

# **CROWN APPLICATION**

This pamphlet is intended for members of the Office of the Parliamentary Counsel.

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## CHAPTER 1 THE BASIC PROPOSITIONS

### Introduction

1.1 The basic propositions about Crown application are—

- An Act does not bind the Crown unless it does so expressly or by necessary implication.
- The courts have not been quick to find any such necessary implication or to support any other general exceptions to this doctrine.
- The Crown can take advantage of an Act without prejudicing the doctrine (see section 31(1) of the Crown Proceedings Act 1947).
- The Crown can waive its immunity.

### The presumption that an Act does not bind the Crown

1.2 The Crown is not immune from statutes by virtue of any rule of the constitution.<sup>1</sup>

1.3 However, it does enjoy a measure of immunity by virtue of a common law rule of statutory construction. This rule is the presumption that an Act does not bind the Crown. It was reaffirmed by the House of Lords in *Lord Advocate v Dumbarton District Council*<sup>2</sup> and by the Supreme Court in *R (on the application of Black) v Secretary of State for Justice*.<sup>3</sup>

1.4 Some have argued that the presumption is an expression of a prerogative immunity subject to the possibility of disapplication by Parliament but it has been confirmed by the Supreme Court in *Black* that it is simply a rule of statutory interpretation.<sup>4</sup>

1.5 The presumption was originally a rule of the law of England and was not recognised by Scots law before the parliamentary union of England and Scotland in 1707. However, the House of Lords made it clear in *Lord Advocate v Dumbarton District Council* that the presumption is now one that applies to all parts of the United Kingdom.<sup>5</sup>

1.6 The presumption does not apply in relation to Acts of the Scottish Parliament that received Royal Assent on or after 4 June 2010 or to Scottish Instruments (within the meaning

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1. It was settled in England as early as 1561 that the Crown was bound by any statute that applied to it (*Willion v Berkley* (1561) 1 Plowden 223; 75 E.R. 339 (KB)). It is also clear that the Crown has no power (except as part of the legislature) to suspend the operation of a statute for a time, or to dispense with a statute in favour of a particular person or group. These “suspending” and “dispensing” powers were abolished by the Bill of Rights in 1688.

2. [1990] 2 AC 580; [1989] 3 WLR 1346.

3. [2017] UKSC 81. At paragraphs 33 to 35 of the Supreme Court’s judgment Lady Hale notes various criticisms of the presumption that have been made over the years by Glanville Williams, Francis Bennion and Paul Craig and considers these commentators’ alternative proposals. Lady Hale then concludes as follows: “It is easy to see the merits of the solution put forward by Glanville Williams and Paul Craig [to reverse the presumption so that the Crown is bound unless expressly excluded]. However, the problem for this Court in adopting either of the solutions proposed is that the presumption...is so well established in modern times that many, many statutes will have been drafted and passed on the basis that the Crown is not bound except by express words or necessary implication...I would therefore decline to abolish the rule or reverse the presumption, although I would urge Parliament, perhaps with the assistance of the Law Commission, to give careful consideration to the merits of doing so.”

4. See paragraph 36 of Lady Hale’s judgment in *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81. See also Sunkin and Payne, “The Nature of the Crown”, p.173 and Craies on Legislation (11th ed., 2017) 11.5.4 to 11.5.5.

of section 1(4) of the Interpretation and Legislative Reform (Scotland) Act 2010)) made on or after that date. Section 20 of the 2010 Act reverses the presumption for these Acts and instruments so that they bind the Crown except in so far as they provide otherwise.

1.7 Similarly, section 28(1) of the Legislation (Wales) Act 2019 reverses the presumption for Acts of the National Assembly for Wales that receive Royal Assent on or after 1 January 2020 so that they bind the Crown except so far as express provision is made to the contrary<sup>6</sup>. Section 28(2) of the 2019 Act makes the same provision in respect of Welsh subordinate instruments made on or after that day, but only in so far as they are made under an enactment which binds the Crown or confers a power to make provision binding the Crown.

1.8 The presumption applies to all other statutes, whether of general application or merely applying to rights, powers, privileges or immunities that are peculiar to the Crown.<sup>7</sup> It applies to statutes whether or not penal or taxing. It applies equally whether an Act affects persons or things. And it is expressly saved by section 40(2)(f) of the Crown Proceedings Act 1947.

1.9 The presumption can have an indirect as well as a direct application. For example, the Restrictive Trade Practices Act 1956 (repealed) was held not to apply to an agreement to which the Crown was not a party but which was supplemental to an agreement to which the Crown was a party.<sup>8</sup>

1.10 There are various circumstances in which the presumption that an Act does not bind the Crown is overturned or is not relevant.

1.11 The presumption is overturned if –

- an Act binds the Crown by express words;
- an Act binds the Crown by necessary implication; or
- other exceptions apply.

1.12 The presumption is not relevant if –

- an Act does not impose any obligations or restraints; or
- the persons or property affected do not fall within the Crown.

1.13 These cases are discussed in more detail below.

### **Binding the Crown by express words**

1.14 There are different ways in which an Act may bind the Crown expressly.

1.15 It may contain a Crown application clause which will usually be located towards the end of the Act (or the end of a Part). Chapter 4 contains a number of examples of these clauses and discusses particular aspects of them.

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5. Some older statutes applying only to Scotland have Crown application clauses which make it clear that the statute does not apply to the Crown although Scottish drafters were asked to try to avoid such provisions wherever possible. An example is section 14 of the Flood Prevention (Scotland) Act 1961. Provisions of this kind reflected the previous uncertainty as to the precise position in Scotland but there is no need for them today.

6. For the exception, see section 4(1) and (3)(b) of the Legislation (Wales) Act 2019.

7. See, for example, *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58 (PC). In this case, the Privy Council held that it made no difference that the land in question had been acquired from private owners rather than being held by any right peculiar to the Crown. It was enough that it was owned by the Crown.

8. *Re Telephone Apparatus Manufacturer's Application* [1963] 1 WLR 463.

1.16 Alternatively, an Act may bind the Crown expressly by naming the Crown in particular provisions.

1.17 However, there are relatively few Acts that do bind the Crown expressly. There are a variety of reasons for this. In some cases, the Crown will be bound by necessary implication. In other cases, the Crown will not be relevant to the bill and so no issue of Crown application will arise. And, in other cases, the policy will be that the Crown is not to be bound and so silence will achieve the right result.

### **Binding the Crown by necessary implication**

#### *Scope of necessary implication*

1.18 Lord Keith of Kinkel touched on the question of what amounted to necessary implication in *Lord Advocate v Dumbarton District Council* –

“As to the considerations which may be applicable for the purpose of finding a necessary implication that the Crown is bound, it is clear that the mere fact that the statute in question has been passed for the public benefit is not in itself sufficient for that purpose<sup>9</sup>... Similarly, the possibility of a distinction in the position of the Crown as regards lands held *jure coronae* and as regards lands held otherwise must be rejected.

