

Chapter 14

Penal Provisions

14.1 General formulae

The same care must be taken to draft penal provisions as any others. Legislative counsel must be prepared to ask why a particular format has been used in the past, and whether aspects of the style used are appropriate in modern drafting. The following over-elaborate provision brings this out:

Any person who makes any false statement during the course of making an application for a licence shall be guilty of an offence and liable, on conviction by a court of competent jurisdiction, to imprisonment for a term not exceeding three months, or to a fine not exceeding five thousand dollars, or to both such fine and such imprisonment.

In most Commonwealth jurisdictions there are provisions in the Interpretation Act or Criminal Procedure Act (or equivalents) to the following effect:

Where in a written law a penalty is specified in respect of an offence, unless otherwise stated that penalty is the maximum penalty that may be imposed for that offence.

Applying this rule, as well as rules on conciseness, elliptical writing (see Chapter 10.7) and plain language principles (including the writing of figures instead of words to represent numbers) to the text at the beginning, it will quickly be apparent that this can be reduced to:

A person who makes a false statement when applying for a licence commits an offence and is liable to imprisonment for 3 months, or a fine of \$5,000, or both.

There is often another important background rule in the Interpretation Act or Criminal Procedure Act:

Where in a written law more than one penalty is specified in respect of an offence, the use of the word "and" between the respective penalties means that the penalties may be imposed in the alternative or cumulatively.

By using this, the penal provision stated above can be further reduced to:

A person who makes a false statement when applying for a licence commits an offence and is liable to imprisonment for 3 months and a fine of \$5,000.

Note that there are normally three elements of an offence provision:

- a statement of the prohibited act or omission ('a person who...'; 'a person must not...');

- a declaration that contravention of the prohibition is an offence ('commits an offence'); and
- specification of the maximum penalty ('and is liable to.....').

However, the second element is sometimes omitted as being implied:

A person who fails to deliver to the receiver an item recovered from a wrecked or stranded vessel is liable to imprisonment for 2 years.

The archaic or over-elaborate introductory words still seen in Penal Codes drafted a long time ago should not be used:

Whosoever shall make any false statement...shall be guilty of an offence.

It shall be unlawful for any person to make any false statement...

In this section and section 14.2 it is presumed that the stated penalties are maximum penalties. Sometimes it is desired to create fixed or minimum penalties, and these are considered under section 14.6.1 and 2.

14.2 Different types of penalties

14.2.1 First and subsequent offences

It is sometimes thought desirable to make a distinction between a first offender and a subsequent one in the penalty provided, particularly in the case of regulatory offences in which there might be strict liability (see section 14.4) and possibly a misunderstanding of the requirements of the law;

A person who advertises a tobacco product contrary to the provisions of this Act commits an offence and is liable:

- (a) for a first offence, to a fine of \$20,000;
- (b) for a second or subsequent offence, to imprisonment for 6 months and a fine of \$50,000.

14.2.2 Continuing offences

In certain areas of the law it is desirable not only to subject an offender to a penalty, but also to discourage the person from continuing to offend. This is especially so in legislation requiring the filing of necessary information, or the payment of money owing:

A person who fails to submit a return as provided by section 42 commits an offence and is liable to a fine of \$2,500, and if the failure continues for more than 30 days after the last day for submission under that section, to a further fine of \$25 for every day or part of a day during which the offence continues.

14.2.3 Serious offences

There are usually background rules (in e.g. the Criminal Procedure Act) allowing a court to sentence an offender to pay a fine or impose another non-custodial sentence as an alternative to imprisonment. If so, with offences that carry a potential sentence of imprisonment of more than 1 year, it is not necessary to provide for a maximum **financial** penalty. In these cases, the penalty may then be more simply expressed, for example:

A person who assaults an inspector in the execution of his or her duty under this Act commits an offence and is liable to imprisonment for 2 years.

But it might be different if, for example, it were desired to provide for a maximum fine greater than that usually considered to be a corresponding alternative (see further section 14.6):

A person who forges a licence, or falsely represents that he or she is licensed under this Act, commits an offence and is liable to imprisonment for 2 years and a fine of \$5,000,000.

