FOR THE QUEEN, THE LAW AND THE PEOPLE

AUSTRALIAN CAPITAL TERRITORY

Government Submission

to the

Standing Committee on Legal Affairs

Inquiry into Strict Liability Offences in the ACT

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Introduction

Strict and absolute liability first emerged during the English industrial revolution "to regulate employers of those working in factories"[1]. Strict liability did not really develop, however, until the late 19th century when English courts began applying strict liability to statutory offences of serving liquor to intoxicated persons[2] and dealing with adulterated milk[3]. At the turn of the 20th Century, Australian courts also began applying strict liability to statutory offences[4].

Today, strict and absolute liability offences are primarily aimed at conduct on the less serious side of the criminal spectrum. They have been included in legislation where its use is necessary to ensure the integrity of a regulatory scheme or it is necessary to assist in enforcing the criminal law. In general strict liability offences are commonly used in legislation concerning traffic and road safety, protecting the revenue, consumer protection, workplace safety, occupational health, dangerous substances, waste disposal, and protecting the environment. Absolute liability is rarely applied to the whole of an offence. Usually it is only applied to a specific element of an offence and often when the specific element has little, if any, bearing on the defendant's culpability (see below).

The Government is pleased to have this opportunity to make a submission to the Committee's inquiry into strict liability offences in the ACT. The Government supports the continued use of strict and absolute liability but is conscious that their application gives rise to important criminal law and human rights considerations. The Government shares the Committee's concern that strict and absolute liability should only be applied where it is necessary to give effect to the purpose of the legislation concerned. The submission is set out in three parts. The first discusses strict and absolute liability under the Criminal Code and the *Human Rights Act 2004*. Part 2 then discusses the merits of absolute and strict liability and suggests some criteria for its application to new offences. Part 3 discusses the Criminal Code Harmonisation Program presently underway. Relevant Criminal Code provisions are attached to this submission.

Part 1 – Strict and absolute liability under the Criminal Code and the Human Rights Act

Chapter 2 of the *Criminal Code 2002* ("the Code") provides the general principles of criminal responsibility that apply to all criminal offences created under ACT law since 1 January 2003. The general principles restate many common law principles, including a number of important principles relating to strict and absolute liability. Under the Code strict or absolute liability must be expressly stated in order for strict or absolute liability to apply, otherwise section 22 of the Code will import fault elements into the offence. Prior to the Code there was no general requirement to state whether strict or absolute liability applied to an offence and accordingly it was left to the courts to determine the intentions of the Legislative Assembly based on such considerations as the nature of the offence and the legislation concerned, the language of the offence and the penalty that applied (see part 3 below). Chapter 2 has been of considerable value in this regard because it clarifies whether an offence is a strict or absolute liability offence and avoids

[1] McSherry, B and Naylor, B, *Australian Criminal Laws: Critical Perspectives*, Oxford University Press, 2004, at p 63.
[2] *Cundy v Le Cocq* (1884) 13 QBD 207.
[3] *Parker v Alder* [1899] 1 QB 20.
[4] For a list of cases see footnotes 11, p 83, and 17, p 86 of Gillies, P, *Criminal Law*, LBC Information Services, 1997 (4th Ed.).

the need for courts and practitioners to engage in time consuming debates about whether the Assembly intended strict or absolute liability to apply.

Strict liability offences have two essential features. The first is that there is no requirement to prove a fault element, such as intention or recklessness. For instance, it is a strict liability offence to exceed the speed limit whether or not a person intends to speed. The second distinguishing feature is that the defence of reasonable mistake of fact automatically applies (section 36 of the Code). So if a person checks the speed dial to ensure that he or she is not speeding but the dial is faulty, the person is not liable because the offence occurred because of a reasonable mistake. Other defences can also apply but to be a strict liability offence the defence of mistake of fact must apply. Absolute liability is similar to strict liability except that the defence of mistake of fact does not apply (section 24 of the Code). However, like strict liability, other defences can apply. The prosecution is still required to prove the physical elements of the strict or absolute liability offence beyond a reasonable doubt (for instance, that the defendant performed the prohibited act or failed to perform the required act) and disprove beyond a reasonable doubt any defences that the defendant has put in issue[5].