Accordingly it is preferable, in my view, to stick to the simple rule that the Crown is not bound by any statutory provision unless there can somehow be gathered from the terms of the relevant Act an intention to that effect. The Crown can be bound only by express words or necessary implication. The modern authorities do not, in my opinion, require that any gloss should be placed upon the formulation of the principle.”<sup>10</sup>

1.19 This is all very well but, in order to understand what is meant by “necessary implication”, it is necessary to place a gloss on it or, at least, look more closely at what it might mean. It is not self-explanatory.

1.20 For example, in *Gorton Local Board v Prison Commissioners*<sup>11</sup> Day J said –

“In the absence of express words the Crown is not to be bound, nor is the Crown to be affected except by necessary implication. There are many cases in which such implication does necessarily arise, because otherwise the legislation would be unmeaning. That is what I understand by “necessary implication”. Here the Crown is not mentioned and no necessary implication of any sort or kind arises ...”

1.21 A slightly looser meaning than that the legislation would otherwise be unmeaning was suggested by Lord Du Parcq on behalf of the Privy Council in *Province of Bombay v Municipal Corporation of the City of Bombay*<sup>12</sup> –

“The Crown may be bound, as has often been said, “by necessary implication”. If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named.”

1.22 However, he did go on to say, in rejecting an argument that, wherever an Act is for the public good, it must be taken to bind the Crown<sup>13</sup> –

“Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown

9. See *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58, 62-65.

10. [1990] 2 AC 580, 598 and 604; [1989] 3 WLR 1346, 1360 and 1366.

11. [1904] 2 KB 165, 167.

12. [1947] AC 58, 61.

13. [1947] AC 58, 62-63.

were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the court is asked to draw this inference, it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words.”

1.23 In *Department of Transport v Egoroff*<sup>14</sup> the court approved the *Province of Bombay* case and stated that the test must be either an examination of the wording of the Act or in certain specific cases a demonstration that the purpose of the sections would be wholly frustrated unless the Crown were bound. This might raise a necessary implication outside the wording of the Act.

1.24 In *R (Revenue and Customs Comrs) v Liverpool Coroner*<sup>15</sup> the High Court held that Schedule 5 to the Coroners and Justice Act 2009 bound the Crown by necessary implication with the result that the Commissioners were under a duty to comply with a notice issued to them under the Schedule that required historical occupational information to be disclosed to a coroner for the purposes of an inquest; this duty overrode the duty of confidentiality that would otherwise have applied to the Commissioners. The High Court’s reasoning was that Schedule 5 was intended to strengthen the powers of coroners so as to enable them to conduct effective investigations into deaths for which the state might bear responsibility (as required by Article 2 of the ECHR) and that this purpose would be frustrated if the Schedule did not bind the Crown.

1.25 In *R (on the application of Black) v Secretary of State for Justice* the Supreme Court drew inspiration from the *Liverpool Coroner’s case* in the course of expanding upon the reasoning in the *Province of Bombay* case set out in paragraph 1.22 above. Lady Hale, giving judgment for the Supreme Court, said that it was not necessary that the purpose of the Act concerned would have been “wholly frustrated” if the Crown were not bound and indicated that a necessary implication may arise if “one very important purpose of the Act would have been frustrated”:

“...it is not necessary that the purpose of the legislation would be “wholly frustrated” if the Crown were not bound. In the *Bombay case*, it is clear that the Board was only using this as one example of where the Crown would be bound by necessary implication. In this case, it is accepted [by Counsel for the Secretary of State] that the *Liverpool Coroner’s case* was rightly decided. The purpose of the Coroners Act would not have been “wholly frustrated” had it not bound the Crown. But one very important purpose of the Act would have been frustrated: that was to render the inquest process compliant with the United Kingdom’s obligations under the European Convention on Human rights, so that deaths for which the state might bear some responsibility could be properly investigated” (emphasis added)<sup>16</sup>

1.26 The Supreme Court in *Black* also stated that in considering whether the purpose of an Act would be frustrated if it did not bind the Crown it was permissible to consider whether the Crown would be likely to act voluntarily to achieve the purpose concerned:

“...in considering whether the purpose of the Act can be achieved without the Crown being bound, it is permissible to consider the extent to which the Crown is likely voluntarily to take action to achieve it. Inaction cannot be assumed. It may be that the Act’s purpose can well be achieved by the Crown exercising powers properly and in the public interest. But if it cannot, that is a factor to be taken into account in determining the intention of the legislation.”<sup>17</sup>

1.27 In applying these principles the Supreme Court in *Black* concluded that the provisions of Chapter 1 of Part 1 of the Health Act 2006 (the smoking ban) did not bind the Crown by necessary implication:

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14.(1986) 1 EGLR 89, 18 HLR 326 (CA).

15.[2014] EWHC 1586 (Admin); [2015] QB 481.

16.See paragraph 36 of Lady Hale’s judgment in *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81.

17.See paragraph 36 of Lady Hale’s judgment.

“It might well be thought desirable, especially by and for civil servants and others working in or visiting government departments, if the smoking ban did bind the Crown. But the legislation is quite workable without doing so. It cannot be suggested, in the way that it could be suggested in the *Liverpool Coroner’s* case, that a major plank of the Act’s purpose would remain unfulfilled if the Act did not bind the Crown. The Crown can do a good deal by way of voluntary action to fill the gap. The Commissioners [in the *Liverpool Coroner’s* case] were not able to fill the gap unless their obligations under the [Coroners and Justice] Act overrode their duty of confidentiality”<sup>18</sup>

1.28 All these examples show that the scope of the necessary implication test is not wholly certain. The trend in the existing case-law is towards a narrow test which, broadly speaking, limits the circumstances in which a necessary implication arises to those in which (a) it is clear from the terms of the legislation that the intention was to bind the Crown or (b) the purpose of the legislation, or a very important purpose of it, would be frustrated if the Crown were not bound.

*Reliance on necessary implication: EU obligations and retained EU law*

1.29 An example of where OPC tends to rely upon necessary implication for provisions to bind the Crown is in the case of instruments made under section 2(2) of the European Communities Act 1972.<sup>19</sup> As a matter of EU law, EU obligations are binding on a member State and emanations of the State and, as a result, instruments made under section 2(2) before IP completion day are generally taken to bind the Crown regardless of whether they say so expressly.

1.30 The same logic can be applied to an EU instrument that has become retained EU law under the European Union (Withdrawal) Act 2018.

*Exclusion of implication*

1.31 Section 30 of the Cardiff Bay Barrage Act 1993 is an example of a provision which has been drafted because of a concern over necessary implication. Somewhat unusually, this section expressly provides that the Act does not bind the Crown and it was drafted in this way because of a concern that the compulsory purchase provisions in the Act would otherwise be construed as applying to the Crown by necessary implication.

