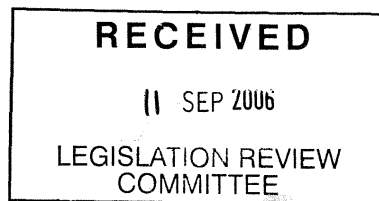


Mr Allan Shearan MP  
Chairman  
Legislation Review Committee  
Parliament of New South Wales  
Macquarie Street  
Sydney NSW 2000



Dear Mr Shearan

Thank you for providing the NSW Department of Health with the opportunity to comment on the Discussion Paper on *Strict and Absolute Liability Offences*.

By way of general comment, a number of offences contained within the *Public Health Act 1991* impose a strict liability. In December 2005 the NSW Court of Appeal, in *Robinson v Zhang* [2005] NSWCA 439 found that the offence of selling tobacco to a minor, under s.59 of the *Public Health Act 1991* carries an absolute liability, and clearly stated that the defence of honest and reasonable mistake of fact is no defence to this offence. Department of Health considers this to be an appropriate state of the law as it relates to tobacco control in the interests of public health and the protection of minors.

I have received advice on those proposals that are of some relevance to public health legislation:

1. *'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.'*

Supported, however it must be remembered that in situations where strict and absolute liability are imposed by the legislation, fault is apportioned regardless of the mental element or *mens rea*.

2. *'Strict and absolute liability should not be used merely for administrative convenience.'*

Agreed.

3. *'Defences, such as due diligence, that take account of circumstances in which punishment for the prohibited conduct would be inappropriate should be available.'*

The availability of defences in determining liability should not be confused with the sanctions imposed once liability is determined. Defences 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.

4. *'Legislation creating strict and absolute liability offences should expressly provide that any other defences remain available.'*

Please refer to comments on Principal 3 above.

5. *'Strict and absolute liability offences should be applied only where the penalty does not include imprisonment.'*

Current public health legislation meets this principle.

6. *'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.'*

It is reiterated that the determination of liability, whether it be strict or absolute liability, and the subsequent imposition of penalties once liability has been determined are two different procedures. It is noted that current sentencing regulations ensure that all or most penalties imposed in strict and absolute liability offences are assessed on a case-by-case basis.

7. *As a general rule, strict and absolute liability should be provided by primary legislation, with regulations used only for genuine administrative detail.'*

Health legislation meets this principle.

8. *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.'*

In the context of developing health legislation, this principle is supported subject to recognising there will be circumstances where exceptions to this principle may be appropriate.

9. *The intent to impose strict or absolute liability should be explicit.'*

Agreed.

Additional principles in relation to absolute liability only:

10. *The size of monetary penalty should reflect the fact that liability is imposed regardless of any mistake of fact.'*

The size of the monetary penalty imposed through legislation for an offence should reflect the seriousness of the offence. Further, issues

relating to a 'mistake of fact' should not be considered in absolute liability offences.

*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, such cases should be rare and carefully considered.*

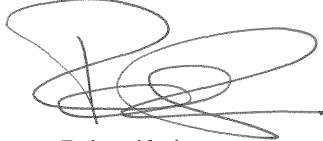
Absolute liability offences are those where the state of mind is not relevant.

*12. Absolute liability offences may be acceptable where inadvertent errors, including those based on mistake of fact, ought to be punished.*

Noted.

The relevant Department of Health contact on this matter is Ms Karen Thomas, Principal Solicitor (Prosecutions) on telephone 93919534.

Yours sincerely

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end.

Robyn Kruk  
**Director-General**

0 4 SEP 2006