report for the creation or reform of regulatory or licensing schemes.

Scrutiny of Bills materials

http://www.parliament.act.gov.au/committees/index1.asp?committee=119

The website of the Scrutiny of Bills contains a range of material relevant to its consideration of offence and enforcement provisions.

Relevant material contained on the website includes the following:

- The Standing Order governing the Committee and its terms of reference.
- Reports in which the Committee sets out responses received from Ministers and then indicates its concluded view.

4. LEGISLATIVE FRAMEWORK

The Human Rights Act 2004

This chapter explains the key concepts in the *Human Rights Act 2004 (HRA)* that must be taken into account when legislation involving criminal sanctions or procedures is developed. All principles outlined in this guide follow ACT human rights standards and policy.

Overview

The purpose of the *HR Act* is to ensure the Territory Government fulfils its obligations to respect, protect and promote human rights. The *HR Act* requires policy officers, agencies, public authorities and Ministers to consider human rights implications when developing major policy initiatives, operational guidelines and new legislation (Acts and subordinate legislation).

The *HR Act* is not an ordinary Act but a statutory Bill of Rights that provides fundamental protections. It is an inherent part of the legal framework of all government law and policy.

The obligation to act consistently with human rights

The *HR Act* requires that all Territory laws are interpreted, as far as possible, in a way that is consistent with the human rights protected in the Act. Section 30 of the *HR Act* is a rule of interpretation that enables Courts and decision-makers to interpret existing Territory laws in a manner consistent with human rights.

In practice, section 30 means that courts, tribunals and administrative decision-makers must interpret law consistently with the *HR Act,* unless a Territory law clearly provides otherwise. A person exercising a statutory discretion must exercise that discretion consistent with human rights described in the Act.

Civil and political rights

The HR Act recognises the individual civil and political rights enshrined in the International Covenant on Civil and Political Rights (ICCPR) as Territory law. Australia has been a party to the ICCPR for more than two decades,[55] but in order that the rights in the ICCPR are domestically enforceable, they must be given force by domestic law.

The specific rights are articulated in Part 3 of the *HR Act*. The rights set out in the *HR Act* that are most often engaged in relation to criminal justice are:

- Section 18, the right to liberty and security of the person;
- Section 19, humane treatment when deprived of liberty;
- Section 20, children in the criminal process;
- Section 21, the right to fair trial; and
- Section 22, rights in criminal proceedings.

The fact that an offence is directed at a corporation does not necessarily mean that human rights considerations can be disregarded. Although an offence may contemplate a corporation as the principal offender, individuals may also be liable for the offence through the operation of Part 2.4 of the *Criminal Code 2002* and common law rules of statutory interpretation (see *Hamilton v Whitehead* (1988) 166 CLR 121).

[55] Australia ratified the ICCPR in November 1980. The ICCPR is part of what is known as the International Bill of Human Rights, which comprises along with the ICCPR, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Meaning and interpretation of the rights

The rights set out in Part 3 of the *HR Act* have been explored in great detail by the justice systems of Europe, Canada, the United Kingdom and New Zealand, to name a few countries. The United Nations has also made various instruments relating to these rights. Human Rights are interpreted or given meaning in the context of international standards including UN instruments and international jurisprudence.

Section 31 of the *HR Act* allows Territory officials and courts to draw on sources of international law and judgments of foreign and international courts for guidance on how to interpret what human rights mean in the ACT.

Consequently, there is an abundance of case law on criminal justice matters from Europe, Canada and New Zealand and other countries which establishes how rights are to be interpreted and upheld in context of criminal justice.

Justified limitations to human rights

International human rights law is based on the recognition of the value of each human being as a member of society. Human rights law recognises that rights exist in a social context and therefore provides a method for reconciling competing rights and interests. For example, the ICCPR may not be interpreted so as to imply that any government, group or individual has the right to infringe the rights of others.[56]

The ICCPR also includes specific limitations in various articles relating to particular rights.[57] By specifying which limitations are permissible, the ICCPR accommodates the tension between legitimate competing interests and the protection of individual human rights.

In line with international human rights norms, the *HR Act* recognises that few rights are absolute and that limits may be placed on rights within defined boundaries.[58] The limit must be reasonable, demonstrably justifiable in a free and democratic society and authorised by a Territory statute or statutory instrument.

The ‘proportionality test’, is the framework that is used to work out what are legally acceptable limitations on human rights. Section 28 of the *HR Act* brings the proportionality test into Territory law and states that:

> Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

---

[56] Article 5 of the ICCPR.

[57] For example, the right to a public trial under Article 14(1) of the ICCPR may be limited, and the press and public excluded from all or part of a trial, on grounds including national security or public order.

[58] Section 28, HR Act 2004. Examples of general provisions authorising restrictions on the exercise of rights can be found in the UDHR (Article 29 and 30) and the ICESCR (Article 4). While the ICCPR does not contain a general limitations provision on the extent to which rights may be restricted, it includes specific limitation clauses in relation to specific rights.

Section 28 requires that any limitation on a fundamental right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is 'reasonable' depends on whether it is proportionate – proportionality requires that the proposed limitation of the right goes only so far as is necessary to achieve the recognised need.[59]

Whether a limit is reasonable depends upon whether it is proportionate to achieve a legitimate aim. Proportionality requires that the limitation of rights is:

- necessary and rationally connected to the competing interest;
- the least restrictive way to satisfy the competing interest; and
- not have a disproportionately severe effect on the person to whom it applies.

This is an established formula used in human rights law in comparable countries and is consistent with the general rule that limits on human rights must be read as narrowly as possible.[60]

Section 28(2) of the *HR Act* states that all relevant factors must be considered in deciding whether a limit is reasonable including:

(a) the nature of the right affected;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relationship between the limitation and its purpose;

(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Some rights are absolute and cannot be restricted in the interests of balancing other competing interests. These absolute rights include the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment and freedom from arbitrary arrest and detention.

Criminal Code 2002

The *Criminal Code 2002* (the *Code*) contains provisions that govern the construction and operation of Territory offences. Primary legal rules in the *Code* that govern offences are:

---

[59] *Human Rights Act 2004:* Plain English Guide, p 9.

[60] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69; *R (Daly) v Secretary of State for the Home Department* 2 AC 532 2001; *James v UK* (1986) 8 EHRR 123; *Campbell v UK* (1993) 15 EHRR 394; *R v Oakes* [1986] 1 SCR103.

- Physical and fault elements of offences, and strict and absolute liability as alternatives to fault (Part 2.2).
- Defences to offences, and circumstances in which there is no criminal responsibility (Part 2.3).
- Extensions of criminal responsibility, such as conspiracy and attempt (Part 2.4).
- Corporate criminal responsibility (Part 2.5).
- Burden and onus of proof and use of averments (Part 2.6).
- Geographical reach of offences (Part 2.7).

Framing offences and the Criminal Code 2002

The *Code* applies to the drafting and enactment of all new criminal offences.

For an offence to work effectively under the *Code* it needs to conform to the fundamentals set out in chapter 2 of the *Code.* Chapter 2 applies to all new offences created or remade after 1 January 2003. It can also be applied to old offences by express words in an Act or in a subordinate law. This guide elaborates upon the principles in chapter 2 of the *Code* that apply to new offences.

Other relevant criminal laws

Other laws that make up the body of criminal laws include the *Crimes Act 1900* and the *Crimes (Sentencing) Act 2005.*

The body of offences that are associated with the traditional understanding of crimes are located in the *Crimes Act 1900* and the *Code.* These are offences against the person, such as violence and property offences.

