

# A legislative guide to the enactment of criminal offences, penalties and related provisions

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*This is a guide that is intended to assist those whose task it is to make proposals for legislation which is criminal in nature, and which will include the proposed enactment of criminal offences, penalties of various kinds, and other enforcement provisions. It is also intended to be a source of general information for the public, so that the public may be better informed about what legislation means and is intended to mean.*

## **1.0—General Principles**

### **1.1—Role of Parliamentary Counsel**

All legislation in this State is drafted by the Office of Parliamentary Counsel (OPC). A detailed description of the drafting process, and OPC's role, can be found in the "Guide to Instructing Parliamentary Counsel for Government Agencies" available at [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au) However, it is intended that the guide that follows will provide a greater insight into various principles associated with the operation of the criminal law and the development of criminal offences within legislation. In considering the material presented in this guide, it is also very important to remember that instructions to OPC are not to be presented in the form of draft legislation, but must be in a narrative form that sets out the policy objectives sought to be achieved.

Furthermore, any instructions to OPC about an offence do not need to specify all of the matters dealt with in this guide, although it will be important for the instructor to understand these concepts when considering the draft legislation prepared by OPC, so that the instructor knows how the government's policy objectives are being achieved in the draft and understands the practical implications of the proposed legislation.

It should also be noted that because the drafters at OPC are dealing with offences constantly, and, because it is desirable that penalties applicable across the statute book be consistent, the penalty applicable in relation to an offence is best determined in consultation with OPC.

Finally, it is important to remember that this document is provided for guidance purposes only and departures may occur from time to time on the advice of Parliamentary Counsel or the Attorney-General's Department, or on account of Government policy in a particular instance.

### **1.2—Introductory Remarks**

A criminal offence, even a minor one, should be regarded as the last resort in getting members of the public to conform to public policy. It is no light thing to burden a person with a criminal record, which may haunt that person for the rest of his or her life. It may not be a sensible thing to do anyway. For example, other laws or policies may do the job better. In addition, it is an expensive thing to do, even if it is a minor offence, although the resources required increase the more serious the offence. Enforcement authorities, courts and corrections at all levels do not come cheaply. So careful consideration and justification should be given before making a criminal offence.

In general terms, the criminal sanction is applied to prevent (in some way) the causing of harm, first to the person and then to society in general. Next in order of importance, with more scrutiny warranted, is the prevention of danger in an activity to the person or society in general. Last in order of importance, and only imposed in the most important cases, is a sanction against danger from an individual based on a prediction of dangerousness.

Here is a minor example for consideration of general principle. It is not intended to give an answer, but merely to look at some reasoning that might be brought to bear.

**Example:** South Australia has a vehicle fleet which is aged by national standards. As a result, there are many vehicles on the road which pollute the air with what might be regarded as excessive smoke and fumes. Should it be an offence to drive a motor vehicle with a smoky exhaust?

As with many of these areas of social policy, opinions will differ. But some considerations might be:

- What is the mischief here? What is the harm? If it is just air pollution, don't other laws about air pollution deal with the problem properly? If not, why not?
- Maybe the problem lies with the laws about defecting vehicles. Are we prepared to say that a certain amount of smoke emitted means that the vehicle is defective and let that system deal with it? If the vehicle is not defective, why are we proposing to act?
- If our concern is just with nuisance and smells, is that enough to justify a criminal offence, even a minor offence?
- Why does South Australia have an aged vehicle fleet? If it is because we have a comparatively poor population who cannot afford a new car, what sense does it make to fine them money for having a cheap one?
- Obviously there cannot be zero tolerance of this offence. For one thing, there are degrees of smokiness. So it will be enforced selectively. How selectively and against who? Maybe, if there is to be an offence of this kind, it should be targeted more carefully.
- This is going to be an offence enforced by the police, for they do all the moving traffic work. As a matter of practicality, on a cold winter morning, it is going to be hard to tell the difference between smoky vehicles and condensing vehicles. Do we seriously want to use police resources on patrol trying to tell the difference between the two, or to enforce this social policy at all?
- Maybe this is just one small manifestation of a much bigger problem - the aging car fleet. That problem gives rise to other issues, such as a higher rate of car theft and controversy about annual motor vehicle inspections. Work has been done on both of those topics. Maybe the overall problem requires holistic examination.

### 1.3—The Principle of Parsimony in the Use of the Criminal Sanction

During the twentieth century, in particular, it became apparent that the old habit of enacting a new criminal offence for every variety or species of behaviour thought to be worthy of the criminal sanction was not sensible. For example, at one point the Western Australian *Criminal Code* had a series of offences aimed at a similar mischief, namely:

- 208 - Poisoning water-holes;
- 296 - Intentionally endangering safety of persons travelling by railway;
- 296A - Intentionally endangering safety of persons travelling by aircraft;
- 298 - Causing explosion likely to endanger life;
- 299 - Attempting to cause explosion likely to endanger life;
- 300 - Maliciously administering poison with intent to harm;
- 302 - Failure to supply necessaries;
- 304 - Endangering life of children by exposure;
- 306 - Unlawful acts causing bodily harm;
- 307 - Endangering safety of persons travelling by railway;
- 308 - Sending or taking unseaworthy ships to sea;
- 309 - Endangering steamships by tampering with machinery;
- 310 - The like by engineers;
- 311 - Evading laws as to equipment of ships and shipping dangerous goods; and
- 312 - Landing explosives.

This is not sensible. They had an offence of endangering passengers on a railway specifically, for example, but when aircraft were invented, had to enact another specific one. All of these offences are specific examples of the same general offence - conduct recklessly endangering the life or serious harm of another. The reduction of dozens of offences to one or two general offences based on an examination of the general principle at work in the area may be referred to as **parsimony in the use of the criminal sanction**. There is no point in having twenty different specific offences if two aimed at the real principle attacked will do.

Further, you should settle what the (say) two offences will look like by the use of discriminators which make sense in the allocation of the criminal sanction. The two discriminators which makes sense, overwhelmingly in general, are (a) the consequences of behaviour and (b) the fault with which it is done. Overwhelmingly, *how* it is done does not really matter at all. If a miscreant poisons a waterhole, it matters little whether he does it by one poison or another if what the sanction is aimed at is the result that the waterhole is poisoned.

The point is to have general overarching principled offences instead of enacting a new offence every time a new social problem appears, thus avoiding a multitude of specific, overlapping and confusing offences. So if it is decided that there is a new evil worthy of the criminal sanction, then (a) look to see whether an existing general offence covers the ground and (b) if not, determine whether a more general principle is involved, of which the particular behaviour is merely one example.

There is a general exception to this principle. Sometimes it makes sense to have a hierarchy of offences and penalties. This is commonly the case where there is a very broad range of criminal conduct involved, ranging from the extremely serious to the moderate or less serious and it makes little sense or is overkill to convict the minor offender of the massive offence. It is a matter of balance whether the drafter wants to leave that question to the sentencing court or to the legislator.

**Example:** Causing a bushfire is a very serious offence against the *Criminal Law Consolidation Act 1935*. It carries a maximum penalty of 25 years imprisonment and special sanctions, as well as a specific sentencing principle in the *Criminal Law (Sentencing Act) 1988*. Does it make sense to treat a farmer who carelessly lets sparks fly from farm machinery the same as someone who deliberately sets a fire? Of course not. So much so that there is a specific minor offence in *Fire and Emergency Services Act 2005*.

## 1.4—The Purposes of Punishment

There has been a good deal of philosophising about the purposes of punishment over the years. Forests have been felled and oceans of ink spilled in the cause. When it all comes down to it, though, for the purposes of this summary, we can say that in any given case of offending and in any given formation of a crime, no one purpose of punishment covers the whole. There will be a mixture which will vary according to circumstances. The generally recognised purposes of punishment are:

- Specific deterrence: deterring the offender from doing it again;
- General deterrence: making an example of the offender so that others won't do it again or at all;
- Rehabilitation: imposing a sanction designed to bring home to the offender the error of his ways so that he has a sound reason (apart from punishment) not to do it again;
- Punishment or revenge: taking it out on the offender out of a sense that the offender should suffer for what he has done;
- Denunciation: imposing a penalty as a condemnation of the offender's conduct and fault;
- Incapacitation: taking the offender out of circulation so that he physically cannot commit the offence again.

All that one can usefully say here is (a) make sure that the imposition of the criminal sanction is likely to achieve one or more of these objectives and (b) have these objectives firmly in mind when you design your sanction to take account of your objective. Don't just impose a fine or a term of imprisonment or both without thinking about it.

## 1.5—Retrospectivity

The general rule is that, unless the statute says something different, a new criminal offence will not operate retrospectively. The general principle to be followed is that a criminal offence should not be specified to act retrospectively, for the result will be to make criminal conduct already performed which was legal at the time that it was done. The basis of the principle is the protection of the legitimate expectations of the citizen. Exceptions to this principle have only been defensible where there has been a gap or loophole in the law and the moral culpability of those who exploited it can be subjected to heavy criticism. An often cited example is the retrospective operation of the law criminalising tax avoidance by the 'bottom-of-the-harbour' tax schemes.<sup>1</sup> A more recent example is the removal of the artificial statute of limitations on the prosecution of serious sexual offences. In the latter case, there was no doubt at all that the conduct was criminal when it was done: the statute imposed no new liability: it removed an arbitrary immunity against prosecution acquired by lapse of time.<sup>2</sup>

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<sup>1</sup> *Crimes (Taxation Offences) Act 1980* (Commonwealth).

<sup>2</sup> *Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003* (SA).

None of this means that all matters statutory that look criminal are not or may not be retrospective. For example, rules of evidence and procedure generally speak to courts at the time of prosecution not criminal conduct at the time the conduct was committed and can therefore be seen to be retrospective in the sense that they apply to trials of crimes alleged to have been committed before the provisions came into effect. Of course, what is 'substantive' and not retrospective and what is 'procedural' and may be retrospective will, in the absence of clear words, be a matter for characterisation by a court.

The lesson here is that the legislator should always actively consider a transitional provision, certainly if in any doubt about the operation of the criminal sanction or provision involved.

## 1.6—Repeating Offences

The *Criminal Law Consolidation Act* contains offences and supporting provisions of general application. These provisions should not be repeated in any form in specialist legislation.

For example, the *Criminal Law Consolidation Act 1935* contains the general offence provisions of complicity:

### 267—Aiding and abetting

A person who aids, abets, counsels or procures the commission of an offence is liable to be prosecuted and punished as a principal offender.

Until recently, the *Controlled Substances Act 1984* said:

### Aiding and abetting, etc.

41. A person who—

- (a) aids, abets, counsels or procures the commission of an offence against this Act; or
- (b) solicits or incites the commission of an offence against this Act,

shall be guilty of an offence and liable to the same penalty as is prescribed for the principal offence.

The latter provision was unnecessary as duplicating the general law and has since been repealed.<sup>3</sup>

The *Criminal Law Consolidation Act 1935* has extensive and modern offences dealing with the crime commonly known as forgery but more accurately referred to as 'dishonest dealing with documents'. The section is too long to repeat here. But the rest of the statute book contains many such replicating offences, many of them ancient. For example, s 229 of the *Real Property Act 1886* contains many and ancient specific offences of fraud and forgery.

The same principle applies to general criminal law defences, such as (for example) mistake, self-defence and lawful authority. Some of these are statutory, others in the common law (because we do not have a criminal code, they can be hard to find).

These overlaps and duplications invite arguments about inconsistencies, loopholes, technical distinctions and invite accusations of incoherence and confusion. They should be avoided.

