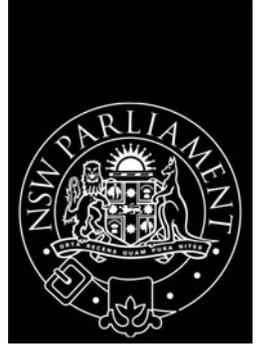


PARLIAMENT OF NEW SOUTH WALES



# Legislation Review Committee

## STRICT AND ABSOLUTE LIABILITY

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Discussion Paper

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## FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

### 8A Functions with respect to bills

- (1) The functions of the Committee with respect to bills are:
  - (a) to consider any bill introduced into Parliament, and
  - (b) to report to both Houses of Parliament as to whether any such bill, by express words or otherwise:
    - (i) trespasses unduly on personal rights and liberties, or
    - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
    - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
    - (iv) inappropriately delegates legislative powers, or
    - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- (2) A House of Parliament may pass a bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

### 9 Functions with respect to regulations:

- (1) The functions of the Committee with respect to regulations are:
  - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
  - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
    - (i) that the regulation trespasses unduly on personal rights and liberties,
    - (ii) that the regulation may have an adverse impact on the business community,
    - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
    - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
    - (v) that the objective of the regulation could have been achieved by alternative and more effective means,
    - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
    - (vii) that the form or intention of the regulation calls for elucidation, or
    - (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
  - (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (2) Further functions of the Committee are:
  - (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
  - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

## EXECUTIVE SUMMARY

### Purpose of the Discussion Paper

The Legislation Review Committee is seeking comment in relation to the principles it should adopt when considering if Bills or Regulations that create offences of strict or absolute liability trespass unduly on personal rights and liberties.

Under sections 8A and 9 of the *Legislation Review Act 1987*, the Committee has repeatedly considered whether particular provisions of Bills and Regulations that create strict or absolute liability offences trespass unduly on personal rights and liberties.

The Committee has taken the view that requiring the prosecutor to prove all elements of an offence, including the intention of the person to do the act, is an essential safeguard for the rights of an accused person, particularly the fundamental right to be presumed innocent. The Committee has routinely referred to the International Covenant on Civil and Political Rights, which requires state parties, of which Australia is one, to protect this right at the national level. However, the Committee has acknowledged that there are circumstances in which strict or absolute liability may be appropriate and may not trespass unduly on personal rights.

To better equip the Committee to inform Parliament of any impact of particular strict or absolute liability offences on personal rights, the Committee is seeking comment on the principles set out below.

### Questions for comment

**The Committee seeks comment on the following principles it proposes to adopt in its consideration of strict and absolute liability offences:**

- (a) Principles in relation to strict or absolute liability:
  - (i) fault liability is one of the most fundamental protections of the criminal law and to exclude this protection is a serious matter and should only ever be done if there are sound and compelling public interest justifications for doing so;
  - (ii) strict and absolute liability should not be used merely for administrative convenience;
  - (iii) defences, such as due diligence, that take account of circumstances in which punishment for the prohibited conduct would be inappropriate should be available;
  - (iv) legislation creating strict and absolute liability offences should expressly provide that any other defences remain available;
  - (v) strict and absolute liability offences should be applied only where the penalty does not include imprisonment;
  - (vi) monetary penalties should be assessed on a case by case basis and having regard to the lack of fault of the person punished and the legislative objective;

- (vii) strict and absolute liability offences should be of a regulatory nature (eg, public safety or protection of the environment), not serious criminal offences;
  - (viii) as a general rule, strict and absolute liability should be provided by primary legislation, with regulations used only for genuine administrative detail;
  - (ix) strict and absolute liability should depend as far as possible on the actions or lack of action of those who are actually liable for an offence, rather than be imposed on parties who must by necessity rely on information from third parties; and
  - (x) the intention to impose strict or absolute liability should be explicit.
- (b) Additional principles in relation to absolute liability:
- (i) the size of monetary penalty should reflect the fact that liability is imposed regardless of any mistake of fact;
  - (ii) absolute liability may be acceptable where an element is essentially a precondition of an offence and the state of mind of the offender is not relevant; such cases should be rare and carefully considered;
  - (iii) absolute liability offences may be acceptable where inadvertent errors, including those based on a mistake of fact, ought to be punished.

**The Committee especially seeks comment on whether there should be a cap on monetary penalties for strict and absolute liability offences and if so, what that cap should be.**

## **Address for Submissions**

Submissions should be sent to:

Chairman  
Legislation Review Committee  
Parliament of New South Wales  
Macquarie Street  
Sydney NSW 2000

Alternatively, submissions can be made on-line by following the links at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au).

The closing date for submissions is **14 August 2006**.

## Chapter One – Introduction

1. The Legislation Review Committee is seeking comment on the principles it should apply when considering if Bills or Regulations that create offences of strict or absolute liability trespass unduly on personal rights and liberties.
2. Under sections 8A and 9 of the *Legislation Review Act 1987*, the Committee has repeatedly considered whether particular provisions of Bills and Regulations that create strict or absolute liability offences:
  - (i) trespass unduly on personal rights and liberties.
3. In the year 2004-05, the creation of strict liability offences was the third most common issue identified by the Committee. Absolute liability offences are considerably less common.
4. The Committee's concern with strict and absolute liability offences stems from the fact that such offences require a prosecuting authority to show *only* that the alleged act took place and not that the person concerned intended to do the act. They displace the common law presumption that the prosecutor must prove *mens rea* or a guilty mind.
5. The Committee has taken the view that requiring the prosecutor to prove all elements of an offence, including the intention of the person to do the act, is an essential safeguard for the rights of an accused person, particularly the fundamental right to be presumed innocent. The Committee has routinely referred to the International Covenant on Civil and Political Rights, which requires state parties, of which Australia is one, to protect this right at the national level. However, the Committee has acknowledged that there are circumstances in which strict or absolute liability may be appropriate and may not trespass unduly on personal rights.
6. The Committee notes that there have been two recent and significant inquiries into strict and absolute liability offences:
  - (1) Senate Standing Committee on Scrutiny of Bills Report, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation 2002*;<sup>1</sup> and
  - (2) Australian Law Reform Commission, Report 95: *Principled Regulation, Federal Civil and Administrative Penalties in Australia 2002*, in which the ALRC considered strict and absolute liability offences as part of its broader inquiry into penalties in Australia.<sup>2</sup>
7. The Senate Committee reported on 26 June 2002 in its Sixth Report of 2002 after consideration of the 12 submissions it received.<sup>3</sup> The Senate Committee considered both the merits and problems of strict liability, set down some

<sup>1</sup> Available at <http://www.aph.gov.au/senate/committee/scrutiny/bills/2002/b06.pdf>. An extract of Chapter 4 of the Report, *Principles and Recommendations*, is attached as Appendix 1.

