STANDING COMMITTEE ON LEGAL AFFAIRS

Strict and Absolute Liability Offences

FEBRUARY 2008

Report 7
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Resolution of Appointment

On 7 December 2004 the Legislative Assembly for the Australian Capital Territory resolved to establish a general purpose standing committee, called the Standing Committee on Legal Affairs:

- to perform the duties of a scrutiny of bills and subordinate legislation committee and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, governance and industrial relations, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services.

Terms of Reference

On 25 October 2005, the Standing Committee on Legal Affairs resolved to undertake an inquiry into strict liability offences. On 6 December 2005 the Committee formalised its terms of reference for the inquiry and advised the ACT Legislative Assembly that it would inquire into and report on:

(a) the merit of making certain offences ones of absolute or strict liability;
(b) the criteria used to characterise an offence, or an element of an offence, as appropriate for absolute or strict liability.
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RECOMMENDATIONS

RECOMMENDATION 1
5.12 The Committee recommends that the Attorney-General undertake an 'audit' of the statute book to determine a) the prevalence of strict and absolute liability offences on the ACT statute book and b) the appropriateness of characterising offences as ones of strict or absolute liability.

RECOMMENDATION 2
5.13 The Committee recommends that the audit also identify offences in terms of the penalty provided for so that an analysis can be made of the prevalence of the seriousness of strict and absolute liability in ACT law.

RECOMMENDATION 3
5.18 The Committee recommends that the Office of Parliamentary Counsel develop and implement guiding principles for the drafting of offence provisions in legislation.

RECOMMENDATION 4
5.21 The Committee recommends that consideration be given to the likely impact of draft legislation on individuals prior to enactment, with provisions containing a knowledge or intent element if any potential impacts are unreasonably or unfairly detrimental to an individual.

RECOMMENDATION 5
5.23 The Committee recommends that a similar provision to section 9.4 (2) (c) of the Criminal Code (Cth), which provides a defence based on mistake or ignorance of subordinate legislation, be inserted into the ACT Criminal Code

RECOMMENDATION 6
5.25 The Committee recommends that offence provisions should be drafted to make it absolutely clear which party bears the burden of proof and what kind of burden of proof is required.
1 CONDUCT OF THE INQUIRY

1.1 The issue of strict and absolute liability offences has been raised on many occasions over the last few years by the Standing Committee on Legal Affairs performing the duties of a scrutiny of bills and subordinate legislation committee [hereafter referred to as the Scrutiny Committee]. The comments and legislation to which they relate are set out in Appendix C of the report.

1.2 The Scrutiny Committee’s major concern has been the seemingly increasing prevalence of strict and absolute liability offences appearing in legislation and the potential impact that such offences might have on an accused person. One of the Scrutiny Committee’s frequently expressed concerns is that such offences have the potential to erode certain human rights, particularly the presumption of innocence and the right to a fair trial. In the parlance of the Scrutiny Committee’s terms of reference, strict and absolute liability offences have the potential to:

- unduly trespass on personal rights and liberties;
- make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

1.3 The Scrutiny Committee has raised concerns consistently over the past five years in relation to strict and absolute liability offences and legislative drafting. The major criticisms of the Scrutiny Committee concern either human rights implications or the inadequate identification and justification of strict liability offences in the Explanatory Statements accompanying proposed legislation. Given the quantum and potential impact of such offences appearing on the statute books over the period, the Legal Affairs Committee felt sufficiently concerned to pursue a focussed reference on strict and absolute liability offences.

1.4 On 13 December 2005, the Legal Affairs Committee therefore adopted the following terms of reference:

(a) the merit of making certain offences ones of absolute or strict liability;

(b) the criteria used to characterise an offence, or an element of an offence, as appropriate for absolute or strict liability.
1.5 Prior to adopting the terms of reference, the Committee consulted with the then Attorney-General, Mr Stanhope, about the scope of the draft terms of reference. Originally, the Committee had included a third aspect, whether criteria were applied consistently to existing and proposed legislation. In response, the Attorney-General stated that any such review would be an enormous task, compromising the introduction of any agreed criteria following the Committee’s report.1 The Committee acceded to his request to confine the inquiry to the above terms of reference, but it should be noted that the initial recommendation addresses this matter.

1.6 The Committee notes the comments of the current Attorney-General at public hearing:

The government welcomes the inquiry by the committee. It provides an opportunity for the committee to settle its understanding about the harmonisation process and to settle a view about the principles that support the use of strict or absolute liability in offences on the ACT statute book. It is critical that we get these principles right. The creation of strict liability offences requires a judgment decision in relation to their appropriateness or applicability in a particular circumstance.2

1.7 The Committee agrees that ‘the creation of strict liability offences requires a judgment decision in relation to their appropriateness or applicability in a particular circumstance’ and it is the exercise of this judgment and the application of any guiding principles in relation to the characterisation of offences which concerns the Committee.

1.8 The Committee received three submissions and held a public hearing on 28 November 2006 at which the Attorney-General, officials of the Department of Justice and Community Safety, the Council for Civil Liberties and Mr Peter Bayne appeared. A list of submissions and witnesses appearing at the public hearing are set out in Appendix A.