14.2.4 Sliding scales

These are especially useful in situations of inflation, where stated monetary penalties can quickly become absurdly small. By expressing these penalties in relation to a published scale, and giving the Minister the power to amend that scale (by subsidiary legislation) in accordance with variations in the value of money, the problem of having to amend individual penalties by statutory amendment is avoided. This is typically done in the following way:

(1) There is established a scale of fines for offences, to be known as “the standard scale”.

(2) The standard scale is divided into 5 levels and the Minister may by order fix the maximum fine in each level.

(3) Where an enactment, whether passed before or after the commencement of this Act:

- (a) provides that a person is liable to a fine; or
- (b) confers power by subsidiary legislation to make a person liable to a fine, by reference to a specified level on the standard scale, that enactment is to be construed as referring to the maximum fine for that level on the standard scale for the time being fixed under this section.

An example of a provision following the above rule would be:

A person who commits an offence under this section is liable to a fine at level 3 on the standard scale.

14.2.5 Related penalties

These are useful in situations where the value of items (including licences) that are the subject of legislation is easily ascertainable:

A person who fails to declare goods to Customs commits an offence and is liable to pay, in addition to the duty payable on the goods, a fine not exceeding five times the value of the goods as assessed under section 21.

14.3 Parties to offences

14.3.1 Particular offenders

Corporations

The following type of provision is used to clarify the fact that where a body of persons commits an offence, those who are responsible for running the affairs of the body also commit that offence:

Where an offence is committed by a body corporate or by a society, association or body of persons, a person who at the time of the offence was concerned with, or acting in, the management of the affairs or activities of the body corporate, society, association or body of persons also commits that offence unless he or she proves:

- (a) that the offence was committed without his or her knowledge; or
- (b) that he or she took all reasonable steps to prevent the commission of the offence.

There are possible variations of this, so that the paragraphs above might instead provide (note the different conjunction between the paragraphs):

- (a) that the offence was committed without his or her consent; and
- (b) that he or she took all reasonable steps to prevent the commission of the offence.

Secondary offenders

General criminal provisions normally cover the criminal liability of those traditionally known as aiders and abettors without the need to set this out in individual provisions:

A person who assists in the commission of an offence, or who arranges for, or advises or encourages, another person to commit an offence, also commits that offence and may be charged with having actually committed it.

14.3.2 Vicarious liability

This is generally a concept which applies in the civil rather than the criminal law, but sometimes the law does make a principal vicariously liable for an offence committed by an employee or agent, the rationale being that the former has a particularly high standard of responsibility for seeing that the legislative provisions are complied with. Areas of the criminal law in which

vicarious liability has been applied are protection of the environment, safety at work, responsibility for the acts of children and of animals, and minor traffic offences:

Where a ship to which this section applies discharges oil into navigable waters, the owner as well as the master commits an offence.

(1) Subject to subsection (2), the person who is the registered keeper of a motor vehicle in respect of which a parking offence is committed is guilty of that offence.

(2) A registered keeper is not guilty under subsection (1) if:

- (a) a notice has been served on him or her under section 46 requiring information as to the person in charge of the vehicle, and within 7 days the keeper has:
 - (i) given to the police the name and address of the person who was in charge of the vehicle at the relevant time; or
 - (ii) satisfied the police that he or she did not know, and could not with reasonable diligence have found out, that name and address; or
- (b) in any other case the keeper satisfies the court that he or she did not know, and could not with reasonable diligence have found out, that name and address.

14.4 Strict liability in criminal law

There is a presumption in criminal law and procedure that proof of *mens rea* or guilty mind is required in order to establish guilt.

Strict liability is in general terms liability without fault, so that all that has to be proved against the accused is the *actus reus* of the offence, no proof of *mens rea* being required. In such cases it will not be a defence to say 'I did not mean to break the law'. In appropriate cases this can be specifically stated, for example:

It is not a defence to a charge under this section that the accused person did not intend or foresee the consequences of his or her actions.

However, strict liability is not usually spelled out in this way, but is to be inferred where offences are of a regulatory nature, involving public health, welfare or safety, or involving such things as minor traffic violations, sale of impure food, violations of liquor laws, pollution of rivers and the environment generally, etc.