<sup>2</sup> Available at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>

<sup>3</sup> The Senate Committee noted that the ALRC Discussion Paper on federal penalties was issued in May 2002, but the Committee was not able to consider the Discussion Paper in any detail. However, it noted that the relevant proposals in that paper, such as those addressing fairness, accountability and infringement notices, are similar to the conclusions it reached.

principles for the use of strict liability and made a number of recommendations in relation to its future use.

8. To some extent, the Committee has applied the recommendations made by the Senate Committee in its consideration of strict and absolute liability offences in NSW legislation.
9. This paper briefly outlines the issues relating to the use of strict and absolute liability offences, including applicable law, approaches taken by the Committee and in other Australian jurisdictions, the recommendations made by the two reports referred to above and sets out proposed general principles for the Committee when reviewing strict liability offences.

## Chapter Two – What is Strict Liability?

10. Under Australian law, crimes are generally considered to have two aspects, a physical aspect (*actus reus*) and a mental aspect (*mens rea*).

11. The ALRC reported:

The physical elements of an offence can include an act, omission or state of affairs. A 'state of affairs' can include, for example, possession of stolen goods.

The fault element [*mens rea*] is the accused's state of mind in relation to an offence that must be proved for guilt to attach. As the state of mind is inextricably linked to the act itself, the mental element means different things in relation to different crimes. Different fault elements are required for different types of offences, generally based on intention, knowledge, recklessness, or awareness of a particular circumstance or an act's consequence or result.

*Intent* is the most commonly understood mental element. A person's intention may be to undertake an act... or an intention to bring about a consequence...<sup>4</sup>

### Offences that require proof of mental element (*mens rea* offences)

12. At common law there is a presumption that a prosecutor must show that an accused person had the requisite criminal intent to commit the offence. This presumption is a fundamental principle of our criminal justice system.

13. According to the ALRC:

The requirement of a mental element is considered a hallmark of our criminal justice system. It is an overarching principle of criminal law that doing a forbidden act should not of itself render a person guilty of a crime; it must also be shown that the person had a guilty mind. (*Sherra v De Rutzen* [1895] 1 QB 918 at p921 quoted in *He Kaw Teh*.)

14. However, this presumption may be, and frequently is, displaced by statute, either expressly or by implication, creating strict or absolute liability offences.

### Strict Liability Offences

15. According to the Commonwealth Standing Committee on the Scrutiny of Bills:

An offence is one of strict liability where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. In other words, someone is held to be legally liable for their conduct irrespective of their moral responsibility. A person charged with a strict liability offence has recourse to a defence of mistake of fact.<sup>5</sup>

16. In those cases in which fault elements are not specified, it will be a matter of statutory interpretation as to whether the offences are *mens rea* offences or offences of strict liability. Note however that the Commonwealth *Criminal*

<sup>4</sup> Australian Law Reform Commission Report No 95, *Principled Regulation*, at paras 4.8-4.12.

<sup>5</sup> Senate Standing Committee for the Scrutiny of Bills, *Report of the Work of the Committee during the 39<sup>th</sup> Parliament*, at para 2.97.

*Code Act 1995*, which NSW has not adopted, requires that a law that creates a strict or absolute liability offence must so expressly provide.<sup>6</sup>

17. The High Court, in the case of *He Kaw Teh*<sup>7</sup>, set out the following four factors for determining whether or not the presumption of fault has been displaced:
- 1) The language of the section creating the offence, for instance, if the section creating the offence uses words such as “knowingly” or “dishonestly” or “willfully”, it would be difficult to show that the presumption of subjective fault is displaced.<sup>8</sup>
  - 2) The subject matter of the statute. If prohibited acts “are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty”<sup>9</sup> then it is likely that the presumption of subjective fault will be displaced.
  - 3) The consequences for the community of the offence.
  - 4) The potential consequences for the accused, if convicted. In general, the more serious the potential consequences for the accused on conviction, the less likely it is that the presumption of subjective fault will be displaced. In *He Kaw Teh* the High Court held that the severe penal provisions relating to the importation and possession of heroin enforced the presumption that subjective fault was required and should not be displaced. If on the other hand the potential consequences to the accused involve a financial penalty, it is likely that the presumption of subjective fault will be displaced.<sup>10</sup>

## **Absolute Liability Offences**

18. Strict liability can be contrasted with absolute liability by the availability or otherwise of the defence of mistake of fact. If the defence is excluded, either expressly or by implication, then the offence may be an “absolute liability” offence.<sup>11</sup>
19. Because of the harshness of holding a person criminally responsible in the absence of any fault on his or her part, courts have generally been reluctant to categorise offences as absolute liability in the absence of a clear legislative intention. Before deciding that an offence is one of absolute liability, the courts may consider whether any purpose will be served by characterising the offence as one of absolute liability which could just as effectively be served by characterising the offence as one of strict liability.<sup>12</sup>

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<sup>6</sup> See section 5.6, *Commonwealth Criminal Code Act 1995*. The Code also defines strict and absolute liability, see section 6.

<sup>7</sup> *He Kaw Teh v The Queen* [1985] HCA 43, in particular see judgement of Gibbs CJ. This case concerned drug importation offences with penalties involving lengthy imprisonment.

