

PARLIAMENTARY COUNSEL

Drafting Direction No. 3.5 Criminal law and law enforcement

Note: This Drafting Direction contains references to the “head drafter”. It is a reference to the senior person who is responsible for matters of drafting policy. This form is used to enable the Drafting Directions to be applied in other organisations. In OPC the head drafter is FPC.

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Contents

Part 1—Criminal Law Guide and Criminal Law Liaison Officer	3
Criminal Law Guide—referral of draft legislation to AGD	3
Requirement for Attorney-General approval for draft legislation	4
Criminal Law Liaison Officer	4
Part 2—Form of offence provisions	4
Use of expression “commits an offence”	4
Expressions to be avoided in creating an offence	4
Notes about strict and absolute liability	5
Part 3—Strict liability and absolute liability	5
Part 4—Penalties	5
Criminal offences	5
Penalty units	5
Do not use the expression “Maximum penalty”	5
Order for penalties of imprisonment and/or fine	6
Civil penalty provisions	6
Notes and examples	6
Part 5—Aggravated offences	6
Part 6—Geographical jurisdiction of offences	7
Offences created on or after 24 May 2001	7
Standard geographical jurisdiction—default rule	7
Extended geographical jurisdiction—optional categories	7
Offences created before 24 May 2001	8
Part 7—General offences created by Chapter 7 of the <i>Criminal Code</i>	9
Offences created by Chapter 7	9
Offences that deal with the same conduct as a Chapter 7 offence	10
Chapter 7 offences should generally be relied on	10
Exception—giving of false evidence	10
Extended meaning of the expression “offence against this [<i>legislation/Part/Division/provision</i>]”	10
Part 8—Privilege against self-incrimination	10
Basis of privilege	10
Abrogation and preservation of privilege	11
Abrogation of privilege by express words	11

Use and derivative use immunity..... 11
Use of phrase “without reasonable excuse” 13
Part 9—Penalty privilege..... 13
Part 10—Secrecy provisions..... 14
Part 11—Compensation for damage to electronic equipment or data..... 14
 Background 14
 Use of model provision..... 14

Part 1—Criminal Law Guide and Criminal Law Liaison Officer

Criminal Law Guide—referral of draft legislation to AGD

1 You should have regard to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the **Criminal Law Guide**) that was developed by the Attorney-General’s Department (**AGD**) in drafting provisions covered by the Criminal Law Guide.

2 You should bear in mind that the Criminal Law 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 In accordance with the Criminal Law Guide, Pt 1.3.2, draft legislation relating to criminal law matters must be referred to AGD if drafters consider that the legislation:

- (a) contains novel or complex issues that the Criminal Law Guide does not address; or
- (b) departs significantly from the principles in the Criminal Law Guide.

4 Drafting Direction 4.2, Attachment A, lists matters that may be required to be referred under the Criminal Law Guide, Pt 1.3.2.

5 **Departures from fundamental principles** The Criminal Law Guide recommends that AGD should be consulted early in the legislative process if departures from “fundamental criminal law principles” are proposed, and lists examples of such departures at Pt 1.3.2. Such departures from these principles may require positive approval from the Attorney-General (see paragraph 12 below). If draft legislation includes an approach that would constitute such a departure, the draft should be referred to AGD in accordance with Drafting Direction 4.2.

6 **Exceptional circumstances** The Criminal Law Guide recommends that certain approaches to criminal law policy should be adopted only in exceptional circumstances. If these approaches are proposed in draft legislation, the draft should be referred to AGD. Examples of relevant recommendations are listed in a note to Drafting Direction 4.2, Attachment A.

7 **Other circumstances** In other respects, the office will continue to work with AGD to clarify matters that should, or should not, be referred under the Criminal Law Guide, Pt 1.3.2. If in doubt, drafters should contact AGD to discuss whether a particular matter should be referred.

8 AGD finds it very helpful if drafts that come for comment contain a brief explanation of *why* legislation is being referred. This explanation can be provided by drafting notes or by a separate note in the email referring the legislation.

9 As well as helping AGD, this will help instructors by alerting them to provisions that may attract adverse comment in the Parliament. The Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee for the Scrutiny of Delegated Legislation now seem to expect that offence, penalty and law enforcement provisions will be

drafted in accordance with the Criminal Law Guide. The Criminal Law Guide identifies a number of areas that the Committees have commented on in the past, including where the Committees will expect the explanatory material for the legislation to give reasons for particular aspects of legislation (e.g. strict liability offences, retrospective application and the existence of coercive powers).