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<sup>3</sup> The soliciting and inciting part is covered by the general criminal law. There is a case for adding it to the *Criminal Law Consolidation Act* in the interests of transparency but that is another question.

## 2.0—Making Criminal Offences

### 2.1—The Structure of Offences

For the purpose of the guide, criminal offences of *any* degree of severity are made up of physical elements, fault elements and defences, plus, of course, a penalty. Each of these types of elements will have its own separate discussion.

### 2.2—Physical Elements

The physical elements of an offence are the descriptions of the facts that make the defendant liable that are *external to the defendant* himself.

**Example:** The *Fire and Emergency Services Act 2005*, s 95(1)

#### **95—Endangering life or property**

(1) A person who, during the fire danger season, without lawful excuse, lights a fire in circumstances where the fire endangers, or is likely to endanger, the life or property of another, is guilty of an offence.

Maximum penalty: \$10 000 or imprisonment for 2 years.

This offence has the following elements:

1. A person who - that is, any person at all; AND
2. during a fire danger season - so - not at any time, only at that time; AND
3. (without lawful excuse - this is a defence which will be extensively discussed below;) AND
4. lights a fire - must light a fire, whatever that means, but certainly is not guilty if he just fails to put one out; AND
5. in (specified) endangering circumstances - not, it seems, including only endangering mere harm to the person of another<sup>4</sup>.

Elements 1, 2, 4, and 5 are physical elements. They describe conditions of criminal liability which are external to the defendant. As noted, item 3 is a defence to be discussed later on<sup>5</sup>. It is common for physical elements to be objective facts capable of proof by witnesses. But not always. For example, the lack of consent of the victim is a physical element of rape but it exists solely in the mind of the victim. In this example, the endangering conditions are a matter of judgment rather than existing fact. None of this is a bad thing. It merely represents a series of judgments about the desirable conditions of liability.

Physical elements can only be one of three kinds. Each one is either conduct, a circumstance or a result. The example offence has one element of conduct (lighting a fire) two circumstances (a person, and during a fire danger season) and one result (the endangering conditions). Curiously, the offence as drafted calls the result a circumstance but it is clearly a condition of liability that the lit fire *results* in the causing of the specified dangers.

Conduct can be an act or acts (lighting a fire), or an omission (say, an offence [which does not exist] of failing to put out a fire), or a state of affairs (the most common example is being in possession).<sup>6</sup>

<sup>4</sup> Although it is hard to envisage a realistic scenario in which that might occur.

<sup>5</sup> So is s 95(2).

<sup>6</sup> Since South Australia has not codified the principles of criminal responsibility, it is sometimes thought necessary to add a clause to that effect if it is intended to punish omissions. So s 127(3) of the *Environment Protection Act 1993* says: “For the purposes of this section, a reference to **conduct** or **acting** includes a reference to failure to act.”

A circumstance is a physical element that *describes* the context in which conduct is forbidden. In this case, for example, the conduct (act) of lighting a fire is only forbidden in the fire danger season.

A result is a physical element that describes the prohibited *consequence* of the forbidden conduct. In this instance, the lighting of a fire in a fire danger season is only an offence if it results in any one of a number of described endangering conditions.

The point of analysing an offence in this way is to cause concentration on how one wants the offence described with precision - and to cause thought about the appropriate fault element, which is vital and to which discussion now turns. It is not possible to understand how to draft fault elements without understanding how they relate to the physical elements.

## 2.3—Fault Elements

The fault elements of an offence are those elements of an offence which require the prosecution to prove a certain state of mind or belief in the defendant<sup>7</sup> before an offence has been committed. For the purposes of this guide, that will also include other legislative options in this general category which will be discussed below.

The general principle is that for serious offences - say, any offence for which imprisonment is an option - a person should not be convicted without proof of a guilty mind. For minor offences, a guilty mind is less of a requirement and often the expediency of enforcement dictates either a more objective standard of liability or, in a few cases, liability without much in the way of fault at all. I will return to the question of “mix and match” and what choices to make in a moment.

Physical elements can be anything. They describe human behaviour and other matters which qualify or describe the behaviour. But fault elements are limited. There are only certain kinds. The legislator has a menu.

***Intention/Intentionally:* A person intends something if that person means it to occur or knows that it will be virtually certain occur in the ordinary course of events.**

*Purpose* will do for intention of course, but a person can intend something to happen without it being part of their purpose. Intention does not necessarily mean *desire* either. That explains what might look like the odd second part of the definition. The escaping bank robber being chased by police who rushes onto a train to Sydney may not *want* to go to Sydney (anywhere will do so long as it's away) but must be said to intend to go to Sydney.

It also helps to think that just about every offence will have an element of intention in it. Most offences have an element of conduct in them (in the sense of an act). Generally speaking, it makes sense to say that one acts intending to act. If the conduct is, say, “lighting a fire”, unspoken is the requirement that the fire be lit intentionally. We will come to the general rules about unspoken fault elements later. It is sufficient to say here that language can cause mistakes. The offence of reckless driving require an intentional act of driving. The recklessness refers to the consequences of the driving, not the act of driving itself. The driver means to drive the car.

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<sup>7</sup> A state of mind in a victim or other person is not a fault element. The most obvious example is the requirement in rape that a victim not consent to sexual intercourse. The notion of consent here is in the mind of a person but not the mind of the defendant. By contrast, the requirement that the defendant know or believe that the victim is not consenting is a fault element.

**Reckless/Recklessly:** A person is reckless if he or she is aware of the possibility that something exists or will exist but takes an unjustifiable risk to go ahead anyway.

This fault element requires *actual foresight* by the defendant of the risk. It is not enough that a reasonable person would have foreseen the risk. There was and remains an unproductive debate about whether the degree of foresight here should be expressed as “possibly” or “probably”<sup>8</sup> or something else. The law in South Australia is clear. The answer is “possibility” except for murder, when it is “probability”.<sup>9</sup>

Note that taking the risk must be unjustifiable. The cases in which the question of justifiability will arise are rare, but may happen. For example, the brain surgeon who operates on a tumour may well be aware of a strong chance that the patient will die, but taking the chance will be justifiable to save the patient’s life.

Old statutes use the words “maliciously” and “wilfully”. These ancient forms of fault should be avoided. A modern court will interpret both as meaning *recklessly*.

**Knowing/Knowingly:** A person has knowledge of a material fact when he or she is aware that it exists or will exist in the ordinary course of events.

This is quite a common fault element. It is a subset of intention. It is different from belief (or suspicion). The thing to remember is that one cannot *know* a fact unless the fact is true, but one can *believe* (or suspect) a fact whether it is true or not. Most criminal offences say that one is guilty on the establishment of facts, and since knowledge goes with the fact, the element of knowledge is quite common. It is not common to base criminal liability on the offender believing something to be true when it is not, although there is no reason not to if that is what is desired. Consider the incongruity of, say, an offence of driving while under the *belief* that one is drunk. It is more common to use belief as a trigger when it is a police officer that holds the belief. Apart from arrest and allied provisions, a good example is the offence of possession of goods reasonably suspected of having been stolen. It does not matter whether the goods were stolen or not. What counts is the suspicion.

**Negligent/Negligently:** A person is negligent with respect to a physical element when his or her conduct involves such a great falling short of the standard of care which a reasonable person would have exercised in the circumstances and such a high risk that the element exists or will exist that the conduct merits criminal punishment for the offence in issue.

The use of criminal negligence as a fault element is very rare in criminal offences. It is the main fault component of manslaughter and criminal neglect. Nevertheless, it is an option and should be borne in mind if that is the kind of fault you want to get after.

## 2.4—Quasi-Fault Elements and Similar Defences

There are two general alternatives to fault elements. The proper names for them are “strict liability” and “absolute liability”.

**Strict Liability:** Where there is strict liability, the prosecution is not required to prove anything about the subjective state of mind of the defendant. Instead, the defendant may escape if he or she raises a reasonable doubt to the effect that he or she made an honest and reasonable mistake about the fact in contention, which, if true, would have made the act innocent.<sup>10</sup> For example, there is authority to say that the offence of failure to turn left with safety may be subject to such a defence.<sup>11</sup> There are many such examples.

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<sup>8</sup> Likely/Likelihood is the same as probable/probability.

<sup>9</sup> There is no good reason for this. For what it is worth, the view of the author is that the law is wrong and that the correct word should be “substantial”. That is the view taken by the Commonwealth *Criminal Code*.

<sup>10</sup> This is sometimes called the *Proudman v Dayman* defence, after the case in which it first became prominent: *Proudman v Dayman* (1941) 67 CLR 536.

<sup>11</sup> *Butler v Lonergan* (1994) 74 A Crim R 259.

The mistake must mean that, on the mistaken view of the facts, if true, would mean that the behaviour was *innocent*. It is no answer to a charge of polluting a watercourse if, on the facts as they were believed to be, the defendant would have been guilty of illegal dumping.

**Absolute Liability:** Where there is absolute liability, the prosecution is not required to prove anything about the subjective state of mind of the defendant and there is no defence of reasonable mistake of fact. Liability is complete on proof of the relevant physical element(s).<sup>12</sup> For example, it is often said that speeding is an offence of absolute liability *in the sense that* if the defendant drove over the speed limit, no mistake about that fact will excuse.<sup>13</sup>

**Other Forms of Liability:** These are just the well recognised and standard forms of liability. But a statute may invent others. They are usually variations on a theme. Here is a common example.

Section 21(3), *Security and Investigation Agents Act 1995*

**21—Limitations on settling claims relating to motor vehicles**

- (1) Subject to this section, a person required to be licensed as an agent must not, when acting on behalf of another, settle or compromise or attempt to settle or compromise a claim in respect of loss or injury arising out of the use of a motor vehicle after proceedings have been instituted in a court in respect of that loss or injury.

Maximum penalty: \$10 000.

- (2) This section does not apply unless the process by which the proceedings are instituted has been served on the defendant to those proceedings.

- (3) It is a defence to a charge of an offence against subsection (1) if it is proved that the defendant did not know, and could not by the exercise of reasonable diligence have discovered, that proceedings had been instituted in a court in respect of the loss or injury.

And here is a variation:

Section 124(1), *Environment Protection Act 1993*

**124—General defence**

- (1) It will be a defence in any criminal proceedings, or in any proceedings for the payment of an amount as a civil penalty, in respect of an alleged contravention of this Act, including—

- (a) proceedings against a body corporate or a natural person where conduct or a state of mind is imputed to the body or person under this Part; and

- (b) proceedings against an officer of a body corporate under this Part,

if it is proved that the alleged contravention did not result from any failure on the defendant's part to take all reasonable and practicable measures to prevent the contravention or contraventions of the same or a similar nature.

<sup>12</sup> There is probably still a rare defence available called “Act of God or a stranger” or “inevitable accident” but the application of the defence is uncommon and will not be further pursued here. Think of it as a common law backstop for cases which no-one could have prevented.

<sup>13</sup> Note, though, that the defendant must drive the car intentionally.

## 2.5—Putting Fault Elements and Physical Elements Together

Fault elements and physical elements relate to each other - with one notable exception which we will get to. With that exception, physical elements and fault elements (or the lack of them) attach to each other like twins. Put another way, for each physical element specified, you have to consider what fault attaches or is wanted to attach. Let's revisit our example.

**Example:** The *Fire and Emergency Services Act 2005*, s 95(1)

### **95—Endangering life or property**

- (1) A person who, during the fire danger season, without lawful excuse, lights a fire in circumstances where the fire endangers, or is likely to endanger, the life or property of another, is guilty of an offence.