<sup>8</sup> This explanation is from Bronitt, S. and McSherry, B. *Principles of Criminal Law*, LBC Information Services, Sydney 2001, p.190.

<sup>9</sup> Gibbs CJ in *He Kaw Teh* quoting from *Sherra v De Rutzen* [1895] 1 QB 918.

<sup>10</sup> This explanation is from Bronitt, S. and McSherry, B. *Principles of Criminal Law*, LBC Information Services, Sydney, 2001, p.191.

<sup>11</sup> However, other common law defences, other than due diligence, may be available (eg, duress & self defence).

<sup>12</sup> Bronitt, S. and McSherry, B. *Principles of Criminal Law*, LBC Information Services, Sydney 2001, p.191-2.

20. However, the courts have held certain offences dealing with the regulation of “social or industrial conditions or protecting revenue as imposing absolute liability”<sup>13</sup>.

### **Mistake of fact defence**

21. Under NSW law, unless there is provision in legislation to the contrary, the common law defence of mistake of fact is available for strict liability offences.<sup>14</sup> This defence allows an accused to raise “an honest and reasonable belief in a state of facts, which, if they existed, would render the act innocent”.<sup>15</sup> The defence has a number of components:
- there must be a mistake and not mere ignorance;<sup>16</sup>
  - the mistake must be one of fact and not law;<sup>17</sup>
  - the mistake must be honest and reasonable;<sup>18</sup> and
  - the mistake must render the accused’s act innocent.<sup>19</sup>
22. If the accused satisfies an evidential burden (ie, the defendant points to evidence that suggests a reasonable possibility that the matter exists or does not exist) needed to make out the defence, the prosecution must prove beyond reasonable doubt that the accused did not have a reasonable belief in the facts asserted.<sup>20</sup>

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<sup>13</sup> Ibid, p.191.

<sup>14</sup> NB other common law defences, other than due diligence, may also be available, for example, duress & self-defence.

<sup>15</sup> Bronitt, S. and McSherry, B. *Principles of Criminal Law*, LBC Information Services, Sydney 2001, p. 191. See also *Proudman v Dayman* (1941) 67 CLR 536.

<sup>16</sup> A mistake of fact can only be made where the accused has turned his or her mind to the relevant facts - See S. Bronitt & B. McSherry, *Principles of Criminal Law*, LBC Information Services 2001, p. 191 and *State Rail Authority (NSW) v Hunter Water Board* (1992) 28 NSWLR 721.

<sup>17</sup> *He Kaw Teh v The Queen* (1985) 157 CLR 523.

<sup>18</sup> *Proudman v Dayman* (1941) 67 CLR 536 and *He Kaw Teh v The Queen* (1985) 157 CLR

<sup>19</sup> *Proudman v Dayman* (1941) 67 CLR 536 at 540 as per Dixon J.

<sup>20</sup> *He Kaw Teh v The Queen* (1985) 157 CLR 523.

## Chapter Three – When are Strict and Absolute Liability Offences Used?

23. Typically, strict and absolute liability are applied to offences of a regulatory nature and where it is particularly important to maximise compliance (eg, public safety or protection of the environment).<sup>21</sup>
24. In its submission to the Senate inquiry, the Federal Attorney-General's Department stated that strict liability has been used in the following cases:
- regulatory offences, particularly those which relate to the environment or public health;
  - where it is difficult for the prosecution to prove a fault element because a matter is peculiarly within the knowledge of the defendant; and
  - to overcome the knowledge of law problem, where an element of the offence expressly incorporates a reference to a legislative provision.<sup>22</sup>
25. Situations in which strict liability is considered justified were set out in evidence given to the Senate Committee for the Scrutiny of Bills in its inquiry, including "greater efficacy in the supervision of regulatory schemes",<sup>23</sup> overcoming "inability to prosecute effectively" in certain circumstances<sup>24</sup> and to enable "matters to be dealt with expeditiously where this is necessary to ensure public confidence in the regulatory regime".<sup>25</sup>
26. However, in its submission to the Senate Committee, the Law Council of Australia submitted that "strict liability was a blunt instrument" and
- ... was acceptable only for offences which are readily understood and easily proven and where failure to comply is obvious, unacceptable and deserving of punishment. Speeding and parking offences are instances of the appropriate application of strict liability.<sup>26</sup>
27. Absolute liability is used for certain regulatory offences in which it is necessary for individuals engaged in potentially hazardous or harmful activity to exercise extreme, and not merely reasonable, care. Such offences as exceeding 60 kilometres per hour in a 60 kilometre zone, causing pollution to waters, selling alcohol to underage persons, refusing or failing to submit to breath testing and

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<sup>21</sup> See for example, the Committee's comments on the *Surveying Amendment Bill 2005* (Digest No 7 of 2005) in which strict liability is imposed for unlawful disclosure of information obtained in the course of administering the Act; *Gaming Machines Amendment Bill 2005* (Digest No 8 of 2005) in which strict liability is imposed to ensure hoteliers, registered clubs, technicians and casinos comply with their obligations under the legislation; and *Fisheries Management Amendment Bill 2006* (Digest No 2 of 2006) relating to the failure of a person to comply with conditions of a licence or make certain records as required under the legislation.

<sup>22</sup> Senate Standing Committee on the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences*, 26 June 2002.

<sup>23</sup> *Ibid*, submissions from Australian Prudential Regulation Authority (APRA), Australian Securities and Investment Commission (ASIC), Department of Defence, and Environment Australia, pp.263 – 269.

<sup>24</sup> *Ibid*, see submissions from ASIC and APRA, p. 265.

<sup>25</sup> *Ibid*, see submissions from Environment Australia, Department of Education, Training and Youth Affairs, Australian Customs Service and ASIC, p. 266.

<sup>26</sup> *Ibid* at p 273.

publishing a name in breach of a suppression order. In these cases, the courts accepted that the benefits to the community overrode any potential negative impact on the accused person.