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

11 Even if draft legislation dealing with matters covered by the Criminal Law Guide is not required to be referred under the Criminal Law Guide, Pt 1.3.2, reference to AGD is required in some other cases described in Drafting Direction 4.2.

Requirement for Attorney-General approval for draft legislation

12 Where legislation departs from a fundamental principle in the Criminal Law Guide or where legislation relating to a matter in the Guide is likely to be sensitive or contentious, the Attorney-General may need to personally approve that departure prior to the legislation being introduced into Parliament. AGD will advise you if the Attorney-General’s approval is required. A letter seeking the Attorney-General’s approval should be sent to the Attorney-General at least a week before the proposed date for finalising the draft legislation.

Criminal Law Liaison Officer

13 The office and AGD have each appointed a Liaison Officer.

14 The office’s Criminal Law Liaison Officer (***CLLO***) is responsible for representing the office at discussions with AGD 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 AGD, you should raise the issue with the CLLO. The CLLO is also happy to discuss the practical application of any aspects of this Drafting Direction with drafters.

Part 2—Form of offence provisions

Use of expression “commits an offence”

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

Expressions to be avoided in creating an offence

16 You should not use the expression “a person may only”, “a person must only” or “a person may do X only if Y” 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).

Notes about strict and absolute liability

17 Previously it has been common to include notes under strict liability offences and absolute liability offences referring to section 6.1 of the *Criminal Code*. For example:

Note: For strict liability, see section 6.1 of the *Criminal Code*.

18 These notes must not be included in new offence provisions and should, wherever practicable, be removed from existing offence provisions.

Part 3—Strict liability and absolute liability

19 You should consult with FPC before applying strict or absolute liability to some or all elements of an offence (including an existing offence) in a way that is not consistent with the Criminal Law Guide.

Part 4—Penalties

Criminal offences

Penalty units

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

21 If draft legislation provides for a pecuniary penalty, it should be expressed as a number of penalty units instead of a number of dollars. (There is one exception relating to Commonwealth-State cooperative schemes, which is discussed in the Criminal Law Liaison Notes). Section 4AA sets the value of a penalty unit and provides for its indexation.

22 If you are amending legislation 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 they will need to seek Ministerial approval.

23 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.

Do not use the expression “Maximum penalty”

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

25 If you are amending legislation 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 they will need to seek Ministerial approval.

Order for penalties of imprisonment and/or fine

26 For all new principal Acts and instruments, if you are providing for a penalty of imprisonment and/or a fine, the term of imprisonment must be stated first, then the fine. For example:

Fault-based offence

(2) A person commits an offence if the person contravenes subsection (1).

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

Civil penalty provisions

27 The *Acts Interpretation Act 1901* contains the following definition:

penalty unit, including in relation to a civil penalty provision, has the meaning given by section 4AA of the *Crimes Act 1914*.

28 If you use the expression “penalty unit” in a civil penalty provision, that definition will have effect for the purposes of that provision (and you should not include a separate definition of “penalty unit”).

Notes and examples

29 Generally, a note or example to a subsection or section that has a penalty at its foot should appear before the penalty rather than after it. This is to avoid questions about the application of section 4D of the *Crimes Act 1914* and of provisions about civil penalties that depend on penalties being set out at the foot of subsections and sections.

30 If you think it would be desirable to put a note or example after a penalty in a particular drafting job, please see the head drafter before sending the draft for editorial checking.

Part 5—Aggravated offences

31 There are two main methods of creating aggravated offences.

32 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*.

33 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 provision to be an offence against the primary provision in which a particular aggravating circumstance is present. See for example sections 270.6 to 270.8 of the *Criminal Code*.

34 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.

35 The issues are discussed in *Cheng v The Queen* [2000] HCA 53, 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 6—Geographical jurisdiction of offences

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

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

Offences created on or after 24 May 2001

38 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

39 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.

40 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

41 If you are drafting a provision creating an offence and the offence needs to have an extraterritorial 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 the head drafter).

