

PARLIAMENTARY COUNSEL

Drafting Direction No. 3.5 Offences, penalties, self-incrimination, secrecy provisions and enforcement powers

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Drafting Direction No. 3.5

Offences, penalties, self-incrimination, secrecy provisions and enforcement powers

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Part 1—Criminal Law Guide and Criminal Law Liaison Officer

Criminal Law Guide

1 You should have regard to the “Guide to Framing Commonwealth Offences, Civil Penalties And Enforcement Powers” (released by the Minister for Justice and Customs in February 2004) in drafting provisions covered by the Guide.

2 You should bear in mind that the Guide is neither binding nor conclusive, and that Commonwealth criminal law policy necessarily develops in response to changes in Government policy, novel legal issues, and emerging enforcement circumstances.

3 The Attorney-General’s Criminal Law Policy Section (***CLPS***) find it very helpful if drafts that come to them for comment contain some sort of explanation for why provisions in a Bill have been drafted in a way:

- (a) that appears to be clearly contrary to the Guide; or
- (b) that appears to be inconsistent with the approach generally recommended in the Guide (eg if the Guide says generally do X, but in “appropriate cases” it may be alright to do Y, and your provision does Y rather than X, it would help CLPS if there was an explanation of why it is thought appropriate for the draft to do Y rather than X).

4 As well as helping CLPS, this will help instructors by alerting them to provisions that may attract adverse comment in the Parliament. The Senate Scrutiny of Bills Committee now seems to expect that offence, penalty and law enforcement provisions will be drafted in accordance with the Guide. The Guide identifies a number of areas that the Committee has commented on in the past, including where the Committee will expect the explanatory memorandum for the Bill to give reasons for particular aspects of legislation (eg strict liability offences, retrospective application and the existence of coercive powers).

5 However, the fact that a provision is flagged by a drafter’s note for CLPS does not invariably mean that the provision will end up needing to be explained in the explanatory memorandum. CLPS may be able to provide guidance to your instructors about whether a matter should be explained.

Criminal Law Liaison Officer

6 OPC and CLPS have each appointed a Liaison Officer.

7 OPC’s Criminal Law Liaison Officer (***CLLO***) is responsible for representing OPC at discussions with CLPS on general issues to do with criminal law and the Guide. If you come across an issue that you consider would be of general interest to all drafters or that you consider should be discussed with CLPS, you should raise the issue with OPC’s CLLO.

8 OPC’s CLLO has developed some Criminal Law Liaison Notes that reflect outcomes of these discussions. You should have regard to these notes in drafting provisions covered by the Guide.

Part 2—Form of offence provisions

Use expression “commits an offence”

9 You should use the expression “commits an offence” rather than the expression “is guilty of an offence” to create a criminal offence.

Do not use the expression “a person may only” or a “person must only” to create an offence

10 You should not use the expression “a person may only” or “a person must only” to create an offence because there is some doubt as to whether these forms attract the operation of subsection 4D(1) of the *Crimes Act 1914* (which refers to a contravention of the section or subsection).

Part 3—Penalties

Criminal offences

Penalty units

11 The *Crimes Act 1914* provides for a system of penalty units (see sections 4AA and 4AB of that Act).

12 If a Bill provides for a pecuniary penalty, it should be expressed as a number of penalty units instead of a number of dollars. Section 4AA currently sets the value of a penalty unit at \$110. There is one exception relating to Commonwealth-State cooperative schemes (which is discussed in the Criminal Law Liaison Notes).

13 If you are amending an Act to provide for a new offence and there are existing offences with dollar penalties, you should amend the dollar penalties to refer to penalty units. To do this, you will need the agreement of your instructors and Ministerial approval.

14 Section 4AB provides for penalties expressed in dollars to be converted into penalty units (by dividing the number of dollars by 100, and rounding up to the next whole number if necessary). Under section 4AA, the penalty units are then converted into a dollar amount at the current rate (\$110 per penalty unit). Thus, a pecuniary penalty expressed as \$2,000 is converted by section 4AB into 20 penalty units, which is in turn converted by section 4AA into a penalty of \$2,200.

