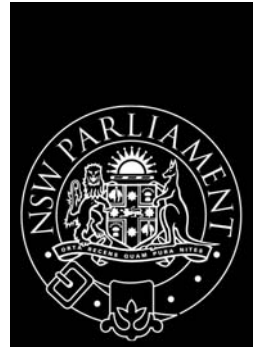


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

STRICT AND ABSOLUTE LIABILITY

Responses to the Discussion Paper

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Functions of the 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.

Chair's Forward

An increasing number of statutory offences in NSW do not provide for any fault element. The Committee has repeatedly commented in its *Digests* on the danger such offences, known as strict or absolute liability offences, can pose to certain fundamental human rights, especially the right to be presumed innocent until proved guilty. To better equip itself when considering bills creating such offences, the Committee resolved to publish a Discussion Paper on Strict and Absolute Liability for public comment.

The Discussion Paper canvassed some of the advantages and disadvantages of strict and absolute liability offences and sought comment on their use in New South Wales. The Discussion Paper proposed the adoption a number of principles that the Committee might use to guide it in its consideration of bills creating such offences. The Discussion Paper specifically asked those making submissions to comment on the appropriateness of these proposed principles.

Having carefully considered each of the submissions received, the Committee has adopted a series of principles on the use of strict and absolute liability. This Report sets out those principles and summarises the key points made in the submissions received.

The Committee thanks all those who made submissions for their very useful comments.



Allan Shearan MP
Chair

Chapter One - Discussion Paper: Strict & Absolute Liability Offences

- 1.1 On 8 June 2006, the Committee tabled a Discussion Paper seeking comment in relation to the principles it should apply when considering if bills or regulations that create offences of strict or absolute liability trespass unduly on personal rights or liberties by undermining the presumption of innocence. The Committee sought such comment to better equip itself when considering bills under s 8A of the *Legislation Review Act 1987*.
- 1.2 The Committee advertised the Discussion Paper on the Parliament's website and in its *Legislation Review Digest* and wrote to all Ministers, Members of Parliament, and over 90 other agencies, organisations and individuals seeking comment. The Committee received 22 submissions in response, of which 18 made substantive comment. The Committee published these submissions on the Parliament's website (www.parliament.nsw.gov.au).

Questions for comment

- 1.3 The Discussion Paper sought comment on the following principles it proposed 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.
- 1.4 The Discussion Paper also sought 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.
- 1.5 The overwhelming majority of submissions supported each of the principles set out in the Discussion Paper. However, a few disagreed with several of the principles. Others suggested additional principles or that one or more principles be modified in some way. These responses are discussed in more detail in Chapter 2.

Strict and Absolute Liability

- 1.6 Under Australian law, crimes are generally considered to have two aspects, a physical aspect (*actus reus*) and a mental aspect (*mens rea*).
- 1.7 At common law there is a presumption that a prosecutor must show that an accused person had the requisite criminal intent, or *mens rea*, to commit the offence. This presumption is a fundamental principle of our criminal justice system.
- 1.8 According to the Australian Law Reform Commission:
- 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*).
- 1.9 However, this presumption may be, and frequently is, displaced by statute, either expressly or by implication, creating strict or absolute liability offences. An offence of strict liability is one in which a person may be punished for doing something whether or not they have guilty intent (*mens rea*) unless they can show that they made an honest and reasonable mistake of fact.
- 1.10 Absolute liability can be contrasted with strict liability by the absence of the defence of mistake of fact. If the defence is excluded, either expressly or by implication, then the offence is an “absolute liability” offence.
- 1.11 Typically, strict and absolute liability are applied to offences of a regulatory nature, where it is particularly important to maximise compliance (eg, public safety or protection of the environment). However, strict liability is also used for some criminal offences, including serious criminal offences, such as in the area of environmental protection.