1.9 Appendix B contains major extracts from a number of Scrutiny Committee reports over the last few years. Appendix C comprises in table form an

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1 Correspondence, Attorney-General [Mr Stanhope] to Committee, 30 November 2005
2 Transcript of Evidence, 28 November 2006, p 3
analysis of the different comments made by that committee over the last few years. Appendix D contains an extract from the *Criminal Code 2002*. Appendix E contains conclusions and recommendations from the Senate Scrutiny of Bills Committee report in 2002.

1.10 The Committee acknowledges the contribution to this report by reports of the:

- Senate Scrutiny of Bills Committee;
- NSW Legislation Review Committee; and
- Australian Law Reform Commission.

1.11 The Committee also thanks those who made submissions to the inquiry and who appeared at public hearing.
2 DEFINITION AND BACKGROUND ISSUES

The criminal law framework in the ACT

2.1 The ACT’s criminal legislation has its origins in the Model Criminal Code project of the 1990s, which aimed to develop model State and Territory criminal law, ie a standardised criminal law regime for the whole of Australia. The Commonwealth passed the Model Criminal Code in 1995. Chapter Two of the Model Criminal Code revised and codified the principles of criminal responsibility.

2.2 The ACT passed its Criminal Code in 2002. The Criminal Code 2002 [the Code] largely reflects the Model Criminal Code and is being progressively implemented. Chapter 2 sets out the principles of criminal responsibility which will eventually apply to all criminal offences. Chapter 2 ‘restates the common law and seeks to clarify when offences are offences of strict or absolute liability’, with the stated objective of ensuring that the intentions of the legislature are clear and unambiguous, thereby promoting greater clarity and certainty in the criminal law.

The fault element in criminal law

2.3 At law, criminal offences comprise two elements – the mental or fault element and the physical element, the mens rea and the actus reus respectively. Generally, both must coincide for a person to be guilty of an offence or an element of an offence.

2.4 Strict and absolute liability removes the fault element of an offence, meaning there is no need for a finding of fault. So long as the defendant’s action is proved to have caused the offence, thereby proving the physical elements of the offence, ie the conduct or consequences of conduct, there is no need to prove the mental or fault element.

2.5 It should be noted that the following disadvantages may accrue to defendants as a result of the application of strict or absolute liability, including:
- a lack of court scrutiny;
- the risk that innocent people will pay the infringement notice penalty to avoid the expense of contesting proceedings;
- the possibility of ‘net widening’ with the automatic issue of an infringement notice where there would otherwise be a caution or a warning;
- failure to consider the circumstances of individual cases;
- dispensing with the traditional common law protection of mens rea;
- reversing the onus of proof; and
- diminishing the moral content of particular offences.3

Rebutting the presumption of subjective fault at common law

2.6 There is a presumption of subjective fault at common law, which can be rebutted where the statute law is unclear or needs interpretation. The authority for rebuttal of the presumption is He Kao Teh v the Queen (1985) 157 CLR 523, which sets out four criteria to be assessed in determining whether or not the presumption of subjective fault has been displaced:
- the language of the section creating the offence;
- the subject matter of the statute;
- the consequences for the community of an offence; and
- the potential consequences for an accused if convicted.4

2.7 Under the Criminal Code, an offence is identified as one of strict or absolute liability. Where there is no identification, the Code imports a fault element.

2.8 In addition, all legislation in the ACT is subject to the provisions of the Human Rights Act 2004 [HRA], which requires that legislation is to be interpreted consistently with human rights as far as possible.5 However, the HRA also recognises that few rights are absolute6 and provides that human rights may be subject only to reasonable limits set by Territory laws that can be

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4 Per Gibbs CJ at 528-530 [as quoted in Bronnitt and McSherry, pp 187-188
5 Human Rights Act 2004, s 30
6 Human Rights Act 2004, Preamble
demonstrably justified in a free and democratic society. The HRA becomes important when considering strict and absolute liability, as these kinds of offences have significant potential to infringe human rights. The question of the balance between individual rights and the public interest becomes a pivotal one.

**The harmonisation process**

2.9 The Criminal Code was not applied to all offences on 1 January 2003. In order to ensure that existing offences would continue to operate as originally intended, the ACT Government embarked on a harmonisation program of reviewing and revising as necessary all offences to ensure that they were in a form consistent with the principles of the Code. The Attorney-General noted:

> Chapter 2 commenced on 1 January 2003. Its principles did not apply immediately, however. This was because a large number of consequential amendments were required in relation to many existing offences to make them code compliant. These amendments are necessary because existing offences are drafted on the basis of different principles. For an offence to operate effectively under the code regime it must be structured in a way that conforms to the general principles of criminal responsibility in chapter 2. 

2.10 The Attorney-General’s submission states:

> 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.

2.11 The harmonisation project aimed to ensure that by 1 July 2007 all offences were covered by 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

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7 Transcript of Evidence, 28 November 2006, p 3
8 Submission 2, Attorney-General, p 10
recently harmonised by the first bill. The application date of the Code to all offences is 1 July 2007.⁹

2.12 Prior to finalising its report, the Committee contacted the Department of Justice and Community Safety [JACS] to check on the progress of the harmonisation process. The Committee was advised that:

- no further harmonisation bills had been introduced since the Criminal Code Harmonisation Act 2005;
- section 10 of the Criminal Code had been amended to defer the default application of the Criminal Code to 1 July 2009.¹⁰

**Strict and absolute liability under the Code**

2.13 As noted above, Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility applicable to all offences created in the ACT since 1 January 2003 and specifically requires that 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.