The *Crimes (Sentencing) Act 2005* is the law applied by the courts when sentencing an offender and provides the courts with a range of sentencing dispositions that make up the punishment for an offence. These dispositions include: fines, good behaviour orders (including conditions of rehabilitation or community service), suspended sentences, periodic detention and imprisonment.

5. OPTIONS OF LAWS AND LIABILITY

Democracy and the rule of law

One keystone of modern democracies is the application of the 'rule of law', namely that the body of law applies to all people: the community is governed by laws that are disclosed and applicable to all.

In the context of liberal democracies there is greater emphasis on the accountability of those making and executing laws. Individuals are free to do what ever is not prohibited by law: Governments may only do what is authorised by law.

Any Government decision to make a law is never taken lightly. If a law needs to be made, the next difficult question to be answered is what type of law needs to be made to resolve the problem, or prevent the behaviour in question.

Regulatory models

There are a plethora of means of regulating behaviour or imposing a liability on people who contravene a law. There are three fundamental models: administrative, civil and criminal.

An example of an administrative model is a licensing scheme that authorises a Government agency to issue and cancel licences without reference to a court.

An example of a civil model involves a law that authorises a court or tribunal to impose a financial penalty upon an individual or company that is licenced or authorised to participate in a regulated industry.

An example of a criminal model is a law that sets the boundaries of acceptable behaviour by creating offences for prohibited behaviour.

Many laws, particularly laws regulating an industry or profession, involve aspects of all three models depending upon the nature of the behaviour or action that is being controlled.

Before deciding to create an criminal offence, other options for achieving the objective should be considered. Other options include:

- community education programs, warning notices, issuing cautions etc;
- creation of licences, authorities, permits etc which ultimately involves suspension or withdrawal of the entitlement. For example, a licence or permit to sell merchandise in the street;
- creation of powers for government agencies to prevent or stop the conduct;
- creating legal rights for citizens or agencies to take civil action for breach of the legislation; and
- civil penalties.

Criminal or not?

It is not always clear whether a given provision should be criminal or civil in character. Factors that should be considered in this context include:

- What is the nature of the conduct sought to be deterred? What are the circumstances surrounding the proposed provision?

- Where does the proposed provision fit in the overall legislative scheme?
- Does the conduct seriously harm other people?
- Does the conduct in some way so seriously contravene our fundamental values as to be harmful to society?
- Is it appropriate to use criminal enforcement powers in investigating the conduct?
- Is the criminal law appropriate for dealing with the undesirable conduct in question?
- How is similar conduct regulated in the proposed legislative scheme and other ACT legislation?
- If the conduct has been regulated for some time, how effective have existing provisions been in deterring the undesired behaviour?
- What level and type of penalties will provide appropriate deterrence?

Cost is a relevant factor to consider before creating an offence. Investigation and prosecution of offences requires considerable resources so creating offences for minor misconduct might be inappropriate.

Consequences of conviction

Another factor is the effect of a criminal conviction. Conviction carries a range of long-term consequences beyond the immediate penalty. For example:

- A person convicted of certain offences will be ineligible to hold public office and may be removed from a position they already hold.
- Subject to the spent conviction provisions in the *Spent Convictions Act 2000*, a person may be required to disclose their criminal conviction in a range of circumstances.
- Conviction will make a person ineligible to travel to many countries.
- A conviction also affects the entitlements of people who are not Australian citizens to remain in Australia under the *Migration Act 1958* (Cth).
- Conviction may disqualify a person or corporation from being accredited under certain legislation.
- Certain convictions may make a person ineligible to be a director, principal officer or auditor of a company.

Conviction will have more impact on an individual than on a corporation. A conviction also invokes social stigma, particularly where the punishment is imprisonment. This is a factor when determining comparative administrative, civil and criminal models.

A criminal offence is the ultimate sanction for breaching the law, and is the benchmark against which other sanctions are measured. Determining when a criminal law should be made involves many considerations. In the *Principled Regulation Report* the ALRC writes:

> The main purposes of criminal law are traditionally considered to be deterrence and punishment. Central to the concept of criminality are the notion of individual culpability and the criminal intention for one's actions.[61]
>
> . . . a key characteristic of a crime, as opposed to other forms of prohibited behaviour, is the repugnance attached to the act, which invokes social censure and shame.[62]

6. ELEMENTS OF AN OFFENCE

Criminal offences are comprised of physical and fault elements. Section 11 of the *Code* explains:

> **Section 11 Elements**
>
> (1) An offence consists of physical elements and fault elements.
>
> (2) However, the law that creates the offence may provide that there is no fault element for some or all of the physical elements.
>
> (3) The law that creates the offence may provide different fault elements for different physical elements.

Physical Elements

The physical elements of an offence are the essential ingredients of liability. Types of physical elements are classified in section 14 of the *Code* as:

- **Conduct**, where the relevant conduct is an act (e.g. harming a person, making a statement, taking a person's property), an omission to act (e.g. failing to comply with a registration requirement) or a state of affairs (e.g. being in possession of a weapon or a prohibited drug);
- A **result** of conduct (e.g. causing harm to a person who is a government official); and
- A **circumstance** in which conduct occurs, or a result of conduct occurs (e.g. threatening a person who is a government official).

This list of physical elements is exhaustive. If an element of an offence does not relate to fault, it is necessarily conduct, result or circumstance.

---

[61] ALRC 95 at 2.9.
[62] Ibid at 2.10.

Fault Elements

Fault elements define the degree of blameworthiness linked to the wrongful conduct (the physical elements of an offence).

It is possible for some, or all, of the physical elements of an offence to have no fault elements, in which case the offence is said to be a strict or absolute liability offence. (See part 8 below.)

Section 17 of the *Code* provides four standard fault elements:

- intention;
- knowledge;
- recklessness; and
- negligence.

Other fault elements may be created only if necessary.

If an offence in an Act does not specify a fault element then section 22 of the *Code* applies a default fault element for any physical element according to the formula in section 22:

> (1) If the law creating an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.
>
> (2) If the law creating an offence does not provide a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for the physical element.

Connecting the fault elements to physical elements

Division 2.2.3 of the *Code* describes the connection between fault elements and physical elements as set out in this table.

Physical elements	**Fault elements available (s. 17-21)**	**Default fault element (s. 22)**
conduct	intention negligence (in some cases)	intention
result	intention knowledge recklessness negligence	recklessness

circumstance	intention knowledge recklessness negligence	recklessness

Intention (section 18)

(1) A person has ***intention*** in relation to conduct if the person means to engage in the conduct.

(2) A person has ***intention*** in relation to a result if the person means to bring it about or is aware that it will happen in the ordinary course of events.

(3) A person has ***intention*** in relation to a circumstance if the person believes that it exists or will exist.

Knowledge (section 19)

A person has ***knowledge*** of a result or circumstance if the person is aware that it exists or will exist in the ordinary course of events.

Recklessness (section 20)

(1) A person is ***reckless*** in relation to a result if—

(a) the person is aware of a substantial risk that the result will happen; and

(b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(2) A person is ***reckless*** in relation to a circumstance if—

(a) the person is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is a question of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element.

Negligence (section 21)

A person is ***negligent*** in relation to a physical element of an offence if the person's conduct merits criminal punishment for the offence because it involves—

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist.

7. FRAMING AN OFFENCE

Conduct that is prohibited by an offence provision must be concise and unambiguous.

Ambiguity undermines the certainty and therefore the enforceability of any law. It should be clear to the police, the prosecution and the courts what conduct the legislature intended to prohibit in a criminal offence.