Do not use the expression “Maximum penalty”

15 You should not use the expression “Maximum penalty” at the foot of a provision.

16 If you are amending an Act to provide for a new offence and there are existing offences with references to “Maximum penalty”, you should amend those references to refer to “Penalty”. You should also repeal the special interpretive provision related to the use of the expression “Maximum penalty”. To do this, you will need the agreement of your instructors and Ministerial approval.

Civil penalty provisions

17 If you use the expression “penalty unit” in a civil penalty provision, you should include a definition of “penalty unit” as follows:

penalty unit has the meaning given by section 4AA of the *Crimes Act 1914*.

18 This will ensure any increase in the level of a penalty unit under the *Crimes Act 1914* will flow through to the relevant civil penalty provision.

Part 4—Aggravated offences

19 There are two main methods of creating aggravated offences.

20 The first method is to create an offence separate from the primary offence, and for the aggravating circumstances to be an element of that separate offence. See for example sections 132.2 and 132.3, and 132.4 and 132.5, of the *Criminal Code*.

21 The second method is to create a single offence, and provide a higher penalty according to whether the offence is an **aggravated offence**. An **aggravated offence** is then defined in another section to be an offence against the primary section in which a particular aggravating circumstance is present. See for example sections 270.6 to 270.8 of the *Criminal Code*.

22 To avoid any risk of breaching section 80 of the Constitution, any aggravated offence created using the second method should be accompanied by a provision ensuring that the aggravating circumstances are alleged in the charge. For example:

(#) If the prosecution intends to prove an aggravated offence, the charge must allege the relevant aggravated offence.

23 The issues are discussed in *Cheng v The Queen* (2000) 203 CLR 248, where the offence concerned was section 233B of the *Customs Act 1901*, and the aggravating circumstances which affected the penalty were contained in section 235 of that Act.

Part 5—Geographical jurisdiction of offences

24 This Part deals with Part 2.7 of the *Criminal Code*, which is about the geographical jurisdiction of offences.

25 Part 2.7 of the *Criminal Code* commenced on 24 May 2001.

Offences created on or after 24 May 2001

26 The objects of Part 2.7 of the *Criminal Code* in relation to offences created on or after 24 May 2001 are:

(a) to provide a default rule (section 14.1) setting out the standard geographical jurisdiction for offences created on or after 24 May 2001; and

- (b) to enable drafters to select one of 4 optional categories of extended geographical jurisdiction for offences created on or after 24 May 2001.

Standard geographical jurisdiction—default rule

27 Standard geographical jurisdiction (section 14.1) is a narrow territorial-based type of geographical jurisdiction. Standard geographical jurisdiction will apply automatically to offences created on or after 24 May 2001, unless the contrary intention appears.

28 If you are drafting a provision creating an offence, you should consider whether to:

- (a) do nothing and accept the automatic application of standard geographical jurisdiction as set out in section 14.1; or
- (b) create a contrary intention for the purposes of that section.

Extended geographical jurisdiction—optional categories

29 If you are drafting a provision creating an offence and the offence needs to have an extra-territorial operation, you should consider whether to:

- (a) apply one of the optional categories of extended geographical jurisdiction set out in Part 2.7 of the *Criminal Code*; or
- (b) draft an alternative provision about geographical jurisdiction (although you should discuss this approach with First Parliamentary Counsel).

30 The optional categories are as follows:

Extended geographical jurisdiction		
Provision	Category of extended geographical jurisdiction	Summary
Section 15.1	Category A	Coverage of conduct that occurs wholly or partly in Australia. Coverage of Australian citizens and Australian bodies corporate for what they do anywhere in the world. Coverage of conduct that has a result in Australia. If the conduct occurs wholly in a foreign country, and the offender is not an Australian citizen or an Australian body corporate, there is a defence based on the law of the foreign country.