2.14 The ACT’s Criminal Code 2002, which is similar but not precisely identical to the Criminal Code Act 1995 (Cth), provides for a default ‘fault’ element:

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.¹¹

2.15 Therefore, in the ACT under the Model Criminal Code, if it is intended to make an offence one of strict or absolute liability, then the law creating the offence must make an explicit statement to this effect, otherwise s 22 of the Code will import a fault element into the offence. The Attorney-General’s submission suggests that Chapter 2 clarifies whether an offence is one of strict

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⁹ Submission 2, Attorney-General, p 10
¹⁰ Correspondence to the Committee, 29 November 2007
¹¹ Criminal Code Act 1995 (Cth), Schedule, s 5.6 and Criminal Code 2002 (ACT) s 22
or absolute liability offences, thereby avoiding 'the need for courts and practitioners to engage in time consuming debates about whether the Assembly intended strict or absolute liability to apply'\textsuperscript{12}.

2.16 The Attorney-General’s submission sets out how strict and absolute liability applies to an offence:

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.\textsuperscript{13}

2.17 The courts traditionally have been disinclined to characterise an offence as one of strict or absolute liability in the absence of clear legislative intention, demonstrating a reluctance to punish an accused on the basis of the physical element alone.\textsuperscript{14} Under the common law, offence provisions must be read in the light of general principles governing criminal responsibility as stated in Sherras v. De Rutzen (1895) 1 QB 918, at p 921:

There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.\textsuperscript{15}

2.18 The leading Australian case is He Kaw Teh\textsuperscript{16} where the defendant was found guilty of the importation of a large quantity of heroin under section 233B of the

\begin{itemize}
  \item \textsuperscript{12} Submission 2, Attorney-General, p 1
  \item \textsuperscript{13} Submission 2, Attorney-General, p 2
  \item \textsuperscript{14} Bronitt S and McSherry B, Principles of Criminal Law, 2005, p 189
  \item \textsuperscript{15} He Kaw Teh v theQueen, 1985 157 CLR, 523 per Gibbs CJ at ???
  \item \textsuperscript{16} He Kaw Teh v the Queen [1985] 157 CLR 523
\end{itemize}
While the accused claimed that he was unaware the heroin was in his possession, the courts previously had consistently interpreted the offences under the Customs Act as strict liability offences, because of subject matter of the offence, ie narcotic drugs. While there was nothing in the language of the statute to indicate strict liability, neither was there a reference to 'knowingly' committing the offence. Courts had therefore concluded that the omission of references to words like 'knowingly' pointed to an intention on the part of the Government of the day that the offences were intended to be strict liability offences. However, on appeal in the High Court, it was held that it would be unjust for offences under section 233B of the Customs Act to continue to be analysed as strict liability offences, stating:

With all respect I do not consider that the fact that the legislation dealt with narcotic goods supports the view that the Parliament intended to make the offence an absolute one or to make proof of guilty knowledge unnecessary; the gravity of the offence indicates the contrary... I accordingly conclude that the presumption that mens rea is required before a person can be held guilty of a grave criminal offence is not displaced in relation to s.233B(1)(b) of the Customs Act and that the prosecution on a charge under that provision bears the onus of proving that the accused knew that he was importing a narcotic substance.

...it is unlikely that the Parliament intended the consequences of committing an offence so serious should be visited on a person who had no intention to do anything wrong and no knowledge that he or she was doing so.17

2.19 The Criminal Code has codified this aspect of the common law, in requiring offences to be specifically identified as offences of strict or absolute liability and in the absence of such identification, to import a mental element.

The defence of mistake

2.20 An accused may raise the defence of mistake for strict liability offences but not for absolute liability offences. The defence of mistake applies to strict liability offences where 'an honest and reasonable belief in a state of facts which, if they

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17 He Kao Teh v The Queen [1985] 157 CLR 523 per Gibbs CJ at 529-30
existed, would render the act innocent. If this defence is excluded, either expressly or by implication, the offence is one of absolute liability.

2.21 At common law the defence of mistake has the following components:

- there must be a mistake and not mere ignorance;
- the mistake must be one of fact and not of law;
- the mistake must be honest and reasonable; and
- the mistake must render the accused’s act innocent.

2.22 The defence of mistake, as set out under the ACT’s Criminal Code, is as follows:

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.

2.23 In the ACT, the defence of mistake in the Code is similar to that at common law in that it is available only where no offence would have been committed

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18 Bronitt S and McSherry B, Principles of Criminal Law, 2005, p 189
19 Bronitt S and McSherry B, Principles of Criminal Law, 2005, p 191
on the facts as they were believed to be and each of the factors listed at paragraph 2 must be considered.\textsuperscript{20}

2.24 Once the defence of mistake of fact has been raised, the prosecution bears the legal burden of disproving the defence; the defence has the evidential burden of providing evidence of mistake of fact.

\textbf{Ignorance of the law}

2.25 The Committee notes that s 9.4 (2) (c) of the Criminal Code (Cth) provides a defence based on mistake or ignorance of subordinate legislation. The Commonwealth Criminal Code states:

\textbf{9.4 Mistake or ignorance of subordinate legislation}

(1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of the subordinate legislation that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.