Before an offence can be drafted, the policy underpinning the offence must be able to identify:

(a) the particular behaviour that needs to be prohibited by an offence provision;

(b) the physical and fault elements that will constitute the prohibited behaviour;

(c) whether provisions are needed regarding the proof of the elements to the offence (e.g. can judicial notice be taken of any facts);

(d) any exceptions to the prohibited behaviour: and

(e) the appropriate maximum penalty to be prohibited should be concisely and clearly described.

Normally a court will interpret ambiguous legislation in favour of an accused. Ambiguity will diminish the law.

Offences should only set out matters that are legally necessary. If unnecessary things are included in the physical elements of an offence, the prosecution may be required to prove these things beyond reasonable doubt.

The precise policy of what makes up the offence needs to be established. The starting point should be the physical elements of the offence: *what is the exact behaviour the offence is aimed to address*.

An offence that is drafted so broadly that it relies on prosecutors or the courts to ensure that innocent individuals are not prosecuted or convicted is not acceptable. Justice Thomas in *Re Gold Coast City Council By-Laws* [1994] 1 QD R commented:

> I am unimpressed with governmental authorities who create unreasonably wide prohibitions and justify them with the statement

> "trust us". Wills J expressed a similar sentiment in 1904: "I dislike extremely legislation which is felt to be so unfair if universally applied that it can only be justified by saying that in a particular case it will not be enforced. I think that is as bad a ground for defending legislation as one could well have." (*Stiles v Galinski* [1904] 1 KB 615 at 625).

Citizens are entitled to know the extent of their rights and obligations under the law. Those rights and obligations should not be dependent on the discretion of unelected authorities.

An offence should not be created if it cannot, or will not, be enforced.

Code offences of general application

The *Code* and *Crimes Act 1900* contain many general criminal offences, such as offences of violence, property, fraudulent conduct and offences against the administration of justice.

The *Code* also contains provisions that extend the application of all Territory offences to those who conspire, incite, attempt etc to commit an offence. These extensions of criminal responsibility are set out in part 2.4 of the *Code.*

It is unnecessary and undesirable to duplicate these offences in other Territory legislation. An offence appearing in the *Code* or the *Crimes Act 1900* will apply to any conduct in the Territory.

Provisions of general application were placed in the *Code*[63] to avoid the technical distinctions, loopholes, additional prosecution difficulty and appearance of incoherence associated with having numerous slightly different provisions of similar effect across ACT law.

Where a relevant *Code* or *Crimes Act* provision applies to the offending behaviour being considered, similar provisions should not be made in another Act. If you are considering making an offence that is conceptually the same as violence, theft, fraud or perverting justice, please check the *Code* or *Crimes Act* or talk to Legislation and Policy Branch at JACS.

It is inappropriate to recommend the enactment of a specific criminal offence that is already in force as a general criminal offence simply "to raise the profile of the issue in the community".[64] If there are particular problems with prosecuting the specific subset of a general offence, please contact the Criminal Law Group in Legislation and Policy Branch of JACS.

However, there are circumstances where particular variations of criminal behaviour may require an additional offence because of distinguishing features that represent a different level of criminality and an adjustment to the available defences. For example, an act of female genital mutilation would amount to the offence of intentionally inflicting grievous bodily harm.

---

[63] There are also some provisions concerning offences in the Crimes Act. It is intended that these will be eventually transferred to the Criminal *Code*.

[64] AIC at 94 reporting on a recommendation of the Victorian Parliamentary Drug and Crime Prevention Committee (2004).

However, the creation of the offence of female genital mutilation removes any doubt whatsoever that this act is considered to be a very serious crime and that consent by a parent is no defence to the crime.

Standard terminology in the ACT statute book

The ACT statute book has a series of common definitions or terminology that applies to all ACT law. It is recommended that when drafting offences standard terms or definitions are considered rather than creating new definitions for the same thing.

Key sources for standard definitions in the criminal context are the *Legislation Act 2001* and the *Code.*

Some common terms from the *Legislation Act 2001* that may be useful for offences include: adult, breach, child, contravene, document, entity, establish, found guilty, individual, parent and person.

Some common terms from the *Code* that are useful for drafting offences include: belongs, benefit, cause and causes, damage, death, deception, dishonest, gain, harm, obtain, serious harm, supply, theft and traffics.

Of particular note is the definition of 'Harm' and 'Serious Harm'.

> ***harm*** means—
>
> (a) physical harm to a person, including unconsciousness, pain, disfigurement, infection with a disease and any physical contact with the person that a person might reasonably object to in the circumstances (whether or not the person was aware of it at the time); and
>
> (b) harm to a person's mental health, including psychological harm, but not including mere ordinary emotional reactions (for example, distress, grief, fear or anger);
>
> (c) whether temporary or permanent, but does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.
>
> ***serious harm*** means any harm (including the cumulative effect of more than 1 harm) that—
>
> (a) endangers, or is likely to endanger, human life; or
>
> (b) is, or is likely to be, significant and longstanding.

It may be necessary to alter the definitions of harm or serious harm in specific circumstances. This is appropriate where there is a clear need. For example, section 48A and 48B of the *Crimes Act 1900* provides for increased penalties for offences against pregnant women. The penalties apply if an offence is committed against a pregnant woman and the commission of the offence caused:

- the loss of, or *serious harm* to, the pregnancy; or
- the death of, or *serious harm* to, a child born alive as a result of the pregnancy.

Clearly the *Code* definition of serious harm is not suitable in the context of a pregnancy, as such the Crimes Act contains a separate definition of harm and serious harm to a pregnancy.

Killing, harm etc to be treated as results

Words like “kill”, “injure”, “harm”, “damage” and “destroy” should not be used as the active verb in an offence. Death, injury, harm, damage and destruction are all the results of conduct, rather than the conduct itself. An offence should be framed in terms of actions that causes “damage to”, “harm to”, “the death of” etc. This avoids potential confusion over whether an element is a result or conduct, and also makes it clear that the automatic fault element is recklessness rather than intention.

8. REVERSE BURDEN OF PROOF

As discussed earlier, the starting point for the formulation of offences is that the prosecution has the burden of proving the elements of an offence beyond reasonable doubt. The prosecution also has the task of negating any defences, exceptions or excuses raised by a defendant beyond reasonable doubt.

Placing an onus of proof upon a defendant, instead of the prosecution, is known as reverse onus of proof.

A reverse onus of proof should only be used where it is justified and proportionate in the context of the *HR Act.*

Casting a provision as a defence, exception, excuse or qualification to an element of the offence usually has the effect of reversing the onus of proof.

Evidential burden

An evidential burden places the defendant in the position of presenting, or pointing to, evidence that suggests a reasonable possibility that the defence can be established. If the defendant achieves this, the prosecution must refute the defence beyond all reasonable doubt for a court to convict the defendant.[65]

---

[65] See for example *Hausmann v Shute* [2007] ACTCA 5.

Legal burden

An onus of proof that requires a legal burden places the defendant in the position of having to prove the defence to the court on the balance of probabilities. If the defendant achieves this, the prosecution must refute the defence beyond all reasonable doubt for a court to convict the defendant.

An evidential burden on the defendant would lend a stronger argument for compatibility with the *HR Act.* A legal burden on the defendant would more likely be incompatible.

Strict liability or absolute liability for elements of offences

A drafting practice endorsed by the *Code* methodology is the application of strict liability or absolute liability to an element of an offence. The use of this drafting technique renders the element of the offence without a fault element and triggers the statutory defences and strict liability provisions in the *Code* to apply to the particular element of the offence.