Maximum penalty: \$10 000 or imprisonment for 2 years.

The physical elements here are: (a) lighting a fire; (b) during fire danger season; (c) in (specified) endangering circumstances. In this instance, as is sadly too common, no fault element is specified by Parliament for any of the physical elements. So the law will have to provide one where the issue arises. A court will, when asked to do so, attach a fault element to each of these physical elements. In the next section we will briefly examine how this is done. It is a guessing game. But, for present purposes, it is sufficient to guess that a court would say that (a) the defendant must intend to light the fire; (b) knowing that it is a fire danger season or subject to a defence of honest and reasonable belief that it is not a fire danger season (not sure here - see below); and (c) resulting in endangerment in fact whatever the defendant's belief about it [ie absolute liability as to endangerment]. I emphasise that this is a guess, albeit an educated one. So far as I know, the issues have not been authoritatively decided.

If one has to ask the fault element question for each physical element, it is not true that for each fault element there must be a physical element. That is to say, a fault element can hang by itself. This is the exception spoken of above. Consider the following example:

### **31—Possession of object with intent to kill or cause serious harm**

- (1) A person who, without lawful excuse, has the custody or control of an object that the person intends to use, or to cause or permit another to use—
- (a) to kill, or to endanger the life of, another; or
  - (b) to cause serious harm to another,
- shall be guilty of an indictable offence and liable to be imprisoned for a term not exceeding 10 years.

This is a very serious offence. In pared down terms, the elements of the offence are: (a) custody or control (possession) of (b) an object; (c) intending to use it (etc) to kill or cause serious harm. Custody and control (possession) is a physical element. So is the "object". But the third specified element is a fault element with no physical element. The "with intention to" formula specified a situation where it is not necessary to prove that (in this case) death or serious harm happened at all. It suffices if the defendant intended that it would. This formula<sup>14</sup> is not uncommon in serious and very serious offences. It may specify recklessness as well. But it is not a common form in lesser offences.

<sup>14</sup> The intent hanging from the end of the offence like this is sometimes called "ulterior intent".

## 2.6—Failure to Specify Fault Elements

Let us return to the example. It is:

**Example:** The *Fire and Emergency Services Act 2005*, s 95(1)

### **95—Endangering life or property**

(1) A person who, during the fire danger season, without lawful excuse, lights a fire in circumstances where the fire endangers, or is likely to endanger, the life or property of another, is guilty of an offence.

Maximum penalty: \$10 000 or imprisonment for 2 years.

The reader may have noticed that when the explanation tried to assign fault elements to this offence, there was a lot of guessing going on. That is because, like so many of these offences, scattered all over the statute book, no-one has bothered to specify what the fault elements (or lack of them) are. That means that the courts have to guess when the issues are litigated. That is, in turn, an uncertain business. There is nothing unusual about that - it has been that way for over a century. But it is wrong in principle - and it means that the Parliament and the Government may not get the result that was intended.

An eminent Judge in the 1930s famously referred to the "multitudes of reported cases . . . many of them irreconcilable, in which the common law rule [in favour of fault] has been treated as excluded or not excluded upon judge-made indicia derived from cases in which there has often been a difference of opinion as to so-called necessary implications". Which means that if you don't make it clear, you never know what will happen.

So the first lesson is - if you want to be sure that you get the results that you intend, specify the fault elements (or the key ones) in advance. That requires some thought - you have to think out what mistakes people will make when engaging in the proscribed conduct - and you have to anticipate what excuses offenders will make that you want to cut off at the pass. Of course, you should keep fairness and what is a reasonable thing in mind. One way of doing this is to think about what the courts call "the luckless victim".

Explaining that concept leads the discussion to what the courts will do if the fault elements (or lack of them) are not specified in advance. there is an awful lot of complicated and unrewarding law on this. I will not do more than heavily summarise the result.

- The answer to the question of the applicable fault element (or lack of it) is ultimately a question of statutory interpretation. The question is what did the Parliament intend?
- There are a set of basic rules which are very general. The courts will consider the words and subject-matter of the offence, including its penalty.
  - If Parliament has used fault words (such as recklessly, knowingly, wilfully and so on, that is conclusive. Some words, such as 'possession', automatically bring in subjective fault, in this case knowledge. Other more neutral words, such as 'permit' tend to indicate strict liability<sup>15</sup>.
  - The more serious the offence the more likely it is to require fault or, going down the scale, strict liability. Absolute liability will be reserved for minor regulatory offences (the kind that might attract expiation fees).
  - In very general terms, the courts have a presumption in favour of some kind of fault or, at least, letting a reasonable mistake excuse.

<sup>15</sup> It is beyond the scope of this discussion to provide a list. Anyway, the list would be full of exceptions and quibbles.

- The courts pay a great deal of attention to ‘the luckless victim’. They look at the range of mistakes that can be made and ask whether the blunderer can do anything, directly or indirectly to obey the law. Unless this is so, there is no reason in penalising him or her, and it cannot be inferred that the legislature imposed strict or absolute liability. Put another way, if the imposition of strict or absolute liability would result in the conviction of a class of people who could not promote the observance of the law, the court is likely to require that the prosecution prove that the defendant knew that what he or she was doing was wrong.

This last is a useful test for the legislator. It requires contemplation of the full range of people who may be caught by the proposed prohibition. That is a salutary thing for anyone creating a criminal offence to do.

## 2.7—Defences

You should carefully consider whether a factor is to be a defence to be proved by the defendant or an element of the offence to be proved by the prosecution. Your instructions should be clear on this, as it may be the subject of expensive and frustrating court action. The general principle is that whether a statutory exception is an element of an offence or a defence is a question of substance, not form. If an exception is within the offence provision and accompanies the description of the offence it is likely to be an element of it. An exception requiring proof of additional facts or setting out a different subject matter distinct from the offence provision is not an element of the offence.

The general common law ‘defences’ of ignorance and mistake are dealt with in the context of fault in the material above. So too are some of the other more inventive examples. Here are some common defences.

### 2.7.1—Without Lawful Excuse - Without Reasonable Excuse

Another very common defence used to bolster criminal liability is “without lawful excuse” or some equivalent expression. These offences are littered all over the statute book. For example:

#### **Summary Offences Act 1953**

##### *15—Offensive weapons etc*

- (1) A person who, without lawful excuse—
- (a) carries an offensive weapon; or
  - (b) has custody or possession of an implement of housebreaking; or
  - (c) carries an article of disguise,
- is guilty of an offence.

Maximum penalty: \$2 500 or imprisonment for 6 months.

#### **Summary Offences Act 1953**

##### *16—Possession of instruments for gaming or cheating*

- (1) A person who, in a public place, without lawful excuse, has possession of an instrument for gaming or an instrument constructed as a means of cheating is guilty of an offence.

Maximum penalty: \$2 500 or imprisonment for 6 months.

**Occupational Health Safety and Welfare Act 1986**

S 38(8) A person must not—

- (a) hinder or obstruct an inspector or other authorised person in the exercise of a power conferred by this section; or
- (b) refuse or fail, without lawful excuse, to comply with a requirement under this section.

Maximum penalty: Division 5 fine.

This is sometimes done as “reasonable excuse”. For example:

**Security and Investigation Agents Act 1995**

S 23C(2) A person who, without reasonable excuse, fails to surrender his or her licence in accordance with a direction under subsection (1) is guilty of an offence.

Maximum penalty: \$1 250.

**Passenger Transport Act 1994**

S 53(9) Subject to subsections (10) and (11), a person who—

- (a) without reasonable excuse, hinders or obstructs an authorised officer, or a person assisting an authorised officer, in the exercise of powers under this Act; or
- (b) uses abusive, threatening or insulting language to an authorised officer, or a person assisting an authorised officer; or
- (c) without reasonable excuse, fails to obey a requirement or direction of an authorised officer under this Act; or
- (d) without reasonable excuse, fails to answer, to the best of the person's knowledge, information and belief, a question put by an authorised officer; or
- (e) falsely represents, by words or conduct, that he or she is an authorised officer, is guilty of an offence.

Penalty: Division 6 fine.

And here is a variation:

**Road Traffic Act 1961**

*79C—Interference with photographic detection devices*

A person who, without proper authority or reasonable excuse, interferes with a photographic detection device or its proper functioning is guilty of an offence.

Maximum penalty: \$5 000 or imprisonment for 1 year.

It is controversial whether there is a significant difference between any of these phrases and, if so, what it might be. The best that can be said is that the court will interpret the meaning of the phrase in question in the context of the statute read as a whole and that Parliamentary intention is as always a paramount consideration. There is a considerable case law on the subject.<sup>16</sup> What is worse, it is clear that there is no set definition to any of these phrases:

*"[the court] doubt[s] if it is possible to define the expression 'lawful excuse' in a comprehensive and satisfactory manner and [it does] not propose to make the attempt. ... it would be undesirable to do so and ... each case requires to be examined on its individual facts".*<sup>17</sup>

The effect of the insertion of this kind of defence is to make the defendant prove the defence (whatever it is) on the balance of probabilities if the offence is contained in the *Criminal Law Consolidation Act* or the *Summary Offences Act*. This is because there is a general reversal of onus provision in each of these Acts which applies automatically.

### **Summary Offences Act 1953**

#### *5—Proof of lawful authority and other matters*

Subject to any provision to the contrary, where this Act provides that an act done without lawful authority, without reasonable cause, without reasonable excuse, without lawful excuse or without consent constitutes an offence, the prosecution need not prove the absence of lawful authority, reasonable cause, reasonable excuse, lawful excuse or consent, and the onus is upon the defendant to prove any such authority, cause, excuse or consent upon which he or she relies.

### **Criminal Law Consolidation Act 1935**

#### *5B—Proof of lawful authority or lawful or reasonable excuse*

In proceedings for an offence against this Act in which it is material to establish whether an act was done with or without lawful authority, lawful excuse or reasonable excuse the onus of proving the authority or excuse lies on the defendant and in the absence of such proof it will be presumed that no such authority or excuse exists.

If there is no explicit reversal of onus by some statutory formula (such as 'proof of which is on the defendant), the prosecution must negative the defence beyond a reasonable doubt.

This sort of statutory formula is over-used and should be regarded with caution. The real justification for the use of this technique is where the potential for innocuous conduct being caught by the offence legislated is so great that it is not practical to legislate specific defences. That being so, it should be recognised that the effect of the technique is to criminalise in the most general of ways and rely on the blancmange of the defence to take care of unspecified innocence. Consider the offence of possession of implements of gaming or cheating without lawful excuse. The effect of the offence is to make every possession of those implements presumptively unlawful. The escape is a lawful excuse. That only makes sense if possession of the things in question ought to be presumptively unlawful. That in turn depends on what an instrument of gaming might entail. For example, it is not sensible to presume that every possession of a pack of cards is unlawful.

<sup>16</sup> "In determining the meaning to be given to the words 'without lawful excuse' only limited assistance is to be obtained from cases which construe phrases which are superficially similar, such as 'without reasonable excuse'... or 'for a lawful purpose'...". (*DPP v Willie* (1999) 114 A Crim R 150 at 153).

<sup>17</sup> *Wong Pooch Yin v Public Prosecutor* [1955] AC 93 at 100.