In some jurisdictions, a distinction is drawn between 'strict liability', where certain basic defences such as honest mistake of fact are available, and 'absolute liability', where no defence at all is available to the doing of the act which contravenes the provision (unless expressly provided in it). An example of an 'absolute offence':

(1) A person commits an offence if he or she remains in Utopia after the expiry of a temporary residence permit and without having applied for and been granted an extension.

- (2) An offence under subsection (1) is committed whether or not the person knows that:
- (a) the permit has expired; or
 - (b) no application for an extension has been made on his or her behalf or granted.

14.5 Shifting the burden of proof

In general, the burden of proof, that is of proving each of the necessary elements constituting the offence, will lie on the prosecution, but the burden of proving a defence or exception to the general rule is often placed on the defence. This is generally where the offence concerns doing something without the authority of a licence or permit, or in circumstances where an explanation, which only the person accused could give, is absent:

A person who, without lawful authority or excuse, deposits anything on the highway, in consequence of which a person is injured or endangered, commits an offence.

A person who carries an offensive weapon in a public place without reasonable excuse, the burden of proving which lies on that person, commits an offence.

In these cases, once the prosecution have proved the basic facts and direct or inferential absence of any authority or excuse it is for the defence to establish on the balance of probabilities that this did in fact exist. The rationale is that the prosecution would almost certainly be unable to positively prove absence of reasonable excuse (as opposed to leaving such lack of excuse to be inferred from the circumstances). Note also the burden of establishing a defence of lack of consent, etc. in cases of a director, etc. of a company, etc. which has been found guilty of an offence, referred to in section 14.3.1.

14.6 General matters concerning offences and penalties

14.6.1 Fixed penalties

It is the constitutional duty of the courts in criminal cases to enquire into matters alleged against persons and, if they are found to have been proved, to do justice as appropriate.

It has already been noted (section 14.1) that in the absence of specific provision to the contrary, sentences provided for offences are to be read as the maximum sentences available. It is accepted that it is for Parliament to lay down the highest penalty available to a court, but subject to that to leave to the discretion of the court the actual sentence that is appropriate in each individual case.

Normally the only exception is the mandatory imposition of the death penalty by a court on those found guilty of the most serious offences (murder, and in some jurisdictions armed robbery and certain serious drugs offences). Even here, the imposition of the death penalty will be subject to certain exceptions (e.g. where the convicted person is under a certain age, or a pregnant woman) and to the possible exercise of the prerogative of mercy by the Head of State.

Apart from these cases, the imposition of fixed penalties is normally reserved for minor offences where the police or some other authority are empowered specifically to proceed in that way:

(1) If a police officer of or above the rank of Inspector has reason to believe that a person has committed an offence specified in the Schedule, the officer may serve on that person a fixed penalty notice in the prescribed form that:

- (a) specifies the offence;
- (b) states that the person served may elect, as an alternative to having the matter tried by a court, to pay a fine of \$... to a specified court within 30 days.

(2) If the fine is so paid, no proceedings may be brought against the person served with the notice in respect of that offence.

14.6.2 Minimum sentences

A sentence of this type would typically be drafted:

A person who commits an offence of handling stolen goods is liable to imprisonment for not less than 5 years.

While there is no constitutional reason why legislation should not provide for this kind of sentence, there are reasons why their provision in legislation should be discouraged:

- they could remove a court's discretion to do justice in a particular case
- courts dislike being constrained in this way and where they consider that imposition of a minimum sentence would work injustice they might seek:
 - ways of convicting an offender of an alternative offence (i.e. one where the sentence is at large, for example of theft instead of handling in the above case);
 - to acquit on a technicality.

14.6.3 Time limits on prosecutions

These apply normally only in cases of summary or minor offences (typically that an information must be laid before a magistrate within 6 months of the alleged offence taking place).

14.6.4 Written consent to prosecute

The express written consent of, for example, the Attorney General or the Director of Public Prosecutions is sometimes required, such as in politically sensitive cases, war crimes cases or cases with extra-territorial elements.