(2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:

(a) the subordinate legislation is expressly to the contrary effect; or

(c) at the time of the conduct, the subordinate legislation:

(i) has not been made available to the public (by means of the Register under the \textit{Legislative Instruments Act} 2003 or otherwise); and

(ii) has not otherwise been made available to persons likely to be affected by it in such a way that the person would have become aware of its contents by exercising due diligence.

(3) In this section:

\textit{available} includes available by sale.

\textit{subordinate legislation} means an instrument of a legislative character made directly or indirectly under an Act, or in force directly or indirectly under an Act.

2.26 This sub-section was not included in s37 (2) of the ACT’s Criminal Code, which reproduces only s 94 (s) (a) and (b) as s 37 (2) (a) and (b).\textsuperscript{21}

\textsuperscript{20} Bronitt S and McSherry B, \textit{Principles of Criminal Law}, 2\textsuperscript{nd} Ed, 2005, p 191
2.27 Bronitt and McSherry appear to support such a defence:

In the Northern Territory and Queensland, there is some recognition of a
defence of mistake or ignorance of delegated or subordinate legislation and it
may be that there is increasing support for such a defence to be recognised in
other jurisdictions.\footnote{22}

2.28 The explanation for the ACT’s exclusion of an explicit defence based on
ignorance of subordinate legislation may stem from the fact that the ACT’s
Legislation Register is the mechanism by which legislation comes into effect in
the ACT. While the Register is highly accessible, it is still an online facility and
it is not necessarily part of everyone’s daily routine to peruse the Legislation
Register to check whether or not new legislation has been posted which might
affect their activities. This is even more so for subordinate legislation, of which
there is significantly more each year.

**Identification of offences as ones of strict or absolute liability**

2.29 As noted above, all legislation introduced into the ACT must identify any
offences which have strict or absolute liability attached. Where there is no
identification a fault element is imported into the offence by virtue of s 22 of
the Code.

2.30 One of the most critical questions for consideration by framers of legislation is
the question of the circumstances in which strict or absolute liability might be
applied. The policy guidelines which underpin the imposition of strict and
absolute liability are fundamental to the issues under consideration in the
inquiry. The Attorney-General stated at public hearing:

There are some clear circumstances where strict liability is appropriate: for
example, where the physical elements are Preconditions or jurisdictional
factors and the defendant’s state of mind has little, if any, bearing on their
culpability; where to escape conviction on those grounds would be
perceived as a loophole; where the persons targeted by the offence can be

\footnote{21} Section 94(2) provides that Subsection (1) does not apply and the person is not criminally
responsible for the offence in those circumstances if:

\( ... (c) \) at the time of the conduct, copies of the subordinate legislation have not been made
available to the public, or to persons likely to be affected by it, and the person could not
be aware of its content even if he or she exercised due diligence.

expected to be aware of their obligations and the need to guard against the risk of contravention; where the gravity of the offence and the penalties or consequences are low; where it is virtually impossible or particularly difficult for the prosecution to prove a fault element because it is peculiarly within the defendant’s knowledge; where offences deal with public health and safety, the environment, protection of revenue and the maintenance of industry or professional standards; and where the imposition of fault-limited liability has been shown to be necessary for the effective operation of a regulatory scheme covering all these factors.23

2.31 The Law Council of Australia submitted to the Senate Scrutiny of Bills Committee that ‘strict liability was only for offences which are readily understood and easily proven and where failure to comply is obvious, unacceptable and deserving of punishment’24. In circumstances where provisions were complex and/or unclear and, consequently, where breaches could be the result of inadvertence or oversight, the Law Council argued that such breaches should not attract strict or absolute liability.25

2.32 There seems to be general agreement that strict liability should never be imposed solely for reasons of ‘administrative convenience’; while this factor is a relevant consideration it should never be a determining one.

Guidelines/principles for characterisation of offences

2.33 In its submission to the inquiry, the ACT Government advised that strict and absolute liability was generally imposed as follows:

- they are primarily aimed at conduct on the less serious side of the criminal spectrum;
- they are 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.26

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23 Transcript of Evidence, 28 November 2006, p 3
25 O 273
26 ACT Attorney-General, submission 2, p 1
2.34 The Attorney-General went on to say:

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. 27

2.35 Strict and absolute liability offences are often to be found in legislation governing public safety and well-being, and especially in environmental protection legislation and legislation governing professional conduct, where there is a higher level of assumed knowledge and/or expertise. In these areas, given the consequences for the public, the conduct is deemed to be serious and penalties are consequentially severe.