## 2.7.2—Due Diligence, Alone and With Other Things

There are some defences that can be used that amounts to saying that the defendant can escape liability if he or she used due diligence to escape liability. Sometimes this takes the form of a 'reasonable steps' defence. A good example of this area is s 36 of the *Classification (Publications, Films and Computer Games) Act 1995*:

### **36—Attendance of minor at MA 15+ film—offence by exhibitor**

- (1) *A person must not exhibit in a public place a film classified MA 15+ if—*
- (a) *a minor under 15 is present during any part of the exhibition; and*
  - (b) *the minor is not accompanied by his or her parent or guardian.*
- Maximum penalty: \$1 250.*
- (2) *For the purposes of subsection (1)—*
- (a) *a minor does not cease to be accompanied if his or her parent or guardian is temporarily absent from the exhibition of the film in order to use refreshment or other facilities provided within the premises in which the film is being exhibited for persons attending the exhibition of the film; and*
  - (b) *an offence is committed in respect of each unaccompanied minor present at the exhibition of the film.*
- (3) *It is a defence to a prosecution for an offence against subsection (1) to prove that—*
- (a) *the defendant or the defendant's employee or agent took all reasonable steps to ensure that a minor was not present in contravention of subsection (1); or*
  - (b) *the defendant or the defendant's employee or agent believed on reasonable grounds that the minor was 15 or older; or*
  - (c) *the defendant or the defendant's employee or agent believed on reasonable grounds that the person accompanying the minor was the minor's parent or guardian.*

The defences are in ss (3). The drafter has, in ss (b) and (c), taken commendable steps to specify the fault elements of various physical elements of the offence. The point of the example is, though, that ss (3)(a) is a very good example of a 'reasonable step' defence. This is not a defence about fault elements. It is a free-standing statutory defence that means what it says.

Here is a plain example of a due diligence defence. It is s 232(3) of the *Fair Work Act 1994*:

- (3) *In proceedings against an employee for an offence against this Act, it is a defence to show that the defendant used all due diligence to prevent the commission of the offence.*

Here is a slight variation. It is in s 59A(2) of the *Occupational Health, Safety and Welfare Act 1986*:

- (2) *It will be a defence in any criminal proceedings under the Act against a body corporate, an administrative unit of the Public Service of the State or a natural person where conduct or a state of mind is imputed to the body, administrative unit or person under subsection (1) if it is proved that the alleged contravention did not result from any failure on the defendant's part to take all reasonable and practicable measures to prevent the contravention or contraventions of the same or a similar nature.*

As s 232(1) of the *Fair Work Act 1994* shows, it is possible to incorporate a due diligence defence with other requirements.

**232—General defence**

- (1) *In proceedings against an employer for an offence against this Act, it is a defence to show -*
- (a) *that another person was responsible for the act or omission constituting the offence; and*
  - (b) *that the defendant employer used all due diligence to prevent the commission of the offence; and*
  - (c) *that the offence was committed without the knowledge of the defendant employer and in contravention of the employer's orders.*

Note that these requirements are cumulative.

Another variation can be seen in s 88 of the *Fair Trading Act 1987*:

**88—Defences**

- (1) *Subject to subsection (3), in a prosecution for a contravention of a provision of this Act, it is a defence if the defendant establishes—*
- (a) *that the contravention was due to reasonable mistake; or*
  - (b) *that the contravention was due to reasonable reliance on information supplied by another person; or*
  - (c) *that—*
    - (i) *the contravention was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control; and*
    - (ii) *the defendant took reasonable precautions and exercised due diligence to avoid the contravention.*<sup>18</sup>

Here we can see alternative defences of reasonable reliance on information and the contravention was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control.

<sup>18</sup> Note: (2) *In subsection (1)(b) and (c)—*  
*another person does not include a person who was—*  

- (a) *a servant or agent of the defendant; or*
- (b) *in the case of a defendant that is a body corporate, a director, servant or agent of the defendant, at the time when the contravention occurred.*

And the last example comes from the *Environment Protection Act 1993*.

**124—General defence**

- (1) *It will be a defence in any criminal proceedings, or in any proceedings for the payment of an amount as a civil penalty, in respect of an alleged contravention of this Act, including—*
- (a) *proceedings against a body corporate or a natural person where conduct or a state of mind is imputed to the body or person under this Part; and*
  - (b) *proceedings against an officer of a body corporate under this Part, if it is proved that the alleged contravention did not result from any failure on the defendant's part to take all reasonable and practicable measures to prevent the contravention or contraventions of the same or a similar nature.*

All of these options are possible either alone or in combination according to the wishes of the legislator. The point is to keep the possibilities firmly in mind.

### **3.0—Other Characteristics of Criminal Offences**

#### **3.1—Continuing Offences**

It is possible to provide that some offences are “continuing offences” - that is, for each day, say, that a breach exists, or a situation remains un-remedied, another offence occurs.

Here are two examples of the provision referred to. They are very much the same. First, the *Explosives Act 1936*.

**51B—Continuing offences**

- (1) *Where an offence against a provision of this Act is committed by a person by reason of a continuing act or omission—*
- (a) *the person is liable, in addition to the penalty otherwise applicable to the offence, to a penalty for each day during which the act or omission continues of not more than an amount equal to one-fifth of the maximum penalty prescribed for that offence; and*
  - (b) *if the act or omission continues after the person is convicted of the offence,*  
*the person is guilty of a further offence against that provision and liable, in addition to a penalty otherwise applicable to the further offence, to a penalty for each day during which the act or omission continues after that conviction, of not more than an amount equal to one-fifth of the maximum penalty prescribed for that offence.*
- (2) *For the purposes of this section, an obligation to do something is to be regarded as continuing until the act is done notwithstanding that any period within which, or time before which, the act is required to be done has expired or passed.*

The second example is drawn from the *Environment Protection Act 1993*.

### **123—Continuing offences**

(1) *Where an offence against a provision of this Act is committed by a person by reason of a continuing act or omission—*

(a) *the person is liable, in addition to the penalty otherwise applicable to the offence, to a penalty for each day during which the act or omission continues of not more than an amount equal to one-fifth of the maximum penalty prescribed for that offence; and*

(b) *if the act or omission continues after the person is convicted of the offence,*

*the person is guilty of a further offence against that provision and liable, in addition to the penalty otherwise applicable to the further offence, to a penalty for each day during which the act or omission continues after that conviction of not more than an amount equal to one-fifth of the maximum penalty prescribed for that offence.*

(2) *For the purposes of this section, an obligation to do something is to be regarded as continuing until the act is done notwithstanding that any period within which, or time before which, the act is required to be done has expired or passed.*

### **3.2—Onus (Burden) and Standard of Proof**

There is a difference between onus of proof, sometimes known as the burden of proof, and the standard of proof. The onus or burden of proof refers to who has to prove something. The standard of proof is the degree to which the party must prove it. In a criminal case, it is commonly said that the burden of proof is on the prosecution to prove the elements of the offence beyond a reasonable doubt. That is a generally true statement. But it is an insufficient explanation.

For these purposes, it is sufficient to say that if the legislator makes a criminal offence, the court will presume, absent specific words to the contrary, that the burden of proof is on the prosecution to prove the elements of the offence beyond a reasonable doubt. But that is not inevitable. Sometimes it is quite respectable to place the burden or onus on the defendant.

Generally speaking, there are three standards of proof. They are:

1. *Beyond reasonable doubt* - This is the default position for criminal offences and it is on the prosecution. There are no examples of it being on the defendant. That is because it is unacceptable to place this onus on the defendant. The meaning of the term is mystical. A court simply says to the jury that they must exclude fanciful doubts but, any attempt to explain beyond that is an error.
2. *On the balance of probabilities (1)* - This can be on the defendant or the prosecution. In the criminal law, it is more commonly placed on the defendant to prove a defence. A common example is the defence of lawful excuse or reasonable excuse (dealt with elsewhere in this paper). Both the *Criminal Law Consolidation Act 1935*<sup>19</sup> and the *Summary Offences Act 1953*<sup>20</sup> contain a general provision saying that the burden of such defences is on the defendant on the balance of probabilities. So if you add one of these defences to those Acts, the general provision *automatically* reverses the onus. The meaning of the standard is also mystical. It does not, despite the name, refer to some kind of 51% standard. The general rule is that the standard varies according to the seriousness of the failure to prove it to the defendant. So - the more awful the result to the defendant, the higher the real standard. The legal jargon for this is “the rule in *Briginshaw*<sup>21</sup>”.

<sup>19</sup> Section 5B.

<sup>20</sup> Section 5.

<sup>21</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336.

3. *On the balance of probabilities (2)* - It is possible to further criminal law policy using a civil law model. The most obvious manifestation of this is the restraining order model. Here, the applicant applies to a court for an order prohibiting the defendant from doing something said by law to be potentially harmful to the applicant, by showing risk on the balance of probabilities. Breach of the order is an offence. The breach would have to be proved, like any other offence, beyond reasonable doubt though. This method has the virtue of creating, in effect, highly individualised and specific criminal offences. So far, the high point is English anti-social behaviour orders (ASBOs) that have made it a crime to do such things as to enter a designated area, jump off a bridge, grow a hedge and so on. This subject is dealt with separately in a subheading immediately below.
4. *On the balance of probabilities (3)* - Such things as civil penalties do exist. Civil penalty provisions are set out in a similar way to offences and are subject to proceedings in court. However, they are enforced by civil proceedings that are subject to civil procedural and evidential rules. Contraventions must be proved on the balance of probabilities. The imposition of a civil penalty does not carry all the consequences of a criminal conviction. Types of civil penalties include injunctions, disqualification orders, license revocations, orders requiring payment of compensation for loss or damage, or monetary fines, also known as 'pecuniary penalties'. As noted above, although these proceedings are civil in nature and formally proved on the balance of probabilities, the *Briginshaw* principle means that the standard of proof will usually approximate proof beyond reasonable doubt to some degree. These orders are not common in State legislation and should be explored much more fully than is possible here.
5. *The evidential onus* - Just because, in the normal criminal prosecution, the prosecution has to prove the elements of the offence beyond a reasonable doubt, does not mean that the defendant has no job to do. Where there is some defence or excuse that is not an element of the offence (such as a statutory defence), it is usual at common law for the defendant to bear what is called an evidentiary onus. That onus is a small one - it is merely that the defendant has to raise sufficient evidence to call the issue into question before the court. Put another way, while the prosecution has to prove all the elements of the offence beyond a reasonable doubt, it does not have to negative all of the conceivable defences or excuses just in case.

### 3.2.1—The Restraining Order Technique

It was noted above that it is possible to legislate a civil application system in order to obtain a specific injunctive order directed to the defendant not to do certain specified things. Notable examples of this are the restraining order, the domestic violence restraining order, the control order and, in England, the Anti-Social Behaviour Order (ASBO). It is less well known that this kind of order has supplanted the old order of binding over to keep the peace, which existed for centuries<sup>22</sup>.

The restraining order technique is best used where there is a wide variety of divergent behaviours to be dealt with. In such cases, the restraining order model is superior to the blunt reactive criminal offence model in at least these ways.

1. As noted, it allows the capture of behaviour that is not and should not be the subject of the criminal sanction;
2. By making an individualised order subject to criminal penalties for breach, the technique allows the magistrate to fashion an individual criminal offence at an appropriate level but with a level of detail that could not possibly be accomplished by Parliament;
3. The process gives fair notice to the defendant, allows him or her to have a say, and places him or her on direct notice of his or her obligations;
4. It is all done initially on the civil onus not the criminal onus<sup>23</sup>; and
5. It is preventative in focus rather than reacting after the event.

<sup>22</sup> Its origins are 'lost in history': Law Commission, *Binding Over* (Law Comm 222, 1994) at para 2.1.