14.6.5 Fines as an alternative to imprisonment

Ideally, statutory or common law provisions will govern this, so that specific maximum alternative fines do not always have to be expressly provided. Where they are so provided, the relationship of maximum fine to maximum term of imprisonment should be reasonably consistent unless for special reasons (e.g. the financial nature of the offence itself; see also section 14.2.3) it is desired to provide a larger than usual financial penalty. The following would contravene this rule, as the maximum fine is small but the sentence of imprisonment comparatively severe:

A person who commits an offence under this Act is liable to a fine of \$500, or to imprisonment for 2 years, or both.

14.6.6 Unlimited fines

Where no express provision is made either in general or specific penalty provisions for a maximum fine, statutory or common law provisions will provide that the extent of a fine is unlimited but ‘must not be excessive’. Clearly, the relevant sentence would in most circumstances be subject to appeal.

14.6.7 Imprisonment in default of payment of a fine

A statutory scale is often set out (typically in a Criminal Procedure Act), but if it is not the same considerations would apply as under unlimited fines.

14.6.8 Attempts to commit offences

The common law rule that an attempt to commit an offence is itself an offence has been codified into the penal codes or equivalents in most jurisdictions, together with relevant penalties (either directly stated, or expressed as a proportion of the penalty for the full offence) and normally does not need to be provided for. Occasionally, however, the nature of the offence may warrant the express inclusion of attempts by way of clarification (see the Wildlife Protection Act example in section 14.6.9).

14.6.9 Statutory defences

There are a range of defences at common law, most of which are **not** normally drafted into offence provisions as they will be understood to apply. Indeed in some jurisdictions these have been codified into a Penal Code or Criminal Procedure Act. Most are in practice quite limited in their application, and some will clearly apply only to some offences:

- claim of right (theft, burglary, trespass)
- self-defence (homicide, assault)
- mistake of fact
- all due care
- intoxication
- insanity
- duress
- necessity.

However, it is sometimes desirable to draft specific defences that might apply in particular cases; these are known as statutory defences. It has already been seen that ‘all due care’ is usually drafted into a statutory defence by officers of corporations (section 14.3). A defence to a regulatory type of offence of strict liability might be drafted as follows:

It is a defence for a person charged to prove that the commission of the offence was due to a mistake or to an accident, or to some other cause beyond his or her control.

Sometimes explicit statutory defences are tailored to specific kinds of offence, as in the following example from a Wildlife Protection Act:

(1) A person commits an offence if that person kills, injures or captures, or attempts to kill, injure or capture, a protected wild animal.

(2) A person does not commit an offence under subsection (1) by reason only of:

- (a) unavoidably or accidentally killing or injuring the animal as an incidental result of a lawful action;
- (b) capturing or attempting to capture the animal where it has been injured, otherwise than by that person’s illegal act, solely in order to tend it; or
- (c) killing or attempting to kill the animal where it appears to be so seriously injured, otherwise than by that person’s illegal act, that to kill it would be an act of mercy.

14.6.10 Compounding of offences

Express powers need to be given for compounding of offences, as they will not be inferred. These powers are commonly included in legislation dealing with customs, banking and insurance, and traffic, and they are increasingly provided for regulatory offences (see section 14.4) and environmental offences.

They normally operate only where there has been an admission of guilt by the offender, and there should be an option for the offender to choose to appear before a court. There are obvious advantages for both enforcers and offenders. For the former, there is a quick and inexpensive alternative to prosecution; for the latter, the advantage of not having to go to court and not having the compounded offence recorded as a conviction in a criminal record. The devices are not appropriate for complex offences or where they are likely to be used as levers to induce admissions of guilt.

(1) Subject to this section, the Commissioner for Customs and Excise may, if satisfied that a person has committed an offence under this Act in respect of which a penalty of a fine is provided, compound the offence and order that person to pay such sum of money as the Commissioner may think fit, not exceeding the amount of the fine to which the person would have been liable if he or she had been prosecuted and convicted of the offence.

(2) The Commissioner may exercise the power under subsection (1) only if the person admits in writing that he or she has committed the offence and requests the Commissioner to deal with the offence accordingly.

(3) Where the Commissioner makes an order under this section:

- (a) the order:
 - (i) is to be in writing and have attached to it the request in writing of the person made under subsection (2);
 - (ii) is to specify the offence committed by the person and the penalty imposed by the Commissioner;
- (b) a copy of the order must be given to the person if he or she so requests;
- (c) on payment of the sum of money specified in the order the person is not liable to prosecution in respect of the offence.