## Chapter Four – Personal Rights and Strict and Absolute Liability

### **Strict and absolute liability offences: A trespass on human rights?**

28. The Committee's concern with strict and absolute liability offences stems from the fact that they displace the common law rule that the prosecutor must prove that the offender intended to commit the offence. Sometimes, this is expressed as being contrary to the fundamental right to be presumed innocent until proved guilty, as the person concerned is presumed to have committed the offence if they committed the act that constitutes the offence regardless of their intention to do so.
29. Article 14(2) of the International Covenant on Civil and Political Rights sets out this fundamental human right:
- Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
30. Although the Committee considers that there may be appropriate circumstances in which to impose strict or absolute liability, the Committee is of the view that, given the potential to trespass on this fundamental right, they should only be imposed "after careful consideration on a case by-case basis of all available options"<sup>27</sup> and taking into account the potential for a serious trespass on a person's fundamental rights.

### **Penalties**

31. The consequences to the accused if convicted is one factor considered by the courts in determining if an offence is one of strict or absolute liability in which the presumption of fault has been displaced.<sup>28</sup> The more serious the consequences, the less likely a court will find that the presumption of fault has been displaced.<sup>29</sup>
32. Further, the extent to which strict or absolute liability offences trespass on rights is linked to the penalty imposed. The Committee has repeatedly commented that, like the Senate Committee and the Federal Attorney-General's Departmental guidelines, it considers imprisonment to be an inappropriate penalty for an offence of which a person may be guilty without intending to commit the offence.
33. The right to liberty is a fundamental right (see for example ICCPR Article 9) that should only be abrogated if there are compelling public interest reasons for doing so. It is clear that depriving a person of liberty where they have been found guilty beyond reasonable doubt of certain serious crimes can be justifiable. However, imprisoning a person for an offence that they did not intend to commit is not and it violates this most fundamental human right.

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<sup>27</sup> Ibid at p. 283.

<sup>28</sup> Bronnitt, S. & McSherry, B. *Principles of Criminal Law*, LBC Information Services, Sydney 2001, at pp. 190-191.

<sup>29</sup> Ibid. See also *He Kaw Teh*, at 157.

34. The Attorney-General's Departmental Guidelines and the Senate Committee have indicated that very high monetary penalties may be inappropriate for strict, and especially for absolute, liability offences. Both have stated that monetary penalties for individuals should not exceed 60 penalty units (currently \$6,600) for strict liability offences. In relation to absolute liability offences, Attorney-General's Departmental Guidelines provide for a maximum of 10 penalty units (\$1,100).
35. However, in the case of strict liability offences, the Committee has taken the view that in some circumstances higher penalties may be appropriate. An example of this might be an offence that would have very serious public health or safety consequences, such as polluting waterways<sup>30</sup> and where a higher penalty is needed as a disincentive for committing the offending behaviour. It may be more appropriate to assess the appropriateness or otherwise of a monetary penalty for a strict liability offence on a case by case basis rather than adopt an arbitrary cap.

### **Defences to strict and absolute liability offences**

36. A trespass on rights resulting from the operation of strict or absolute liability offences may be mitigated if appropriate defences are available. This is a view also held by some agencies that made submissions to the Senate Committee's inquiry. That Committee quoted from one such submission in its Report:

[T]he general defence of mistake of fact for strict liability offences, which needs to be proved by the accused only on the balance of probability, addresses many of the concerns which might otherwise exist about the fairness of strict liability.<sup>31</sup>

37. Another witness giving evidence to the Senate Committee stated:

when considering whether a particular offence should be strict liability, we seek to set a balance between public interest and the rights and obligations of individuals. Most of the strict liability offence provisions in the act [sic] include a range of additional statutory exemptions aimed at ensuring they do not operate unduly harshly in day-to-day practical circumstances. Obviously these exemptions are in addition to the mistake of fact defence that is available for strict liability.<sup>32</sup>

38. The Committee has also commented on the importance of the availability of defences in its consideration of whether particular strict liability offences unduly trespass on a person's rights. In particular, the common law defence of mistake of fact should not be excluded and other defences that take account of circumstances in which punishment for the conduct would be inappropriate, such as due diligence, should also be available. A person should not be punished for a strict liability offence if there are exonerating circumstances in which punishment would not serve the objective of the legislation.

<sup>30</sup> See Legislation Review Committee's report on the *Protection of the Environment (Operations) Amendment Bill 2005*, Digest No. 10 of 2005.

<sup>31</sup> Senate Standing Committee on the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences*, 26 June 2002, p.267.

<sup>32</sup> Witness from Environment Australia, Senate Report at p. 267.

## Chapter Five – Legislation Review Committee’s Approach

39. The Committee acknowledges that there are circumstances in which it may be appropriate to create strict liability offences. Nonetheless, it considers the protection of the fundamental right to be presumed innocent to be so important that it ought not to be derogated from unless there are highly compelling public interest grounds for doing so.
40. In considering whether bills or regulations that appear to create an offence of strict or absolute liability trespass unduly on personal rights, the Committee tries to balance the community impact of the offence with the impact of strict or absolute liability on an accused person, including the penalty to which they would be exposed and the availability of any defences or safeguards. The Committee then considers if, on balance, the application of strict or absolute liability trespasses on personal rights and if so, whether that trespass is “undue”.
41. The Committee has considered a number of bills that imposed strict or absolute liability for so-called regulatory offences, about which it questioned whether the potential impact on an accused person was justified. The Committee’s concern with these offences was largely because they were punishable by imprisonment or very high monetary penalties, including up to \$1 million in one case.<sup>33</sup> For example, the *Companion Animals Amendment Bill 2005* imposed high monetary penalties and terms of imprisonment.<sup>34</sup> Similarly, the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005* imposed terms of imprisonment for a number of strict liability offences.<sup>35</sup> In these instances, the Committee raised serious concerns about imposing terms of imprisonment for strict liability offences.
42. The Committee has also commented on bills where strict liability was found not to unduly trespass on personal rights. In these cases, the Committee found that the public interest in ensuring that persons take all reasonable steps to avoid the offence, and the need to ensure the integrity of the regulatory regime, outweighed any trespass on rights of the individual.<sup>36</sup> In such cases, the level of penalties was an important factor in determining whether the two competing interests were appropriately balanced.
43. The Committee’s consideration of absolute liability has been infrequent, although the Committee has considered two examples of road transport