Extended geographical jurisdiction		
Provision	Category of extended geographical jurisdiction	Summary
Section 15.2	Category B	Coverage of conduct that occurs wholly or partly in Australia. Coverage of Australian citizens, Australian bodies corporate and Australian residents for what they do anywhere in the world. Coverage of conduct that has a result in Australia. If the conduct occurs wholly in a foreign country, and the offender is not an Australian citizen or an Australian body corporate, there is a defence based on the law of the foreign country.
Section 15.3	Category C	Unrestricted coverage. If the conduct occurs wholly in a foreign country, and the offender is not an Australian citizen or an Australian body corporate, there is a defence based on the law of the foreign country.
Section 15.4	Category D	Unrestricted coverage. There is no defence based on the law of the foreign country where the conduct occurs.

31 The following is an example of a provision applying one of those categories to an offence:

- (3) Section 15.3 of the *Criminal Code* (extended geographical jurisdiction—category C) applies to an offence against subsection (1).

32 The order in which the categories appear in Part 2.7 of the *Criminal Code* does not imply which category should be preferred in a particular case.

33 If you are drafting a provision to apply one of the categories to an offence in a Bill or Act, you should consider whether there is any conflict between that provision and any other provision that relates to the geographical operation of the Bill or Act. If there is a conflict, you will need to consider how to avoid the conflict.

Offences created before 24 May 2001

34 The objects of Part 2.7 of the *Criminal Code* in relation to offences created before 24 May 2001 are:

- (a) to enable drafters to apply standard geographical jurisdiction (section 14.1) to an offence created before 24 May 2001; and
- (b) to enable drafters to apply one of the optional categories of extended geographical jurisdiction to an offence created before 24 May 2001.

35 If you are amending an offence created before 24 May 2001, you do not have to consider Part 2.7 of the *Criminal Code* unless you are instructed to draft a provision dealing with the geographical jurisdiction of the offence.

36 If you are drafting a provision dealing with the geographical jurisdiction of an offence created before 24 May 2001, you should consider whether to:

- (a) apply standard geographical jurisdiction to the offence; or
- (b) apply one of the optional categories of extended geographical jurisdiction to the offence.

37 The following is an example of a provision applying standard geographical jurisdiction to an offence:

- (4) Section 14.1 of the *Criminal Code* (standard geographical jurisdiction) applies to an offence against subsection (1).

Part 6—General offences created by Chapter 7 of the *Criminal Code*

Offences created by Chapter 7

38 This Part deals with Chapter 7 of the *Criminal Code*, which creates the following kinds of general offences:

- (a) theft and other property offences;
- (b) fraudulent conduct;
- (c) false or misleading statements, information or documents;
- (d) making unwarranted demands with menaces;
- (e) bribery, corrupting benefits and abuse of public office;
- (f) forgery and falsification of documents;
- (g) giving information derived from false or misleading documents;
- (h) harming, or threatening to harm, Commonwealth public officials;
- (i) impersonating Commonwealth public officials;
- (j) obstructing Commonwealth public officials.

Offences that deal with the same conduct as a Chapter 7 offence

Chapter 7 offences should generally be relied on

39 The Attorney-General's Department has a policy against the unnecessary proliferation of offences in Commonwealth laws. A key object of Chapter 7 of the *Criminal Code* is to minimise the number of offences in other Commonwealth laws. Accordingly, these *Criminal Code* offences should be relied on, in preference to including in a Bill offence provisions that cover some or all of the same conduct, unless there are special circumstances that justify departing from this rule.

Exception—giving of false evidence

40 The Chapter 7 offences relating to false or misleading information or documents could apply to the giving of false evidence in certain circumstances. However, the Criminal Law Branch of the Attorney-General’s Department has advised that, as a matter of policy, the Chapter 7 offences relating to false or misleading information or documents should not be relied on to deal with the giving of false evidence.

Extended meaning of the expression “offence against this [Act/Part/Division/section]”

41 You should consider whether the expression “offence against this [Act/Part/Division/section]”, when used in an Act other than the *Criminal Code*, should be given an extended definition so that it includes some or all of the offences created by Chapter 7 of the *Criminal Code* that relate to the Act, Part, Division or section concerned.

42 In particular, you should consider whether a provision that confers investigative powers in relation to an “offence against this [Act/Part/Division/section]” should extend to the investigation of Chapter 7 offences that relate to the Act, Part, Division or section concerned.

43 The following is an example of an extended definition of the expression “offence against this Act”:

offence against this Act includes an offence against Chapter 7 of the *Criminal Code* that relates to this Act.