2.36 The Scrutiny Committee cites a passage from R v The Corporation of the City of Sault Ste. Marie[1978] 2 SCR 1299, which underpins the notion of the regulatory offence and the consequential rationale for the adoption of strict and absolute liability:

The distinction between the true criminal offence and the public welfare offence is one of prime importance. …Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent. …

2.37 The Scrutiny Committee went on to say that:

Various arguments are advanced in justification of [strict or absolute] liability in public welfare offences. Two predominate. Firstly, it is argued that the protection of social interests requires a high standard of care and attention on the part of those who follow certain pursuits and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them. The removal of any possible loophole acts, it is said, as an incentive to take precautionary measures beyond what would otherwise be taken, in order that mistakes and mishaps be avoided. The second main argument is one based on administrative efficiency. Having

27 ACT Attorney-General, submission 2, p 1
regard to both the difficulty of proving mental culpability and the number of petty cases which daily come before the Courts, proof of fault is just too great a burden in time and money to place upon the prosecution. To require proof of each person’s individual intent would allow almost every violator to escape. This, together with the glut of work entailed in proving *mens rea* in every case would clutter the docket and impede adequate enforcement as virtually to nullify the regulatory statutes. In short, absolute liability, it is contended, is the most efficient and effective way of ensuring compliance with minor regulatory legislation and the social ends to be achieved are of such importance as to override the unfortunate by-product of punishing those who may be free of moral turpitude. In further justification, it is urged that slight penalties are usually imposed and that conviction for breach of a public welfare offence does not carry the stigma associated with conviction for a criminal offence.28

2.38 However, Bronitt and McSherry also note that empirical research into the enforcement of environmental offences, which are often strict or absolute liability, suggests that regulatory agencies exercise appropriate discretion in the prosecution of strict and absolute liability offences, in that they seem only to prosecute where there is evidence that polluters knew they were breaching the law, following receipt of repeated warnings.29 They conclude that:

Prosecution discretion and policies, operating in the shadow of the law, ameliorate the coercive and potentially unjust nature of ‘no-fault’ liability.30

**The prevalence of strict and absolute liability offences**

2.39 One of the concerns prompting the inquiry was the perceived increase in the number of strict or absolute liability offences. At public hearing, the Attorney-General stated that this identification requirement in part accounts for the seeming larger number of strict or absolute liability offences being enacted:

The concept of strict or absolute liability is not new. What is new is that prior to the code there was no general requirement to state whether strict or absolute liability applied to an offence. It was left to the courts to determine the intentions of the legislature based on factors like the nature of the offence and the statute concerned, and the language of the offence and the penalty that should be applied.

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28 Scrutiny of Bills and Subordinate Legislation Committee, Report no 2, 14 February 2005, p 9
29 Bronitt S and McSherry B, Principles of Criminal Law, 2nd Ed, 2006, p 190
30 Bronitt S and McSherry B, Principles of Criminal Law, 2nd Ed, 2006, p 190
It is fair to say that this, to some extent, has created a black hole in relation to offences. It created a degree of uncertainty about when and where strict or absolute liability applied, and often this uncertainty could not be resolved until the matter was considered by a court, after the event, in terms of the conduct that formed the basis of the offence.  

Lawmakers will generally characterise offences or elements of offences as offences of strict liability in the following circumstances:

- traffic and road safety;
- protecting revenue;
- consumer protection;
- workplace safety;
- occupational health;
- dangerous substances;
- waste disposal;
- protecting the environment.  

Strict and absolute liability offences have often been described as being 'marginalised to the periphery of the criminal law' and 'exceptional and regulatory in nature'. However, there are now many SAL offences which carry substantial penalties. These offences generally apply in areas of environmental protection and public safety, where the consequences of any harm can be significant and far-reaching.

In terms of sheer numbers of offences, the majority of crimes are strict liability offences. However, the Scrutiny Committee has commented that an increasing number of offences impose strict liability, often without adequate identification in the Explanatory Statement [ES] nor, more importantly, without adequate justification. Further, drug offences, terrorism offences and regulatory offences contained in environmental protection legislation can carry severe penalties. The difficulty for lawmakers in such situations is to balance

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31 Transcript of Evidence, 28 November 2006, p 2
32 Submission 2, Department of Justice and Community Safety, p 2
33 Bronitt S and McSherry B, Principles of Criminal Law, 2005, p ??
34 See Appendices B and C
the rights of the individual against the public interest and make an appropriate determination.

2.43 The Committee notes the comment in the Attorney-General’s submission:

…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.35 [emphasis added]

2.44 While the Committee acknowledges that there is some merit in part of this statement, the explanation or justification that offences are characterised as strict liability offences for reasons of assisting in the 'enforcement of the criminal law' is so broad as to be unfit to form a serious guideline or principle. Strict liability offences are no longer 'marginalised to the periphery of the criminal law' and the penalties attaching to such offences have become progressively more serious, including the likelihood of imprisonment for many offences. Absolute liability offences are still very much the exception and reasonably rare, although certain kinds of environmental regulatory schemes and anti-terrorism legislation are examples of areas of law in which absolute liability is becoming more common.

2.45 The Committee notes that the Scrutiny Committee has drawn attention to the fact that there are now many strict liability offences which impose prison terms or other severe penalties to 'reflect' the significance of the crime. The Committee considers that there would be value in identifying all the strict and absolute liability offences which carry 'severe' penalties and analysing the justification in the Explanatory Statement accompanying the bill.

2.46 The quantity of subordinate legislation being made at all levels of government has increased substantially over the years. The Productivity Commission, in a report called Regulation and its Review 2003-04, noted that there were now 1700 regulations introduced in the Commonwealth jurisdiction during 2003-2004 and 1800 in 2002-2003. The ACT, a much smaller jurisdiction, has introduced almost 350 legislative instruments and disallowable instruments each year over the past few years.

35 Submission 2, Department of Justice and Community Safety, p 2
Reversal of the burden of proof

2.47 One of the issues of concern to the Scrutiny Committee is the reversal of the burden of proof where strict liability is imposed. Mr Peter Bayne\(^36\) also raised this reversal as a major issue in his submission.