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<sup>33</sup> See for example, the Committee’s reports on the *Protection of Agriculture (Right to Farm) Bill 2005*, Digest No. 4 of 2005 and *State Revenue Legislation Amendment Bill*, Digest No. 8 of 2005, both of which create strict liability offences with penalties of up to \$11,000 for individuals; and *Protection of the Environment Operations Bill 2005*, Digest No. 10 of 2005, which creates strict liability offences relating to pollution with maximum monetary penalties for a corporation of \$1 million or \$250,000 for an individual.

<sup>34</sup> *Companion Animals Amendment Bill 2005*, Digest No. 15 of 2005.

<sup>35</sup> *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, Digest No. 15 of 2005.

<sup>36</sup> See for example: *Water Efficiency Labelling and Standards (New South Wales) Bill 2005*, Digest No. 3 of 2005; *Surveying Amendment Bill 2005*, Digest No. 7 of 2005; *Legal Profession Amendment Bill 2005*, Digest No. 8 of 2005.

legislation that appeared to create absolute liability offences by expressly excluding the defence of mistake of fact.<sup>37</sup> In these cases, the Committee considered that the trespass on personal rights was not undue, having regard to the importance of heavy vehicle road safety and the limited maximum penalties for the offence.

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<sup>37</sup> See Digest No. 1 of 2005 - *Road Transport (General) Bill 2004* and *Road Transport Legislation (Speed Limiters) Amendment Bill 2004*.

## Chapter Six – Approaches in Other Jurisdictions

### Commonwealth

44. The Attorney-General's Department's Guidelines on the Application of Strict and Absolute Liability<sup>38</sup> and the terms of the Criminal Code Act clearly set out the policy to be adopted in the Commonwealth. The policy provides that offences should generally require proof of fault, but in those circumstances where strict or absolute liability may be appropriate, express legislative provision that an offence carries absolute or strict liability is required. Penalties should not include imprisonment and are to be restricted to low monetary fines.

### Australian Capital Territory

45. The ACT has adopted the Model Criminal Code<sup>39</sup> and the *Human Rights Act 2005* [HRA]. These Acts have particular application to the use of strict and absolute liability. The *Criminal Code 2002* follows the Commonwealth Code. Sections 23 and 24 define offences of strict and absolute liability in identical terms to sections 5 and 6 of the Commonwealth Code.
46. The *Human Rights Act 2005* relevantly provides for the right to liberty (s.18), the principle of proportionate punishment, which may be located in the right to be free from torture, cruel and degrading treatment (s.10);<sup>40</sup> and the presumption of innocence (s. 22(1)). That Act also provides that human rights "may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society" (s.28). This may allow offences of strict and absolute liability in some circumstances.<sup>41</sup>
47. The ACT Standing Committee on Legal Affairs (exercising the duties of Scrutiny of Bills and Subordinate Legislation Committee) has frequently commented on strict and absolute liability offences. In one of its reports, it stated:
- It is fair to say that the most frequently recurring point of disagreement between the Scrutiny Committee and the Executive ... concerned proposal in bills for offences of strict or absolute liability.<sup>42</sup>
48. On the issue of when it is appropriate to provide for strict or absolute liability, the ACT Committee said that it "has not attempted to spell out a framework according to which it assesses whether it is appropriate to provide for an offence of strict or absolute liability."<sup>43</sup> However, it has asked the ACT Government to set out a general framework for use of strict or absolute liability.

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<sup>38</sup> See Appendix 2.

<sup>39</sup> Criminal Code 2002 (ACT).

<sup>40</sup> See ACT Committee, Scrutiny Report No. 2 of 2005, p. 10. This Report is available at <http://www.legassembly.act.gov.au/committees/reports/6scrutiny02.pdf>

<sup>41</sup> The ACT Committee has commented on strict and absolute liability offences and the Human Rights Act, as well as the approach taken in other jurisdictions with bills of rights (eg, Canada and New Zealand). This discussion is in Scrutiny Report No. 38 of 2003, pp.1-16. This Report is available at <http://www.legassembly.act.gov.au/committees/reports/Scrutiny38.pdf>

<sup>42</sup> ACT Committee, Scrutiny Report No 2 of 2005, p. 10.

<sup>43</sup> Ibid, p.8

It has also proposed that the Explanatory Statement for a bill that creates strict or absolute liability offences address why strict or absolute liability is required, and which defences are available (in addition to mistake of fact).<sup>44</sup>

49. In response, the ACT Attorney General gave a statement of general approach on the matter. This was reported in the ACT Committee's Scrutiny Report No 2 of 2005.<sup>45</sup>

Offences incorporating strict liability elements are carefully considered when developing legislation and generally arise in a regulatory context where for reasons such as public safety or protection of the public revenue, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties.

In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale is that professionals engaged in [the matter being regulated] as a business, as opposed to members of the general public, can be expected to be aware of their duties and obligations.

... The penalties for offences cast in these terms are lower than for those requiring proof of fault.<sup>46</sup>

50. In relation to penalties for strict and absolute liability offences, the ACT Committee has commented that:

The Committee has a particular concern with offences of strict or absolute liability in respect of which imprisonment is a possible punishment, and has suggested that such clauses may be found to be incompatible with the [Human Rights Act].<sup>47</sup>

## Victoria

51. The Victorian Scrutiny of Acts and Regulations Committee has commented on strict liability offences in proposed legislation in its Alert Digests. In determining if a strict liability offence is justified, the Victorian Committee has considered similar issues to those that are set out in the Federal Attorney-General's Department's Guidelines, including whether the offence is regulatory in nature or where it is difficult for the prosecution to prove a fault element because a matter is peculiarly within the knowledge of the defendant. It has also considered whether an appropriate defence, such as mistake of fact, and standard of proof for that defence (ie, on the balance of probabilities) are available.<sup>48</sup>
52. Note that the Victorian Government has introduced into Parliament a *Charter of Human Rights and Responsibilities Bill 2006*<sup>49</sup> on 4 May 2006. This Bill is

<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> Ibid. For a response by the ACT Committee to this comment, see ACT Committee Scrutiny Report No 2 of 2005, pp. 9-10.