Absolute and strict liability can be applied to the whole of an offence or to just a particular element of the offence (see sections 23 and 24 of the Code). If strict liability etc only applies to a particular element of the offence it means that there is no fault element for that physical element but there will be a fault element for each other physical element of the offence. In effect, the offence remains a fault element offence, though in relation to one of the physical elements, fault does not have to be proven.

Strict or absolute liability may be applied to a particular element of an offence where it has been demonstrated that the requirement to prove fault, with respect to that physical element, has undermined or will undermine the effectiveness of the offence in a significant number of cases and there are clear and legitimate grounds for penalising a person for lack of 'fault' in relation to that element. Section 64 of the *Crimes Act 1900* is an example. It provides that:-

(1) A person commits an offence if—

(a) the person uses, offers or procures a child—

(i) for the production of child pornography; or

(ii) for a pornographic performance; and

(b) the child is under 12 years old.

Maximum penalty: 1 500 penalty units, imprisonment for 15 years or both.

(2) Absolute liability applies to subsection (1) (b).

In many cases (particularly where the child's appearance is borderline) it would be very difficult for the prosecution to prove beyond a reasonable doubt that the defendant knew that the child was under the age of 12. Depending on the available evidence to the

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[5] Generally, to put a defence in issue (including the defence of reasonable mistake of fact in section 36 of the Code) the defendant is required to satisfy an "evidential burden" of proof. That is, he or she must present or point to evidence that suggests a reasonable possibility that the matters relevant to the defence existed (see section 58 of the Code). However, in some cases the legislation will impose a "legal burden" on the defendant to establish a defence in which case he or she must prove the matters relating to the defence on the balance of probabilities (see sections 59 and 60 of the Code).

contrary a defendant could escape liability on the basis that he or she simply gave the matter of the child's age no thought. It is considered appropriate to apply absolute liability to the age element of this offence, given the nature and subject matter of the offence, the potential for it to be undermined if the prosecution were required to prove fault about age and the reasonable community expectation that people should take special care to ensure that children of such a young age are not involved in pornography.

When applying this approach consideration will be given to including a defence to alleviate the harshness of applying absolute or strict liability to the particular physical element concerned. Paragraph 13 (1)(c) and subsections (2) and (3) of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* is an example. It provides that:-

(1) A person commits an offence if—

(a) the person exhibits a film in a place other than a public place; and

(b) a child is present during any part of the exhibition; and

(c) the film is—

....

(ii) an unclassified film; and

(d) ... the film is subsequently classified RC, X 18+ or R 18+.

(2) Absolute liability applies to—

(b) subsection (1) (d).

(3) This section does not apply if—

....

(b) .... the person does not believe, and has no reasonable grounds for believing, that the film would be classified RC, X 18+ or R 18+.

In this case, having regard to all the relevant considerations, including the nature and subject matter of the offence and the potential of it to be undermined, it was considered appropriate to couple the application of absolute liability with the defence in paragraph 13(3)(b). In this case the burden of proof in relation to the offence is an evidential burden but depending on all the relevant considerations a legal burden may also be appropriate.

Strict or absolute liability can also be applied to a particular element of an offence where the physical element is essentially a precondition of the offence (often referred to as a jurisdictional element of the offence) and the state of mind of the offender with respect to that element has little, if any, bearing on his or her culpability. Section 361 of the Code is an example. It provides that:-

(1) A person commits an offence if—

(a) the person obstructs, hinders, intimidates or resists a public official in the exercise of his or her functions as a public official; and

(b) the person knows that the public official is a public official; and

(c) the public official is a territory public official; and

(d) the functions are functions as a territory public official.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

(2) Absolute liability applies to subsection (1) (c).

(3) Strict liability applies to the circumstance that the public official was exercising the official's functions as a public official.

In effect, the application of absolute liability in this offence (subclause 361(2)) means that although the prosecution must prove that the defendant knew that the person he or she was obstructing etc was a public official of some kind (paragraph 361(1)(b)), it is not necessary to prove that the defendant knew (believed or had any other fault element) that the person he or she was obstructing was a Territory public official. This is considered appropriate because the fact that the defendant may have thought that he or she was obstructing a Commonwealth official instead of a Territory official has no real bearing on his or her moral culpability.