42 The optional categories are as follows:

Extended geographical jurisdiction		
Provision	Category of extended geographical jurisdiction	Summary
Section 15.1	Category A	<p>Coverage of conduct that occurs wholly or partly in Australia.</p> <p>Coverage of Australian citizens and Australian bodies corporate for what they do anywhere in the world.</p> <p>Coverage of conduct that has a result in Australia.</p> <p>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.</p>
Section 15.2	Category B	<p>Coverage of conduct that occurs wholly or partly in Australia.</p> <p>Coverage of Australian citizens, Australian bodies corporate and Australian residents for what they do anywhere in the world.</p> <p>Coverage of conduct that has a result in Australia.</p> <p>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.</p>
Section 15.3	Category C	<p>Unrestricted coverage.</p> <p>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.</p>
Section 15.4	Category D	<p>Unrestricted coverage.</p> <p>There is no defence based on the law of the foreign country where the conduct occurs.</p>

43 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).

44 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.

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

Offences created before 24 May 2001

46 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.

47 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.

48 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.

49 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 7—General offences created by Chapter 7 of the *Criminal Code*

Offences created by Chapter 7

50 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

51 AGD 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 draft 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

52 The Chapter 7 offences relating to false or misleading information or documents could apply to the giving of false evidence in certain circumstances. However, AGD 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 [legislation/Part/Division/provision]”

53 You should consider whether the expression “offence against this [legislation/Part/Division/provision]”, when used in legislation 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 legislation, Part, Division or provision concerned.

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

55 The following is an example of an extended definition of the expression “offence against this [legislation]”:

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

Part 8—Privilege against self-incrimination

Basis of privilege

56 The privilege against self-incrimination is the privilege of a person to refuse to produce a document, answer a question or to give information or evidence on the ground that the production of the document, the answer, the information or the evidence might incriminate the person in relation to a criminal offence.

57 You should bear in mind that when claimed in relation to the production of documents, the privilege is not only able to be claimed on the ground that the contents of the document might incriminate the person, but also on the ground that production of the document itself might do so. *Sorby v Commonwealth* [1983] HCA 10 contains a discussion of the privilege against self-incrimination.

Abrogation and preservation of privilege

58 The Senate Standing Committee for the Scrutiny of Bills has recognised that abrogating the privilege against self-incrimination represents a serious loss of personal liberty for persons who are subject to questioning, and the Committee will question whether there is a public benefit in the abrogation of the privilege that outweighs the loss of personal liberty. The Committee is less likely to be critical of the abrogation of the privilege if the matters requiring evidence are peculiarly within the knowledge of the person concerned and there is some sort of immunity against the use of any information obtained (see the discussion below about use and derivative use immunity). The Committee will not view the inclusion of use immunities, or use and derivative use immunities, as sufficient safeguards justifying the privilege being removed in all cases. The Committee has commented that provisions removing the privilege should only be enacted for serious offences and in situations where they are absolutely necessary (see, for example, Alert Digest 4/2000, pages 12 and 20, and Alert Digest 6/2000, page 31).

59 The general position of AGD is that the privilege against self-incrimination should be maintained. For further information see the Criminal Law Guide. If you are instructed to abrogate the privilege in particular circumstances, you should ask your instructor to contact AGD at an early stage to discuss the instructions and inform them that the approval of the Attorney-General may be required in some cases for an abrogation of the privilege. It may also be helpful to mention that they should bear the issue in mind when drafting their statement of compatibility with human rights.

60 If your instructor's policy is to maintain the privilege, you do not need to include an express provision confirming this and can instead rely on the operation of the common law. You also should not include defences to compulsory powers that are based on the privilege against self-incrimination (for an example of such a provision, see subsection 13(5) of the *National Health Act 1953*). You should include a note to your instructors asking them to explain in the explanatory memorandum that there is no intention to displace the privilege. If you are instructed to abrogate the privilege in particular circumstances, you should ask your instructor to contact the AGD (in accordance with Drafting Direction 4.2) at an early stage to discuss the instructions.

Abrogation of privilege by express words

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

- (1) An individual 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 *[giving the information/giving the evidence/producing the document/answering the question]* might tend to incriminate the individual in relation to an offence.

Note: A body corporate is not entitled to claim the privilege against self-incrimination.

Use and derivative use immunity

62 The Criminal Law Guide contains a discussion of the “use” and “derivative use” immunity provisions that are usually included if the privilege against self-incrimination is abrogated. If you are instructed to provide for a “use” immunity, you should include the following provision:

(2) However:

- (a) the *[information given/evidence given/document produced/answer given]*; and
- (b) *[the giving of the information/the giving of the evidence/the production of the document/the answering of the question]*;

are not admissible in evidence against the individual in *[insert reference to relevant proceedings and exceptions]*.