- 1.12 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 include exceeding 60 kilometres per hour in a 60 kilometre zone, polluting waters, selling alcohol to underage persons, refusing or failing to submit to breath testing and publishing a name in breach of a suppression order.
- 1.13 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 beyond reasonable doubt that the offender intended to commit the offence. Sometimes this is expressed as being contrary to the fundamental right to be presumed innocent until proven guilty, as the person concerned is presumed to have committed the offence if they committed the offending act regardless of their intention to do so.
- 1.14 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.
- 1.15 The Committee considers that there are appropriate circumstances in which to impose strict or absolute liability. However, it also considers that the potential of strict and absolute liability offences to trespass on this fundamental right means they should only be imposed after careful consideration on a case by-case basis of all available options and taking into account the potential for such a serious trespass.
- 1.16 The consequences to the accused if convicted of a strict or absolute liability offence is one factor considered by the Committee in determining if such an offence unduly trespasses on the person's fundamental rights. The more serious the consequences, the more concerned the Committee is likely to be. For example, the Committee has repeatedly commented that it considers imprisonment to be an inappropriate penalty for an offence of which a person may be guilty without intending to commit the offence.
- 1.17 In relation to monetary penalties, the Discussion Paper expressed the view that, in the case of strict liability offences, there may be some circumstances in which high 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, and where a higher penalty is needed as a disincentive for committing the offending behaviour. The Discussion Paper stated that, for this reason, it may be more suitable 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.
- 1.18 A trespass on rights resulting from the operation of strict or absolute liability offences may be mitigated if appropriate defences are available. 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 is 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.
- 1.19 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.

- 1.20 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”.

Chapter Two - Issues raised in submissions

Principle (a)(i) - Presumption of fault liability

- 2.1 The majority of submissions supported this principle, although some said that there are legitimate exceptions.
- 2.2 The Department of Environment and Conservation (DEC) and the Environmental Defenders Office (EDO) supported the principle in general terms, but expressed the view that strict and absolute liability offences can be justified in certain circumstances.
- 2.3 Specifically, the DEC agreed:
- That fault liability is one of the most fundamental protections of the criminal law. However, in relation to environmental offences, there are sound and compelling public interest justifications for making a number of offences strict liability offences.
- 2.4 The DEC cited a number of justifications for this position, including:
- relieving “the prosecutor of the virtual impossibility of proving intent or knowledge of the wrongful conduct”;
 - proving “intentional conduct as the ‘victim’ is the environment which cannot speak for itself”; and
 - “strong public policy reasons which underlie the decision that certain conduct should be considered criminal even where the person did not intend to commit an offence” (eg, “the conduct is morally reprehensible and worthy of criminal sanction”, such as the pollution of waterways).
- 2.5 The DEC also submitted:
- Whilst *mens rea* is not an element of strict or absolute liability offence, an offender’s culpability will be a relevant factor considered by the prosecutor in deciding whether to prosecute or by a court in sentencing.
- 2.6 In its submission, the EDO stated that it is “unequivocally of the opinion that the legal protections that form the cornerstone of our system should be firmly maintained, except where there is an overriding public interest to justify derogating from these intrinsic safeguards.” The EDO submitted:
- [T]hat the area of environmental crime invariably falls into this exception... Public policy considerations therefore dictate that environmental protection provisions should be strictly instituted and enforced, and those who cause damage to the environment be punished appropriately. The imposition of strict liability offences supports this end... It is therefore clear that there are circumstances where individual rights are of disproportionate importance when compared to the paramount public interest in rigorously punishing and deterring environmental crime.
- The quid pro quo of overriding individual rights in the public interest in this context is that strict liability offences: a) should not attract terms of imprisonment; b) should have a defence of honest and reasonable mistake of fact; and c) involve some discretion in the imposition of penalties.
- 2.7 The NSW Council for Civil Liberties submitted that, to ensure fairness, fault liability should only be displaced after a thorough social impact assessment has been made of the likely effect of the offence. The Council of Civil Liberties recommended this assessment should identify:

- The group(s) of people likely to be convicted of an offence; and
- The likely desirable or undesirable consequences of imposing a particular penalty on members of that group without regard to the circumstances of the offence or the social and financial circumstances of the offender.

