

8 August 2006

Mr Allan Shearan MP
Chairman of the Legislation Review Committee
Legislative Assembly
Parliament House Macquarie Street
Sydney NSW 2000

Invitation to comment on the Discussion Paper on Strict and Absolute Liability offences

The Australian Lawyers Alliance welcomes the release of the Legislation Review Committee's Strict and Absolute Liability Discussion Paper.

With regards to the proposed issues for comment, outlined in points (a) and (b) in the Executive Summary, the Lawyers Alliance submits that these principles seem to be acceptable.

The Lawyers Alliance would however like to specifically comment on the need to preserve judicial discretion in relation to the imposition of sentencing. Judicial discretion in this regard, is a cornerstone to the criminal justice system, in particular with strict and absolute liability offenses.

The common law tradition in Australia gives way to the fundamental principle of independence of the judiciary. An independent judiciary has long been supported by the Lawyers Alliance.¹ The Lawyers Alliance supports the principles and institutions of our common law system which serve to ensure equality and fairness before the law. Strict and absolute liability offenses should be dealt with by a fearless and independent judiciary that is free from political influence, as required under the Westminster system of government.

The Lawyers Alliance upholds that the sentencing of strict and absolute liability offenses should fit the individual circumstances of each case. It is therefore a logical assertion that the judiciary is in the best position to determine the appropriate sentence for the cases that are before them. As outlined by Adam and Crickett JJ, "Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process".²

Stringent and inflexible legislative provisions should not determine sentencing for strict and absolute liability offenses. It is the judicial officers who have the

¹ Please see attached 2005 Policy document, Independent of the Judiciary

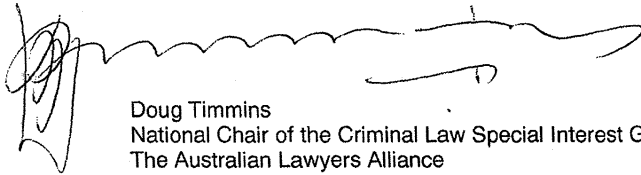
² *R v Williscroft and Ors* [1975] VR 292 300

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.

The Australian Lawyers Alliance would like to thank the Legislation Review Committee, and its Chairman Mr Allan Shearan MP, for the invitation to comment on the discussion paper.

If you wish to contact the Australian Lawyers Alliance or would like to hear further from us on this issue please call Patrick McCarthy, Legal and Policy Officer on (02) 9258 7700.

Regards,

A handwritten signature in black ink, appearing to read 'Doug Timmins', with a long horizontal flourish extending to the right.

Doug Timmins
National Chair of the Criminal Law Special Interest Group
The Australian Lawyers Alliance

2005 Policy document



Independence of the Judiciary

The Australian Lawyers Alliance believes that individual freedoms ultimately depend on equal access to justice before a truly independent judiciary. We support the principles and institutions of our common law system, which serve to ensure equality and fairness before the law and a fearless independent judiciary free that is from political influence, as required under the Westminster system of government.

Public confidence in this system requires that it is perceived to adhere to these principles, as well as to adhere to them in fact. It is crucial for the judiciary both to be and to be seen as independent of the government, as work involves reviewing and interpreting acts of the executive. Judges have security of employment by nature of their tenured appointment, and this security allows them the freedom to make decisions that may not be popular with government. Independence means that a judge has no personal stake in the outcome other than determining a correct and fair decision. Impartial decision-making means that there is less chance of any perception of bias and that the judiciary will enjoy the respect and trust of the community. Chapter III of the Australian Constitution provides security of tenure maintaining a retiring age for judges at seventy in both the High Court of Australia and Federal courts.

However, judges can be appointed on a fixed-term basis (so-called 'acting judges') to state courts thereby threatening to undermine the judicial independence protected by security of tenure. In Victoria proposals to allow the Governor-in-Council to appoint as many acting judges of the Supreme Court as are necessary for transacting the business of the court would seriously impair the judicial independence of judges. An acting judge is eligible for appointment for a second five-year term subject to the government's discretion, and not entitled to reappointment thereafter. Fixed term appointments are likely to generate the perception that appointees are subject to political pressure. Even if the government has no intention of putting any pressure on appointees to act in a particular manner, appointees must be aware that, after their term expires, any further appointment is entirely at the discretion of the government.

Similar proposals have been made to modify the appointment of president of the Administrative Appeals tribunal (AAT) from a tenured position to a fixed term. Tenured appointments were seen as reducing the flexibility of the tribunal to respond to the changing caseload. Why that would be the case is unclear. There is no valid reason why the standard of judicial independence in the AAT, Australia's highest administrative tribunal, should be any lower than that guaranteed to judges of federal courts.

The Australian Lawyers Alliance believes that removing guaranteed tenure will erode judicial independence. No efficiency or fiscal imperative should supersede the interests of justice, both in fact and perception.

Lawyers

**AUSTRALIAN
LAWYERS
ALLIANCE**

for the People

WHO WE ARE

Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We have some 1,500 members and estimate that they represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

APLA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee that has branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2005. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine *Precedent* is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.