The use of strict or absolute liability for elements of an offence can potentially create a form of reverse onus. This technique is justified when the element of the offence is intended to be factual.

Example:

321 Minor theft

(1) A person commits an offence (also ***theft***) if—

(a) the person dishonestly appropriates property belonging to someone else with the intention of permanently depriving the other person of the property; and

(b) the property has a replacement value of $2 000 or less when it is appropriated.

(2) Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

(3) Absolute liability applies to subsection (1) (b).

In this offence the physical element of (1)(b) has no mental element, consequently there is no issue as to whether the person intended to steal property of $2000 or less.

Conversely, it also means that the offence would not be applicable to a defendant who allegedly stole more than $2000 worth of property. The intent of the defendant to steal less than $2000 worth of property would not enable the offence to apply. In the context of absolute liability the defence of mistake of fact would not be available to the defendant.

While this drafting technique is very useful for a range of offences, it is by no means the only technique that is available to achieve a similar aim. In some cases it may be more reasonable to use reverse burdens of proof of an evidential standard for elements of an offence and provide relevant defences.

Presumptions

A presumption is a provision that prescribes something is to be presumed by a court under the criteria set out in the legislation. For example, an Act might say that a person is deemed to be selling drugs if they are found to be in possession of a particular quantity of drugs. In this sense, a presumption acts like a reverse burden as the defendant has to rebut the presumption by adducing evidence or proving the contrary.

The considerations relevant to whether a presumption should be included in an offence are equivalent to those applicable to provision for a defence. Section 59(c) of the *Code* states that a provision which "creates a presumption that the matter exists unless the contrary is proved". Consequently, a presumption in an offence is treated as equivalent to a legal burden defence. Likewise, a "prima facie" presumption operates in a similar manner as an evidential burden defence.

Reverse burdens identified in the offence

It is Government policy that offences containing reverse burdens should explicitly identify the reverse burden and state the threshold of the burden, ie whether the burden is evidentiary or legal.

Explanatory statements

The ACT Legislative Assembly Scrutiny of Bills Committee consistently draws the Assembly's attention to offences that reverse the onus of proof on the basis that they derogate from section 21 of the *HR Act* and they may be considered to trespass unduly on personal rights and liberties. Agencies must include the following minimum requirements in the explanatory statement accompanying a Bill:

- clear identification of a reverse onus provision;
- compelling and demonstrable policy justifications for reversing the onus of proof, and in particular it must explain why the defendant should bear the onus of proof instead of the prosecution;
- set out the reason why it is justifiable under section 28 of the *HR Act*; and
- where a legal burden is imposed: the justification for requiring the defendant to discharge a legal burden rather than an evidential burden.

Case law

Sheldrake v Director of Public Prosecutions & Attorney General's Reference (No 4 of 2002) [2004] UKHL 43.

Sheldrake decided that European human rights jurisprudence did not "outlaw presumptions of fact of law" incorporated into an offence. However, the justification and fairness of offences that include reverse burdens must be tested in the context of a fair trial.

The substance and effect of any presumption adverse to a defendant had to:

- be examined on all of the facts and circumstances;
- be proportionate to the object of the offence;
- provide the defendant with the opportunity to rebut the presumption;
- uphold the court's authority to assess the evidence; and
- weigh up what is at stake and the difficulty for prosecution in the absence of a presumption.

See also *R v Wholesale Travel Group Inc* [1991] 3 SCR 154, L'Heureux-Dube and Cory JJ.

9. CRIMINAL CODE DEFENCES

The *Code* contains a number of defences of general application. Defences covering these same matters should not be included in individual offences.

The *Code* contains the following de a defence open to a defendant only if the person considered whether or not facts fences of general application to all ACT offences.

Mistake of fact — strict liability offences only

Under section 36, mistake of fact is existed and was under a mistaken but reasonable belief about the facts. If those facts had existed, the conduct would not have constituted an offence. Mistake of fact applies to strict liability offences only. It has no application to absolute liability (section 24).

Lack of capacity — Children

A child under 10 years is not criminally responsible (section 25). A child aged 10 years or more but under 14 years can only be criminally responsible for an offence if the child knows that their conduct is wrong. The prosecution must prove that the child knows their conduct is wrong (section 26).

Mistake or ignorance of law

The *Code* largely follows the common law rule that mistake about or ignorance of the law is no defence. Section 37 applies this to all law (Acts and subordinate legislation).

Intervening conduct or event

It is a defence if the conduct in question is the result of an act of another person, or non-human activity, over which the defendant had no control and against which they could not reasonably be expected to guard. The defence is only relevant to offences, or physical elements, involving strict liability or absolute liability, because the circumstances that make up the defence would negate any fault element.

Duress

A person has a defence if the conduct in question was carried out under duress. For conduct to have been carried out under duress the person must have reasonably believed that a threat has been made that will be carried out unless an offence is committed, that there is no reasonable way to render the threat ineffective and that the conduct is a reasonable response to the threat (section 40(2)).

Sudden or extraordinary emergency

A person has a defence if the conduct in question was carried out in response to circumstances of sudden or extraordinary emergency. The person must reasonably have believed that circumstances of sudden or extraordinary emergency existed, that committing the offence is the only reasonable way to deal with the emergency and that the conduct is a reasonable response to the emergency (section 41(2)).

Lawful authority

Section 43 provides a defence of lawful authority. An example of lawful authority might be an authorisation to manufacture a dangerous substance. The defence applies to all offence provisions under Territory law. Its specific mention in an offence provision is redundant.

Particular exceptions:

The existence of defences, exceptions, excuses and qualifications in the *Code* does not prevent the creation of particular, or specific, defences, exceptions, excuses or qualifications for new offences. Section 58 of the *Code* provides some examples.

'Without reasonable excuse'

The phrases "without reasonable excuse" or "section X [being an offence] does not apply if the person has a reasonable excuse" should be avoided if the excuses it intends it to cover:

- are already covered by a generic defence in the *Code*; or
- can be articulated as a specific defence to the proposed offence.

Reasonable excuse is useful in circumstances where:

- it is difficult to anticipate the justifiable excuses that may arise and it is impractical to attempt to specify them; or

- there are other circumstances that justify using the defence.

Also, the need to preserve the privilege against self-incrimination or legal professional privilege is not a reason to include the phrase “without reasonable excuse”. The privileges are not abrogated by the absence of that phrase or any other defence.

Averments and evidentiary certificates

An averment works as a factual presumption that positively favours the prosecution. An evidentiary certificate is a means of establishing something as fact on the basis of the authority of the official or agency providing the certificate. Averment and evidentiary certificate provisions are generally inappropriate as they remove from the prosecution the usual burden of establishing the facts that may constitute an offence. This raises significant issues of fairness for the defendant.

Averments and evidentiary certificates detract from the presumption of innocence and therefore their use has generally been confined to formal or technical matters or where the matters are peculiarly within the defendant’s knowledge. An example of the use of a certificate for a “formal” matter is a certificate indicating that a notice was duly issued or served. An example of a technical notice is one indicating the outcome of a scientific analysis and the details of when and where that analysis occurred.

A court may fail to give effect to an averment that is cast too broadly.[66]

Procedural safeguards are normally included with provisions for averments and evidentiary certificates directed to a technical/ scientific context. This recognises that the use of evidentiary certificates will only be effective if a court is confident that the certificate can be relied on. For example, a copy of the certificate must be given to the defendant, the person who prepared the certificate may be called to give evidence, and the court may consider additional evidence that is relevant.