Principle (a)(ii) - Not for mere administrative convenience

2.8 The overwhelming majority of those making submissions supported this principle. No additional comment was made.

Principle (a)(iii) - Provide defences such as due diligence

2.9 The Discussion Paper noted that the Committee has commented on the importance of the availability of defences in its consideration of whether a particular strict liability offence unduly trespasses on a person's rights. The Discussion Paper noted the particular importance of the defence of mistake of fact. It also stated that other defences that take account of circumstances in which punishment for the conduct would be inappropriate, such as due diligence, should likewise be available. The Discussion Paper stated that 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.¹

2.10 The NSW Law Society agreed that:

Defences should be available unless the legislature has clearly excluded such defences. It is a balancing exercise of weighing up the public interest against individual rights and determining whether certain defences should be available, to avoid too significant an encroachment on individual rights.

2.11 The EDO submitted that strict liability offences should have a defence of honest and reasonable mistake of fact as “a substantial common-law safeguard”. It stated that this defence

Will succeed where a defendant can show the court that he or she was under a mistaken but reasonable belief about a fact that, had it been correct, would have meant that the conduct would not have constituted the offence.

2.12 The EDO noted that this defence has been construed strictly by the courts and rarely succeeds in the context of environmental crimes. It further stated that this strict construction is in keeping with the deterrence objectives of strict liability provisions, making “clear to offenders that no legal loopholes can enable them to escape the consequences of their actions”. However, it submitted that the availability of this defence enables those polluters who were genuinely under an honest and reasonable misapprehension to escape liability at the discretion of the court.

2.13 Conversely, the DEC disagreed with this principle in relation to all environmental offences. It stated:

There are some strict liability offences, such as environmental offences, where the only appropriate defence that should be available is a defence of honest and reasonable mistake of fact or such other defences which are specifically provided for in the particular piece of legislation, which may not necessarily include due diligence.... The availability of the defence of due diligence is not appropriate in relation to the majority of environmental strict liability offences. Where the defence is deemed to be appropriate, it has been specifically provided for in legislation on a case-by-case basis.

¹ See Discussion Paper, p.9.

...It is noted that even in the absence of the availability of the defence of due diligence, the prosecutor always has a discretion as to whether or not it is appropriate for a prosecution to be brought. The dominant factor in the exercise of such a discretion is the public interest... One of the factors that the *EPA Prosecution Guidelines* states arises for consideration in determining whether the public interest requires a prosecution is the degree of culpability of the offender. In some circumstances, this may include consideration of matters which would otherwise be relevant to the defence of due diligence. Furthermore, in certain cases the court may recognize that punishment in the particular circumstances of the case is inappropriate and may dismiss the charge... refuse to convict the person or impose only a nominal fine.

2.14 NSW Health submitted that:

The availability of defences in determining liability should not be confused with the sanctions imposed once liability is determined. Offences such as due diligence, should only be available, having regard to the elements of the relevant offence and the overall policy objectives of the legislation.

Principle (a)(iv) - Expressly provide defences

2.15 The New South Wales Law Society supported this principle and stated:

The judiciary should be given express directions, which may avoid the need for 'judicial creativity' to meet the demands of a given case where a defence might otherwise be considered not available.

2.16 The Minister for Community Services and Youth gave qualified support to this principle, but stated that protections afforded by certain non-publication strict liability offences would be compromised if a defence was available. She referred to section 105 of the *Children and Young Person (Care and Protection) Act 1998*, which creates a strict liability offence in respect to publishing or broadcasting the names or other identifying material of children or young persons involved in care proceedings. The Minister stated that, in her opinion:

The fundamental protections that section 105... accords children or young persons involved in care proceedings, would be compromised if any defence (such as lack of knowledge that information would identify the child or person concerned) was available.

2.17 The Minister concluded that she was of the view that it may not be appropriate to adopt this principle in relation to strict liability non-publication offences.

2.18 The Minister for Local Government and the DEC unequivocally rejected this principle. The Minister for Local Government submitted:

The listing of available defences to strict or absolute liability offences in the relevant legislative provisions would seem, at face value, to defeat their deterrent effect and potentially encourage litigation.