Before the *Criminal Code (Administration of Justice Offences) Amendment Act 2005*, absolute liability was also applied in offences to overcome the "knowledge of law" problem. Essentially the problem related to offences that included cross-references to other legislative provisions. For example, where the offence states that a person commits an offence if he or she contravenes a direction given under "section 5 of the Act". Because of section 22 of the Code there was a concern that a simple cross-reference of this kind could be interpreted to require the prosecution to prove that the defendant knew or was aware, for example, that the direction he or she contravened was given under section 5 of the Act, which in most cases would be difficult or impossible. To overcome this problem, absolute liability was applied to the cross-reference, however, this made for complex drafting and involved an over-use of a term that should be used sparingly. The *Criminal Code (Administration of Justice Offences) Amendment Act 2005* recently provided a longer-term solution by providing that a court is not compelled to require proof of knowledge of the existence or content of a law unless the relevant provision expressly requires it.

The *Human Rights Act 2004* (HRA) also informs the use of strict and absolute liability. A significant issue is the nexus between strict and absolute liability and the right to fair trial in section 21 of the HRA.

The Committee's Views

The Committee has taken a close interest in strict and absolute liability for some time.[6]

Even before the passage of the HRA, the Committee identified potential issues for the nexus between the Criminal Code and the right to fair trial in section 21 of the HRA.[7] For example, in *Scrutiny Report No 38* of 2003, the Committee noted that the Criminal Code established three types of statutory criminal offence, based on the common law.

[6] See generally Legislative Assembly. Standing Committee on Justice and Community Safety, Scrutiny *Report No 2 of 2000*, 29 February 2000; Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report No 24*, 24 January 2003; *Scrutiny Report No 37*, 2 September 2003.

[7] The Committee also noted the right to liberty and security of the person (now in section 24(1) of the HRA): Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report No 38*, 14 October 2003, at p 4.

The second and third categories incorporated strict and absolute liability respectively.[8]

The approach of the Committee, then and now, has been that strict and absolute liability will engage the presumption of innocence, a fundamental aspect of the right to fair trial. As a result, there is a need to apply the proportionality test in section 28 of the HRA. The Committee has asked for this assessment to be articulated in the Explanatory Statement.

The Presumption of Innocence

The Committee's view of the presumption of innocence is based on Canadian precedent.

The core element of this caselaw is that absolute liability, combined with imprisonment, will engage the right of a person not to be deprived of liberty except in accordance with the 'principles of fundamental justice' (*Charter of Rights and Freedoms*, section 7). In particular, it is said, “it is a principle of fundamental justice that the penalty imposed on an accused and the stigma which attaches to that penalty and/or to the conviction itself, necessitate a level of fault which reflects the particular nature of the crime”.[9]

The Canadian courts then apply a proportionality test similar to section 28 of the HRA.

There are limits in applying this view to the right to fair trial in section 21 of the HRA. One objection is that the HRA does not refer to 'the fundamental principles of justice'. A broader objection may be based on a distinction between procedural and substantive protections observed in the caselaw of the European Court and the United Kingdom.

In the context of reverse onus provisions, the European Court of Human Rights (ECHR) implied that States might adopt absolute liability without breaching the right to fair trial. It said Contracting States “may under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence”.[10] However, it required such provisions to be confined “within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence”.[11] The strong implication is that the presumption of innocence is a procedural rather than a substantive protection. It is limited in its focus to procedural and evidential matters.

The implication has been applied to strict and absolute liability in the United Kingdom. For example, the House of Lords has interpreted the ECHR caselaw as recognising that Legislatures “may, generally speaking, attach criminal consequences to defined facts”.[12] Moreover, the High Court has concluded that the presumption of innocence “does not impose *any* restrictions on the power of Parliament to create strict liability offences”:

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[8] The Committee argued 'it may be said with confidence that whatever version of a bill of rights the Assembly were to adopt, the way in which threefold categorization is applied raises a potential rights issue': Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report No 38*, 14 October 2003, at p 4.
[9] *R v Wholesale Travel Group Inc*. [1991] 3 S.C.R. 154 at p 183.
[10] *Salabiaku v France* (1988) 13 EHRR 379 at [27].
[11] *Salabiaku v France* (1988) 13 EHRR 379 at [28].
[12] *Attorney General's Reference No 4 of 2002* [2004] UKHL 43