2.48 The burden of proof becomes significant when the accused is required to adduce evidence for a defence. The term 'burden of proof' is used in two different ways, the legal and evidentiary burden of proof:

The most significant burden of proof is ...the burden which is placed on the prosecution to prove every element of the offence. This is called the legal burden. ... The risk of failure to persuade lies on the prosecution, not on the defendant: so if the prosecutor fails to persuade the jury, then the matter is not proven. The burden remains on the prosecution for the whole trial.

The other use of burden of proof relates to the duty to produce some evidence to support an argument. This is called the evidential burden, and unlike the legal burden, can rest on either party. The duty is placed on one of the parties to produce sufficient evidence to merit the consideration of a particular issue by the jury. This burden does not require the party to prove the issue.\(^37\)

2.49 The evidential burden of proof is primarily where evidence is adduced to point to the reasonable possibility of a fact or matter; the legal burden of proof must be discharged beyond reasonable doubt. The evidential burden is generally on the accused and the legal burden on the prosecution, but there are times when a defendant is required to assume a legal burden of proof, ie where they wish to rely on the defence of insanity:

In [insanity defence and certain statutory defences] cases the legal burden of proving the defence lies with the defendant. Insanity is a defence to any criminal offence, albeit a defence which carries a qualified acquittal.... The second exception relates to statutory offences which expressly provide that the legal burden lies with the defendant to prove a particular defence. This is commonly used with offences prohibiting possession of prohibited drugs or possession of stolen goods. Where the legal burden is on the defendant, the standard of proof is the civil standard: balance of probabilities.\(^38\)

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\(^36\) Mr Bayne is the legal adviser to the the Standing Committee on Legal Affairs, in its scrutiny of bills capacity.


2.50 The Committee notes that the reverse onus problem arises because it is up to the accused to adduce evidence to negate the strict or absolute liability of the offence. A major issue for consideration is the extent to which this shifting of the burden of proof amounts to an undue trespass on the presumption of innocence.

**The impact of the Human Rights Act 2004 on strict and absolute liability offences**

2.51 The relevant sections of the *Human Rights Act 2004* state:

22(1) Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

28 Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

2.52 If the characterisation of strict and absolute liability offences in legislation is increasing unjustifiably then the Scrutiny Committee has argued that such a trend has implications for the continued compliance with the *Human Rights Act 2002* and the human rights of defendants, principally the right to be presumed innocent until proven guilty. Such rights, the Committee has argued may be jeopardised as a result of the consequential shifting of the burden of proof to the defence.

2.53 The Attorney-General’s submission in commenting on the application of the HRA to proposed legislation, notes that:

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.39

2.54 The HRA therefore states in s 28 that 'human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society'. The submission states:

Whether a limitation is reasonable depends upon whether it is proportionate to achieve a legitimate aim. This requires that the limitation be necessary and

39 Submission 2, Attorney-General, p 6
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;
- 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.40

2.55 Agencies responsible for drafting legislation need to undertake a two-pronged inquiry to determine the reasonable limits under the HRA:
- whether the provision serves an important and significant objective; and
- whether there is a rational and proportionate connection between the two [ie the provision and the objective].41

2.56 The application of this proportionality test is central to the determination of whether strict and absolute liability offences will offend against the Human Rights Act or not and whether the intrusion is justifiable.

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40 Submission 2, Attorney-General, pp 6-7
41 Submission 2, Attorney-General, p 7
3 SUBMISSION AND SCRUTINY
COMMITTEE COMMENT

Submission no 1, Civil Liberties Australia

3.1 Civil Liberties Australia [CLA] took a rights perspective, expressing concern that "[p]oorly constructed laws invoking strict and absolute liability have the potential to expose people accused of crimes to unwarranted convictions and sentences, and may give rise to unscrupulous abuses of the law by government departments and law enforcement agencies". They further aver that the danger for the community is that it is very tempting to the bureaucracy to create crimes of strict liability for 'administrative convenience'.

3.2 CLA questions the frequent use of the distinction between criminal and so-called 'civil' or 'regulatory' offences, arguing that such a distinction is unhelpful and misleading. The submission states:

CLA adopts the view that any legal proceeding which can be characterised by the State bringing an action against the accused with a view to securing the imposition of some form of punishment should be characterised as a criminal proceeding....A legislative provision should be characterised by reference to the effects that may be visited upon the accused. That is not to say that it is inappropriate for an offence to be created on the basis of regulatory considerations – such offences may be entirely reasonable. But if such offences nonetheless involve some form of punishment or coercive mechanism of the State being visited upon the accused, it is would be wrong and misleading to suggest that the offence is somehow not criminal but regulatory or civil in nature.

3.3 CLA argued that strict and absolute liability offences should be the exception and not the rule, but expressed concern that they are becoming increasingly common. The submission recognised that administrative efficiency is a valid consideration for legislative drafters and policy makers to take into account

42 Submission 1, Civil Liberties Australia [ACT] Inc, p 1
43 Submission 1, Civil Liberties Australia [ACT] Inc, p 7
44 Submission 1, Civil Liberties Australia [ACT] Inc, p 6
but stressed that it is only one consideration. The CLA suggested that some government departments were not sufficiently cognisant of the competing considerations.