<sup>23</sup> See, for example, *McCann* [2003] 1 AC 787.

It might be remarked that, typically, the restraining order technique is used against behaviour that is thought to impose some kind of objective danger to individuals or the community - that is, pose a risk of some kind. Individuals are officially warned not to do this and told that there are penalties if they do. On the other hand, typically, criminal offences are aimed at causing harms and, because harm has been caused, the warning lies in the law itself - it is thought that there is no need to warn individuals that this is a bad thing, but rather they are punished for causing the harm at once. It may be noted that the difference does not mean that there need be less care in drafting the terms of one or another.

One way of looking at the restraining order technique is that the result of making the order requiring the defendant to refrain from doing certain things subject to penalty on breach is the creation of a very specific criminal offence - specific not only to the behaviour restrained but particular to the individual restrained. The authority making the order has made a specific criminal offence in effect.

### **3.3—Reversing the Onus of Proof**

It is a general principle that the prosecution should be required to prove all elements of the offence beyond a reasonable doubt. It is, however, quite common for a defence to be the subject of a presumption or some other statutory device that shifts the onus of proof onto the defendant (commonly on the balance of probabilities). This should not be done as a mere matter of convenience. One good ground for reversing the onus is that the matter the subject of proof is in the particular knowledge of the defendant (and so easy for the defendant to prove if it exists). For example, suppose it is an offence to participate in a strike unless the defendant is a member of the union. Clearly, it would be hard for the prosecution to prove that the defendant was not a member of the union but easy for the defendant to prove. Reversal of the onus on that issue could be justified.

Another version of this rule is that it is justifiable to reverse the onus where requiring the prosecution to prove the issue would make the scheme unworkable. The best example of this is the presumption of accuracy of instruments used to detect offences. If the prosecution had to prove the accuracy of a laser gun every time a speeding prosecution was contested, the legislative scheme would become unworkable.

A more general justification of the reversal of onus is where there is a rational relationship between the fact proved and the fact presumed. So, a presumption that the occupant of the driving seat of a car is the driver of the car (in the absence of proof to the contrary) might well be justified. The common presumption that possession of a certain amount of a drug gives rise to a presumption that there was an intention to traffic in that drug is also justified so long as the amount specified is not normally an amount possessed by a mere user. But it used to be the case that there was a presumption that the accused was living off the avails of prostitution (and hence committing that offence in the absence of proof to the contrary) if it was proved that the accused was habitually in the company of prostitutes. There is no rational relationship between proof that the accused was habitually in the company of prostitutes and the presumed fact that he lived off their earnings.

That last example can be employed in reverse. It is not sensible or just to place the onus on the accused to prove something that is near impossible to prove. How, exactly, is the accused going to go about proving on the balance of probabilities that he is not living off the avails of prostitution? In more general terms, in most cases it is neither sensible nor just to require the accused to prove a negative on the balance of probabilities. The more broad the negative, the less sensible it is.

### 3.4—Parasitic Offences

When considering the desired reach of a criminal offence - the net that is to be spread and who it should catch - it is desirable to keep firmly in mind that, when a criminal offence is legislated, the law automatically, and without further action of any kind, creates a whole bunch of parasitic offences. It automatically becomes an offence to attempt to commit that offence and an offence to conspire to commit that offence (in South Australia, the common law does this). The law also adds the whole range of offences which are variations in participation in the commission of the offence, known to the criminal law as complicity offences. In South Australia, this is mostly done by statute. Section 267 of the *Criminal Law Consolidation Act 1935* says:

**267—Aiding and abetting**

*A person who aids, abets, counsels or procures the commission of an offence is liable to be prosecuted and punished as a principal offender.*

This legal fact is not only relevant to making sure that the effect of the offence is not overbroad. It is sometimes desirable to consider whether the action of these parasitic offences should be prevented. For example, it is quite common to enact what are preparatory offences - that is, offences that get at behaviour that is preparatory to the behaviour sought to be regulated. A common form is doing X with intent to do Y. For example, here is an identity theft offence:

**144C—Misuse of personal identification information**

*(1) A person who makes use of another person's personal identification information intending, by doing so, to commit, or facilitate the commission of, a serious criminal offence, is guilty of an offence and liable to the penalty appropriate to an attempt to commit the serious criminal offence.*

This is clearly a preparatory offence. Without more, it would also be an offence to attempt to commit this offence. Careful thought should be given to whether the attempt offence should apply or whether that goes too far before the evil sought to be addressed. If the latter, the attempt offence should be precluded<sup>24</sup>.

### 3.5—Mutual Recognition

Mutual recognition principles are something that instructing officers must try to keep in mind. The *Mutual Recognition Act 1992 (Cth)* provides for the recognition within each State and Territory of regulatory standards adopted elsewhere in Australia regarding the sale of goods and the regulation of occupations. The regulation of goods causes the most problems in practice. Section 9 of this Act says:

*...goods produced in or imported into the first State, that may lawfully be sold in that State either generally or in particular circumstances, may, because of this Act, be sold in the second State either generally or in particular circumstances (as the case may be), without the necessity for compliance with further requirements as described in section 10.*

The same applies to goods produced in or imported into New Zealand and their sale in Australia under sections 10 and 11 of the *Trans-Tasman Mutual Recognition Act 1997*.

If goods may be lawfully sold in at least one other Australian State or in New Zealand, any South Australian law which seeks to prohibit their sale will be inconsistent with the *Mutual Recognition Act 1992* and the *Trans-Tasman Mutual Recognition Act 1997*. These are Commonwealth laws, so they will override any inconsistent State law, to the extent of the inconsistency, pursuant to section 109 of the Commonwealth *Constitution*. That means that any attempt to regulate the sale of the goods will be invalid.

<sup>24</sup> In this instance it is.

Enacting legislation to prohibit the sale of anything will only be enforceable, therefore, if the sale of that thing is also prohibited in all States that are participating jurisdictions or if the State law has either a permanent exemption or a temporary exemption.

In order to permanently exempt a State law from the operation of the *Mutual Recognition Act 1992* and the *Trans-Tasman Mutual Recognition Act 1997* an amendment would need to be made to Schedule 2 of this Act. This would require the agreement of all jurisdictions.

It is also possible to obtain a temporary exemption from the operation of the *Mutual Recognition Act 1992* under section 15 and the *Trans-Tasman Mutual Recognition Act 1997* under section 46. Section 15(1) says that Part 2 of the Act will not affect the operation of a particular law in a State if an Act or regulation in the State declares that the law is a law to which section 15 applies. Unless the general exemption under s 15(2) applies (as to which, see below), the State may make regulations under the *Mutual Recognition (South Australia) Act 1993* and the *Trans-Tasman Mutual Recognition (South Australia) Act 1999* which temporarily (for 12 months) exempt particular goods and or laws from the operation of the Commonwealth Acts. That means that you have 12 months to get the agreement of all other jurisdictions.

The general exemption in section 15(2) says:

*Any such exemptions have effect only if they are substantially for the purpose of protecting the health and safety of persons in the State or preventing, minimising or regulating environmental pollution (including air, water, noise or soil pollution) in the State.*

## **4.0—Corporate Criminal Responsibility**

There is a difference between making a company responsible for a crime in and of itself and making corporate officers responsible for the crime in some way.

### **4.1—Making Companies Criminally Responsible**

It is unfortunate that there is no general formula or rule, statutory or otherwise, for making companies criminally responsible on a principled basis for breaking the criminal law. The common law, which is what we fall back on, is quite complicated. To cut a long story short, the criminal law has little trouble attributing the conduct of employees or agents of the company to the company itself by a variety of means, notably the doctrine of agency or by vicarious liability, but has balked at attributing any fault required by the offence to the company. To make a complicated rule simple, you can just about say that a company will only have any fault required by the offence if one or more of the board of directors had the fault required by the offence. This is almost always not so for a variety of obvious factual reasons and even if it is, it can't be proved beyond a reasonable doubt. In practice, the reality is that it is very rare indeed for a company to be held criminally liable at common law for any offence requiring any degree of fault at all.

Where there is no fault required for the offence at all, that is, of course, another matter. But these offences are uncommon. Judges are astute to avoid them or attribute a defence of some kind to them. Where there is but one director of the company (as is sometimes the case) it is all the easier because of the small size of the company. But you cannot rely on that.

It is possible to creatively expand the liability of a company by statute beyond the very sheltered harbour of the common law by a number of different alternatives. This is a very technical and difficult subject indeed and should be made the subject of specialist advice. The most general example of a statutory attempt to deal with the problem in South Australia is in the *Environment Protection Act 1993*. It is a very blunt instrument indeed, and deems criminality to the company on proof of criminality of almost anyone acting on behalf of the company. This is harsh indeed. Here are the provisions:

**127—Imputation of conduct or state of mind of officer, employee etc**

- (1) *For the purposes of proceedings for an offence against this Act or proceedings for the payment of an amount as a civil penalty in respect of an alleged contravention of this Act—*
- (a) *the conduct and state of mind of an officer, employee or agent of a body corporate acting within the scope of his or her actual, usual or ostensible authority will be imputed to the body corporate;*
  - (b) *the conduct and state of mind of an employee or agent of a natural person acting within the scope of his or her actual, usual or ostensible authority will be imputed to that person.*
- (2) *Where—*
- (a) *a natural person is convicted of an offence against this Act; and*
  - (b) *the person would not have been convicted of the offence but for the operation of subsection (1),*
- the person is not liable to be punished by imprisonment for the offence.*

#### **4.2—Making Company Directors Criminally Responsible**

There are a large number of South Australian provisions that attach personal liability of company directors to the liability of the company to which they are directors, subject (usually) to certain defences. These are now subject to a set of principles agreed by the Council of Australian Governments in late 2009. Those principles are:

- a. *where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance;*
- b. *directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act;*
- c. *a “designated officer” approach to liability (where a particular officer of the company is designated as the one who will be held responsible for the company’s breach) is not suitable for general application;*
- d. *the imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:-*
  - i. *there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that might be caused by the particular corporate offending);*
  - ii. *liability of the corporation is not likely on its own to sufficiently promote compliance, and*

- iii. *it is reasonable in all the circumstances for the director to be liable having regard to factors including:-*
  - A. *the obligation on the corporation, and in turn the director, is clear,*
  - B. *the director has the capacity to influence the conduct of the corporation in relation to the offending, and*
  - C. *there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation;*
- e. *where principle (d) above is satisfied and directors' liability is appropriate, directors could be liable where they:-*
  - i. *have encouraged or assisted in the commission of the offence, or*
  - ii. *have been negligent or reckless in relation to the corporation's offending, and*
- f. *in addition, in some instances, it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending if they are not to be personally liable.*

South Australia aligned its statute book in accordance with these principles in the *Statutes Amendment (Directors' Liability) Act 2011*. The Act repealed a number of instances of deemed director liability as, on examination, it was found that the provision was no longer necessary. The remaining provisions were then examined and classed into two groups. In the first group, the director (manager) will be liable for the criminal offence if:

*the prosecution proves that—*

- (a) *the manager or member (as the case may be) knew, or ought reasonably to have known, that there was a significant risk that such an offence would be committed; and*
- (b) *the manager or member (as the case may be) was in a position to influence the conduct of the body corporate in relation to the commission of such an offence; and*
- (c) *the manager or member (as the case may be) failed to exercise due diligence to prevent the commission of the offence.*

In the second group, the director (manager) will be liable:

*unless the manager proves that he or she could not by the exercise of due diligence have prevented the commission of the offence.*

The classification of offences for these purposes within a regulatory scheme is not a simple matter and the advice of Parliamentary Counsel should be sought.