Part 7—Privilege against self-incrimination***Basis of privilege***

44 The privilege against self-incrimination in relation to documents is the privilege of a person to refuse to produce a document on the ground that the production of the document might incriminate the person. It is not a privilege based on the ground that the contents of the document might incriminate the person.

45 The privilege against self-incrimination in relation to the answering of questions or the giving of information or evidence is a privilege of a person to refuse to answer a question or to give information or evidence on the ground that the answer, information or evidence might incriminate the person.

46 You should bear the differences between these two privileges in mind whenever you draft a provision to provide expressly for a privilege or to abrogate a privilege. *Sorby v Commonwealth* (1983) 46 ALR 237 contains a discussion of the privilege against self-incrimination.

Abrogation and preservation of privilege**Abrogation of privilege by express words**

47 If the policy is to abrogate the privilege against self-incrimination, you should include the following provision:

- (1) A person is not excused from *[giving information/giving evidence/producing a document/answering a question under (insert a reference to the relevant provisions)]* on the ground that the *[information/evidence/production of the document/answer to the question]* might tend to incriminate the person or expose the person to a penalty.

48 The Australian Government Solicitor has advised (opinion 05058036 dated 13 July 2005) that if a statute is held to abrogate the privilege against self-incrimination, it will probably also be held to abrogate the privilege against self-exposure to civil penalties. The opinion noted that in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, the judges pointed to the bizarre consequences of construing the provisions in question in such a way that a person could be compelled to admit confession of a criminal offence yet be excused from admitting a contravention of a civil penalty.

49 Section 187 of the *Evidence Act 1995* abolishes the privilege against self-incrimination for bodies corporate. If the provisions referred to in subsection (1) could apply to individuals and bodies corporate, then subsection (1) should refer to a person (to avoid any argument that the privilege is not abrogated for bodies corporate in the particular case). If the provisions referred to in subsection (1) could only apply to individuals, then you may change subsection (1) to refer to an individual instead of a person.

Use and derivative use immunity

50 The “Guide to Framing Commonwealth Offences, Civil Penalties And Enforcement Powers” (released by the Minister for Justice and Customs in February 2004) contains a discussion of the “use” and “derivate use” immunity provisions that are usually included if the privilege against self-incrimination is abrogated. If you are instructed to provide for a “use” and “derivative use” immunity, you should include the following provision:

- (2) However, in the case of an individual:
- (a) the *[information given/evidence given/document produced/answer given]*; and
 - (b) *[giving the information/giving the evidence/producing the document/answering the question]*; and
 - (c) any information, document or thing obtained as a direct or indirect consequence of *[giving the information/giving the evidence/producing the document/the answering of the question]*;
- are not admissible in evidence against the individual in *[insert reference to relevant proceedings and exceptions]*.

51 The Attorney-General’s Department has advised that subsection (2) should only apply to individuals. If subsection (1) refers to an individual instead of a person, you should omit the words “in the case of an individual” from subsection (2).

52 You should discuss with your instructors the proceedings and exceptions to be referred to in subsection (2). You should consider civil proceedings and criminal proceedings. It is common to refer to “criminal proceedings other than proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to *[insert reference to relevant provisions]*”.

Abrogation of privilege by phrase “without reasonable excuse”—how to preserve the privilege

53 In 1984 the Full Court of the Supreme Court of Queensland in *Price v McCabe; Ex parte Price* (1984) 55 ALR 319 held that a provision of an Act that made it an offence to fail to answer questions or produce documents, without reasonable excuse, abrogated the privilege against self-incrimination.

54 Although the decision has been criticised, if you include a provision in a Bill creating an offence in similar terms and the policy is not to abrogate the privilege against self-incrimination, you should include a further provision along the following lines:

- (4) It is a reasonable excuse for a person to refuse or fail to answer a question or produce a document on the ground that to do so might tend to incriminate the person or expose the person to a penalty.