2.19 The DEC asserted that:

...not all statutory defences are appropriate to be available for environmental strict liability offences. In a number of cases it is appropriate that the only available defence is the common law defence of honest and reasonable mistake of fact. In relation to environmental offences, where Parliament considers that it is appropriate for other statutory defences to be available, it has expressly provided what those other defences are.

2.20 The DEC was also of the view that

...legislation creating strict and absolute liability offences only needs to expressly provide that any other defences remain available where there is some doubt about whether the common-law position is being displaced.

Principle (a)(v) - No imprisonment

2.21 With the exception of the DEC and the Minister for Local Government, all submissions that addressed this principle agreed with, or gave, it qualified support. The DEC submitted that some strict liability offences should include imprisonment as a penalty option, such as environmental offences that are essentially crimes against the public and where a financial penalty would be an insufficient deterrent.

2.22 The Minister for Local Government stated:

...a blanket limitation of strict and absolute offences to non-imprisonment penalties ... may be inappropriate in circumstances where the offence or consequences of the offence are of such a serious nature that a fine would have been insufficient deterrent impact. Conversely, imprisonment may be appropriate in circumstances where the proposed benefit or gain to an individual would 'offset' any financial penalty applied.

2.23 The New South Wales Law Society and the Director of Public Prosecutions (DPP) gave qualified support to this principle. They both indicated that there may be strict liability offences for which imprisonment is an appropriate penalty.

2.24 The NSW Law Society submitted that they generally agreed that:

Imprisonment represents a significant incursion on individual's freedom and liberty and should be avoided, where the element of 'intent' is not be proven.

2.25 However, they also submitted that the question of whether or not imprisonment is an inappropriate penalty for a strict liability offence "depends on the nature of the legislation and the mischief it seeks to address."

2.26 The DPP stated:

... while I agree that offences imposing strict or absolute liability should as a general rule ... not carry a penalty of imprisonment, I note that there are areas of criminal law that on occasion warrant the creation of strict liability offences that carry sentences of imprisonment. The example of this is section 52A of the *Crimes Act 1900* ('dangerous driving'), where the rationale for creating an offence of strict liability is clear.

2.27 In its submission, the EDO submitted that strict liability offences should be limited to provisions that impose monetary and regulatory penalties. The EDO said:

Denial of a defendant's freedom, without an examination of his or her mental state of mind, would be an unjustifiable and disproportionate incursion onto the personal rights and liberties of offenders. There are currently no strict liability [environmental] offences in NSW which carry prison terms."

Principle (a)(vi) - Monetary penalties on a case-by-case basis

2.28 A number of submissions suggested there should be discretion in the imposition of penalties. For instance, the NSW Law Society expressed the view that with the imposition of strict or absolute liability an arbitrary scale would be inappropriate in assessing monetary penalties. However, it suggested that maximum and minimum thresholds with guidelines as to how to approach the assessment of monetary penalties would be appropriate.

- 2.29 The Australian Lawyers Alliance stressed the importance of preserving judicial discretion in relation to sentencing. It submitted:

Stringent and inflexible legislative provisions should not determine sentencing for strict and absolute liability offences. It is the judicial officers who have the capacity to blend principles of punishment and prevention, civil rights and community protection. Consequently, judicial officers have the capacity to bring a degree of humanity to sentencing.

- 2.30 The NSW Council for Civil Liberties submitted that courts must have discretion in sentencing strict liability offences. It also stated that:

All penalties should be assessed on a case-by-case basis, having regard not only to a person's lack of fault but also to the likely consequences of the penalty in the individual case. Particular regard should be had to whether - in light of the offender's work, family and financial circumstances - it is likely that imposing a given penalty may lead to further criminality or undue hardship for the individual or their family.

- 2.31 The Council for Civil Liberties also recommended that strict liability financial penalties should not be subject to systems of escalation that lead automatically to more serious offences or imprisonment. In such cases, the focus should be on enforcement of the original penalty. They said:

Consequential punishments for non-compliance with strict liability fines should only be imposed by a court that has had a proper opportunity to consider the circumstances of the case.