<sup>47</sup> Ibid

<sup>48</sup> See for example, Victorian Scrutiny of Acts and Regulations Committee, Alert Digest No 10 of 2005, at p. 14.

<sup>49</sup> Available online at <http://www.dms.dpc.vic.gov.au/>

very similar to the ACT *Human Rights Act* and, therefore, if passed is likely to raise the same issues referred to above in relation to the ACT HRA.

## Chapter Seven – Proposed Principles

53. The Committee is not aware of the NSW Government, or any government agency, having adopted any guidelines or policies on the use of strict or absolute liability in offences under NSW legislation.
54. In the absence of any such guidelines or policies, the Committee has applied the general view of the Senate Committee that, “the supposed merits of strict liability and criteria for its application should be subject to strong safeguards and protections for those affected”.<sup>50</sup> Further, that they should also be administered fairly, to provide maximum protection for those affected.
55. The Committee has also applied some of the specific findings and recommendations made by the Senate Committee and some of the Federal Attorney-General’s Department’s guidelines on the use of such offences. These findings and recommendations, and the guidelines, are set out in Appendix 1 and Appendix 2 respectively.

### Questions for Comment

**56. The Committee seeks comment on the following principles it proposes to adopt in its consideration of strict and absolute liability offences:**

- (a) Principles in relation to strict or absolute liability:
- (i) fault liability is one of the most fundamental protections of the criminal law and to exclude this protection is a serious matter and should only ever be done if there are sound and compelling public interest justifications for doing so;
  - (ii) strict and absolute liability should not be used merely for administrative convenience;
  - (iii) defences, such as due diligence, that take account of circumstances in which punishment for the prohibited conduct would be inappropriate should be available;
  - (iv) legislation creating strict and absolute liability offences should expressly provide that any other defences remain available;
  - (v) strict and absolute liability offences should be applied only where the penalty does not include imprisonment;
  - (vi) monetary penalties should be assessed on a case by case basis and having regard to the lack of fault of the person punished and the legislative objective;
  - (vii) strict and absolute liability offences should be of a regulatory nature (eg, public safety or protection of the environment), not serious criminal offences;

<sup>50</sup> Senate Standing Committee on the Scrutiny of Bills, Application of Absolute and Strict Liability Offences, 26 June 2002, p. 284.

- (viii) as a general rule, strict and absolute liability should be provided by primary legislation, with regulations used only for genuine administrative detail;
  - (ix) strict and absolute liability should depend as far as possible on the actions or lack of action of those who are actually liable for an offence, rather than be imposed on parties who must by necessity rely on information from third parties; and
  - (x) the intention to impose strict or absolute liability should be explicit.
- (b) Additional principles in relation to absolute liability:
- (iv) the size of monetary penalty should reflect the fact that liability is imposed regardless of any mistake of fact;
  - (v) absolute liability may be acceptable where an element is essentially a precondition of an offence and the state of mind of the offender is not relevant; such cases should be rare and carefully considered;
  - (vi) absolute liability offences may be acceptable where inadvertent errors, including those based on a mistake of fact, ought to be punished.

**57. The Committee especially seeks comment on whether there should be a cap on monetary penalties for strict or absolute liability offences and if so, what that cap should be.**

# Appendix 1

## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

### Report on the Application of Absolute and Strict Liability Offences in Commonwealth Legislation, 2002

The Senate Scrutiny of Bills Committee Report made the following recommendations (amongst others) on the use of strict and absolute liability offences in Commonwealth Law.

#### Chapter 4: Principles and Recommendations

##### Introduction

The Committee has concluded that the following principles and recommendations should be the framework of Commonwealth policy and practice in relation to strict and absolute liability.

##### Basic Principles

The Committee concluded that there were certain basic principles, which should constitute the starting point for Commonwealth policy on strict and absolute liability, as follows:

- fault liability is one of the most fundamental protections of criminal law; to exclude this protection is a serious matter;
- strict liability should be introduced only after careful consideration on a case by-case basis of all available options; it would not be proper to base strict liability on mere administrative convenience or on a rigid formula;
- the Commonwealth *Criminal Code* should continue to provide general principles of criminal responsibility applicable to all Commonwealth offences, with a central provision being section 5.6, which creates a rebuttable presumption that to establish guilt fault must be proven for each physical element of an offence;
- the *Criminal Code* should continue to provide that the presumption that fault must be proven for each element of an offence may be rebutted only by express legislation provision under section 6.1 for strict liability and section 6.2 for absolute liability;
- the general defence of mistake of fact with its lower evidentiary burden is a substantial safeguard for those affected by strict liability; the *Criminal Code* should continue to expressly provide for this defence;
- the *Criminal Code* should continue to expressly provide that strict or absolute liability does not make any other defence unavailable;
- strict liability should, wherever possible, be subject to program specific broadbased defences in circumstances where the contravention appears reasonable, in order to ameliorate any harsh effect; these defences should be in addition to mistake of fact and other defences in the *Criminal Code*;
- strict liability offences should, if possible, be applied only where there appears to be general public support and acceptance both for the measure and the penalty; and
- strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units (\$6,600 for an individual and \$33,000 for a body corporate) appears to be a reasonable maximum.