63 You should discuss with your instructors the proceedings and exceptions to be referred to in subsection (2). 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]*”. The immunity should apply only in relation to criminal proceedings.

64 If you are instructed to provide for a “use” and “derivative use” immunity, you should include the following additional paragraph in subsection (2):

- (c) any information, document or thing obtained as a direct *[or indirect]* consequence of *[the giving of the information/the giving of the evidence/the production of the document/the answering of the question]*;

65 If you are instructed to include a “derivative use” immunity, you should also consider whether a reference to “or indirect” should be included in the provision after the reference to “direct”. The Senate Standing Committee for the Scrutiny of Bills is less likely to be critical of the abrogation of the privilege if a derivative use immunity is included. The Committee is even less likely to be critical if the derivative use immunity is extended to apply to documents or information obtained indirectly.

66 Whether or not a “derivative use” provision should be included, and whether a reference to “indirect” should be included in that provision, depends on various factors including the following:

- (a) the extent to which such a provision may be exploited by an individual divulging a significant amount of incriminating information that may then render any further evidence gathered in relation to the individual inadmissible in relevant proceedings;
- (b) the particular area of law and whether derivative use immunity has historically been given in that area (for example, the regulatory schemes in relation to the ACCC, ASIC and APRA do not generally include derivative use immunity provisions) and if it has, whether it covers information obtained both directly and indirectly;
- (c) whether the public interest in the proposed uses of the incriminating information decisively outweighs the detriment to individuals;
- (d) the extent to which the incriminating information would not be able to be obtained by other means if the provision were included;
- (e) the difficulty in proving or disproving whether subsequent information has been obtained as a direct or indirect consequence of the incriminating information being obtained.

Use of phrase “without reasonable excuse”

67 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.

68 Similarly, in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* [1985] HCA 6, the High Court held that a provision of an Act that made it an offence to fail to comply with a notice to produce books, without reasonable excuse, abrogated the privilege against self-incrimination.

69 If you include a provision in a draft creating an offence in similar terms, you should not include the “without reasonable excuse” defence as this would be inconsistent with the Criminal Law Guide that provides the defence of reasonable excuse should generally be avoided.

70 You should also not include a provision in the following terms (although these were included in the past to address the cases referred to in paragraphs 67 and 68):

- (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.

Part 9—Penalty privilege

71 If you are abrogating the privilege against self-incrimination, you also need to consider penalty privilege. This is the privilege against self-exposure to a “penalty”. A penalty in this context means something in the nature of a penalty (other than a penalty for an offence) and can include the following:

- (a) proceedings in relation to a contravention of a civil penalty provision;
- (b) statutory disciplinary proceedings;
- (c) removal from public office;
- (d) disqualification from acting in the management of a corporation.

72 Penalty privilege applies in the context of judicial proceedings which are brought against an individual to secure a penalty and may be claimed by the individual to resist compulsion in the course of such proceedings (such as the requirement to file a defence, or provide discovery). It is not normally available outside of judicial proceedings absent clear legislative intent that the privilege should apply. The privilege is not available to a body corporate.

73 The general position of AGD is that penalty privilege should not apply outside judicial proceedings. To ensure this outcome, if you have included the provision in paragraph 61, you should also include the following provision:

If, at general law, an individual would otherwise be able to claim the privilege against self-exposure to a penalty (other than a penalty for an offence) in relation to [*giving information/giving evidence/producing a document/answering a question under (insert a reference to the relevant provisions)*], the individual is not excused from [*giving the*

information/giving the evidence/producing the document/answering the question] under those provisions on that ground.

Note: A body corporate is not entitled to claim the privilege against self-exposure to a penalty.

Part 10—Secrecy provisions

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

75 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.

76 Whenever you include a secrecy provision in a draft that extends to information that may, by virtue of another provision of that draft, 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.

77 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 [*legislation*]” includes the giving of evidence to the Parliament or to the specified parliamentary committee.

Part 11—Compensation for damage to electronic equipment or data

Background

78 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.

79 In the late 1990s the provision was revised. The revised version has been further developed since.

Use of model provision

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

81 It is not essential to redraft existing provisions that use the original form. However, if you are amending legislation that contains the old form of the provision, it would be desirable to redraft it if time permits and if your instructors do not object.

**** Compensation for damage to 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]:

- (i) damage is caused to the equipment; or
 - (ii) the data recorded on the equipment is damaged (including by erasure of data or addition of other data); 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]/a court of competent jurisdiction*] 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.

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