Any averment or evidentiary certificate should be framed in line with section 61 of the *Code,* which provides that averments cannot be used:

- with respect to a fault element of an offence (ie, a defendant’s intention, knowledge, recklessness or negligence); and

- for offences punishable by imprisonment.

10. STRICT AND ABSOLUTE LIABILITY

An offence is called ‘strict liability’ or ‘absolute liability’ when there are no fault elements for all, or some, of the physical elements of an offence. If it is

[66] Australian Law Reform Commission Report 60: *Customs and Excise* volume II paragraph 12.5.

intended that no fault elements should apply to an offence or a particular physical element of an offence, the provision must state that strict or absolute liability applies.

Strict liability

There are two essential features of a strict liability offence. First, there is no requirement to prove a fault element, such as intention or recklessness. It is sufficient to show that the defendant did the prohibited act. For instance, it is a strict liability offence to exceed the speed limit whether or not the driver intended to drive faster than the speed limit.

The second distinguishing feature is that the defence of reasonable mistake of fact applies. So if the driver checks the speedometer to check they are not speeding but the dial is faulty, the person is not liable because the offence occurred due to a reasonable mistake of fact. Other defences can also apply, but the defence of mistake of fact inherently applies through section 36 of the *Code.*

Absolute liability

Absolute liability is similar to strict liability except that the defence of mistake of fact does not apply. However, like strict liability, other defences can apply.

Application of strict and absolute liability offences in the ACT

State, Territory and Commonwealth governments and parliaments, as well as the ACT and Commonwealth Scrutiny of Bill Committees hold a long standing view that legislatures should be restrained in making strict or absolute liability offences and that these offences should be properly justified.

In the human rights context, strict and absolute liability offences engage the right to be presumed innocent (section 22(1) *HR Act*). This type of offence engages this right because there are no fault elements to these offences. The absence of a fault element generally places a burden upon the defendant to challenge the prosecution case.

Normally, the prosecution has to prove to a court that a person is guilty. In a situation of strict liability, the onus is on the defendant to raise a defence by presenting evidence, or pointing to evidence.

Fault liability is considered to be one of the most fundamental protections of criminal law and to exclude fault is a serious matter. Strict (or in exceptional cases absolute liability) should only be applied after careful consideration on a case-by-case basis of all available options. It is strongly recommended that every proposed strict liability offence should be discussed with the Legislation and Policy Branch of JACS.

Absolute liability offences are rare and would only be approved in the most exceptional cases. The table below lists the criteria for considering whether an offence is suitable for strict or absolute liability.

It is essential that strict liability offences are crafted to address unlawful behaviour in a context where the person knows, or ought to know, their legal obligations. A common sense rule of thumb is that strict liability is used only for 'regulatory' offences. Strict liability offences should not be framed to catch the general public for inadvertent breaches of the law.

A useful way of conceptualising if a prohibited activity will be suitable for a strict liability offence will be to apply the notion of whether the person or entity will be in a framework of licensing or authorisation and therefore be aware of their obligations.

This concept is discussed in the decision of Justices L'Heureux-Dube and Cory, as delivered by Justice Cory in the case of *R v Wholesale Travel Group Inc* [1991] 3 SCR 154:

> The licensing concept rests on the view that those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of that responsibility. Therefore, it is said, those who engage in regulated activity should, as part of the burden of responsible conduct attending participation in the regulated field, be deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere. Foremost among these implied terms is an undertaking that the conduct of the regulated actor will comply with and maintain a certain minimum standard of care. [p. 93]
>
> . . .
>
> The nature of regulated conduct will itself go far to determining whether the licensing argument applies. It is useful to distinguish between conduct which, by virtue of its inherent danger or the risk it engenders for others, would generally alert a reasonable person to the probability that the conduct would be regulated, from that conduct which is so mundane and apparently harmless that no thought would ordinarily be given to its potentially regulated nature. In the latter circumstances, the licensing argument would not apply.

What subject matter will meet the 'licensing concept' or 'licensing approach' test will depend upon the substance and context of the matter. For example, drinking coffee or tea is perfectly lawful in most public places. However, it might be prohibited in a treatment or surgical area of a public hospital. Whether this matter will be suitable for a strict liability offence would depend upon whether the people entering these areas in a hospital would have reasonable notice or awareness that they enter on condition of not taking hot drinks with them.

Imprisonment can only be imposed as a penalty for strict liability offences in limited cases. Imprisonment can only be a penalty if the offence includes a defence of 'reasonable steps', 'due diligence' or another defence of a similar nature and breadth.

Criteria for strict liability or absolute liability

Strict Liability	Absolute Liability
Criteria when applying to all physical elements of an offence	**Criteria when applying to all physical elements of an offence**
There must be a demonstrable and legitimate aim for creating a strict liability offence. Strict liability offences can only be created in a context where a person or body corporate is on notice that the behaviour is prohibited. It must be demonstrable that a person ought to know the obligation placed on them. A clear example is a licensing scheme, where the licence holder would be expected to know of their legal obligations. The licensing or authorisation concept is a useful way of assessing whether a strict liability offence would be appropriate.	Absolute liability offences are extremely rare and must only be made in the most exceptional circumstances. A very high degree of notice and knowledge of the person liable would be expected.
Strict (and absolute) liability offences are usually employed in cases where it is necessary to ensure the integrity of a regulatory scheme, or some context where the behaviour is regulated. For example: • public health; • safety; • the environment; and • protection of the revenue. Alternatively, they may apply where the context of law ensures that people are on notice of what behaviour is prohibited. For example, offences that might apply to smoking in a public place.	In addition to clear legitimate ground for penalising persons lacking fault, there must also be clear legitimate grounds for penalising a person who made an honest and reasonable mistake of fact (as the defence of reasonable mistake of fact is not available for absolute liability).

Strict Liability	Absolute Liability
Criteria when applying to all physical elements of an offence	**Criteria when applying to all physical elements of an offence**
The application of strict liability is not justified on the sole ground of minimising resource requirements or reasons that might fall under the heading of 'administrative convenience'.	
As these offences are primarily aimed at conduct on the less serious side of the criminal spectrum, the maximum penalty is usually limited to a monetary penalty (maximum 50 penalty units). Only in appropriate cases would a penalty of imprisonment be compliant with human rights law. Any strict liability offence holding imprisonment as a penalty must have a general defence of 'taking reasonable steps'; 'due diligence'; or another defence of a similar nature to be compliant with human rights. Any prison term as a penalty can only be to a maximum of six months.	

Relevant references

Cases: *He Kaw Teh* (1985) 157 CLR 523; *Salabiaku v France* 13 EHRR 379; *Sheldrake v DPP* [2005] 1 AC 264 (HL); *R v Wholesale Travel Group Inc* [1991] 3 SCR 154; *Re BC Motor Vehicle Act* [1985] 2 SCR 486; *Hausmann v Shute* [2007] ACTCA 5.

Texts: Stefan Trechsel, *Human Rights in Criminal Proceedings,* Oxford University Press, (2005); A Butler & P Butler, *The New Zealand Bill of Rights Act: A Commentary,* LexisNexis, (2005); Kent Roach, *Criminal Law,* 3rd ed, Irwin Law, (2004); Australian Law Reform Commission, *Principled Regulation,* Report 95 March (2003).

11. OFFENCES IN SUBORDINATE INSTRUMENTS

Minor offences can be dealt with in regulations provided the penalty does not exceed 20 penalty units (30 penalty units in exceptional cases) — this equates to $2,000 for an individual and $10,000 for a corporation.