3.4 CLA cited as an example the *Tree Protection Act 2005*, where people who damage trees unintentionally or inadvertently are also caught by the provisions of the Act. CLA questions whether the Executive will use its discretion appropriately about when to lay charges and they state:

It is true that often the legal burden is set quite high and can be difficult and demanding for government departments to meet. But that is as it should be. Our legal system is based on the time-honoured principle that it is better to let guilty men go free if that is what it takes to protect the innocent from wrongful conviction and undeserved punishment. For this reason government departments should not seek to lower the burden to succeed in prosecutions through such devices as strict and absolute liability offences.  

3.5 The submission further stated that 'government departments and agencies should be instructed not to view strict and absolute liability offences as a simple means to secure convictions in the furtherance of any agency or department objectives'.

3.6 CLA also considers the severity of penalties which should apply to strict and absolute liability offences, arguing that i) they should always be relatively minor, ii) they should never involve any form of imprisonment and iii) convictions should never form part of a person's criminal record.

3.7 CLA suggests the following general criteria for strict liability offences:

- Strict and absolute offences should be exceptional amongst offences enacted;
- Strict and absolute liability offences should not be enacted unless there is a pressing and compelling need, ie, it is not possible for the objectives the offence is trying to achieve to be achieved through an offence containing a fault element;
- Such offences are more justifiable when the penalty is relatively trivial. It should never involve imprisonment, and 50 penalty units should be a general maximum;

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45 Submission 1, Civil Liberties Australia (ACT), p 12
46 Submission 1, Civil Liberties Australia (ACT), p 13
Administrative efficiency, ie, making it easier for public servants to achieve policy and departmental objectives is a valid consideration, but only one consideration amongst many, and should not be afforded excessive weight in deciding whether an offence should be one of strict or absolute liability;

- Strict and absolute liability offences are more justifiable when they do not subject persons at large to liability, but are directed at people with specialist expertise or knowledge.47

3.8 CLA also points out the application of the Human Rights Act and possible consequences of strict and absolute liability offences. In particular, they raise the question of 'cruel, inhuman and degrading treatment' and the potential for a person to be imprisoned for an offence for which there was no fault element and conviction leads to a sentence which may be disproportionate to the crime.48

Submission no 2, Attorney-General

3.9 The Attorney-General devotes much of his submission to the impact of the Human Rights Act on the use of strict and absolute liability and the Scrutiny Committee's approach that 'strict and absolute liability will engage the presumption of innocence, a fundamental aspect of the right to fair trial' and as a result the proportionality test in s 28 of the Act needed to be applied49.

3.10 The Attorney-General suggests that there may be limits in applying this view to the right of fair trial as set out in s 21 of the HRA. It notes that the Committee's view of the presumption of innocence is taken from Canadian precedent, where the Charter of Rights and Freedoms states "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"50. The Attorney-General notes:

- the HRA does not refer to the 'fundamental principles of justice';

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47 Submission 1, Civil Liberties Australia (ACT), pp 16-17
48 Submission 1, Civil Liberties Australia (ACT), pp 16-17
49 Submission 2, Attorney-General, p 5
50 Submission 2, Attorney-General, p 5
the distinction between procedural and substantive protections observed in the case law of the European Court of Human Rights [ECHR] and the United Kingdom.

3.11 The submission directly addresses the reverse onus concerns of the Scrutiny Committee. It states:

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”.51 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”.52 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.53

3.12 The submission further notes that the UK High Court had concluded that the presumption of innocence did not impose any restrictions on the power of Parliament to create strict liability offences and that therefore the courts were not entitled to use Article 6.2 [of the Human Rights Act 1998] to import a defence into a strict liability offence where Parliament had not done so, nor could any declaration of incompatibility be made.54

3.13 The submission does note that there is a possible defect in the reasoning, in that an absolute liability offence will never engage the presumption of innocence, but the addition of a reverse onus of proof inevitably would, leading 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’55.

3.14 The submission then focuses on the framework for reasonable limits in the HRA as noted above in Chapter 2 and the application of the proportionality

51 Salabiaku v France (1988) 13 EHRR 379 at [27].
53 Submission 2, Attorney-General, p 5
54 Submission 2, Attorney-General, pp 5-6
55 Submission 2, Attorney-General, p 6
test. The submission also notes that the Committee 'has not been prescriptive about a general framework in this area.

3.15 The submission then considers the merits of and criteria for strict and absolute liability, noting the common law presumption that fault must be proven for every physical element of the offence and that the presumption can be rebutted on 'clear, legitimate grounds for attaching strict or absolute liability' to an offence. The submission notes that it will always be context specific and sets out some relevant considerations for determining whether such liability should be applied. The relevant considerations set out in the submission include:

- 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;

- 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.56

**Submission no 3, Peter Bayne**

3.16 Mr Peter Bayne is the legal adviser to the Scrutiny Committee and has assisted that committee for the past several years in the scrutiny of bills function. He is therefore highly familiar with the issues facing the Committee in both its guises and the Scrutiny Committee’s comments which led to this inquiry. Mr Bayne generously provided a submission to the inquiry and gave evidence at public hearing.