Part 8—Secrecy provisions

Offences

55 Section 43 of the *National Water Commission Act 2004* provides:

A person commits an offence if:

- (a) the person obtains information in, or in connection with, the performance of the person's function or duty for the purposes of this Act; and
- (b) the person makes a record of or discloses that information; and
- (c) either:
 - (i) the record or disclosure is not made in the course of performing that, or any other, function or duty for the purposes of this Act; or
 - (ii) the record or disclosure is not required or permitted by law.

Penalty: Imprisonment for 2 years.

56 The Australian Government Solicitor (AGS) has advised that the National Water Commission can take a practical approach to the release of information in the course of performing a function under the Act. However, AGS has also advised that the section causes AGS some concern as, if it were read literally, it could be taken to mean that a person will be committing an offence of disclosure under section 43 even if that disclosure is in the course of performing a function or duty under the Act if the disclosure is not also required or permitted by law.

57 You should not duplicate this particular provision until it has been amended.

Secrecy provisions to take account of powers of the Parliament and Parliamentary Committees

58 Secrecy provisions generally prevent the disclosure of information “except for the purposes of [the] Act or otherwise in connection with the performance of duties under [the] Act”.

59 Several years ago a secrecy provision was included in legislation that also included a provision imposing on a parliamentary joint committee a duty to “monitor and review” the performance of the authority whose members were subject to the secrecy provision. Controversy arose concerning the ambit of the secrecy provision in respect of an authority member called to give evidence to the parliamentary committee.

60 Whenever you include a secrecy provision in a Bill that extends to information that may, by virtue of another provision of that Bill, be the subject of inquiry by the Parliament or a parliamentary committee, you should ensure that the secrecy provision specifies the circumstances in which that information might be divulged to the Parliament or that parliamentary committee.

61 This could be done, in appropriate cases, by including a definition at the end of the secrecy provision to make clear that “the performance of duties under the Act” includes the giving of evidence to the Parliament or to the specified parliamentary committee.

62 An opinion of the Solicitor-General (Volume 93, page 5048, 12 August 1991) may be relevant to this issue. The opinion is actually, but apparently incorrectly, dated 12 August 1990.

Part 9—Compensation for damage to electronic equipment or data

Background

63 Until 1998, section 3M of the *Crimes Act 1914* contained the standard provision dealing with compensation for damage to electronic equipment operated by officials exercising search powers under Commonwealth laws.

64 In 1998, as a result of advice from the Australian Government Solicitor about deficiencies in the standard provision (ref. 98037080), the provision was revised. The revised version has been further developed since.

Use of model provision

65 The provision set out below should be used as the model for all new provisions of this kind.

66 In the context of the 1998 advice, the Australian Government Solicitor advised that it was not essential to redraft existing provisions that use the original form. However, if you are amending an Act that contains the old form of the provision, it would be desirable to redraft it if time permits and if your instructors don’t object. However, before adding subsection (5) to an older version of the provision you should check what assumptions have so far been made by administrators about the source of funds for compensation.

**** Compensation for damage to electronic equipment**

(1) This section applies if:

- (a) as a result of equipment being operated as mentioned in [*identify provisions that allow specified people to enter premises and operate equipment on the premises to see whether the equipment or disks etc. contain material such as evidential material or material relating to compliance*]:

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- (i) damage is caused to the equipment; or
 - (ii) the data recorded on the equipment is damaged; or
 - (iii) programs associated with the use of the equipment, or with the use of the data, are damaged or corrupted; and
 - (b) the damage or corruption occurs because:
 - (i) insufficient care was exercised in selecting the person who was to operate the equipment; or
 - (ii) insufficient care was exercised by the person operating the equipment.
- (2) The Commonwealth must pay the owner of the equipment, or the user of the data or programs, such reasonable compensation for the damage or corruption as the Commonwealth and the owner or user agree on.
- (3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings in the Federal Court of Australia for such reasonable amount of compensation as the Court determines.
- (4) In determining the amount of compensation payable, regard is to be had to whether the occupier of the premises, or the occupier's employees or agents, if they were available at the time, provided any appropriate warning or guidance on the operation of the equipment.
- (5) Compensation is payable out of money appropriated by the Parliament.
- (6) For the purposes of subsection (1):
- damage*, in relation to data, includes damage by erasure of data or addition of other data.

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