> It follows that the courts are not entitled to use Article 6.2 to import a defence into a strict liability offence where Parliament has not done so, nor can they make any declaration of incompatibility because of the absence of any such defence.[13]

In effect, it held that the presumption of innocence in the *Human Rights Act 1998* is "not a criterion against which the substance of a domestic offence can be scrutinised" but it is "confined to procedural matters and the way in which such an offence may be proved".[14]

A possible defect in this reasoning is that an absolute liability offence will never engage the presumption of innocence but the addition of a reverse onus defence inevitably will. This was recognised by the High Court which noted that, given the focus on procedural fairness, 'a state's laws are subject to fuller review when they include a defence which places the burden on the [accused] than they are when no defence at all is conferred'.[15]

This defect has been the subject of substantial critique by academic commentators:

> [It] leads to the absurd conclusion that a reverse onus of proof in a defence to an offence of strict liability may be held incompatible with Article 6(2) where the very same offence will be regarded as compatible as a whole if no such defence exists at all.[16]

Clearly it is the view of the Committee that strict and absolute liability engage the right to fair trial. Given this history, we do not wish to contest that view. This submission proceeds on the assumption the same view will be adopted in the Supreme Court.

It is necessary therefore to discuss the framework for reasonable limits in the HRA.

The Proportionality Test

The HRA recognises that few rights are absolute and that, within defined boundaries, certain limits may be placed on rights as part of the balancing of competing interests. Human rights law has developed the 'proportionality test', which is a framework that is used to work out what are legally acceptable limitations on human rights.

Section 28 HRA brings the 'proportionality test' into Territory law. For a limitation to be justifiable under section 28, it must be reasonable, demonstrably justifiable in a free and democratic society and be authorised by a Territory statute or statutory instrument.

Whether a limitation is reasonable depends upon whether it is proportionate to achieve a legitimate aim. This requires that the limitation be necessary and rationally connected to the objective; the least restrictive means reasonably available to accomplish the object; and not have a disproportionately severe effect on the person to whom it applies.

It is a matter of weighing:

- the significance in the particular case of the values of the HRA;
- the importance in the public interest of the intrusion on the particular right;

[13] *Barnfather v London Borough of Islington Education Authority* [2003] EWHC 418 at [34].
[14] *Barnfather v London Borough of Islington Education Authority* [2003] EWHC 418 at [18].
[15] *Barnfather v London Borough of Islington Education Authority* [2003] EWHC 418 at [45].
[16] Victor Tadros and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act', *Modern Law Review*, 2004, Volume 67 Issue 3, 402; *cf* Paul Roberts, 'The Presumption of Innocence Brought Home? Kebilene Deconstructed', *Law Quarterly Review*, 2002, 118 (JAN), 41-71.

- the limits to be placed on the application of the particular right in the particular case; and
- the effectiveness of the intrusion in protecting the interests put forward to justify the limits.

In essence, the inquiry is two-fold:

1. Whether the provision serves an important and significant objective; and,

2. Whether there is a rational and proportionate connection between the two.

This is a well-established formula used in comparable countries and is in keeping with the general rule that limits on fundamental rights must be read as narrowly as possible.[17]

Applying the Proportionality Test

Clearly, strict and absolute liability provisions must meet the proportionality test. However, the Committee has not been prescriptive about a general framework in this area:

> … there is room for debate as to just what is an appropriate framework for sorting out the issue of when there should be such an amelioration [of the presumption of innocence]. The approach of the Canadian courts, and of the Senate Committee, are suggestive of a range of factors. This is a matter that needs to be addressed on a case-by-case basis until a general position can be stated. [However], the Committee feels that it is appropriate for the Attorney to indicate at least some minimum general standards.[18]

The Committee has sought to have these issues canvassed in Explanatory Statements:

- Why it is in respect of the offence that no fault element should be required; and
- Why it is that if no fault element is required, why a defendant should not be able to rely on some defence - and in particular, one of having taken reasonable steps to avoid liability - in addition that is, in relation to an offence of strict liability, to the defence of reasonable mistake of fact allowed by s 36 of the Criminal Code 2002.[19]

