



16 August 2006

Mr Allan Shearan MP
Chairman
Legislative Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan

Thank you for the opportunity to comment on the *Strict and Absolute Liability Offences* Discussion Paper. The Public Defenders have for many years been disquieted by the apparent proliferation of regulatory and other offences that displace the ancient presumption that a guilty act must be accompanied by a guilty mind. Although many such provisions are, at first blush, innocuous and relate to relatively minor matters attracting minor financial penalties, they give rise to consideration of important matters of principle. More recently there has been a strong temptation to remove the requirement for proof of a guilty mind in relation to serious offences related to public order offences. It is our strong view that this is to be resisted.

It is trite to observe that we live in troubled times. As recent debate as to aspects of anti-terrorist laws have shown, there is considerable tension between the core values of a society aspiring to fairness and justice and the measures to be tolerated as necessary to preserve such values. One recognises that there is an obvious need for the prosecuting authorities and courts to be equipped with the effective means to maintain a well regulated and civilised society. However, the effective mechanisms for achieving these aims do not require, nor do they justify, departures from principles inherent in the rule of law. Foremost amongst these principles is the presumption of innocence and the requirement that innocent acts not be rendered criminal, unless accompanied by proof at the requisite level in the criminal onus, of criminal intent. These observations apply with the greatest relevance to the offences referred to in chapter five of the Discussion Paper. We respectfully commend the Committee for raising its concerns in relation to such provisions, specifically the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*.

Consistent with the above comments, we support the proposed principles outlined in Chapter 7 of the Discussion Paper.

In light of the concerns encapsulated above, we agree with each of the principles outlined in paragraph 56 of the Discussion Paper. Specifically, we regard it as essential that there be an entrenched code of legislative practice and interpretation, to the effect that any legislation, past and future, purporting to create strict or absolute liability offences should be deemed to provide that defences amounting to reasonable excuse remain available (see 56. (a)(iv)), absent explicit exclusion. The latter is to be avoided as a matter of prime public policy.

We give qualified support to the proposition that (v) "*strict and absolute liability offences should be applied only where the penalty does not include imprisonment.*" Our support is subject to the caveat that strict or absolute liability offences have no place in the administration of criminal justice. To this end, the Public Defenders express our continuing concern that provisions directed to the prevention of terrorism or otherwise relating to the prevention or prosecution of other serious public order offences, afford no reason or excuse for the imposition of a legislative regime that departs from the rule of law.

It is respectfully submitted that departures from the presumption of innocence are inherently dangerous and self-defeating. The risk of injustice in individual cases has a consequent impact of bringing the sincerity of our society's aspirations to fairness and justice into disrepute.

The specific question as to whether there should be cap on monetary penalties raises less dramatic but pressing concerns for potentially large numbers of adversely effected people, who sometimes inadvertently commit any of the broad class of strict liability regulatory offences. The Public Defenders support a low cap on penalties where individuals are concerned. We further submit that any person subjected to a monetary penalty should always be able to seek waiver or reduction of that penalty. Such remedies should to be granted where just and appropriate, whether as a discretion to extend such amelioration is vested administratively or, where the scale of the penalty is other than nominal, judicially.

The Public Defenders note the recommendations contained within Appendix 2, arising from the Federal Attorney-General's Department Guide to the framing of Commonwealth Offences, civil penalties and enforcement powers. Even when based upon "*well thought out grounds*" (p. 21 [4.5]), the rule of law, rather than utility should always dominate the deliberations of those imposing any penalties, whether monetary or of imprisonment. The Commonwealth recommendations suggest a monetary cap of \$6,600. Such a cap is not, in relation to an individual, a sufficient counter-balance to the reality if such a penalty is imposed upon the prima facie unjust basis of punishing an act, irrespective of whether it was done in ignorance or with a reasonable excuse. The impact of such a penalty moreover may be massive upon a broad class of individuals in less fortunate socio-economic groups. It anomalous that penalties of this nature may be imposed, with crushing financial consequences to individuals or their families, whereas persons charged with very grave criminal acts may suffer no penalty for their acts, unless those acts are properly proven to be accompanied by the requisite criminal mind or "*mens rea*". We do not pretend expertise in selection of

a specific cap figure and would suggest that the views of relevant community and welfare groups be given considerable weight in selecting a figure or a formula, perhaps C.P. I. related, upon which the cap may be reviewed from time to time.

We note in passing that the Sentencing Council has a current reference in relation to fines. This is a fact that is raised in the unlikely event that the Committee is not aware of the reference.

We apologise for the delay in submitting this report but again thank the Committee for its consideration and the opportunity to advance our views.

Yours sincerely



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Deputy Senior Public Defender