1.32 The 1993 Act contained power for the Cardiff Bay Development Corporation to acquire compulsorily land “shown on the deposited plans and described in the book of reference” (section 3). The book of reference contained a list of all the “land to be acquired” for the purposes of the Act and Crown land was included in the book in order to give a complete picture of what was envisaged although it was not intended that the compulsory acquisition powers should be exercisable in relation to Crown land (which would, instead, be transferred by agreement).

1.33 The concern was that the express mention of Crown land (and an express mention of its ownership by the Crown) in the book of reference amounted to a necessary implication that the compulsory acquisition powers should be available in relation to that land. Hence the provision in section 30 of the Act that the Crown should not be bound.

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18. See paragraph 49 of Lady Hale’s judgment.

19. Section 2(2) of the European Communities Act 1972 is repealed by section 1 of the European Union (Withdrawal) Act 2018, but was saved until IP completion day by section 1A of that Act (inserted by the European Union (Withdrawal Agreement) Act 2020).

### **Other exceptions to the presumption**

1.34 There are a number of other exceptions to the presumption that a statute does not bind the Crown.

1.35 For example, a statute might bind the Crown if it is incorporated by reference into an Act that does bind the Crown.

1.36 Or, where the Crown is a litigant in civil proceedings, it follows from the Crown Proceedings Act 1947 that it will be bound by all relevant statutes relating to civil proceedings.

1.37 Or a statute might bind the Crown because it is incorporated by reference into a Crown contract although, clearly, it would only be enforceable at the suit of the other party to the contract and so the Crown would not, in this way, be exposed to any criminal liability or any form of public enforcement.

### **Presumption irrelevant where no obligations or restraints imposed**

1.38 The House of Lords in *Lord Advocate v Dumbarton District Council* seems to have accepted that the presumption of Crown immunity can only be relevant if there is something to be immune from. In other words, a statute has to be “imposing obligations or restraints on persons or in respect of property” for the rule to be triggered. It recognised that the very notion of a statutory provision being binding on a person connotes that the person’s freedom of action is in some measure thereby constrained.

1.39 In the absence of any such obligation or restraint, the presumption cannot apply.

1.40 There may be no obligation or restraint either where an Act has no effect on the Crown or where it has a beneficial effect on the Crown.

1.41 A provision that had no effect on the Crown was considered in *Madras Electric Supply Corporation v Boarland*.<sup>20</sup> In this case, the computation of a corporation’s income tax depended upon whether the corporation had sold its undertaking to a “person”. The corporation had actually sold its undertaking to the Crown and so the question in issue was whether the word “person” included the Crown. The House of Lords said yes. Their Lordships reasoned that in this context the “ordinary meaning” of the word “person” included the Crown. If the word were given its ordinary meaning, the computation of the corporation’s tax would be affected, but this would make no difference to the Crown. Since the statutory provision could not operate to the prejudice of the Crown, there was no reason to give the word “person” other than its ordinary meaning.

1.42 If a provision has only a beneficial effect on the Crown, the presumption of Crown immunity will also not apply. In such a case, the Crown may be able to take the benefit of a statute which does not name it or apply to it by necessary implication<sup>21</sup> although the question whether it is entitled to do so is answered by the application of ordinary principles of interpretation.

1.43 This ability to take the benefit of a statute in the right context is recognised by section 31(1) of the Crown Proceedings Act 1947.

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20.[1955] AC 667 (HL).

21.*Willion v Berkley* [1561] 1 Plowd 223, 243; *Town Investments Ltd v Department of the Environment* [1976] 3 All ER 479 (CA), reversed on other grounds [1977] 1 All ER 813 (HL).



1.44 Of course, a statutory provision may be both beneficial and burdensome to the Crown.

1.45 The likelihood is that, if the Crown seeks to take the benefit of an Act by which it is not bound, it must also take the burden so far as it exists. This follows from the fact that the Crown is expected to behave fairly and to serve the public interest.

1.46 Thus, for example, Lord Moulton said in *A-G v De Keyser's Royal Hotel Ltd*<sup>22</sup> –  
“When the Crown elects to act under the authority of a statute, it, like any other person, must take the powers it thus uses *cum onere*”.

1.47 To the extent that the Crown takes the burden of an Act in these circumstances, it waives its immunity.

### **Waiver of Crown immunity**

1.48 It is open to the Crown to waive immunity from statute in particular cases although difficult questions can sometimes arise as to the extent of the waiver.

1.49 Waiver might, for example, happen where the Crown accepts the burden of a statute in order to take its benefit (see above).

### **Scope of “the Crown” for the purposes of the presumption**

1.50 The full scope of the Crown for the purposes of the presumption of non-application to the Crown is uncertain.

1.51 A distinction is traditionally made between the monarch in her personal capacity and the monarch or the Crown as the political entity which exercises governmental powers (ie. the executive government<sup>23</sup> including government Ministers, government departments, members of the armed forces etc). The concept of the Crown embraces both elements.

1.52 But difficult questions can arise when one has to look more closely at what falls within the Crown for the purposes of the presumption.

1.53 As mentioned above, the presumption applies equally whether an Act affects persons or things although, often, the issues overlap because both persons and things are involved.

1.54 So far as the presumption affects things, it might, for example, affect Crown property such as Crown land, Crown vehicles,<sup>24</sup> Crown ships or Crown aircraft.<sup>25</sup>

1.55 The Palace of Westminster is Crown land and so will benefit from the presumption. Other land that forms part of the parliamentary estate but is not within the palace<sup>26</sup> is not Crown land and will therefore not benefit from the presumption.<sup>27</sup>

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22.[1920] AC 508, 549-550.

23.*Town Investments Ltd v Department of the Environment* [1978] AC 359.

24.See, for example, paragraph 15 of Schedule 4 to the Protection of Freedoms Act 2012, section 90(2)(a) of the Traffic Management Act 2004, section 75 of the Crime (International Co-operation) Act 2003 and section 167(2) and (3) of the New Roads and Street Works Act 1991.

25.See, for example, section 105(3) of the Transport Act 2000 or section 100(1) of the Railways and Transport Safety Act 2003.

26.The Parliament website mentions the Norman Shaw and Parliament Street buildings and Portcullis House as extending beyond the Palace.

1.56 So far as the presumption affects people, there are different ways of looking at the questions that can arise.

*Classification as regards persons*

1.57 In *Bank voor Handel en Scheepvaart, NV v Administrator of Hungarian Property*,<sup>28</sup> Lord Tucker identified three classes of persons who benefit from the presumption of Crown immunity. They are –

- the Sovereign personally;
- her servants or agents; and
- persons who are not Crown servants or agents but who, for certain limited purposes, are considered to be in an analogous or similar position (*in consimili casu*).

1.58 An example of persons falling within the third class was owners or occupiers of property exclusively used for the purposes of government although the presumption of Crown immunity only protected them in respect of liability or disability arising in respect of the ownership or occupation of such property.

