



**The Law Society
of New South Wales**

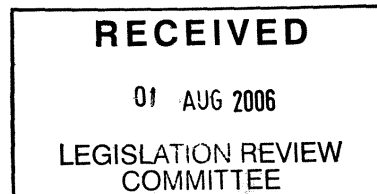
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27 July 2006

Mr Allan Shearan MP
Chair
Legislation Review Committee
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000



Dear Mr Shearan

Re: Discussion Paper: Strict and Absolute Liability Offences

I refer to your letter of 19 June 2006 seeking the Law Society's comments on the Discussion Paper. The Paper was referred to the Criminal Law and the Litigation Law and Practice Committees of the Law Society for comment.

The Criminal Law Committee has indicated that it supports the principles set out in the Discussion Paper. The Litigation Law and Practice Committee has provided the following comments.

Proposed Principles:

- (a)
- (i) Agreed. This principle represents a fundamental common law precept of criminal law that liability only attaches upon *mens rea* or intent being proven and this requirement should only be abrogated if the public interest clearly outweighs the rights of the individual.
 - (ii) Agreed. With the extension that only principal legislation should impose strict and absolute liability. It may be appropriate for delegated legislation to set out the range of any monetary penalties or the guidelines for determining the appropriate penalty in any given case. Guidelines are necessary to assist the judiciary in administering the legislation.
 - (iii) Agreed. 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.

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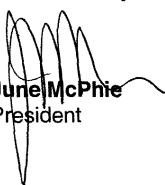
- (iv) Agreed. The judiciary should be given express directions, which may avoid the need for "judicial creativity" to meet the demands of a given case where a defence may otherwise be considered not available.
- (v) Depends on the nature of the offence but generally agree that imprisonment represents a significant incursion on an individual's freedom and liberty and should be avoided where the element of "intent" need not be proven. It really depends on the nature of the legislation and mischief it seeks to address.
- (vi) Given the imposition of strict or absolute liability it is appropriate that an arbitrary scale should not be applied in assessing monetary penalties. However, maximum and minimum thresholds with guidelines as to how to approach the assessment of monetary penalties would be appropriate.
- (vii) Agreed, and see combination of factors identified above.
- (viii) Agreed, and see above.
- (ix) Agreed. This is a matter probably best addressed by the express provision of defences in the legislation.
- (x) Agreed.

(b)

- (i) This is again a balancing exercise of public interest against individual freedom. 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. If that is so, then the monetary penalty should provide a sufficient deterrent. On balance, support is given for the principle.
- (ii) Agreed. Given that defences will be not be available, a conservative approach should be adopted.
- (iii) If reference is being made to more serious offences such as creating dangerous environmental hazards (even though not known but capable of being known) then it imposes a positive obligation on those potentially at risk to exercise a greater degree of care in conducting their affairs.

Thank you for consulting the Law Society on this important issue.

Yours faithfully,


June McPhie
President