A partial framework was provided in an Explanatory Statement to a bill in 2004:

> Offences incorporating strict liability elements are carefully considered when developing legislation and generally arise in a regulatory context where for reasons such as public safety or protection of the public revenue, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale is that professionals engaged in [the regulated activity], as opposed to members of the general public, can be expected to be aware of their duties and obligations … Unless some knowledge or intention ought

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[17] The main elements of the proportionality test are established by the Canadian case of *R v Oakes* [1986] 1 SCR103. A similar approach has been endorsed by the Privy Council in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998] 3 WLR 675. The ECHR, the United Kingdom courts and the New Zealand courts have also taken a similar approach: *Sunday Times v UK* (1979-80) 2 EHRR 245; *Ministry of Transport v Noort* [1992] 3 NZLR 260.

[18] Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report No 38*, 14 October 2003, at p 16.

[19] Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report No 38*, 14 October 2003, at p 8.

> be required to commit a particular offence (in which case a specific defence is provided), the defendant's frame of mind at the time is irrelevant. The penalties for offences cast in these terms are lower than for those requiring proof of fault.[20]

The Committee has endorsed these principles:

> - strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation; [or] where its application is necessary to protect the general revenue;
>
> - strict liability may be appropriate to overcome the "knowledge of law" problem, where a physical element of the offence expressly incorporates a reference to a legislative provision;
>
> - strict liability may be appropriate where it has proved difficult to prosecute fault provisions, particularly those involving intent; as with other criteria, however, all the circumstances of each case should be taken into account; [and]
>
> - strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general … criteria of 60 penalty units … appears to be a reasonable maximum.[21]

Essentially, it is recognised that the HRA and the proportionality test will be influential in deciding whether strict liability (and absolute liability) is appropriate in each particular case.

Part 2 – The merits of and the criteria for strict and absolute liability

The Code reflects the presumption at common law that fault must be proven for each physical element of an offence before a person can be found guilty. This presumption can be rebutted but first there must exist clear, legitimate grounds for attaching strict or absolute liability to a physical element of an offence. The attachment of strict and absolute liability to an offence is context specific. That is, the subject matter of the Bill or regulation and the particular offence will have a significant bearing on whether it is appropriate to apply strict or absolute liability rather than a fault element.

The following are relevant considerations in determining whether strict and absolute liability should be applied in an offence, though they are not exhaustive:

- Strict liability offences are primarily for conduct on the less serious side of the criminal spectrum and are usually employed where it is necessary to ensure the integrity of a regulatory scheme. In particular, schemes that deal with public health and safety, the environment, the protection of the revenue and the maintenance of industry and professional standards, etc. Offences that impose requirements to report and keep records and to comply with conditions of a permit or licence are typical examples of such offences;

[20] Explanatory Statement, Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004, pp 2-3.
[21] Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report No 2*, 14 February 2005, at p 10.

- Strict or absolute liability offences may also be used where it is necessary to assist in enforcing the criminal law, such as where it is demonstrated that the requirement to prove fault has undermined or will undermine the effectiveness of the offence in a significant number of cases and there are clear and legitimate grounds for penalising a person for lack of 'fault' in relation to that offence;

- Whether the persons who are to be subject to the offence can be expected to be aware of their obligations and the need to guard against the possibility of any contravention. This will usually be the case in relation to regulatory schemes;

- Whether it is appropriate to apply strict or absolute liability to a specific element of an offence because it has been demonstrated that the requirement to prove fault with respect to that element has undermined or will undermine the effectiveness of the offence and there are clear and legitimate grounds for penalising a person for lack of 'fault' in relation to that element;

- Strict or absolute liability may apply to an element that is a precondition or a jurisdictional element of the offence;

- The application of strict or absolute liability is not justified on the sole ground of minimising resource requirements or administrative convenience;

- For a strict liability offence, the penalty is generally limited to a monetary penalty, though in some cases a term of imprisonment, up to a maximum of six months may be appropriate. As a general rule, the maximum monetary penalty should not be more than 60 penalty units, however there may be circumstances relating to the subject matter and the particular conduct involved that requires a higher pecuniary penalty;

- Imprisonment should not apply to an absolute liability offence and the monetary penalty should not exceed 10 penalty units.