1.59 Another way of looking at this is to consider the following categories of case (in addition to the case of the Sovereign acting in person) –

- cases where the question is one of the status of the body or person claiming exemption;
- cases where the question is whether the body or person concerned, though not having general Crown status, should nevertheless fall within the Crown presumption for the purpose of taking or carrying out any particular action or activity (when he will be acting as agent of the Crown);
- cases where the question is whether some transaction between, or operation involving, persons who do not enjoy either general Crown status or the benefit of the presumption as a result of the particular action or activity that they are engaged upon, should benefit from the Crown presumption because of the possible effect on Crown interests of applying the relevant statute to the transaction.

(1) Status of body or person

1.60 The first category of case is where there is a continuing relationship between the body or person and the Crown from which it may be deduced that the body or person acts on behalf of the Crown, either generally or, at least, in respect of official duties or when acting in the course of employment. A typical example is a Minister of the Crown or another person employed in the public service of the Crown.

1.61 Another example is public bodies whose general status as Crown or non-Crown bodies is determined by statute or needs to be determined by the courts for the purpose of knowing whether they would benefit from the presumption.

1.62 Modern statutes will generally make it clear whether a new body is or is not a Crown

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27.For more information see Halsbury's Laws, vol 78 (2018) (Parliament) paras. 813 to 815 (Parliamentary premises).

28.All ER 1954 Vol 1 p. 969.

body. Examples of provision for a Crown body include the following:

- Paragraph 22 of Schedule 1 to the Child Maintenance and Other Payments Act 2008 provides that “the functions of the [Child Maintenance and Enforcement] Commission, and of its members, are to be exercised on behalf of the Crown”. It also provides that, for the purposes of any civil proceedings arising out of those functions, “the Crown Proceedings Act 1947 applies to the Commission as if it were a government department”.
- Paragraph 1 of Schedule A1 to the Apprenticeships, Skills, Children and Learning Act 2009 provides that the Institute for Apprenticeships “is to perform its functions on behalf of the Crown”.

Examples of provision for a non-Crown body include the following:

- Paragraph 1(1) of Schedule 1 to the Higher Education and Research Act 2017 provides that the Office for Students “is not to be regarded as a servant or agent of the Crown, or as enjoying any status, immunity or privilege of the Crown”. Paragraph 1(2) provides that the Office’s “property is not to be regarded as the property of the Crown, or as property held on behalf of the Crown”.
- Paragraph 15(1) of Schedule 1 to the Parliamentary Buildings (Restoration and Renewal) Act 2019 provides that the Parliamentary Works Sponsor Body “is not to be regarded as a servant or agent of the Crown, or as enjoying any status, immunity or privilege of the Crown”. Paragraph 15(2) provides that “the members and staff of the Sponsor Body are not to be regarded as Crown servants.”

(For a case in which a statement of non-Crown status did not lead to the expected result, see paragraph 3.12.)

1.63 Where it is unclear from the relevant legislation whether a body enjoys Crown status, the matter falls to be resolved by the courts. Denning LJ stated the test as whether the body or person “is properly to be regarded as the servant or agent of the Crown”.<sup>29</sup> In practice, it is often necessary to assess the degree of control exercisable over the body or person by Ministers. What seems to be required is not simply scope for ministerial direction or intervention but that the body is answerable to the government.<sup>30</sup>

1.64 In *Bank voor Handel en Scheepvaart, NV v Administrator of Hungarian Property*,<sup>31</sup> Lord Reid said –

“In my judgement the question whether the custodian is a servant of the Crown depends on the degree of control which the Crown through its Ministers can exercise over him in the performance of his duties. The fact that a statute has authorised his appointment is, I think, immaterial, but the definition in the statute of his rights, duties and obligations is highly important. .... when a statute creates an office it may give to the holder more or less independence from Ministerial control so that the officer has, to a greater or less extent, a discretion which he alone can exercise, and it may be that the grant of any substantial independent discretion takes the officer out of the category of servants of the Crown for the present purpose.”

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29. *Tamlin v Hannaford* [1950] 1 KB 18, 22.

30. See, for example, *Gilbert v Trinity House Corporation* [1886] 17 QBD 795, *Commissioners of Works and Public Buildings v Pontypridd Masonic Hall Co Ltd* [1920] 2 KB 233 and *Tamlin v Hannaford* [1950] 1 KB 18 (PC).

31. In this case, the House of Lords made it clear that Ministers of the Crown were servants of the Crown (see, for example, (1954) All ER, Vol 1, 969 at 981-2).

1.65 The following are not Crown bodies –

- the British Broadcasting Corporation (see *BBC v Johns (Inspector of Taxes)*<sup>32</sup>);
- official receivers (see *In Re Minotaur Data Systems Ltd*<sup>33</sup> and *Mond v Hyde & Department of Trade and Industry*<sup>34</sup>).

1.66 Provision may be made for a body to lose the status of a Crown body. See section 11 of the Child Maintenance and Other Payments Act 2008 (review of status of Child Maintenance and Enforcement Commission; power to alter by order).

1.67 One consequence of the status exemption is that a person employed in the public service of the Crown acting in the course of his duties is not bound by, and therefore cannot be convicted of an offence under, a statute which does not bind the Crown.<sup>35</sup> But difficult issues can arise as to whether a person is indeed acting in the course of his duties and the scope of this rule is therefore not as wide as may at first appear. Generally, a person will not be acting in the course of his official duties as a servant of the Crown when doing something that is prohibited by the general law.<sup>36</sup>

## (2) Action or activity attracts Crown presumption

1.68 The second category of case is where the question is whether the body or person concerned, though not having general Crown status, should nevertheless fall within the Crown presumption for the purpose of taking or carrying out any particular action or activity. This is the case where one looks at the particular action or activity and asks whether the body or person, in carrying out that action or activity, is acting on behalf of the Crown (so that the act is that of the Crown) in the particular matter in question.

1.69 Thus, for example, in some circumstances a contractor who is carrying out a task on behalf of the Crown might be held to benefit from the presumption in respect of that task.

1.70 OPC tends to act on the basis of the following basic propositions about the applicability to independent contractors of Acts which do not bind the Crown –

- A contractor doing work for the Crown does not prima facie obtain Crown exemption by virtue solely of the fact that the contractor is carrying out a contract made with the Crown (ie Crown status or exemption is not obtained in the contractor's own right).
- Where a statutory authority to execute works is conferred on a Minister, that authority will also protect the contractors through whom the works are executed (as the instrument or agent of the Crown), to the same extent as it protects the Minister himself. Such authority may in general be taken to extend to performing activities authorised by the statute in any manner in which it is lawful for the Minister to perform them, including any manner in which it is lawful by reason of

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32.[1965] Ch 32 (CA).

33.[1999] 1 WLR 1129 (CA).

34. [1998] 3 All ER 832 (CA).

35.*Cooper v Hawkins* [1904] 2 KB 164 (DC). But there is doubt about how far this judgment goes: see *Wilkinson on Road Traffic Offences* and *Williams on the Criminal Law and Crown Proceedings Act 1947*.