As a matter of Government policy, serious offences should not be created in subordinate laws.

The enactment of laws punishing criminal behaviour with serious penalties should be deliberated fully by the Legislative Assembly. Therefore, serious offences should be proposed in a Bill, not subordinate law.

Where content of an offence is stated in the offence provision itself, the scope and effect of the offence is clear to the Courts, the Government, the Legislative Assembly and the community.

An offence that relies upon physical elements, or information, standards etc that lie in a subordinate law or other source is undesirable.

For example:

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

A further problem with such provisions is that they are a form of general offence that applies a single maximum penalty to a wide range of potential conduct of unspecified seriousness.

However, in some cases it may be unavoidable or necessary for an offence to interact with other legal instruments. For example, a law may rely on a national standard or a subordinate law that lists classifications, regulated substances etc. In this case it is recommended that the offence should refer to the subordinate law in the narrowest possible way. If it is necessary to take this approach, it is recommended you contact the Legislation and Policy Branch to discuss.

The following factors are relevant in determining whether the content of an offence to a subordinate law is appropriate.

- There should be a demonstrated need for some of the content to be determined under a subordinate instrument.

- The offence should generally carry a maximum penalty not exceeding 30 penalty units for an individual – although 20 penalty units is the preferred maximum. The Territory's general approach in recent years has been that offences in regulations should carry maximum penalties no higher than 30 penalty units for an individual (the maximum for a corporation is five times higher). It is logical that penalties for offences contained in part in a regulation or other subordinate instrument should be no higher than this.

- The content that may be determined under the subordinate instrument should be defined and circumscribed in the Act to the greatest extent possible.

- There should be an appropriate mechanism for ensuring that the subordinate rule is readily available to the public (eg it will be a regulation or a *Code* of practice that is approved under the relevant Act and notified on the ACT Legislation Register).

- There should be a mechanism for clearly identifying the part(s) of an instrument that the offence provision uses. For example, if the offence applies to contravention of a regulation made for the purposes of the offence, relevant regulations should refer back to the offence. This provides certainty for both enforcers and those subject to the law.

- It is generally easier to justify the delegation of offence content to regulations compared to other types of subordinate instrument. Regulations are considered by the Assembly, whereas other instruments may not be. This provides an additional layer of scrutiny and accountability.

Standing Committee on Legal Affairs views: The Scrutiny of Bills Committee is likely to be critical of any offence considered to contain an excessive delegation of rule-making power to the executive or unelected public officials.

12. PENALTIES

Penalties should be relative to seriousness or prevalence of behaviour

Where possible penalties within a body of law, and ideally within the body of ACT laws, should be in proportion to their respective seriousness. Penalties might also be set in relation to the prevalence of the behaviour.

For example, intentional harm towards wildlife and animals should attract relatively similar penalties. However, a higher penalty may be considered if the prevalence of behaviour needs to be addressed. For example, a greater number of marsupials are being subjected to intentional harm.

The maximum penalty for an offence should reflect the seriousness of the offence relative to other offences of a similar nature.

Other factors include the relative seriousness of the particular offence within the legislative scheme, the level of responsibility carried by the person falling within the obligation and the possible consequences of failing to comply with a provision.

Imprisonment

A penalty of imprisonment should normally be limited to offences involving behaviour or conduct that involves:

- violence
- dishonesty
- abuse of authority or trust (including licenced activity)
- enrichment from illegal dealings

- perversion or obstruction of justice or law enforcement
- serious breaches of a person's human rights
- endangering life or property
- intentional damage to property
- illegally depriving other people of their property or property rights.

Penalty units

A fine should be expressed in penalty units. There may be limited circumstances where the use of dollar penalties is more appropriate; for example, where an existing scheme already uses dollar amounts.

At present, under section 133 of the *Legislation Act 2001* the value of the penalty unit for the offence is—

- if the person charged is an individual—$110; or
- if the person charged is a corporation—$550.

Section 15 of the *Crimes (Sentencing Act) 2005* stipulates the maximum fine that a court may impose for an offence where the legislation does not prescribe the maximum penalty unit value for the offence. Under this section, where the maximum penalty unit value is not stated, the Supreme Court can impose a fine up to the value of $10 000; while the Magistrates Court can impose a fine up to the value of $2 000.

Despite this section, it is recommended that agencies ensure that any offence that carries a fine, the offence must be drafted to include the maximum penalty units for the fine.

Penalties allowed in subordinate legislation

Where an Act authorises the creation of offences in a regulation or other subordinate legislation it should specify that these offences may carry a maximum fine not exceeding 30 penalty units.

Penalties of imprisonment in subordinate legislation are against Government policy.

Please see page 25 for further discussion on offences in subordinate instruments.

Indictable and Summary offences

The dividing line between indictable and summary offences provided for in section 190 of the *Legislation Act 2001* should apply unless there is a demonstrated reason why that dividing line is inappropriate for a particular offence.

Section 190 of the Legislation Act provides that an offence is indictable if it is punishable by imprisonment for a period exceeding 2 years. An offence that is punishable by 2 years imprisonment or less, or by a fine only, is summary.

190 Indictable and summary offences

(1) An offence is an ***indictable offence*** if—

(a) it is punishable by imprisonment for longer than 2 years; or

(b) it is declared by an ACT law to be an indictable offence.

(2) An ***indictable offence*** includes an indictable offence that is or may be dealt with summarily.

(3) Any other offence is a ***summary offence*** and is punishable on summary conviction

Summary offences are heard in the Magistrates Court. Summary offences are tried by a Magistrate and not before a jury. Departures from this well-established dividing line have been rare and should only be made where there is a clear reason for such a departure.

Investigation costs

The ACT Government has taken the view in most circumstances that it is undesirable to include provision in legislation allowing for the recovery of investigation costs from a convicted defendant.

Provisions allowing for recovery of investigation costs have been perceived as having the following drawbacks:

- they may lead to the unwanted precedent that acquitted defendants might seek or be awarded costs for criminal proceedings;
- the ability to recover investigation costs on conviction may distort investigation priorities; and
- there is potential for injustice to a poorer defendant, who may be more inclined to admit guilt rather than risk the prospect of having to pay investigation costs.

Mandatory or minimum penalties

The setting of mandatory or minimum penalties, and sentencing guidelines determined by the Legislature are contrary to Government policy. The Government considers these kind of provisions to be a breach of the separation of powers between the role of the Judiciary and the role of the Legislature. Mandatory and minimum penalties substitutes the Legislature for the Judiciary for a class of offence in the absence of a trial of the particular offenders. The Government's policy is that it is the Legislature's role to set a maximum penalty for an offence and for a trial court to decide the appropriate sentence to be imposed upon an offender.

However, where the Legislature indicates that a fine but penalty units are not maximum does not

Setting a penalty: Adequacy

There should be a single maximum penalty for an offence that is adequate to deter and punish a worst case offence including the case of a repeat offence. As a general rule, there should not be multiple penalties for a single offence, for example applying to first and repeat offences. Tiered penalties run the risk of elevating a single factor (recidivism) above all factors a court must consider in accord with the sentencing considerations in section 33 of the *Crimes (Sentencing) Act 2005*.

A maximum penalty should be adequate and appropriate to act as an effective deterrent to commission of the offence to which it applies. A heavier penalty will be appropriate where there are strong incentives to commit the offence, or where the consequences of the commission of the offence are particularly dangerous or damaging.

Separate penalty for each offence

Each offence should carry its own penalty. General penalties should not be used in ACT legislation.