## **5.0—Penalties**

### **5.1—Setting Maxima**

By far the most common way of setting the applicable penalty for the offence is by setting the maximum penalty, either in terms of a term of imprisonment or in terms of a fine (as applicable). Each offence should carry its own penalty. It is not common to set both a term of imprisonment and a fine, although there are some instances of this in the statute book.

It is not necessary to set both a maximum sentence of imprisonment and a fine in order to allow the court to impose a fine. More generally, section 18 of the *Criminal Law (Sentencing) Act* says:

**18—Court may add or substitute certain penalties**

*Where, on convicting a defendant or finding a defendant guilty of an offence, the court thinks that good reason exists for departing from the penalty provided by the special Act, the court may sentence the defendant as follows:*

- (a) *where the special Act prescribes a sentence of imprisonment only for the offence, the court may instead impose—*
  - (i) *a fine; or*
  - (ii) *a sentence of community service; or*
  - (iii) *both a fine and a sentence of community service; or*
- (b) *where the special Act prescribes a sentence of both imprisonment and a fine for the offence, the court may instead impose—*
  - (i) *a sentence of imprisonment only; or*
  - (ii) *a fine only; or*
  - (iii) *a sentence of community service; or*
  - (iv) *both a fine and a sentence of community service; or*
- (c) *where the special Act prescribes a sentence of imprisonment or a fine in the alternative for the offence, the court may instead impose—*
  - (i) *a sentence of community service; or*
  - (ii) *both a fine and a sentence of community service; or*
- (d) *where the special Act prescribes a fine only for the offence, the court may instead impose a sentence of community service.*

There are three major and interlocking general principles that should be borne in mind. First, the maximum penalty should reflect what should be imposed for the worst imaginable breach of the offence including a repeat offence. Just because it is the worst imaginable breach of that offence, though, does not mean that the principle of proportionality should be discarded. Second, the maximum must bear some reasonable relationship to comparable offences. In applying this principle, it is wise to bear in mind that the worst possible example of the conduct (not the offence) that the legislator may have in mind is also another more serious offence directed specifically at that conduct and therefore subject to a much higher maximum penalty under that more serious offence. An example should make this more clear.

**Example:** *The most serious offences under the Food Act 2001 dealing with the sale etc of unsafe food carry a maximum penalty of 4 years for an individual. We will return to other aspects of these offences later. The penalty of 4 years is the same as assault with an offensive weapon, a subsequent offence of unlawful use of a motor vehicle, dealing in an instrument of crime and attempt to pervert the course of justice (for example). But, it might be argued, South Australians, in particular, are well aware that the sale of unsafe food can have horrendous consequences threatening to life and causing, at least serious harm (as the Garibaldi metwurst example showed). That's closer to the worst possible case - closer to life imprisonment. The answer to that is that causing the death of another, by any means, by criminal negligence or unlawful and dangerous act is manslaughter for which the maximum penalty is life imprisonment. The offences in the Food Act should not try to duplicate the manslaughter charge.*

So what is comparable? That cannot be decided in isolation. It all depends on what the subject matter of the offences may be. Parliamentary Counsel has an overview of the statute book. But interstate offences of comparable vintage should not be ignored as a source of information.

Third, as a general rule, it is rational to grade serious offences according to the seriousness of the criminal fault which accompanies the act and the seriousness of the harm which is caused or the risk of harm created. The other side of that argument is that the way in which the harm is done is less significant and should, usually, be a matter of sentence. That is not always so of course, but it is a principle worth bearing in mind, particularly for the more serious offences.

It is possible to make two observations of a general nature. First, attention should be paid to the physical elements of the offence. What is the offence about? How does it sit in the scheme of things? For example, in general the *Fair Trading Act 1987* contains a number of regulatory offences and most of them are set at a maximum penalty of a fine of \$2,500 or \$5,000. In particular, for example, it contains an offences of obtaining information by false pretences and an offence of knowingly providing false information to third parties with the standard maximum fine of \$5,000. But s 77 contains the offence of providing false information to an authorised officer on lawful requirement. That is obviously more serious - and so is the maximum penalty, a fine of \$10,000. But not all such offences are equal. Providing false information in response to an official lawful demand for it varies in seriousness depending on the seriousness of the investigation contemplated so, to take an obvious extreme, as might be expected, it is far more serious to lie to a police officer (in general) than to an authorised officer under the *Fair Trading Act*.

Second, attention should be paid to the fault elements of the offence (if any) or the defences provided. This is a far more common guide to the seriousness of the offences and hence the comparative maximum penalties that are warranted. Offences that require intention are more serious than others. Offences that require recklessness are the second most serious - and so on. In general terms, offences that only provide for a defence of reasonable or lawful excuse should normally be summary offences, as should offences which are strict or absolute liability. It is quite reasonable to have a hierarchy of offences, ranging from the most serious to the least serious, in descending order. The *Food Act 2001* provides a good example. The offences are ranked in seriousness according to fault - 'knows' is more serious, 'ought reasonably to know' is less serious - but the policy is that the harms caused by the various types of offence are equivalent. It should not pass notice that the knowledge offences are minor indictable and hence may go to the District Court, but they ought to know offences are summary and will be dealt with in the Magistrates Court.

### **13—Handling of food in unsafe manner**

- (1) *A person must not handle food intended for sale in a manner that the person knows will render, or is likely to render, the food unsafe.*

*Maximum penalty:*

- (a) *If the offender is a body corporate—\$500 000.*  
(b) *If the offender is a natural person—\$100 000 or imprisonment for four years.*

- (2) *A person must not handle food intended for sale in a manner that the person ought reasonably to know is likely to render the food unsafe.*

*Maximum penalty:*

- (a) *If the offender is a body corporate—\$375 000.*  
(b) *If the offender is a natural person—\$75 000.*

#### **14—Sale of unsafe food**

- (1) *A person must not sell food that the person knows is unsafe.*

*Maximum penalty:*

- (a) *If the offender is a body corporate—\$500 000.*  
(b) *If the offender is a natural person—\$100 000 or imprisonment for four years.*

- (2) *A person must not sell food that the person ought reasonably to know is unsafe.*

*Maximum penalty:*

- (a) *If the offender is a body corporate—\$375 000.*  
(b) *If the offender is a natural person—\$75 000.*

#### **15—False description of food**

- (1) *A person must not cause food intended for sale to be falsely described if the person knows that a consumer of the food who relies on the description will, or is likely to, suffer physical harm.*

*Maximum penalty:*

- (a) *If the offender is a body corporate—\$500 000.*  
(b) *If the offender is a natural person—\$100 000 or imprisonment for four years.*

- (2) *A person must not cause food intended for sale to be falsely described if the person ought reasonably to know that a consumer of the food who relies on the description is likely to suffer physical harm.*

*Maximum penalty:*

- (a) *If the offender is a body corporate—\$375 000.*  
(b) *If the offender is a natural person—\$75 000.*

- (3) *A person must not sell food that the person knows—*  
(a) *is falsely described; and*  
(b) *will cause, or is likely to cause, physical harm to a consumer of the food who relies on the description.*

*Maximum penalty:*

- (a) *If the offender is a body corporate—\$500 000.*  
(b) *If the offender is a natural person—\$100 000 or imprisonment for four years.*

- (4) *A person must not sell food that the person ought reasonably to know—*  
(a) *is falsely described; and*  
(b) *is likely to cause physical harm to a consumer of the food who relies on the description.*

*Maximum penalty:*

- (a) *If the offender is a body corporate—\$375 000.*  
(b) *If the offender is a natural person—\$75 000.*

These offences in the *Food Act 2001* also illustrate another set of principles. If it is likely that companies will be guilty of the offences that are to be legislated, it is wiser to think about what the maximum penalty should be for a company. That will not usually be the same as for an individual. Obviously, it is not possible to imprison a company literally, although, as we shall see, it is possible to imprison one metaphorically. The normal and usual practice is to set a fine for a company and to set that fine at a far higher maximum than an individual. No doubt, the reason for this is that a company may have far greater resources than an individual so a sentencing court should be given correspondingly more room to move within the maximum cap to set a penalty that will sting. Of course, the sting will hurt the shareholders, not the company itself, or at least not directly, but that is the way the system works.

It is possible to be more creative about setting penalties for companies, although it is not common for this to be done. Perhaps the most common is to provide for remediation orders in one form or another, such as mandating a cleanup or a recall of a defective product. But there are others that are rare but may be considered. One is mandating shaming publicity by, for example, conferring a power on a sentencing court to require the company to advertise its failings prominently. Another is the equivalent of imprisonment. In this step, one would allow the court to appoint an administrator to fix a problem.

There is one further matter of principle that should be mentioned. It may be that a certain method or power of criminal investigation is available if the maximum penalty is set at or above a certain point. For example, it is apparent to anyone following recent trends in criminal investigation that telecommunications interception is a major and very effective crime fighting weapon. But just because the Commonwealth legislation enabling the use of telecommunications interception limits the availability of warrants artificially by reference to a set maximum penalty of 7 years is no justification whatsoever for setting the maximum penalty for an offence at that level. Were that logic to be followed, all offences in the criminal calendar would be at 7 years or more. Maxima should be set in a principled manner by reference to the comparative seriousness of the offence (and not by reference to the investigative tools that may or may not be available as a consequence).

## 5.2—Minimum Penalties

It is not common to set minimum penalties for a criminal offence. The operative general principle, observed very generally, is that the legislator sets an appropriate maximum penalty and leaves the court to assess the real applicable penalty. Judicial discretion is a major function of that branch of government, designed to do justice between the State and the subject. Sentencing is a major part of the judicial function and is not lightly to be interfered with.

There are, of course, exceptions. There are not many of them. For example s 86A of the *Criminal Law Consolidation Act 1935* says:

### **86A—Using motor vehicle without consent**

- (1) *A person who, on a road or elsewhere, drives, uses or interferes with a motor vehicle without first obtaining the consent of the owner of the vehicle is guilty of an offence.*

*Penalty:*

*For a first offence—imprisonment for 2 years;*

*For a subsequent offence—imprisonment for not less than 3 months and not more than 4 years.*

The casual reader might be forgiven for thinking that a second offender against this provision will, in every case, get at least 3 months imprisonment. It turns out that that is not so. The reason lies in s 17 of the *Criminal Law (Sentencing) Act 1988*, which says:

**17—Reduction of minimum penalty**

*Where a special Act fixes a minimum penalty in respect of an offence and the court, having regard to—*

- (a) the character, antecedents, age or physical or mental condition of the defendant; or*
- (b) the fact that the offence was trifling; or*
- (c) any other extenuating circumstances,*

*is of the opinion that good reason exists for reducing the penalty below the minimum, the court may so reduce the penalty.*

In other words, the minimum penalty is not an irreducible minimum penalty after all.

But there are some. The most widely known are those for drink-driving in the *Road Traffic Act 1961*. There, a number of provisions make special provision for the minimum effect relating to licence suspension. The following sub-section is typical:

*the disqualification prescribed by paragraph (a) cannot be reduced or mitigated in any way or be substituted by any other penalty or sentence unless, in the case of a first offence, the court is satisfied, by evidence given on oath, that the offence is trifling, in which case it may order a period of disqualification that is less than the prescribed minimum period but not less than one month;*

So - if there are to be minimum penalties that are really to be minimum penalties, it is necessary to spell out the proposition in detail.