### **Merits of Strict Liability and Criteria for its Application**

The Committee concluded that the supposed merits of strict liability and criteria for its application should be subject to strong safeguards and protections for those affected. The principles governing such protection are set out later in this Chapter. It should be noted, however, that the Committee has included qualifications on some of the following principles relating to merits of strict liability identified by Commonwealth agencies:

- strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation; as with other criteria, however, this should be applied subject to other relevant principles;
- strict liability should not be justified by reference to broad uncertain criteria such as offences being intuitively against community interests or for the public good; criteria should be more specific;
- strict liability may be appropriate where its application is necessary to protect the general revenue;
- strict liability should not be justified on the sole ground of minimising resource requirements; cost saving alone would normally not be sufficient, although it may be relevant together with other criteria;
- strict liability may be appropriate where it has proved difficult to prosecute fault provisions, particularly those involving intent; as with other criteria, however, all the circumstances of each case should be taken into account;
- strict liability may be appropriate to overcome the knowledge of law problem, where a physical element of the offence expressly incorporates a reference to a legislative provision; in such cases the defence of mistake of fact should apply;
- two-tier or parallel offences are acceptable only where the strict liability limb is subject to a lower penalty than the fault limb, and to other appropriate safeguards; in addition, it should be clearly evident that the fault limb alone would not be sufficient to effect the purpose of the provision;
- infringement notices should be used only for strict liability offences and are acceptable subject to the usual safeguards;
- absolute liability offences should be rare and limited to jurisdictional or similar elements of offences; in contrast to the present Commonwealth policy absolute liability should not apply to offences in their entirety in relation to inadvertent errors including those based on a mistake of fact; and
- absolute liability may be acceptable where an element is essentially a precondition of an offence and the state of mind of the offender is not relevant; such cases should be rare and carefully considered.

### **Principles of Protection for those Affected by Strict And Absolute Liability**

The Committee concluded that agencies have not given enough attention to the interests of parties affected by strict and absolute liability. It has, therefore, developed the following principles which should be taken into account when deciding on the need for such offences and the form they will take:

- the process of deciding whether to introduce strict liability for an offence should recognise that this may have adverse effects upon those affected; the legitimate rights of these people should be paramount and take precedence over administrative convenience and perceived cost savings in program administration;

- agencies should acknowledge that there may be areas where existing strict liability offences or the way they are administered may be unfair; in these cases agencies should review the offences under the general coordination of the Attorney-General's Department;
- strict liability should not be implemented for legislative or administrative schemes which are so complex and detailed that breaches are virtually guaranteed regardless of the skill, care and diligence of those affected; any such scheme would be deficient from the viewpoint of sound public administration;
- strict liability offences should be designed to avoid the likelihood that those affected, particularly by the issue of an infringement notice, will pay the lower penalty simply because it is easy and convenient to do so, rather than spend the money and time to pursue what might be a legitimate defence; any agency which encouraged this tendency would be acting improperly;
- strict liability should depend as far as possible on the actions or lack of action of those who are actually liable for an offence, rather than be imposed on parties who must by necessity rely on information from third parties in Australia or overseas; offences which do not apply this principle have the potential to operate unfairly;
- strict liability has the potential to adversely affect small and medium enterprises; steps should be taken to ameliorate any such consequences arising from the different compliance and management resources of smaller entities;
- any potential adverse effects of strict liability on the costs of those affected should be minimised to the extent that this is possible; in particular, parties who are subject to strict liability should not have their costs increased as a consequence of an agency reducing its costs;
- external merit review by the AAT or other independent tribunal of relevant decisions made by agencies is a core safeguard of any legislative or administrative scheme; every agency which administers strict liability offences should review those provisions to ensure that this right is provided;
- new and existing strict liability schemes should have adequate resources to ensure that they are implemented to maximise safeguards; a lack of proper resources may result in the inadequate operation of those safeguards;
- strict liability should not be accompanied by an excessive or unreasonable increase in agency powers of control, search, monitoring and questioning; any such increase in powers may indicate that the legislative and administrative scheme has structural flaws;
- there should be a reasonable time limit within which strict liability proceedings can be initiated; it would be unfair to those affected if they were to be charged perhaps years after an alleged breach;
- as a general rule, strict liability should be provided by primary legislation, with regulations used only for genuine administrative detail; it would be a breach of parliamentary propriety and personal rights for regulations to change the basic framework or important aspects of a legislative scheme; and
- the use of strict liability in relation to the collection of personal information about members of the public from third parties has the potential to intrude into the legitimate rights of the people whose details are being collected; in such cases the entire process should be transparent, with all affected members of the public being notified of their rights and remedies under the Privacy Act.

### **Principles for the Sound Administration of Strict Liability**

The Committee concluded that, in addition to conceptual safeguards, schemes of strict liability should also be administered in a way which provides maximum protection for those affected:

- administration of strict liability in the form of non-legislative procedures may have as significant an effect as acts and regulations; such non-legislative matters should therefore be subject to the same protections and safeguards as the legislative structure of the scheme;
- licence holders who hold a licence on condition that they comply with an act may be prejudiced by the inappropriate use of strict liability to vary, suspend, cancel or not renew their licence; processes in relation to licences should be conducted in a transparent manner with adverse decisions subject to external independent merits review;
- compliance records have the potential to operate unfairly to the detriment of those affected; such records should be subject to comprehensive safeguards, including a limit on what they may include, access by those to whom a record relates and the ability to require deletion of stale or incorrect information;
- professional indemnity insurance in the context of strict liability penalties, especially those caused not by the putative offender but by third parties who may be overseas, has the potential to operate unfairly; agencies should be sensitive to this problem and consult with industry groups on ways to alleviate its consequences;
- comprehensive internal review procedures are an essential safeguard for strict liability; as with other aspects of administration of strict liability these should be transparent and detailed, clearly providing a process which is both independent and credible;
- the use of infringement notices should include safeguards for those affected, including detailed prescription of the form of a notice; the form itself should indicate all of the safeguards to which it is subject;
- consultation with industry is essential before any decision to introduce or vary strict liability, with the valid concerns of industry being taken into account; industry consultation should be genuine, not a formality to legitimise plans already finalised;
- it is undesirable if a strict liability scheme includes a large number of offences creating a substantial pool of contravening behaviour, resulting in selective and possibly inconsistent enforcement; to avoid this, agencies should ensure that enforcement guidelines are detailed and unambiguous and accompanied by adequate training;
- every scheme of strict liability should be administered through detailed, binding guidelines which should be agreed between the relevant agency and industry and tabled in both Houses; breach of the guidelines by an agency should preclude prosecution of those affected by the breach; and
- every scheme of strict liability should be subject to an independent review 12 months to two years after its commencement, with further review depending on the findings of the first review; industry should be given the fullest opportunity to participate in each review.