36.For a discussion of this, see Craies (11th ed., 2017) 11.5.6 to 11.5.7 and 11.5.16 to 11.5.21. See also section 205(3) and (4) of the Equality Act 2010: subsection (3) provides that “The remainder of this Act applies to Crown acts as it applies to acts done by a private person” and subsection (4) defines “Crown acts” for the purposes of that provision.

the Minister's being exempt from statutory provisions which do not bind the Crown.

- Contractors could not claim exemption from statutes where they are acting outside the scope of the Crown's statutory authority or they are acting outside their contractual authority.

1.71 The result of these principles is that it will generally be unnecessary to include, in a bill conferring on a Minister authority to execute works, provisions exempting contractors engaged by the Minister for the purpose from the provisions of the bill that do not bind the Crown.

### (3) Effect on Crown interests attracts Crown presumption

1.72 The third category of case is where the question is whether some transaction between, or operation involving, persons who do not enjoy either general Crown status or the benefit of the presumption as a result of the particular action or activity that they are engaged upon, should benefit from the Crown presumption because of the possible effect on Crown interests of applying the relevant statute to the transaction.

1.73 One example of this is where a bill affecting land does not bind the Crown and the question arises whether, in the absence of provision to the contrary, a tenant or other person having an interest in Crown land will be immune by virtue of the Crown's interest in the land.

1.74 This was held to be so in the case of the Rent Acts in *Rudler v Franks*<sup>37</sup> where, following an earlier decision in *Clark v Downes*,<sup>38</sup> it was held that a sub-tenancy created by a tenant of the Crown was outside the Acts. These decisions were based on the rather mysterious proposition that the Rent Acts "operate in rem" but the true reason for them, as explained by Romer LJ in *Wirral Estates Ltd. v Shaw*<sup>39</sup> is that –

"the Acts not binding the Crown, it is the duty of the courts so to construe the Acts that the Crown and its property are in no way prejudicially affected by them."

1.75 As a result, in *Wirral Estates Ltd v Shaw*,<sup>40</sup> it was held that, if the Crown sold the reversion, the Crown's tenant did not thereby get the protection of the Rent Acts because to hold otherwise would be to deprive the Crown of part of the value of the reversion. The position under the Rent Acts was reversed by the Crown Lessees (Protection of Sub-Tenants) Act 1952.

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37.[1947] KB 530.

38.[1931] 145 LT 20.

39.[1932] 2 KB 247, 263.

40.[1932] 2 KB 247.

## **CHAPTER 2 PRACTICAL MATTERS**

### **Instructions**

2.1 The question whether, and to what extent, a bill is to bind the Crown is a matter of policy which is to be decided on the merits and facts of a particular bill.

2.2 There appears to be an increasing tendency to decide, on policy grounds, to bind the Crown unless there is good reason not to do so.

### **Informing the Cabinet Office Legal Director**

2.3 The department are responsible for getting policy approval within Whitehall for any provisions of their bill which affect the Crown.

2.4 If the bill applies to the Crown, send a copy of it at an early stage to the Cabinet Office Legal Director, and keep this contact informed on this aspect of the bill as the drafting progresses.

2.5 It is not necessary to send a copy of the bill to this contact merely because it confers power to hold land on the Crown or an emanation of the Crown having Crown status.

### **Queen's or Prince's consent**

2.6 The need for Queen's or Prince's consent for a bill is separate from the issue of Crown application. For example, a bill may apply to the Crown in the sense of applying to government departments but may not need Queen's or Prince's consent because it does not affect the prerogative or interests of Her Majesty.

## CHAPTER 3 OTHER ISSUES

### Partial application clauses

3.1 Questions sometimes arise if:

- a Crown application clause provides expressly for the application of a bill to the Crown in a particular respect and expressly for the bill not to apply in another respect, but
- there are other provisions in respect on which nothing is said.

The issue is what impact this has on the presumption of non-application in respect of these other provisions.

3.2 It seems that the law is reasonably robust on this. In *Lord Advocate v Dumbarton District Council*, Lord Keith of Kinkel said –

“The conclusion that the provisions in question do not bind the Crown is not, in my view, controverted by a consideration of section 146(1) of the Act, which provides in effect that nothing therein shall apply in relation to land belonging to the Crown. The argument is that any such express saving would be unnecessary if the Crown were immune. But, as Lord Du Parc explained in the *Province of Bombay case* [1947] A.C. 58, 65, such saving provisions are commonly inserted *ex abundante cautela*, and are not apt to support the inference that the Crown was in other respects intended to be bound.”<sup>41</sup>

3.3 The point was also dealt with in *Hornsey Urban District Council v Hennell*.<sup>42</sup> In that case, it was argued that, there being certain specified exemptions in the Act under review, those exemptions excluded the presumption of any exemptions other than the specified ones. The argument was rejected by the court citing three earlier cases and “the general doctrine of the immunity of the Crown applied notwithstanding the insertion of an express exemption clause as to certain matters”.

3.4 Conversely, where an Act contained a general saving for the Crown, it was held that this did not prevent a particular enactment within the Act from binding the Crown where it was clearly intended to do so.<sup>43</sup>

3.5 Where express provision is made for one part of an Act to apply to the Crown that may weaken the case for another part of the Act to be read as applying to the Crown by necessary implication. This is illustrated by *R (on the application of Black) v Secretary of State for Justice* in which the Supreme Court decided that Chapter 1 of Part 1 of the Health Act 2006 (the smoking ban) did not apply to the Crown by necessary implication. Lady Hale, in giving the judgment of the Court, noted that the 2006 Act contained express provision for Chapter 1 of Part 3 to apply to the Crown and then concluded that “the fact that where Parliament did mean to [bind the Crown] in this Act, it said so, and made tailored provision accordingly, is to my mind conclusive of the question.”<sup>44</sup>

### Amendments of Acts

3.6 Particular issues relating to Crown application can arise when a bill amends an earlier

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41.[1990] 2 AC 580, 600; [1989] 3 WLR 1346, 1363.

42.[1902] 2 KB 73.

43.*Stewart v River Thames Conservators* [1908] 1 KB 893.

44.See paragraph 50 of Lady Hale’s judgment in *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81.

Act. For example, if the bill and the Act have express Crown application clauses, it is important to ensure that the clauses do not contradict each other so far as they relate to the amendments made by the bill to the Act.

3.7 Alternatively, if the bill is silent on Crown application, it will be necessary to consider whether this leaves the position sufficiently clear in relation to the amendments to the Act. For example, if the intention is for the amendments to bind the Crown, they will only do so if there is a necessary implication to that effect. Such an implication might, for example, be deduced if the Act being amended expressly binds the Crown and the amendments themselves only make sense as part of the provisions being amended. But much will depend upon the particular facts of each case.

3.8 A similar point applies if a bill and an earlier Act are to be construed as if provisions in the bill were contained in that Act.<sup>45</sup>

### **Other members of the Royal Family**

3.9 There is no question of personal immunity from legislation for any member of the Royal Family<sup>46</sup> other than the Sovereign.