### **5.3—Expiation**

Expiation as a penalty is controversial and commonly misunderstood. That comment extends to what expiation is. An expiation fee is often called a fine. It is not a fine. It is a fee. It is a price that is paid for making the complaint against the defendant go away - a bribe not to be taken to court. The defendant has a right to go to court if the complaint is contested, but that takes time and trouble. In minor matters, it often pays just to make it go away. This is a fee - not a fine. The defendant does not get a criminal conviction - for there has been no finding of guilt.

Expiation is governed by the *Expiation of Offences Act 1996*. The general rules governing the expiation of all offences are to be found there. Because expiation is so common, there are a number of issues that need to be discussed about it as a legislative technique.

#### **5.3.1—What Offences Should Be Expiable?**

The general view is that expiation is reserved for minor offences. The most common and obvious example is parking infringements. Equally, the public would be rightly outraged if serious offences such as sexual assault and fraud could be resolved by the alleged offender just paying a fee (however large) to the authorities. But there is a large disputed area between these extremes. For example, in South Australia, driving over 0.05 (first offence) is expiable. This is controversial. So too minor cannabis offences in South Australia and Western Australia.

The justifiable area for expiation is therefore contested. There is no one or right answer about what should be capable of being expiated and what not. There are some principles to which regard should be given. Here is what the New South Wales Ombudsman thinks:

*That the following principles form the basis of determining whether a particular criminal offence is suitable to be dealt with by way of a Criminal Infringement Notice (CIN):*

- *the offence is relatively minor;*
- *there is a sufficiently high volume of contraventions so as to justify the cost of establishing systems for the offence to be dealt with by way of a CIN;*
- *other diversionary options are not available to police to effectively and appropriately deal with the conduct in question;*
- *a fine for the offence is a sufficiently effective means of addressing the conduct, as opposed to an alternative penalty or sentence;*
- *specific and general deterrence can be adequately conveyed by police rather than by a court;*
- *the physical elements of the offence are relatively clear cut;*
- *the issuing of a CIN for the offence would generally be considered by the community to be a reasonable sanction, having due regard to the seriousness of the offence.*

A quite neat way of putting a general principle in this area is this. It is fair to say that a person who is given an expiation notice is, in a sense, no worse off. The person can elect to be prosecuted for the alleged offence. They may well be acquitted. However, the purpose of the expiation notice is to avoid the public expense of prosecuting a person in a case where the offence is so nearly indisputable that prosecution is a waste of resources. It is not proper to invite the public to expiate offences that are not in this category. The person may well be tempted to expiate the offence to avoid the inconvenience and expense of prosecution, when, in fact, they are innocent. Instead, police should charge the person with the offence in the ordinary way.

Put another way, expiation notices should be used for clear cut offences in which it can be said with considerable certainty that the offender either did it or not. Expiation is not appropriate for offences with subjective elements where there are questions of fine subjective judgment involved. A good example of that is, say, the offence of offensive behaviour. What is and what is not offensive should be left to a court, not a police officer or a council inspector.

There is a good deal that could be said about expiation, but what follows addresses some of the commonly raised issues.

### **5.3.2—Other Things to Consider About Expiation**

If expiation is to be used for an offence, there are other things to consider about it apart from any perceived convenience.

- Expiation schemes have been criticised for transferring judicial power to police discretion in the name of economy, implying that those offences are not serious matters of concern to the community. This criticism may be made with more strength if the offence is seen to be merely a revenue raising activity.
- An expiation fee is a flat fee that pays no attention to the offender's means of paying. For those who can afford it, it could be seen as an opportunity to buy their way out of trouble without a conviction being recorded. Those who are too poor will have to apply for community service and face the additional disadvantage of having a conviction recorded. The higher the expiation fee, the more the inequity shows.

- Expiation notices also risk encouraging enforcement not to deal carefully with any response the accused may have to the allegation, but rather encourage officers to simply fill out a form without having to evaluate the circumstances of the case. There is a real tendency for cautions and informal resolutions to go down and net-widening to go up.
- It is sometimes thought that there is an upper limit for an expiation fee of \$315. That is not so. There is no legal limit to the amount of an expiation fee in almost all cases. But there is a practical limit. Offenders have the right to go to court so if its unjust or too expensive they will. This will frustrate the objective of resolving cases quickly and inexpensively.
- The reason for the \$315 figure is a provision in the *Expiation of Offences Act 1996*. That section says that (a) if you want to set an expiation fee for a regulation and (b) the authorisation power for making the regulation does not authorise the setting of an expiation fee, then, (c) nevertheless an expiation fee can be set but (d) the upper limit is either the divisional penalty (see below) or \$315 or 25% of the maximum fine (whichever is the lesser).
- The result of many of these factors are two general guidelines. They are only guidelines, but one should have a reason to depart from them. As a general rule, one should not expiate offences punishable by imprisonment and one should not expiate offences punishable by a fine of more than \$10,000. As a general rule, the expiation fee should not exceed 25% of the maximum fine.
- It should be borne steadily in mind that the statute of limitations for summary offences is 2 years, but that for expiable offences is 6 months either (a) from the expiry of the expiation period specified in the notice; or (b) if an expiation notice was not issued, within 6 months of the date on which the offence is alleged to have been committed<sup>25</sup>. So the effect of making a summary offence expiable is to shorten the period within which the offence may be dealt with.

## 5.4—Divisional Penalties

You will be aware that it is common to specify a penalty at the end of an offence in terms of maximum imprisonment for a selected number of years and/or a fine to a maximum of a certain amount and/or an expiation fee. The specification of monetary amounts only lasted for so long though. The more or less gradual erosion in the value of money means that the amounts lose their original purpose and have to be reassessed. In the case of many expiation fees and fines, this would have to be done in one hit for the purposes of the annual budget. This was and is a messy exercise, involving keeping track of and amending many individual statutes and regulations.

This messy problem afflicted all comparable jurisdictions. The idea rose that it could be made much simpler. If the State expressed fines and fees in terms of a common notion, then all you would have to do is change the basis of the calculation of the common notion and all would be well. This common notion had a number of names. It might be penalty units. So instead of specifying a fine of \$5,000, the State would specify 10 penalty units, each penalty unit being specified for the whole of the statute book at \$50.

In the case of South Australia, the method chosen was slightly more complicated. The method chosen was to enact a scale of divisional penalties. So instead of specifying a fine of \$4,000, the State would specify a Division 6 fine. The meaning of a Division 6 fine, and so on, would be set by the *Acts Interpretation Act 1915*. The theory was that the scheme could be adjusted from time to time by the easier expedient of amending the *Acts Interpretation Act 1915*. The complication was that imprisonment was also in the scheme and linked to fine and expiation levels so that there was a recommended set of equivalencies, although there was no compulsion for the equivalencies to be maintained.

<sup>25</sup> *Summary Procedure Act 1921*, s 52(1).

The *Botanic Gardens and State Herbarium Act 1978* is a good example of this approach. For example, s 24A(1) says:

*A person must not, except as authorised under this section, light or maintain a fire on any land vested in, or placed under the control of, the Board.*

*Maximum penalty: Division 6 fine or division 6 imprisonment.*

*Expiation fee: Division 7 fee.*

The original Divisional Table is still in the *Acts Interpretation Act 1915*. It says:

<b>Division</b>	<b>Maximum Imprisonment</b>	<b>Maximum Fine</b>	<b>Expiation Fee</b>
1	15 years	\$60 000	
2	10 years	\$40 000	
3	7 years	\$30 000	
4	4 years	\$15 000	
5	2 years	\$8 000	
6	1 year	\$4 000	\$300
7	6 months	\$2 000	\$200
8	3 months	\$1 000	\$150
9		\$500	\$100
10		\$200	\$75
11		\$100	\$50
12		\$50	\$25

The scheme was in place for a while. A deal of legislation was passed using it and some of that is still in place. But it was not universally liked. For one thing, it was opaque. The reader had to look up another Act to know what the penalty in the special Act meant. There was an attempt to deal with this problem by (as in the *Botanic Gardens and State Herbarium Act 1978* itself) adding the table in an Appendix to the Act with a warning that the information was true at date of publication or re-publication, (with a cross-reference in the Act itself). But this was difficult too - for at least these Appendices would require maintenance if the table was changed.

As it turned out, the table was not changed formally. It grew into disuse. As time passed, the old practice of specifying dollar amounts returned. As an expedient, in 1995 Cabinet approved an updated table be used as a guide. That table looks like this (updates in highlight):

<b>Division</b>	<b>Maximum Imprisonment</b>	<b>Maximum Fine</b>	<b>Expiation Fee</b>
1	15 years	\$60 000 <b>\$75 000</b>	
2	10 years	\$40 000 <b>\$50 000</b>	
3	7 years	\$30 000 <b>\$35 000</b>	
4	4 years	\$15 000 <b>\$20 000</b>	
5	2 years	\$8 000 <b>\$10 000</b>	
6	1 year	\$4 000 <b>\$5 000</b>	\$300 <b>\$315</b>
7	6 months	\$2 000 <b>\$2 500</b>	\$200 <b>\$210</b>
8	3 months	\$1 000 <b>\$1 250</b>	\$150 <b>\$160</b>
9		\$500 <b>\$750</b>	\$100 <b>\$105</b>
10		\$200 <b>\$250</b>	\$75 <b>\$80</b>
11		\$100 <b>\$125</b>	\$50 <b>\$55</b>
12		\$50 <b>\$75</b>	\$25 <b>\$30</b>

But it must be emphasised that the original table is still law and has not been changed. It therefore represents what current divisional penalties mean. The new figures are merely equivalencies and suggested standards for fixing new specific amounts.

Most penalties are now fixed by amount in new legislation. But some Acts retain the old Divisional penalties regime from the previous period. When there is a time to amend, a decision must be taken whether to retain the scheme or abolish it in each Act.

## 5.5—Basic and Aggravated Offences

It is possible to split an offence into a basic (ordinary, as everyday committed) offence and an aggravated (particularly nasty version) offence in the penalty provisions, rather than having two entirely separate offences. This directs the attention of the sentencing court to factors that the Parliament thinks are particularly nasty and, what is more, directs the court to the degree to which that is so by specifying the aggravated penalty (compared to the basic penalty). This is best illustrated by an example from the *Road Traffic Act 1961*.

### 45—Careless driving

- (1) *A person must not drive a vehicle without due care or attention or without reasonable consideration for other persons using the road.*
- (2) *If a court convicts a person of an offence against this section that is an aggravated offence, the following provisions apply:*
  - (a) *the maximum penalty for the offence is 12 months imprisonment; and*
  - (b) *the court must order that the person be disqualified from holding or obtaining a driver's licence for such period, being not less than 6 months, as the court thinks fit; and*
  - (c) *the disqualification prescribed by paragraph (b) cannot be reduced or mitigated in any way or be substituted by any other penalty or sentence.*
- (3) *For the purposes of this section, an aggravated offence is—*
  - (a) *an offence that caused the death of, or serious harm to, a person; or*
  - (b) *an offence committed in any of the following circumstances:*
    - (i) *the offender committed the offence in the course of attempting to escape pursuit by a police officer;*
    - (ii) *the offender was, at the time of the offence, driving a vehicle knowing that he or she was disqualified, under the law of this State or another State or Territory of the Commonwealth, from holding or obtaining a driver's licence or that his or her licence was suspended by notice given under this Act;*
    - (iii) *the offender committed the offence while there was present in his or her blood a concentration of .08 grams or more of alcohol in 100 millilitres of blood;*
    - (iv) *the offender was, at the time of the offence, driving a vehicle in contravention of section 45A or 47.*
- (4) *If a person is charged with an aggravated offence against this section, the circumstances alleged to aggravate the offence must be stated in the instrument of charge.*
- (5) *In this section—*

**serious harm** means—

  - (a) *harm that endangers, or is likely to endanger, a person's life; or*
  - (b) *harm that consists of, or is likely to result in, loss of, or serious and protracted impairment of, a part of the body or a physical or mental function; or*
  - (c) *harm that consists of, or is likely to result in, serious disfigurement.*

This example is instructive. The basic offence is common and minor. The maximum penalty is a fine of \$2,500. But careless driving may be egregious, either because of its results (death or serious harm) or the circumstances in which it is committed (driving while drunk or engaging in a police chase). But instead of having separate offences for these things, it is convenient to simply create aggravated penalties for offences committed with those results or in those circumstances. The aggravated penalties build on the general ingredients of the basic offence.

