

PARLIAMENT OF NEW SOUTH WALES

**Legislative Review Committee**

**STRICT AND ABSOLUTE LIABILITY**

**Discussion Paper**

**SUBMISSION ON BEHALF OF  
THE LEGAL AID COMMISSION OF NEW SOUTH WALES**

The Legal Aid Commission of New South Wales (the Commission) is established under the *Legal Aid Commission Act 1979* (NSW) and is an independent statutory body. The Commission provides legal services to socially and economically disadvantaged people in criminal law, family law and civil law matters. Legal services include representation in Federal and State courts and tribunals. The Commission also works in partnership with private practitioners in representing legally aided people.

The Commission's Criminal Law Branch provides representation in matters in the Children's Court, Local Court, District Court, Supreme Court, Court of Criminal Appeal and High Court. In 2004-2005, the Commission provided representation in 41,002 new criminal law case grants and provided 88,088 criminal law duty services. The Commission represented 215 people in the Court of Criminal Appeal and conducted four full hearings in the High Court.

The Commission has been invited to respond to the New South Wales Parliament's Legislative Review Committee's Discussion Paper: Strict and

Absolute Liability Offences. The Committee in particular 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.

The Committee, at page 2 of the Discussion Paper, has listed a number of principles that it proposes to adopt in its consideration of strict and absolute liability offences. These principles take as a starting point the presumption that proof of criminal intent “is a fundamental principle of our criminal justice system” (at point 12 on page 3). Having considered approaches taken in other jurisdictions (the Commonwealth, Victoria and the ACT), the Committee has come to a conclusion similar to that of the Commonwealth, that wherever strict or absolute liability offences are to be created by statute, then they should be “subject to strong safeguards and protections for those affected”.

The views adopted by the Committee, and reflected in the guiding principles, contain important policy statements as to the operation of the criminal law and the Commission considers the following to be of paramount importance where an offence of either strict or absolute liability is being considered:

- That penalties of imprisonment should not apply to offences of this kind
- That defences should be available and expressly provided for in the legislation creating the offences
- That the relevant legislation should not trespass upon the human rights of an individual, and
- That the exclusion of fault liability as an element of a criminal offence is a serious matter and should only be considered where there is a compelling public welfare/safety issue at hand.

The Commission approves of these guiding principles as the basis of any legislation seeking to create fresh offences of either strict or absolute liability. It is also the Commission’s view that these principles should be enacted in legislation, thereby defining the parameters of any legislation that seeks to

impinge upon the concept of fault as an essential element of a criminal offence.

Strict and absolute liability offences tend to be regulatory matters administered by government agencies to secure compliance with regulations rather than act as a punitive measure. Primarily, these “offences” are to be found in the public welfare/safety field such as with traffic and pollution control. These matters tend to be outside the Commission’s jurisdiction in providing legal representation, for the very reason that there is no custodial penalty for the relevant offence. Generally, legal aid is only available for offences which have a term of imprisonment as an available penalty. While the Commission has limited involvement in representing defendants charged with strict and absolute liability offence, the Commission is of the view that it is important that where penalties are aimed at “professional compliance” that they are not excessive and seen to be used as a punitive measure.

The Commission appreciates the opportunity to make these comments. If the Committee requires any further information please contact Sally McAtee on (02) 92195034 or via e-mail [sally.mcatee@legalaid.nsw.gov.au](mailto:sally.mcatee@legalaid.nsw.gov.au).