Principle (a)(vii) - Regulatory offences

- 2.32 Principle (a)(vii) states "strict and absolute liability offences should be of a regulatory nature (e.g., public safety or protection of the environment), not serious criminal offences". Both the Minister for Local Government and the NSW Bar Association supported this principle, although both considered the terms of the principle to be subjective and, therefore, difficult to understand clearly (eg, concepts such as "regulatory nature", "serious criminal offence", "genuine and administrative details" and "public safety").
- 2.33 The DEC did not support this principle and stated that it disagreed that environmental offences are regulatory in nature. The Department considers such offences to be criminal offences, even serious criminal offences, which sometimes appropriately have no fault element.

Principle (a)(viii) - Strict liability to be provided by primary legislation

- 2.34 The RTA did not support this principle. It submitted:

Although this principle may be appropriate for the Commonwealth legislative approach, in New South Wales serious offences, such as those contained in the Crimes Act, are usually not strict liability offences. [M]ost strict liability offences are less serious offences and therefore more likely to end up in regulations. The decision as to whether offences are to be created in primary or subordinate legislation depends on a range of factors including whether it is or is not strict liability. It may not be determinative or even the most important factor in that decision.

In New South Wales, traffic offences are in subordinate legislation and practically must be so to enable the frequent changes required to be introduced in a timely manner.

- 2.35 Most of the other submissions received did not address this issue.

Principle (a)(ix) - Prosecute those actually liable, not third parties

- 2.36 The majority of submissions received supported this principle.
- 2.37 However, the RTA and the DEC gave only qualified support. The RTA stated that, as far as possible, offences should depend on actions or failures to act by persons who actually commit a criminal act. However, in some situations, the public interest calls for the creation of “status” offences. The RTA submitted that these are offences by which a person is deemed at law to be responsible regardless of whether they have in fact committed the offence (e.g., parking offences, speed camera detected offences and environmental and OH&S offences).
- 2.38 The DEC also noted that there are some circumstances that are difficult to regulate in which this principle should not apply (eg, offences related to the transportation of waste). The DEC pointed out that its prosecution guidelines highlight that the most culpable person should be charged with an offence.

Principle (a)(x) - Expressly provide offence is strict or absolute liability offence

- 2.39 With the exception of the RTA and the Minister for Police, all the submissions supported this principle, either explicitly or implicitly. The RTA argued that it is not the practice in NSW legislation to make explicit whether a particular offence is one of strict or absolute liability, although it is done from time to time. It noted that Chapter 2 of the Commonwealth Criminal Code requires Commonwealth legislation to indicate whether a particular offence is one of strict or absolute liability. However, Chapter 2 of the Criminal Code has not been adopted in New South Wales, and, in these circumstances, the RTA argued that it may be premature to adopt this principle in isolation without also adopting Chapter 2 of the Criminal Code.
- 2.40 The Minister for Police stated that, while he generally agreed with this principle:
- ...it raises concerns with respect to the prosecution of existing offences. If new offences were to expressly state an offence is one of strict or absolute liability, it may create doubt in the interpretation of some existing offences which are not explicitly stated as such.

Principle (b)(i) - Monetary penalty to reflect no defence of mistake of fact in absolute liability offences

- 2.41 Legal Aid NSW supports this principle. In particular, it commented that penalties aimed at “professional compliance” must not be excessive or seem to be used as a punitive measure.
- 2.42 The Law Society submitted that whether or not the size of a monetary penalty for an absolute liability offence should reflect the fact that liability is imposed regardless of any mistake of fact, requires a balancing exercise of public interest against individual freedom. It further submitted that:
- The fact that the legislature has determined it is necessary to impose absolute liability for certain offences may be seen as government's response to community attitudes.
- 2.43 The RTA stated:
- While the general principle that the size of monetary penalties should reflect the fact that liability is imposed regardless of any mistake of fact is supported, this is only one of the factors determining the amount of penalty. It is noted for example that some mass, dimension and loading offences under the *Road Transport (General) Act 2005*, which are

absolute offences, provide for penalties up to 500 penalty units. The public interest justifications for these penalties is public safety.