Note that the aggravating factor must be specified in the instrument of charge. This is important. The defendant is entitled to know what is the essence of the charge against him or her.

One further advantage of this technique is that the basic charge is necessarily incorporated in a charge of the aggravated offence. If the court finds that the aggravation is not proved (for some reason), it is still open for the court to convict of the basic charge in the same proceedings.

## **5.6—Confiscation (and Related Penalties)**

There are other penalties provided by the general law that are not confined to the traditional punishments of the courts. The *Criminal Assets Confiscation Act 2005* is a very big and complicated Act that provides, in the most general of terms, for the confiscation of the proceeds of crime and for the confiscation of the instruments by which crime is committed. The Act's extensive and very detailed provisions apply to all indictable offences (see below for classification of offences rules) and to a stated list of summary offences. It follows that if a new indictable offence is created, the criminal assets confiscation regime applies to it. It also follows that, if a new summary offence is created that is based on the idea of criminalising the making of an illicit profit, consideration should be given to listing it in the list of summary offences to which the Act applies. One of the major advantages of this regime from an enforcement point of view is that the proceedings are civil and not criminal in nature and do not depend on proof of the commission of a criminal offence beyond reasonable doubt - merely on the balance of probabilities. The meaning of these phrases has been discussed elsewhere in this Guide.

Confiscation regimes have been in the arsenal of law enforcement since the mid 1980s although their form has varied over time. More recently, the impounding and possible destruction of motor vehicles has been the subject of legislation<sup>26</sup>. It is beyond the scope of this Guide to venture further into this area beyond pointing out that innovative sanction should be contemplated as an alternative to merely fining or imprisoning a malefactor.

## **5.7—Civil Penalties**

A civil penalty is like a criminal penalty but is enforced in a civil court and not a criminal court. The rules of evidence and procedure relevant to ordinary civil proceedings apply, so that the penalty is applied when the offence is proved on the balance of probabilities. The meaning of that term has been discussed above.

The general operation of civil penalties was well described<sup>27</sup> by Finkelstein J in the Federal Court (Note - some of these factors have been mirrored in other contexts above).

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<sup>26</sup> *Criminal Law (Clamping, Impounding and Forfeiture of Vehicles) Act 2007*.

<sup>27</sup> *ASIC v Petsas and Miot* [2005] FCA 88.

*There are several reasons for the disappearance of the line between criminal and civil proceedings. First, civil remedies are now available to supplement criminal sanctions. Second, civil remedies are being chosen as alternatives to the criminal law, especially in the area of so called "white collar" crime. Third, and this case provides an example, civil remedies may be chosen by the enforcing authority as an express alternative to a criminal prosecution. There are good reasons why parliament and enforcing authorities are moving towards the use of civil sanctions (such as injunctions, forfeiture, restitution and civil fines) in preference to criminal sanctions especially in the regulatory sphere, regardless of whether the proscribed conduct is regarded as essentially criminal. The main reason for the move is that proceedings that are 'civil' in nature are likely to be cheaper and more efficient than criminal proceedings. Civil proceedings are cheaper and more efficient because the rules of evidence are less strict, the protections afforded to defendants are not as great and the level of certainty required to secure a conviction (the standard of proof) is lower. There is another benefit derived from the use of civil proceedings. If there is a greater likelihood of obtaining a conviction, enforcing authorities may be more inclined to take action in doubtful, or potentially doubtful, cases.*

Civil penalties are very uncommon in South Australian law. They are far more common in Commonwealth law because they are far more common in commercial regulation and the Commonwealth does most of that by far. A standard example is the general duties of company directors to act fairly and honestly. The general civil penalty provision says:

**181—Good faith—civil obligations**

*Good faith—directors and other officers*

- (1) *A director or other officer of a corporation must exercise their powers and discharge their duties:*
- (a) *in good faith in the best interests of the corporation; and*
  - (b) *for a proper purpose.*

*Note 1: This subsection is a civil penalty provision (see section 1317E).*

*Note 2: Section 187 deals with the situation of directors of wholly-owned subsidiaries.*

But where the duty is breached with criminal fault, the matter becomes one for criminal penalties rather than civil penalties:

**184—Good faith, use of position and use of information—criminal offences**

*Good faith—directors and other officers*

- (1) *A director or other officer of a corporation commits an offence if they:*
- (a) *are reckless; or*
  - (b) *are intentionally dishonest;*
- and fail to exercise their powers and discharge their duties:*
- (c) *in good faith in the best interests of the corporation; or*
  - (d) *for a proper purpose.*

In general terms, there are four criteria that should be satisfied before a civil penalty model is preferred. They are:

1. The imposition of a criminal penalty for the behaviour or consequences is not warranted. Civil penalties should not be used simply to avoid the inconveniences of criminal prosecution; that is to say, to get what is in effect a criminal result through a means that offers less protections to the defendant.
2. The imposition of a civil penalty will meet one or more of the objectives of a sanction: it will deter the malefactor, prevent recurrence of the misbehaviour in some other way, deter others from misbehaving or restore something to the victim of the misbehaviour.
3. The imposition of the penalty is sufficient to warrant a court proceeding. The imposition of small civil penalties may not warrant the full panoply of civil proceedings. It has been suggested that a civil penalty of \$5000 is an absolute minimum.
4. Civil penalties are commonly used against white-collar or corporate criminals because (a) imprisonment is often unavailable and (b) criminal prosecutions are complicated and hard to prove.

There are a number of general principles that should be applied if civil penalties are to be used, they are:

1. The provision setting out the civil penalty should be framed and structured in the same way as a criminal offence with clear fault and physical elements and the specification of a maximum penalty.
2. The penalty imposed should be selected with the same principles in mind that have been suggested in relation to the selection of an appropriate criminal penalty.
3. In particular, it is appropriate to specify separate and higher penalties for offences committed by a body corporate.
4. There should be a declaration that a person is not liable to be penalised under two or more civil penalty provisions for the same or substantially the same conduct, and that a person is not liable to be penalised under a civil penalty provision and a criminal provision for the same or substantially the same conduct.

There are a few South Australian examples of civil penalties but they are not simple examples of the genre and do not conform to all of the suggested rules.

For example, section 104A of the *Environment Protection Act 1993* contains a comprehensive code about the matter (restricted to that Act)<sup>28</sup>. The more important parts of that code are:

**104A—Authority may recover civil penalty in respect of contravention**

- (1) *Subject to this section, if the Authority is satisfied that a person has committed an offence by contravening a provision of this Act, the Authority may, as an alternative to criminal proceedings, recover, by negotiation or by application to the Environment, Resources and Development Court, an amount as a civil penalty in respect of the contravention.*
- (2) *The Authority may not recover an amount under this section in respect of a contravention if the relevant offence requires proof of intention or some other state of mind, and must, in respect of any other contravention, determine whether to initiate proceedings for an offence or take action under this section, having regard to the seriousness of the contravention, the previous record of the offender and any other relevant factors.*

<sup>28</sup> Another example can be found in s 38A of the *Heritage Places Act 1993*.

- (3) *The Authority may not make an application to the Court under this section to recover an amount from a person as a civil penalty in respect of a contravention—*
- (a) *unless the Authority has served on the person a notice in the prescribed form advising the person that the person may, by written notice to the Authority, elect to be prosecuted for the contravention and the person has been allowed not less than 21 days after service of the Authority's notice to make such an election; or*
  - (b) *if the person serves written notice on the Authority, before the making of such an application, that the person elects to be prosecuted for the contravention.*
- (4) *The maximum amount that the Authority may recover by negotiation as a civil penalty in respect of a contravention is—*
- (a) *the amount specified by this Act as the criminal penalty in relation to that contravention; or*
  - (b) *\$120 000,*  
*whichever is the lesser.*
- (5) *If, on an application by the Authority, the Environment, Resources and Development Court is satisfied on the balance of probabilities that a person has contravened a provision of this Act, the Court may order the person to pay to the Authority an amount as a civil penalty (but not exceeding the amount specified by this Act as the criminal penalty in relation to that contravention).*
- (6) *In determining the amount to be paid by a person as a civil penalty, the Court must have regard to—*
- (a) *the nature and extent of the contravention; and*
  - (b) *any environmental harm or detriment to the public interest resulting from the contravention; and*
  - (c) *any financial saving or other benefit that the person stood to gain by committing the contravention; and*
  - (d) *whether the person has previously been found, in proceedings under this Act, to have engaged in any similar conduct; and*
  - (e) *any other matter it considers relevant.*
- (7) *The jurisdiction conferred by this section is to be part of the civil jurisdiction of the Court.*
- (8) *If conduct of a person constitutes a contravention of two or more provisions of this Act, an amount may be recovered from the person under this section in relation to the contravention of any one or more of those provisions (provided that the person is not liable to pay more than one amount as a civil penalty in respect of the same conduct).*

The specification of the matters to which the court should have regard in ss (6) is particularly significant and praiseworthy. It indicates that considerable thought has gone into the provisions. On the other hand, the delineation between what is worthy of a criminal sanction on the one hand and what is worthy of a civil penalty only, on the other hand, is less than clearly marked.

## 6.0—Classification of Offences

The classification of an offence determines many procedural rights and obligations. There are two major categories; summary offences and indictable offences. Indictable offences are subdivided. The offence may be either minor indictable or major indictable. This table tells how you can tell as a general rule<sup>29</sup>:

<b>Summary Offence</b>	<b>Minor Indictable Offence</b>	<b>Major Indictable Offence</b>
<i>Where imprisonment is specified - a maximum of 2 years or less</i>	<i>Where imprisonment is specified - a maximum of 5 years or less but more than 2 years</i>	<i>Where imprisonment is specified - a maximum of more than 5 years</i>
<i>Where no imprisonment is specified - a fine of \$120,000 or less</i>	<i>Where no imprisonment is specified - a fine of more than \$120,000</i>	

While these are the general rules, there are detailed exceptions. All concern the operation of specified sections or Parts of the *Criminal Law Consolidation Act 1935* and therefore do not need further specification here.

It should be borne steadily in mind that there is no statute of limitations for indictable offences (minor or major) but the statute of limitations for summary offences is 2 years, and that for expiable offences is 6 months either (a) from the expiry of the expiation period specified in the notice; or (b) if an expiation notice was not issued, within 6 months of the date on which the offence is alleged to have been committed<sup>30</sup>. So the classification of an offence has an automatic effect on the statute of limitations applicable to the offence (if any).

<sup>29</sup> The legislative source of the classification of offences is s 5 of the *Summary Procedure Act 1921*.

<sup>30</sup> *Summary Procedure Act 1921*, s 52(1).