### **Other basic privileges and immunities of the Crown**

3.10 Until the enactment of the Crown Proceedings Act 1947, the Crown enjoyed three main privileges and immunities –

- the King can do no wrong;<sup>47</sup>
- the King cannot be sued in his own courts<sup>48</sup>; and
- the presumption that the King is not bound by statutes.

3.11 So far as concerns the civil law, the Crown Proceedings Act 1947 largely obliterated the first two doctrines<sup>49</sup> but it left the third doctrine untouched.

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45. For an example of this see section 168(2) and (5) of the Education and Skills Act 2008.

46. Craies (11th ed., 2017) refers at 11.5.14.5 to the question of construction which arose on section 79(5) of the Marriage Act 1949 (“Nothing in this Act shall affect any law or custom relating to the marriage of members of the Royal Family”).

47. This was a genuine non-waivable substantive immunity. It meant that the King was regarded as incapable of either committing, or authorising the commission of, any tort. He was also immune from criminal liability in relation to common law offences on the same principles supplemented by the twin constitutional rules that the sovereign is deemed to be injured by every public wrong and that prosecutions are therefore brought in the name of the Crown. Immunity from statutory offences is conferred, in the absence of express provision or necessary implication, by the third doctrine.

48. This was a waivable procedural immunity in the nature of a privilege. It derived from the notion that “the King hath no lord but God” and from the feudal principle that a lord could not be sued in his own court. It was tempered by the associated principle that the King was not above the law and that he therefore owed a duty to give redress to his subjects in those cases where redress would be available from a fellow subject. Accordingly, the King could, and generally would, waive his immunity from suit and allow proceedings to go ahead via procedures such as the petition of right.

49. Although not in relation to Her Majesty in her private capacity (including the Duchies of Lancaster and Cornwall). In *M v Home Office* [1993] 3 All ER 537, Lord Templeton said at 540: “The judges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong.”



### Non-Crown bodies and Crown employment

3.12 The Employment Appeal Tribunal found in *Adult Learning Inspectorate and others v Beloff*<sup>50</sup> that the employees of a non-departmental public body that was not a Crown body were nonetheless in Crown employment for the purposes of the Trade Union and Labour Relations (Consolidation) Act 1992.

3.13 In establishing the Inspectorate, the Learning and Skills Act 2000 used standard wording for a statutory body that was not to have Crown status.<sup>51</sup> Despite this, the Tribunal found both limbs of the Crown employment definition in section 273(3) of the 1992 Act to be satisfied. As regards the second limb, the Tribunal was satisfied that a body could carry out functions on behalf of the Crown and yet not be the Crown’s servant or agent, nor enjoy Crown immunity. The judgment raises a question for drafters: should provision for non-Crown status include an express statement that employment by a statutory body is not Crown employment for the purposes of the 1992 Act?<sup>52</sup> The department should be advised to consult the Cabinet Office before such an express statement is included.

### Other relevant case-law

3.14 The House of Lords in *Lord Advocate v Dumbarton District Council* rejected an argument that the presumption of Crown immunity only applies if an Act prejudicially affects the Crown by divesting it of some of its existing rights, interests or privileges (or, put another way, interferes with the Crown’s lawful freedom of action).

3.15 The House of Lords, in rejecting this argument, felt that any investigation of prejudice could be a “difficult and inconvenient process” and that a statute must, in the absence of some particular provision to the contrary, bind the Crown either generally or not at all. It felt that, where the Crown is not expressly bound, there is no room at all for the view that it is not bound by necessary implication when acting within its rights but is so bound when acting without any right. It also felt that it was illogical for the application of a statute to the Crown to depend not upon the terms of the statute but upon extraneous matters, i.e. the relevant common law rights of the Crown at the time.

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50.EAT/0238/07 (30/01/08).

51.Paragraph 16 of Schedule 6 to the Learning and Skills Act 2000 (repealed).

52.For an example of an express statement to this effect, see paragraph 14(4) of Schedule 7 to the Energy Act 2013.

## CHAPTER 4 EXAMPLES OF CROWN APPLICATION CLAUSES

### “This Act binds the Crown”

#### *General*

4.1 Some Acts simply state, without exception, that they bind the Crown. For example, section 31 of the Business Rate Supplements Act 2009 reads –

“This Act binds the Crown.”

4.2 Similar examples include –

- section 64(3) of the Marine and Coastal Access Act 2009,
- sections 41, 53 and 65 of the Energy Act 2011,
- section 105 of the Localism Act 2011, and
- section 209(1) of the Data Protection Act 2018.

4.3 This is the general catch-all expression which catches the Crown in all its aspects.

4.4 It embraces:

- the Sovereign in person,
- all Crown servants<sup>53</sup> and other emanations of the Crown,
- land and other property held by government departments and by the Sovereign in right of the Crown and in her private capacity,
- land and other property held in right of the Duchy of Lancaster<sup>54</sup>, and
- lands of the Duchy of Cornwall<sup>55</sup>.

4.5 However, the starting point is that a reference to the Crown does not catch the Crown in right of an overseas territory or a Commonwealth government unless the context suggests otherwise. But, if an Act extends to an overseas territory, the ambit of “the Crown” in relation to the Act will include the Crown in right of the government of that territory.<sup>56</sup>

4.6 A reference to the Crown is wide enough to catch the Crown in right of the Scottish Administration and other devolved administrations as well as the Crown in right of Her Majesty’s government in the United Kingdom but it will be a matter of construction in each case whether this extended meaning is relevant and applicable.

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53.Compare section 50(4) of the Violent Crime Reduction Act 2006 which provides that “section 35 binds persons in the service of Her Majesty” and then defines, for particular purposes, when a person is in such service.

54.The presumption that an Act does not bind the Crown extends to the Crown in right of the Duchy of Lancaster: *A.G. of Duchy of Lancaster v Moresby* [1919] W.N. 69. Note that a reference to anything done “by or on behalf of the Crown” is likely to include anything done by or on behalf of the Duchy of Lancaster even if the same Crown application clause elsewhere distinguishes between land belonging to the Sovereign in right of the Crown and land belonging to the Sovereign in right of the Duchy of Lancaster.

55.Such lands are, in the absence of express provision or necessary implication, likely to be exempt from the application of statute because of the Crown’s interest in them (see *Craies* (11th ed., 2017) 11.5.25). However, if the provisions of a bill bind the Crown, they will also catch the Crown’s interest in the Duchy lands and so also bring the Duchy lands within their ambit.

56.See, for example, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] 2 All ER 118 (CA) and *R (on the application of Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 3 All ER 111 (HL).

*Exception for Her Majesty in her private capacity*

4.7 It is fairly common to see an exception from a general statement that an Act binds the Crown for Her Majesty in her private capacity. See, for example, section 96(1) of the Health and Social Care Act 2008 –

“(1) Any provision made by or under Chapter 2 or 3 or this Chapter binds the Crown, but does not affect Her Majesty in her private capacity.”