(4) The compounding of an offence under this section does not affect the liability to forfeiture of anything in relation to which the offence was committed.

It will be seen that there is some similarity between the procedure for compounding offences and that for fixed penalties above. The consequences of each will depend on how the provisions are drafted, although usually the payment of a fixed penalty does not alter the fact that an offence has been committed, and consequences such as penalty points on a driving licence (see section 14.7) could well follow. On the other hand, where an offence is compounded, the effect is usually that an offence is not recorded as such against the person in respect of whom the compounding order is made.

The concept of compounding offences has been enlarged considerably in recent years (see further section 14.8).

14.7 Other matters consequent on conviction

Consideration often needs to be given to drafting rules for the following types of consequences of conviction of an offence:

- attachment of penalty points to a licence
- cancellation or suspension of a licence
- disqualification

If **the court** is to have power to order these, explicit provisions to that effect need to be inserted into the relevant legislation. They would be likely only in cases where the matter is clear-cut (as with, for example, driving offences) and would **not** involve, for example, assessment of a person's professional fitness to hold a licence, etc. Cases involving such an assessment would be better dealt with under the disciplinary powers given to statutory bodies to oversee the conduct of professions.

- forfeiture

The court may order that any weapon or instrument in respect of which an offence has been proved is to be forfeited.

This would normally apply to articles that are the subject of, or produced in evidence at, criminal trials in which the accused person is convicted of unauthorised or otherwise criminal possession. The Interpretation Act will often provide that anything ordered to be forfeited will be forfeited to the Government.

- seizure of assets

Separate legislation authorising this would normally be needed.

- payment of compensation

Where a person is convicted of an offence, the court may order that person to pay compensation to a person who has suffered loss or damage as a result of the offence.

14.8 Administrative penalties

Administrative penalties are a mechanism for enforcing compliance with regulatory legislation, the use of which has significantly increased in recent years. They are monetary penalties assessed and imposed by a Minister or regulator without recourse to a court or administrative tribunal, and technically constitute a form of civil administrative, rather than criminal, proceedings.

An administrative penalty is a financial penalty that can be imposed on an individual or company that fails to comply with a particular provision of

legislation, or the terms of an authorisation such as a permit or licence. As an administrative (or civil) rather than criminal type of sanction, administrative penalties are calculated and imposed by a Minister or designated Government official instead of a court of law. They are intended to encourage regulatory compliance. The following is a simple example of such a provision:

23(1) If the regulator is satisfied on a balance of probabilities that a person has:

- (a) contravened a provision of this Act or the regulations,
- (b) failed to comply with an order under this Act, or
- (c) failed to comply with a requirement of a licence, certificate or permit issued, or notice given, under this Act,

the regulator may serve the person with a determination requiring the person to pay an administrative penalty in the amount specified in the determination.

(2) A determination under subsection (1) must be in the prescribed form and contain the prescribed information.

(3) Where a requirement to pay a penalty notice is issued under subsection (1), a prosecution for an offence under this Act in respect of the same contravention or failure may not be brought against the person.

A common instance of the use of this device has been in the area of benefit fraud:

(1) This section applies where:

- (a) it appears to the Minister that there are grounds for instituting proceedings against a person for an offence under this Act relating to an act or omission on the part of that person in relation to a benefit; or
- (b) if an overpayment attributable to the act or omission had been made, the overpayment would have been recoverable from the person by, or due from the person to, the Treasury.

(2) The Minister may give the person a written notice:

- (a) stating that the person may be invited to agree to pay a penalty and that, if he or she does so in the manner specified by the Minister, no proceedings referred to in subsection (1) will be instituted against him or her; and
- (b) containing such information relating to the operation of this section as may be prescribed.

(3) If the person agrees in the specified manner to pay the penalty:

- (a) the amount of the penalty is recoverable by the same methods as those by which the overpayment is recoverable; and
- (b) no proceedings may be instituted against the person for an offence under this Act relating to the overpayment or to the act or omission referred to in subsection (1).