Guide for Framing Offences

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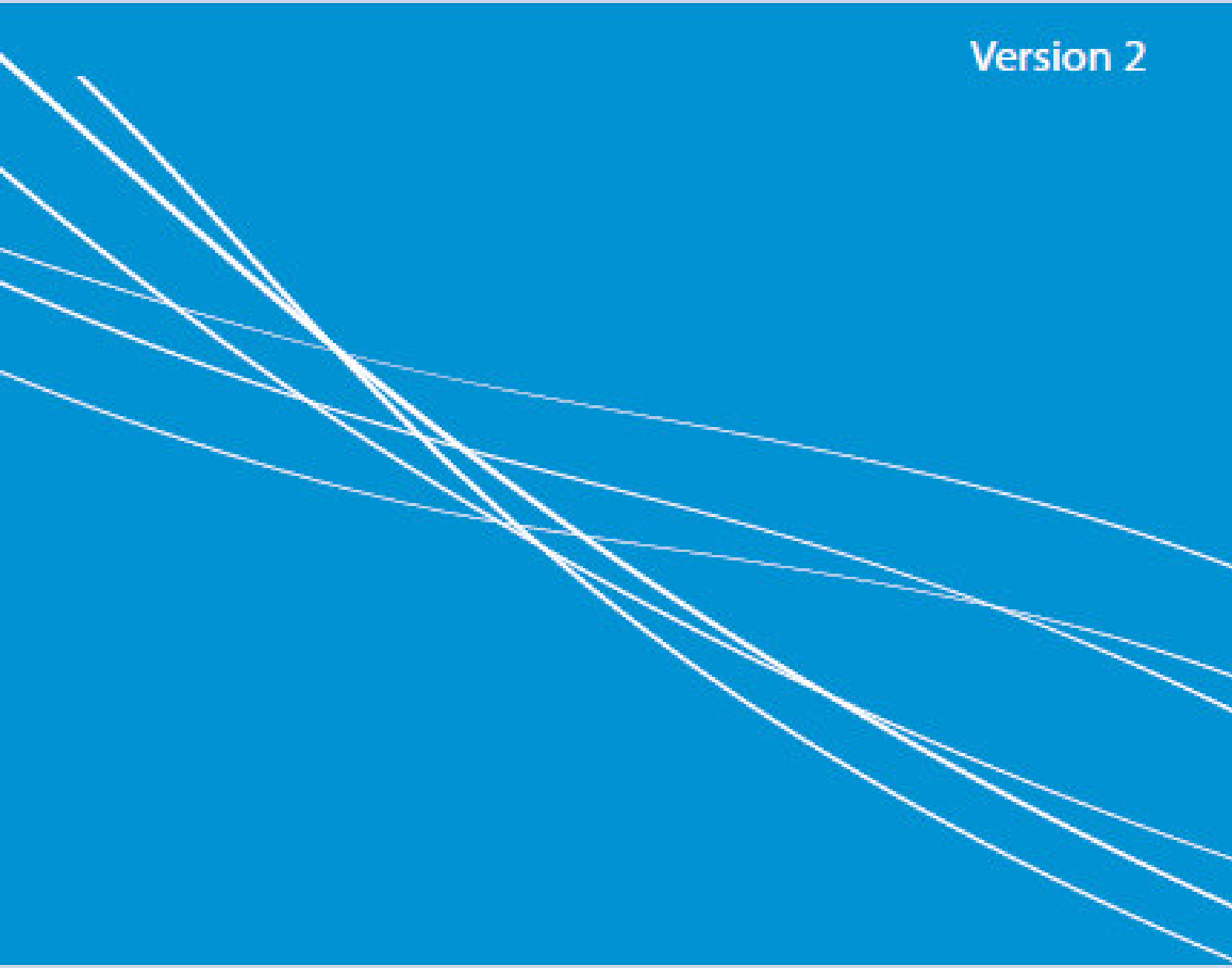

Department of Justice and Community Safety

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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,[1] 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.

[1] 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).

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).

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.[2]

The ICCPR also includes specific limitations in various articles relating to particular rights.[3] 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.[4] The limit must be reasonable, demonstrably justifiable in a free

[2] Article 5 of the ICCPR.

[3] 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.

[4] 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.

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.

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.[5]

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.[6]

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.

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

[6] *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.

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:

- 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.[7]
>
> . . . 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.[8]

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.

[7] ALRC 95 at 2.9.
[8] Ibid at 2.10.

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.

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	intention
	negligence (in some cases)	
result	intention	recklessness
	knowledge	
	recklessness	
	negligence	
circumstance	intention	recklessness
	knowledge	
	recklessness	
	negligence	

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*[9] 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".[10] 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. 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.

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

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

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.[11]

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.

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

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 defences of general application to all ACT offences.

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).

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.[12]

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 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.

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

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.[13]

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.

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

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.

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.