4.8 Section 96(2)(b) of that Act provides that subsection (1) “is to be read as if section 38(3) of the Crown Proceedings Act 1947 (references to Her Majesty in her private capacity) were contained in this Act.” Section 38(3) of the 1947 Act provides that any reference to His Majesty in his private capacity includes a reference to His Majesty in right of His Duchy of Lancaster and to the Duke of Cornwall.

4.9 Other examples of this type of exception include –

- section 32(1), (5) and (6) of the Cluster Munitions (Prohibitions) Act 2010,
- section 44(1), (4) and (5) of the Terrorist Asset-Freezing etc. Act 2010,
- section 138(4) of the Police Reform and Social Responsibility Act 2011, and
- section 52(3) of the Sanctions and Anti-Money Laundering Act 2018.

*Exception for criminal offences*

4.10 “This Act binds the Crown” appears to make the Crown criminally liable in all its manifestations, including government Ministers or Crown servants and whether acting in the course of their official duties or not.

4.11 The result is that often there will be an exception for criminal offences committed by some or all aspects of the Crown (the unique position of Her Majesty is discussed below).

4.12 For example, section 32(1) to (3) of the Cluster Munitions (Prohibitions) Act 2010 reads –

- “(1) This Act binds the Crown.
- (2) No contravention by the Crown of a provision of this Act makes the Crown criminally liable.
- (3) Subsection (2) does not affect the criminal liability of persons in the service of the Crown.”

4.13 This section appears to absolve the Crown itself from criminal liability but to ensure that persons in the service of the Crown can be criminally liable (whether acting in the course of their official duties or not).

4.14 It seems that “persons in the service of the Crown” will include Ministers<sup>57</sup> as well as their civil servants. It will also include other persons such as members of the armed forces.

4.15 As a matter of drafting, it might be thought to be unsatisfactory that the exception in subsection (2) includes so much less than the exception in subsection (3) to that exception. However, the alternative would be to try to spell out the residual exception in subsection (2) once everyone caught by subsection (3) has been removed from it. This would be difficult to achieve and would involve mentioning Her Majesty expressly.

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<sup>57</sup>In *Bank voor Handel en Scheepvaart, NV v Administrator of Hungarian Property*, the House of Lords made it clear that Ministers of the Crown were servants of the Crown (see, for example, (1954) All ER, Vol 1, 969 at 981-2).

4.16 For a slightly different approach see, for example, section 122 of the Health and Social Care Act 2008 –

- “(1) Sections 120 and 121 bind the Crown.
- (2) No contravention by the Crown of any provision of either of those sections or regulations made under them makes the Crown criminally liable..
- (3) The provisions of those sections apply to persons in the service of the Crown as they apply to other persons.”

4.17 For further examples, see –

- section 60 of the Commons Act 2006, and
- sections 111(1) to (3), 185(1) to (3) and 295(1) to (3) of the Marine and Coastal Access Act 2009.

4.18 The approach in section 209(6)(c) of the Data Protection Act 2018 is to specify certain provisions of that Act under which persons in the service of the Crown are liable to prosecution.

4.19 Some Acts also provide for a declaration of unlawfulness in relation to any contravention by the Crown. See, for example, section 295(2) of the Marine and Coastal Access Act 2009 –

- “(2) No contravention by the Crown of any provision of Chapter 5 is to make the Crown criminally liable; but the High Court or, in Scotland, the Court of Session may declare unlawful any act or omission of the Crown which constitutes such a contravention.”

4.20 Sometimes, an Act will state who may make an application for a declaration of unlawfulness. See, for example –

- section 91(4) of the Pensions Act 2008, and
- section 111(2) of the Marine and Coastal Access Act 2009.

4.21 Where an Act is otherwise applied to the Crown, there are many examples of an express exception which has the effect (often along with other effects) of protecting Her Majesty from criminal prosecution. However, the Sovereign is in any event personally immune from criminal prosecution.<sup>58</sup>

#### *Other exceptions*

4.22 Numerous other exceptions are possible from the general statement that an Act binds the Crown.

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<sup>58</sup>Craies (11th ed., 2017) notes at 11.5.15 that “The reason why the Sovereign cannot personally be prosecuted for a criminal offence is now generally agreed to be simply that there is no court in which to try him, his own courts being incompetent to do so.”

4.23 Examples include –

- a power of the Secretary of State to certify in the interests of national security that powers of entry are not exercisable in relation to Crown land;<sup>59</sup>
- powers in respect of certain Crown land to be exercisable only with the consent of an appropriate authority;<sup>60</sup>
- an exception for a power of entry in relation to any motor vehicle in the public service of the Crown;<sup>61</sup>
- an exception for any penalty under the Act;<sup>62</sup>
- an exception for a particular penalty under the Act;<sup>63</sup>
- an exception for anything done on, or in relation to any use of, premises occupied (temporarily or permanently) by Her Majesty’s naval forces, military forces or air forces;<sup>64</sup> or
- an exception for a land transaction under which the purchaser is a Minister of the Crown etc.<sup>65</sup>

*Expansion of the expression*

4.24 It is far less common to find an Act that seeks to expand upon the meaning of the expression, “this Act binds the Crown”.

4.25 One expansion that is sometimes found is to provide that the Act “and any provisions made under it” bind the Crown.

4.26 See, for example –

- section 51(1) of the Safeguarding Vulnerable Groups Act 2006,
- section 60(1) of the Animal Welfare Act 2006, and
- section 96(1) of the Health and Social Care Act 2008.

4.27 An example of a provision that proceeds from another direction is section 38(2) of the Food Standards Act 1999 which provides that a statement that the Act binds the Crown “does not require subordinate legislation made under this Act to bind the Crown”. See also section 96(2)(a) of the Health and Social Care Act 2008.

4.28 However, there are also many Acts that expressly state that they bind the Crown but where nothing is said as to what this means for powers to make provision under them. There is therefore no common approach as to whether anything needs to be said in these circumstances and, if so, what.

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59.For examples of this sort of provision, see: section 221(4) of the Water Industry Act 1991; section 60(4) to (6) of the Animal Welfare Act 2006 (this also included an exception in relation to land belonging to Her Majesty in right of Her private estates (as defined in section 60(7))); section 96(5) of the Health and Social Care Act 2008; paragraph 38(4) of Schedule 8 to the Water Act 2014.

60.See section 221(6) of the Water Industry Act 1991, section 73(4) and (5) of the Competition Act 1998 and section 31 of the Neighbourhood Planning Act 2017.

61.See section 196(4) of the Transport Act 2000.

62.See section 73(1)(b) of the Competition Act 1998.

63.An example is section 156(4) of the Data Protection Act 2018. Section 156(4) prevents the Information Commissioner from giving a penalty notice to the Crown Estate Commissioners or a person who is a controller by virtue of section 209(4) - that is, officials of the Royal Household and the Duchies of Lancaster and Cornwall. See also section 153(10)(b) of the Policing and Crime Act 2017.

64.See section 354(2) of the Gambling Act 2005.