Strict and absolute liability serves to protect the community by enforcing a high standard of care. Without this ability to deal with minor regulatory offences in this way, the standard of care has the potential to be undermined. To require proof of fault will often render some legislation ineffective. Fundamentally it is about the public interest in seeing the law enforced and the need to avoid the perception that because of difficulties in sustaining a charge, a good many defendants might "deliberately break the law, or at least . . .take too little care in avoiding its infringement."[22]

For example, suppose the offence of exceeding the speed limit by less than 15 km/h[23] was a fault element offence. The prosecution has to prove the motorist intended to speed or knew he/she was speeding. This may be impractical because the evidence may not exist or the testimony from the motorist is that their mind was 'elsewhere', that they had simply not considered whether they were speeding[24]. Knowledge requires a conscious advertence to the fact they were exceeding the speed limit and this is unlikely to be able to be proven by the prosecution. The outcome would mean an unsuccessful prosecution,

[22] Gillies at p 87.
[23] Road Transport (Offences) Regulation 2005, part 1.2, item 1.1 (Australian Road Rule 20).
[24] This example is from Gillies at p 86.

which would be repeated many times over. However, courts have long considered speeding to be appropriate as a strict liability offence (and in some jurisdictions, an absolute liability offence[25]) because the public welfare demands protecting the community from wanton or reckless speeding. Courts were persuaded that the consequences for the community overrode the potential consequences for the accused.

Part 3 – Harmonisation Program

Harmonisation is essentially the process of reviewing and revising existing ACT offence provisions to ensure that they are in a form that can operate under the Code. The Assembly passed the first Bill (*Criminal Code Harmonisation Act 2005*), which harmonised 32 Acts and 6 regulations. Presently the Criminal Code applies only to offences created since 1 January 2003 and those offences recently harmonised by the first bill. The application date of the Code to all offences is 1 July 2007.

The ACT's policy on new offences and on substantive amendments to existing offences is distinct from its approach to the harmonisation of criminal offences with the *Criminal Code 2002*. The harmonisation approach is centred on legal considerations, namely the maintenance of the legal status quo in adjusting the wording of the offences to meet the requirements of the Code. Essentially, this involves stating the physical and fault elements of an offence more clearly and in particular, stating that absolute or strict liability applies to an offence or element of an offence, when it is considered that was the original intention of the offence. That is, the general approach of the Harmonisation Program is to ensure, essentially, that previously enacted offences continue to operate as the Assembly intended at the time they were enacted. However, where it is considered that an offence provision no longer complies with established criminal law principles or the *Human Rights Act 2004*, appropriate alterations will be made and these will be identified and explained in the Explanatory Statement for the Assembly's consideration.

General statutory interpretation principles are used to determine whether an existing offence was intended to be strict or absolute liability. These tests have generally come from the case law where the courts, in particular the High Court in *He Kaw Teh v R*[26], have laid down a number of indicators that infer strict liability, including:

- The words of the statute;
- The subject matter of the statute;
- The importance of the offence in the enforcement of a regulatory scheme;
- The consequences of non-compliance; and
- The penalty that applies.

Offences that are wholly regulatory in nature, ie. failure to comply with reporting or record-keeping requirements, failure to comply with conditions of permits or licences, are generally the clearest examples of offences where it can be inferred that strict or absolute liability was intended to apply.

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[25] *Kearon v Grant* [1991] 1 VR 321.
[26] (1985) 157 CLR 523.

Extracts of Criminal Code 2002 provisions

22 Offences that do not provide fault elements

(1) If the law creating an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.

(2) If the law creating an offence does not provide a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for the physical element.

23 Strict liability

(1) If a law that creates an offence provides that the offence is a strict liability offence—

(a) there are no fault elements for any of the physical elements of the offence; and

(b) the defence of mistake of fact under section 36 (Mistake of fact—strict liability) is available.

(2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence—

(a) there are no fault elements for the physical element; and

(b) the defence of mistake of fact under section 36 is available in relation to the physical element.

(3) The existence of strict liability does not make any other defence unavailable.