- 2.44 The RTA also stated that whether a defendant is a corporation is one factor relevant to determining whether a significant monetary penalty is justified.
- 2.45 NSW Health stated that the size of the monetary penalty imposed through legislation for an offence should reflect the seriousness of the offence.
- 2.46 The NSW Bar Association submitted that it does not support the use of absolute liability. However, it stated that if:

Parliament is minded to introduce offences of absolute liability, then [this] principle ... is appropriate.

Principle (b)(ii) - Absolute liability should be used rarely

- 2.47 All submissions that addressed this principle gave their support for it, except the NSW Bar Association, which stated that it does not support the use of absolute liability. Specifically, the Bar Association referred to the decision of Hunt J in *Hawthorn (Department of Health) v Marcom Pty Ltd* (1992) 29 NSWLR 120 at 240:

Absolute liability will not assist in preventing the sale of adulterated food where the seller honestly believes upon reasonable grounds that it is unadulterated. All the imposition of such liability will do is obtain a conviction for conduct which is manifestly not criminal in nature by any recognized standards of justice.

Principle (b)(iii) - Absolute liability for inadvertent errors that ought to be punished

- 2.48 All of the submissions that addressed this principle gave their support with the exception of the NSW Bar Association and the NSW Teachers Federation. The NSW Bar Association stated that it does not support the use of absolute liability.
- 2.49 By contrast, the Teachers Federation supports the use of absolute liability offences for OH&S offences. Specifically, it submitted:

Absolute liability avoids the argument that an employer has conflicting demands or limited resources to provide quality education and to ensure the safety of employees and others.... The prosecution of employers for breaches of the Occupational Health and Safety Act in the education sector have involved incidents that have caused severe psychological and physical injuries and in one case a death. Absolute liability has ensured that these prosecutions will be able to be brought and have reinstated [sic] the defendant to provide the appropriate resources and training to minimise the risk of further breaches.

Should there be a cap on monetary penalties?

- 2.50 Views on whether or not there should be a cap on monetary penalties and, if so, what its level might be, varied among the submissions. For example, the EDO and the RTA did not support a cap at a low level. The EDO was of the view that the financial consequences of pollution need to exceed potential profits in order to be an effective deterrent. The RTA commented that while any cap would need to be set at a high level, a cap at a high level would seem to defeat the purpose of having a cap. The Australian Manufacturing Workers' Union submitted that the level of penalties should reflect that:

The threat of prosecution and the size of potential penalties are significant factors in promoting compliance.

2.51 The Minister for Police did not support a cap on penalties, stating:

...a monetary cap is unnecessary and would be inappropriate. The principles proposed in the (a)(i)-(iii) [in the Discussion Paper] provide sufficient safeguard with respect to monetary penalties while allowing for flexibility for offences to be considered on a case-by-case basis.

2.52 The DEC also did not support a cap on penalties, but stated that if there is to be a cap it should not be set too low. The Public Defenders Office supported a low cap on penalties for individuals and stated that 60 penalty units may be too high in many cases. It also recommended that a waiver or reduction of penalties be available to individuals where just and appropriate.