65.See section 107(2) of the Finance Act 2003.

## **Application of Acts to different types of land**

### *General*

4.29 Various Acts make provision for their application in relation to different types of Crown land.

4.30 For example, section 57 of the High Speed Rail (London-West Midlands) Act 2017 provides that various powers conferred under the Act may be exercised in relation to “Crown land” and then continues as follows:

“(4) In this Act, “Crown land” means land in which there is –

- (a) an interest belonging to a government department or held in trust for Her Majesty for the purposes of a government department,
- (b) an interest belonging to an office-holder in the Scottish Administration or held in trust for Her Majesty for the purposes of the Scottish Administration by such an office-holder,
- (c) an interest belonging to Her Majesty in right of the Crown, or
- (d) an interest belonging to Her Majesty in right of the Duchy of Lancaster.”

4.31 For other examples see –

- section 138(1) and (2) of the Police Reform and Social Responsibility Act 2011, and
- paragraph 1(1) of Schedule 22 to the Coronavirus Act 2020.

### *Distinguishing the private estates from other Crown land*

4.32 The policy intention may be to apply a bill to Crown land generally, but to treat the private estates differently. The method used for doing this will depend upon the department’s instructions.

4.33 There are two possible methods for treating the private estates differently.

- (1) The first is a method like that in section 154 of the Rent Act 1977 and section 19 of the Party Wall etc Act 1996. This does not apply to Crown land generally, but picks out “interests in right of the Crown”.
- (2) The second is to apply a bill to Crown land generally and then to carve out an exception for the private estates. In that situation, a bill may need to distinguish between the private estates and lands held in right of the Crown. An example of general application with provision distinguishing categories of land appears in the Town and Country Planning Act 1990.

4.34 In the Town and Country Planning Act 1990, section 292A provides for the Act to bind the Crown subject to the provisions of the Part. Section 293 sets out relevant definitions.

“(1) In this Part –

“Crown land” means land in which there is a Crown interest or a Duchy interest;

“Crown interest” means any of the following –

- (a) an interest belonging to Her Majesty in right of the Crown or in right of Her private estates;
- (b) an interest belonging to a government department or held in trust for Her Majesty for the purposes of a government department;
- (c) such other interest as the Secretary of State specifies by order;

“Duchy interest” means an interest belonging to Her Majesty in right of the Duchy

of Lancaster or belonging to the Duchy of Cornwall;

“private interest” means an interest which is neither a Crown interest nor a Duchy interest.

- (2) For the purposes of this Part “the appropriate authority”, in relation to any land –
  - (a) in the case of land belonging to Her Majesty in right of the Crown and forming part of the Crown Estate, means the Crown Estate Commissioners;
  - (b) in relation to any other land belonging to Her Majesty in right of the Crown, means the government department having the management of that land;
  - (ba) in relation to land belonging to Her Majesty in right of Her private estates means a person appointed by Her Majesty in writing under the Royal Sign Manual or, if no such appointment is made, the Secretary of State;
  - (c) in relation to land belonging to Her Majesty in right of the Duchy of Lancaster, means the Chancellor of the Duchy;
  - (d) in relation to land belonging to the Duchy of Cornwall, means such person as the Duke of Cornwall, or the possessor for the time being of the Duchy of Cornwall, appoints;
  - (e) in the case of land belonging to a government department or held in trust for Her Majesty for the purposes of a government department, means that department;
  - (f) in relation to Westminster Hall and the Chapel of St Mary Undercroft, means the Lord Great Chamberlain and the Speakers of the House of Lords and the House of Commons acting jointly;
  - (g) in relation to Her Majesty’s Robing Room in the Palace of Westminster, the adjoining staircase and ante-room and the Royal Gallery, means the Lord Great Chamberlain.
- (2A) For the purposes of an application for planning permission made by or on behalf of the Crown in respect of land which does not belong to the Crown or in respect of which it has no interest a reference to the appropriate authority must be construed as a reference to the person who makes the application.
- (3) If any question arises as to what authority is the appropriate authority in relation to any land, that question shall be referred to the Treasury, whose decision shall be final.
- (3A) References to Her Majesty’s private estates must be construed in accordance with section 1 of the Crown Private Estates Act 1862.
- (3B) In subsection (2A) the Crown includes –
  - (a) the Duchy of Lancaster;
  - (b) the Duchy of Cornwall;
  - (c) a person who is an appropriate authority by virtue of subsection (2)(f) and (g).”

4.35 Similar definitions are used in section 227 of the Planning Act 2008.

*“land in which there is a Crown interest”*

4.36 The meaning of “land in which there is a Crown interest”, in section 293(1) of the Town and Country Planning Act 1990 (before amendment by the 2004 Act), was considered cursorily in *Mid-Devon District Council v First Secretary of State*.<sup>66</sup> The court found that the private owners’ licence to MAFF contractors to carry out works on their land did not amount to such an interest in land.

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66.[2004] EWHC 814 (Admin), [4]-[6].

## **Other examples**

### *Section 22 of the Agriculture (Safety, Health and Welfare Provisions) Act 1956*

4.37 Section 22 of the Agriculture (Safety, Health and Welfare Provisions) Act 1956 reads –  
“22. Sections one, two and six of this Act and regulations under any of those sections shall, in so far as they impose duties failure to comply with which might give rise to a liability in tort, be binding upon the Crown.”

4.38 This therefore does not catch Her Majesty in her private capacity or in her capacity as Duke of Lancaster or Duke of Cornwall (see sections 38(3) and 40(1) of the Crown Proceedings Act 1947).

### *Section 1(2)(b) of the Corporate Manslaughter and Corporate Homicide Act 2007*

4.39 Section 1(2)(b) of and Schedule 1 to the Corporate Manslaughter and Corporate Homicide Act 2007 enable the government departments or bodies listed in that Schedule to be prosecuted for the offence of corporate manslaughter or corporate homicide under section 1 of that Act.

4.40 Section 11 provides that –

- (a) a servant or agent of the Crown is not immune from prosecution under the Act for that reason (subsection (1));
- (b) a department or other body listed in Schedule 1 or a corporation that is a servant or agent of the Crown is to be treated as owing whatever duties of care it would owe if it were a corporation that was not a servant or agent of the Crown (subsection (2)); and
- (c) for the purposes of sections 2 to 7 anything done purportedly by a department or other body listed in Schedule 1, although in law by the Crown or by the holder of a particular office, is to be treated as done by the department or other body itself (subsection (4)).

4.41 The following sections of the Act relating to the section 1 offence may also be of interest: sections 12 (application to armed forces), 17 (DPP’s consent required for proceedings), 18 (no individual liability) and 28(3) (extra-territorial application of section 1 in certain cases).

4.42 For further examples of Crown application provisions, see paragraphs 11.5.14.1 to 1.5.14.5 of Craies (11th ed., 2017). As noted there, the examples illustrate the range of potential complexities of Crown application and the fact that the possible permutations of policy are endless.