General penalty provisions (eg “a contravention of this Part is punishable by a fine of 50 penalty units”) make it more difficult for the reader to find the relevant penalty and fail to give any indication of the relative seriousness of the particular contravention.

Increased penalties for certain classes of offences

Penalties are sometimes increased for certain classes of offences or classes of people, these are commonly known as “aggravated” offences. The creation an aggravated offence increases the maximum penalty that can be imposed in particular circumstances.

Aggravated offences should be used very sparingly and carefully considered. Any proposal should not contradict Government policy of arbitrary elevating one group of society over another in criminal law.

For example, at first blush it seems appropriate that assaults against public servants who provide social services should attract a higher penalty than other assaults. However, a closer look at assault rates would reveal a range of industries and professions where employees experience assault. A further look at assault in general would reveal that there are a range of non-work related circumstances where assault is likely to occur.

Including everyone who had a case for a higher penalty would lead to a significant and arbitrary division in the population of who was covered by such an aggravation and who was not.

Despite popular perception, research suggests that increasing penalties does not act as a significant deterrent or prevent crime. Strategies that look at reducing the incidence of the crime (such as targeted education and awareness raising) and improving detection, arrest and prosecution of offenders are generally more effective.[67]

Preventing assaults or other anti-social behaviour at an industry level is a far more effective strategy than focussing on the offences. Bank tellers for example are a particularly vulnerable class of victims. In this area the focus and responsibility has been primarily on employers to create the safest working environment for staff.

Dealing with the issue as an occupational health and safety concern has seen the introduction of measures that protect bank tellers in their work environment. These practical measures have done considerably more to protect staff than high penalties associated with armed robbery.

Fault elements

Penalties should be set at an appropriate level for the fault element of an offence, or the absence of fault element.

The fact that an offence or substantive elements of an offence carry strict liability, absolute liability or the fault element of negligence will normally lower the maximum penalty that is appropriate.

Corporations

The framing of a penalty should take into account the "corporate multiplier" in subsection 133 of the *Legislation Act 2001*. The penalty unit for a corporation is five times higher than an individual.

Corporations cannot be imprisoned, consequently section 161 of the *Legislation Act 2001* provides a conversion of imprisonment times into fine rates if an offence is only punishable by imprisonment.

Fine / imprisonment ratio

The ratio for maximum penalty units to imprisonment terms should be expressed in legislation as follows: 50 penalty units: 6 months imprisonment; 100 penalty units: 12 months imprisonment; and so on in proportion.

The general application of a standard ratio helps to maintain the coherency and rationality of criminal law. The most common case in which a departure is warranted is for corporate and white collar crimes, where the maximum fine needs to be much higher than the ratio would provide, in order to counter the potential financial gains from committing an offence.

Unlike some other jurisdictions, in the ACT if a maximum penalty of imprisonment is specified for an offence, and no fine is specified, there is no monetary fine available for the offence if a natural person is convicted of the offence.

---

[67] Dom Weatherburn, *Law and Order in Australia: Rhetoric and Reality*, The Federation Press, (2004).

Maximum imprisonment terms less than 6 months

If imprisonment is an appropriate penalty for an offence, a term of at least 6 months should be specified.

It is not a meaningful option to allow a court to imprison someone for only a very short period of a couple of weeks or months. Such a brief term is unlikely to indicate that the offence is a serious one, and if a longer term of imprisonment would never be justified, a fine is likely to be more appropriate in all cases. Avoiding short prison terms underlines the message that imprisonment is reserved for serious offences.

Continuing offences

Where an act or thing is required to be done within a particular period or before a particular time, and failure to comply is an offence, a person is guilty of a separate offence for each day of non-compliance.

Where this is intended, it should be made clear in the legislation that the thing must be done within a particular period or before a particular time. The penalty should be expressed in clear terms that it is a daily penalty.

Continuing offences provide a strong incentive for compliance with a continuing obligation (eg to submit an annual report by a specified day) in the aftermath of an initial contravention. Where an offence is a "continuing" offence the maximum penalty should be one that is appropriate as a daily penalty and therefore should be significantly less than if the penalty was a global maximum.

Alternative sanctions

Where offences directed at corporate crime are being prepared, consideration could be given to possible non-monetary sanctions that could be applied separately or in combination. Chapter 27 in *ALRC Report 95: Principled Regulation* identifies a range of non-monetary sanctions and suggests these should always be available in the case of corporate crime. However, it is essential that any alternative sanctions comply with human rights standards.

13. INFRINGEMENT NOTICES: AKA ON-THE-SPOT FINES

Under an infringement notice scheme, a public servant or police officer is empowered to give a notice alleging an offence to an alleged offender. The notice provides the recipient with the option of paying a fixed amount to the Government to avoid prosecution.

Infringement notices are not a substituted form of prosecution and trial. They are an offer to a person by the Government not to proceed with a prosecution if a nominal amount of the potential fine for the offence is paid. Paying an infringement notice is not a plea of guilt or an acceptance of guilt.

If a person declines to pay an infringement notice, the onus is upon the Government and the prosecuting agency is to proceed with the prosecution or drop the allegation.

The use of infringement notices in appropriate circumstances received support in Australian Law Reform Commission Report No 95: *Principled Regulation*. This report informs the key requirements of ACT Government policy discussed in this part of the guide.

Criteria for selecting infringement notice offences

The prerequisite for an infringement notice is a strict liability offence. Infringement notices derive their legal authority from an offence made by the Assembly. The *Magistrates Court Act 1930* enables these offences to be used for infringement notices.

The Government aims to keep in check any unjustified increase in the number of strict liability offences and infringement notices.

Full consideration should be given to each offence when approving it as an infringement notice offence. When an agency proposes to amend an existing scheme, each existing infringement notice offence should also be reviewed for continued suitability.

The only offences suitable for infringement notices are strict or absolute liability offences that have straightforward ‘yes or no’ criteria. A strict or absolute liability offence that has complex legal distinctions is not suitable for an infringement notice.

For example, an offence of parking in a disabled zone without a permit, is a ‘yes or no’ criteria. An offence of driving dangerously is not a straightforward ‘yes or no’ because the threshold of ‘dangerous’ is variable and contextual. The latter offence requires judicial determination.

Unsuitable offences

Generally, the types of offences, which are not suitable as infringement notice offences, are offences:

- which require proof of intention or some other mental element;
- where there is a high degree of subjective judgment in determining whether the elements of the offence are made out;
- where the evidence of the commission of the offence is not readily apparent without further inquiry; and
- which are serious in nature and to which a substantial penalty is attached (particularly where the penalty may include a period of imprisonment).

Offences are not prescribed as infringement notice offences only because they are strict liability and do not appear to fall within any of the categories outlined above. There must be demonstrable, legitimate grounds for making the offence an infringement notice offence.

Nominal amount on infringement notice — 20% rule

The ACT Government has a long-standing policy that the nominal amount on an infringement notice should not exceed 20% of the maximum fine stipulated in the offence.

The reason for this policy goes to the heart of what an infringement notice scheme is. Essentially, it is the Government offering an alleged offender the opportunity to pay a nominal amount of the maximum penalty in exchange for the Government not pursuing a prosecution. The person offered the notice pays the amount and walks away with no conviction. If a person does not pay the infringement notice fine then the Government should prosecute and the person is tried in Court.

Most people pay the infringement notice fine. However, this dynamic changes when the infringement notice amount approaches the maximum penalty in the offence itself.