Chapter Three - Conclusion

- 3.1 All the submissions received recognised that the presumption of fault is an important element in our criminal justice system for the protection of individual rights. At the same time, most submissions expressed the view that there are circumstances in which it may be appropriate for this presumption to be displaced, and strict or absolute liability offences created. These areas include environmental crimes, which one submission characterised as “crimes against society as a whole”, requiring offences with a high deterrent factor, such as strict liability offences. Other cases justifying the use of strict liability were said to include those situations in which it is difficult or impossible to prove intent or knowledge of the wrongful conduct and where conduct is worthy of criminal punishment on strong public policy reasons even if the person concerned did not intend to commit an offence.
- 3.2 These views are consistent with the approach taken by the Committee to date. In its Digests, the Committee has repeatedly expressed its concern with offences that appeared to displace the presumption of fault as contrary to the fundamental right of a person to be presumed innocent until proved guilty.
- 3.3 However, the Committee has also expressed the view that there are circumstances in which it is appropriate to impose strict or absolute liability, but only if there are highly compelling public interest reasons for doing so. The Committee is of the view that many environmental and some other kinds of crimes may fall within this category, especially if there is a strong public interest in ensuring that persons take all reasonable steps to avoid the conduct that makes up the offence or where the need to ensure the integrity of a regulatory regime outweighs any trespass on individual rights.
- 3.4 The Committee notes the recommendation of the Council for Civil Liberties that a rigorous social impact assessment be made for proposed strict liability offences to identify the likely consequences of imposing a particular penalty on those who are likely to be convicted of the offence. The Committee is of the view that an assessment of this sort might be beneficial in minimising the potential trespass on individual rights caused by strict and absolute liability offences. However, this is a matter for the Government to consider as it develops policy that might include strict or absolute liability offences.
- 3.5 In relation to the other principles in the Discussion Paper, the Committee notes that most submissions gave their support, at least in general terms. However, there were diverging views on whether or not legislation creating strict or absolute liability offences should expressly provide for defences and, if so, whether defences other than the defence of mistake of fact should be included. There were also diverging views on whether or not there should be a cap on monetary penalties and, if so, whether that cap should be set at a high or a low level.

Principles Adopted

- 3.6 Based on these responses, the Committee has adopted the following principles to apply when considering bills:

General principles to govern the use of strict or absolute liability:

- 1) Fault liability is one of the most fundamental protections of the criminal law and to exclude this protection is a serious matter. It should only ever be excluded if,

and to the extent that, there are sound and compelling public interest justifications for doing so.

- 2) Strict and absolute liability should not be used merely for administrative convenience.
- 3) The intention to impose strict or absolute liability should be explicitly stated in legislation.
- 4) As a general rule, strict and absolute liability should be provided by primary legislation, except for offences with minor penalties.
- 5) 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.

Applicability of defences to strict and absolute liability offences

- 6) Appropriate defences should be available to ensure that a person is not punished for a strict liability offence if there are exonerating circumstances and if punishment would not serve the objective of the legislation.

Penalties for strict and absolute liability offences

- 7) Strict liability offences should not be punishable by imprisonment, unless there are highly compelling and extraordinary public interest justifications for doing so.
- 8) Absolute liability offences should not be punishable by imprisonment.
- 9) Monetary penalties for particular strict and absolute liability offences must be set at an appropriate and justifiable level having regard to the lack of fault of the person punished and the legislative objective. The Committee will continue to monitor closely the size of monetary penalties to ensure they are not excessive.

Additional principles in relation to absolute liability:

- 10) Absolute liability should be used only if there is a highly compelling justification.
- 11) 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.
- 12) Absolute liability offences may be acceptable where inadvertent errors, including those based on a mistake of fact, ought to be punished.
- 13) The size of monetary penalty should reflect the fact that liability is imposed regardless of any mistake of fact.

Appendix : Submissions Received

- 1) Australian Lawyers Alliance
- 2) Australian Manufacturing Workers' Union
- 3) The Hon Peter Breen MLC
- 4) Director of Public Prosecutions
- 5) Environmental Defenders Office
- 6) Legal Aid Commission NSW
- 7) Minister of Community Services and Minister for Youth
- 8) Minister for Local Government
- 9) Minister for Police
- 10) Minister for Natural Resources, Primary Industries & Mineral Resources
- 11) Minister for Tourism, Women & Minister Assisting Minister for State Development
- 12) Minister for Water Utilities, Small Business, Regional Development & the Illawarra
- 13) NSW Bar Association
- 14) NSW Council for Civil Liberties
- 15) NSW Department of the Environment & Conservation
- 16) NSW Health
- 17) NSW Law Society
- 18) NSW Teachers Federation
- 19) Public Defenders Office
- 20) Roads and Traffic Authority
- 21) Treasurer
- 22) WA Joint Standing Committee on Delegated Legislation