24 Absolute liability

(1) If a law that creates an offence provides that the offence is an absolute liability offence—

(a) there are no fault elements for any of the physical elements of the offence; and

(b) the defence of mistake of fact under section 36 (Mistake of fact—strict liability) is not available.

(2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence—

(a) there are no fault elements for the physical element; and

(b) the defence of mistake of fact under section 36 is not available in relation to the physical element.

(3) The existence of absolute liability does not make any other defence unavailable.

36 Mistake of fact—strict liability

(1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if—

(a) when carrying out the conduct making up the physical element, the person considered whether or not facts existed, and was under a mistaken but reasonable belief about the facts; and

(b) had the facts existed, the conduct would not have been an offence.

(2) A person may be taken to have considered whether or not facts existed when carrying out conduct if—

(a) the person had considered, on a previous occasion, whether the facts existed in the circumstances surrounding that occasion; and

(b) the person honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as the circumstances surrounding the previous occasion.

Note Section 24 (Absolute liability) prevents this section applying to offences of absolute liability.

56 Legal burden of proof—prosecution

(1) The prosecution has the legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note See s 11 (Elements) on what elements are relevant to a person's guilt.

(2) The prosecution also has the legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof on the defendant.

(3) In this Act:

legal burden, in relation to a matter, means the burden of proving the existence of the matter.

57 Standard of proof—prosecution

(1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

(2) Subsection (1) does not apply if a law provides for a different standard of proof.

58 Evidential burden of proof—defence

(1) Subject to section 59 (Legal burden of proof—defence), a burden of proof that a law imposes on a defendant is an evidential burden only.

(2) A defendant who wishes to deny criminal responsibility by relying on a provision of part 2.3 (Circumstances where there is no criminal responsibility) has an evidential burden in relation to the matter.

(3) Subject to section 59, a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence (whether or not it accompanies the description of the offence) has an evidential burden in relation to the matter.

Examples

1 The *XYZ Act 2002*, section 10 (1) creates an offence of producing a false or misleading document. Section 10 (2) provides—

(2) This section does not apply if the document is not false or misleading in a material particular.

Section 10 (2) is an exception to section 10 (1). A defendant who wishes to rely on the exception has an evidential burden that the document is not false or misleading in a material particular.

2 The *XYZ Act 2002*, section 10 (1) creates an offence of a person making a statement knowing that it omits something without which the statement is misleading. Section 10 (2) provides—

(2) This section does not apply if the omission does not make the statement misleading in a material particular.

Section 10 (2) is an exception to section 10 (1). A defendant who wishes to rely on the exception has an evidential burden that the omission did not make the statement misleading in a material particular.

3 The *XYZ Act 2002*, section 10 (1) creates an offence of disclosing certain information about a restraining order. Section 10 (2) provides—

(2) This section does not apply if the disclosure is made to a police officer.

Section 10 (2) is an exception to section 10 (1). A defendant who wishes to rely on the exception has an evidential burden that the disclosure was made to a police officer.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(4) To remove any doubt, for a strict liability offence that allows the defence of reasonable excuse, a defendant has an evidential burden in relation to the defence.

(5) The defendant no longer has the evidential burden in relation to a matter if evidence sufficient to discharge the burden is presented by the prosecution.

(6) The question whether an evidential burden has been discharged is a question of law.

(7) In this Act:

evidential burden, in relation to a matter, means the burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

59 Legal burden of proof—defence

A burden of proof that a law imposes on the defendant is a legal burden only if the law expressly—

(a) provides that the burden of proof in relation to the matter in question is a legal burden; or

(b) requires the defendant to prove the matter; or

(c) creates a presumption that the matter exists unless the contrary is proved.

Example for par (b)

The *XYZ Act 2002*, section 10 (1) creates an offence of exhibiting a film classified 'R' to a child. Section 10 (2) provides—

(2) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that the defendant believed on reasonable grounds that the child was an adult.

Section 10 (2) provides a defence to an offence against section 10 (1). A defendant who wishes to rely on the defence has a legal burden of proving that the defendant believed on reasonable grounds that the child was an adult.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

60 Standard of proof—defence

A legal burden of proof on the defendant must be discharged on the balance of probabilities.