An infringement penalty that is too low will be an inadequate deterrent and may simply be paid by the guilty and innocent alike as a cost of doing business. An infringement penalty that is too high will provide no incentive to a guilty defendant to avoid the matter going to court.

The figure was fixed at 20% with two main objectives in mind. First, is to ensure that infringement notice recipients are given sufficient incentive to forgo their right to a trial and thereby avoid the use of valuable court time and resources on relatively minor matters. Second, is to minimise the harm to innocent recipients who will decide to pay the notice fine, irrespective of whether they believe they are innocent. This ratio has consistently been applied in infringement notice schemes in recent years.

A shift of as little as one percent of all of the Territory's infringement notices going to Court would place considerable pressure on Court resources.

The bigger the Territory's infringement notice schemes are, the greater prudence is required with casting the offence and setting the nominal amount in the infringement notice. This logic also applies to any arbitrary increase of notice amounts without any increase in the statutory amount. Accumulating increases in nominal amounts eventually changes the ratio between the nominated amount and the offence amount. This runs the risk of pushing a greater number of people to choose litigation rather than pay the notice fine.

Magistrates Court Act Scheme

Part 3.8 of the *Magistrates Court Act 1930* provides for the issue of infringement notices for offences listed in regulations.

All infringement notices are created under part 3.8 to provide one generic infringement notice scheme across the Territory. The framework contained in Part 3.8 avoids technical distinctions, additional prosecution difficulties, and the appearance of incoherence associated with having numerous slightly different infringement notice schemes in effect across the ACT.

The normal process for creating an infringement notice offence is to pass a regulation to the Magistrates Court Act. The regulation will create an infringement notice offence by referring to an offence in another Act, and stating that Part 3.8 of the Magistrates Court Act applies to that offence. Where the regulation creates a number of infringement notice offences, it may contain a schedule listing offences from another Act, and state that Part 3.8 of the Magistrates Court Act applies to the offences in that schedule.

Part 3.8 of the Magistrates Court Act also contains provisions about:

- How infringement notices are to be served;
- What infringement notices should contain;
- How much time a person has to pay an infringement notice;
- How someone goes about paying an infringement notice;
- Reminders notices relating to infringement notices;
- How someone seeks an extensions of time to pay an infringement notice;
- How someone disputes liability for an infringement notice; and
- What happens if someone doesn't pay an infringement notice.

Process for making infringement notice regulations

The Legislation and Policy Branch of JACS facilitates the process in consultation with the agency seeking to make infringement notices. The general process is as follows:

(1) The agency seeks agreement from its relevant minister to the creation of an infringement notice scheme under the relevant act.

(2) The agency consults the Legislation and Policy Branch in the development of drafting instructions. The Legislation and Policy Branch provides advice on the suitability of each proposed offence as an infringement notice offence.

(3) The agency forwards drafting instructions to the Parliamentary Counsel.

(4) A draft regulation is forwarded to the Legislation and Policy Branch for approval.

(5) The agency prepares an Explanatory Statement for the regulation.

(6) The Legislation and Policy Branch drafts a brief for the Attorney General recommending that the regulation be made.

(7) The Regulation is then notified under the *Magistrates Court Act 1930* by JACS.

14. CIVIL PENALTIES

What is a civil penalty

A civil penalty authorises a court to impose a financial penalty upon an individual or company that is licenced or authorised to participate in a regulated industry.

When is a civil penalty appropriate

As discussed under the topics of formulating criminal offences, above, it may not be evident whether a given provision should be criminal or civil in character. Factors that should be considered in this context include:

- What is the nature of the conduct sought to be deterred? What are the circumstances surrounding the proposed provision?
- Where does the proposed provision fit in the overall legislative scheme?
- Does the conduct seriously harm other people?
- Does the conduct in some way so seriously contravene our fundamental values as to be harmful to society?
- Is it appropriate to use criminal or civil enforcement powers in investigating the conduct?
- Is the criminal law appropriate for dealing with the undesirable conduct in question?
- How is similar conduct regulated in the proposed legislative scheme and other ACT legislation?
- If the conduct has been regulated for some time, how effective have existing provisions been in deterring the undesired behaviour?
- What level and type of penalties will provide appropriate deterrence?

If the nature of the behaviour is not harmful to individuals or the community and doesn't contravene fundamental democratic or moral values, then the conduct might be suitable for a civil penalty.

Civil penalties may only be created in a regulatory context. For a civil penalty to be justified the companies or individuals liable for the penalty must be definitively on notice that they are liable if they choose to participate in the regulated activity.

Examples of appropriate contexts for civil penalties:

- regulation of financial activities conducted by corporate entities;
- regulation of licenced professionals or professional bodies;
- regulation of authorised or certified industries that require high levels of knowledge of their legal obligations/requirements.

Examples of inappropriate contexts:

- regulation of commonplace activities such as signing a lease, purchasing arrangements, or financing;
- conditions imposed upon people for engaged in day-to-day activities, such as private parking, receiving professional services etc.

The ACT Civil and Administrative Tribunal (ACAT)

The *ACT Civil and Administrative Tribunal Act 2008* is the authorising law for civil disputes in the Territory.

Under this Act, the ACAT has power to impose penalties in a number of licensing and regulatory jurisdictions in the ACT.

Applicants may only bring a matter before ACAT if an authorising law gives the tribunal the power to make a decision about that matter. There are over 160 authorising ACT laws that the ACAT has jurisdiction over.

The ACAT provides a forum for the determination of a wide range of civil disputes, requests for review of administrative decisions and professional and occupational licensing and disciplinary matters.

The ACAT commenced on 2 February 2009, and took over the work of a number of existing tribunals and boards including:

- the Administrative Appeals Tribunal
- the Small Claims Court
- the Discrimination Tribunal
- the Guardianship and Management of Property Tribunal
- the Mental Health Tribunal
- the Residential Tenancies Tribunal
- the Liquor Licensing Board
- the Health Professions Tribunal
- the Legal Practitioners Disciplinary Tribunal

ACAT also assumed responsibility for disciplinary proceedings relating to builders, electricians, plumbers and other licensed construction occupations, motor vehicle dealers, tobacco sellers, finance brokers, surveyors and architects and for the resolution of unit titles disputes and all civil disputes involving amounts under $10,000.

Civil or criminal? Human rights test

A description by the legislature that a provision in an Act is a 'civil penalty' or as being subject to a civil process does not necessarily mean that a court will proceed on the basis that the provision is inherently civil in nature.

The leading European case on whether the courts should treat proceedings for an alleged offence as being civil or criminal in nature is *Engel v Netherlands* (1980) 1 EHRR 409. In that case the European Court of Human Rights held that, in determining whether proceedings are criminal in nature and thus engage the rights of the European convention that are required to be accorded to criminal defendants, regard must be had to the following criteria:

- how has the offence been designated in domestic law;
- the nature of the offence; and
- the severity of the penalty that the court can impose.

If a Court is satisfied that the substance of the provisions should properly be described as criminal in nature, then the Court may find that the provision should be dealt with as a criminal procedure. Consequently, all of the rights, privileges and protections relevant to criminal proceedings would apply.

Conversely, if the behaviour targeted in a civil penalty is similar to a criminal offence there needs to be some delineating factor between the two to prevent the civil provisions as being read as criminal.

Where a regulator has the option of pursing either a criminal prosecution or a civil action where an offence has been committed, clear criteria should be developed governing which course of action the regulator chooses to take. If a regulator pursues some offences through a civil process, and others through a criminal prosecution on an *ad hoc* basis, the decision-making process may adversely affect a prosecution or be subject to judicial review under administrative law.