## Appendix 2

**FEDERAL ATTORNEY-GENERAL'S DEPARTMENT *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, February 2004, Issued by the Authority of the Minister for Justice and Customs<sup>51</sup>**

### 4.5 Strict liability and absolute liability

#### **Give careful consideration to the use of strict liability and absolute liability**

Principle: Strict or absolute liability should only be used in an offence where there are well thought out grounds for this.

Discussion: The Criminal Code reflects the same starting presumption as the common law: that fault must be proven for each physical element of an offence for a person to be guilty. Strict or absolute liability can only be applied by an express provision to this effect. This reflects the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).

The application of either strict or absolute liability negates the requirement to prove fault (see sections 6.1 and 6.2 of the Criminal Code). The application of strict liability gives rise to a defence of honest and reasonable mistake of fact. The application of absolute liability does not. The defence does not apply to circumstances where a mistake results from a lack of awareness of relevant facts.

Commonwealth Governments and Parliaments have long taken the view that any use of strict or absolute liability should be properly justified (see further below on the views of the Senate Scrutiny of Bills Committee).

#### **Strict liability or absolute liability may apply to specific elements**

Different considerations apply to the use of strict and absolute liability depending on how it applies to an offence. Application of strict or absolute liability to *all* physical elements of an offence has generally only been considered appropriate where *each* of the following considerations is applicable:

- The offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate) in the case of strict liability or 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability. A higher maximum fine has been considered appropriate where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment.
- The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences.
- There are legitimate grounds for penalising persons lacking 'fault', for example because they will be placed on notice to guard against the possibility of any contravention. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made an honest and reasonable mistake of fact.

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<sup>51</sup> <http://www.ag.gov.au/agd/www/Agdhome.nsf/Page/6F19B1D7FCBBF6C3CA256E5F00017937?OpenDocument>

Strict liability *should* apply to all physical elements of an offence that is subject to an infringement notice scheme, and therefore an offence will only be appropriate for inclusion in such a scheme if it meets the criteria above (see further Part 4.5).

Application of strict or absolute liability to *a particular* physical element of an offence has generally only been considered appropriate where *one* of the following considerations is applicable:

- There is demonstrated evidence that the requirement to prove fault of that particular element is undermining or will undermine the deterrent effect of the offence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made an honest and reasonable mistake of fact in respect of that element.

### **Jurisdictional elements attract absolute liability**

- The element is a jurisdictional element rather than one going to the essence of the offence. Absolute liability should apply to the jurisdictional element. For example, in the case of theft of Commonwealth property, the act of theft is the substantive element of the offence; while the circumstance that the property belongs to the Commonwealth is a jurisdictional element (see section 131.1 of the Criminal Code).

### **Cross-references to provisions attract strict liability**

- Where one provision refers to another, strict liability should attach to that cross-reference. This avoids the 'knowledge of law' problem, ensuring that the prosecution will not have to prove the defendant knew of the existence of the relevant provision. Subsection 8K(2) of the *Taxation Administration Act 1953* is an example. The Attorney-General's Department has issued drafting instructions to resolve this problem.

### **Scrutiny Committee views**

Senate Committee Views: An instructing agency that is preparing legislation under which strict or absolute liability is imposed should familiarize themselves with Report 6/2002 of the Scrutiny of Bills Committee: *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. The report sets out in detail the Committee's views on the appropriate use of strict and absolute liability in Commonwealth offences. The report sets out a lengthy list of principles that the Committee believes should apply to the framing and administration of such provisions in Commonwealth legislation. While many of these are more prescriptive than the Commonwealth Government's long standing approaches, an instructing agency will need to be prepared to assist its Minister to respond to any concerns raised by the Committee.

A Government response to the Committee's report is under preparation and should be tabled in the 2004 Autumn Parliamentary Sitings. Among the propositions set out in that report which *do* accord with the approach the Government has taken in recent years, are the following:

- 'fault liability is one of the most fundamental protections of criminal law; to exclude this protection is a serious matter' (page 283),

- 'strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; it would not be proper to base strict liability on mere administrative convenience or on a rigid formula' (page 283),
- 'strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units (\$6,600 for an individual and \$33,000 for a body corporate) appears to be a reasonable maximum' (page 284),
- 'strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation' (page 284),
- 'strict liability may be appropriate where its application is necessary to protect the general revenue' (page 284),
- 'strict liability should not be justified on the sole ground of minimising resource requirements' (page 284),
- 'strict liability may be appropriate to overcome the 'knowledge of law' problem' (page 285), and
- 'absolute liability offences should be rare and limited to jurisdictional or similar elements of offences' (page 285).

If the explanatory memorandum to a Bill is not considered to provide adequate explanation for any use of strict or absolute liability, the Committee will seek an explanation from the responsible Minister. Recent examples of explanations given and the Committee's response can be found at Report 7/2002 pages 304-05, Report 9/2002 pages 372-74, Report 12/2002 pages 429-30, Report 15/2002 pages 509-11, Report 16/2002 pages 553-54, Report 1/2003 pages 5-7, 9-10, 18-22, Report 2/2003 pages 66-68, and Report 14/2003 pages 317-319).

Further discussion of the Committee's views on the use of strict and absolute liability and cases where the Committee has raised concerns are contained at pages 35-38 of the Committee's report on *The Work of the Committee during the 39th Parliament November 1998 - October 2001*