3.17 Mr Bayne’s submission suggested at the outset that the Committee consider the matter of reversal of the onus of proof provisions and not just as a result of categorising offences as ones of strict or absolute liability. The Committee considered this but decided to consider the strict and absolute liability issue in isolation initially before embarking on a matter which has broader legal and human rights implications. The Committee has chosen not to pursue this issue at this time, but may choose to do so in the future.

3.18 Mr Bayne’s submission concentrates on the shift in the burden of proof generally, outlining in some degree of technical detail the impact of current provisions in legislation so far as the prosecution and defence is concerned and expressing concerns about how the courts, in the absence of clear guidance,

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56 Submission 2, Attorney-General, pp 8-9
interpret legislation. The concern stems from the adequacy or otherwise of identification of strict or absolute liability offences.

3.19 The major focus of his submission is the issue of the reversal of the burden of proof. He argues that strict and absolute liability is but one example of this trend, although probably the most common. The reversal process operates as follows:

An offence provision ‘reverses’ the onus of proof where it casts on the defendant an obligation to carry either an evidential or legal burden of proof in respect of the existence (or non-existence) of some fact... The strict liability offence and the absolute liability offence are but examples of a provision that ‘reverses’ the onus of proof in this way.57

3.20 In the past the Legal Affairs committee, in its capacity as a scrutiny committee, has used as a starting point for consideration of strict and absolute liability provisions, whether any placement of the burden of proof on a defendant amounts to an undue trespass on the presumption of innocence:

Provisions of [b]ills that place any kind of burden of proof on a defendant must be assessed in terms of whether this amounts to an undue trespass on the presumption of innocence. It is thus important that the Assembly be able to ascertain that any such shifting of onus is the result of a particular provision. In addition, any lack of clarity in the criminal law is a matter of concern from a rights perspective.58

3.21 The Scrutiny Committee has previously suggested that the adoption of appropriate drafting techniques will assist in resolving these problems. In particular, the committee has consistently recommended that legislation should make explicit what kind of burden of proof is to be borne by the respective parties. This focus is borne out in Mr Peter Bayne's submission when he recommends that 'offence provisions should be drafted so as to make absolutely clear which party has what kind of onus of proof', ie the law must make clear:

- the elements of the offence; and
- any matters of defence59

57 Mr Peter Bayne, Submission 3, p 1
58 Mr Peter Bayne, Submission 3, p 6
59 Submission 3, p 2
3.22 The submission argues that the provisions are required to be drafted in this way 'because it is notoriously difficult to predict how a court will interpret an offence provision'. The submission further states:

In many cases it very difficult to predict whether the offence provision has been drafted in such a way that some particular ultimate issue of fact falls into category [1] - element of the offence, or category [2] - a matter of defence.

3.23 Peter Bayne's submission makes the following major recommendations:

- the drafting of offence provisions should make it absolutely clear which party has what kind of onus of proof;
- a statement of a framework for assessing the justifiability of a reverse onus clause is required;
- a statement of a framework for assessing the justifiability for creation of offences of strict or absolute liability is required.

ACT Scrutiny Committee consideration

3.24 As noted in Chapter 1, the Scrutiny Committee has consistently raised concerns about the prevalence of strict and absolute liability offences in proposed legislation and matters around the characterisation of such offences.

3.25 In Report 38 of the Fifth Assembly, reiterated in Report 14 of the Sixth Assembly, the Scrutiny Committee commented at length on matters relating to strict and absolute liability offences and concerns in relation to the operation of the Human Rights Act 2004. Extracts from Scrutiny Committee reports since February 2004 are found at Appendix B and Appendix C contains an analysis of those criticisms in tabular form.

3.26 The Scrutiny Committee's criticisms have mainly been on the basis of:

- the lack of identification of strict or absolute liability offences in the Explanatory Statement;
- the lack of a justification in the Explanatory Statement;

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60 Submission 3, p 4
61 Submission 3, p 4
62 Submission 3, pp 2, 11 and 13
- the seeming proliferation of strict and absolute liability offences;
- instances where imprisonment is a possible penalty;
- derogation from the presumption of innocence;
- a failure to nominate a defence of due diligence.

3.27 The Table at appendix D sets out the frequency of the different criticisms by the Committee since 2004.

3.28 In Report 38 the Scrutiny Committee suggested basic principles for the application of strict and absolute liability, prefacing these principles with the comment 'that the supposed merits of strict liability and criteria for its application should be subject to strong safeguards and protections for those affected'. The Committee went on to conclude that agencies had not given sufficient attention to the interests of parties affected by strict and absolute liability and set out the following principles to be taken into account when deciding on the need for such offences and the form they would take:

- the process of deciding whether to introduce strict liability for an offence should recognise that this may have adverse effects upon those affected; the legitimate rights of these people should be paramount and take precedence over administrative convenience and perceived cost savings in program administration;
- agencies should acknowledge that there may be areas where existing strict liability offences or the way they are administered may be unfair; in these cases agencies should review the offences under the general coordination of the Attorney-General’s Department;
- strict liability should not be implemented for legislative or administrative schemes which are so complex and detailed that breaches are virtually guaranteed regardless of the skill, care and diligence of those affected; any such scheme would be deficient from the viewpoint of sound public administration;
- strict liability offences should be designed to avoid the likelihood that those affected, particularly by the issue of an infringement notice, will pay the lower penalty simply because it is easy and convenient to do so, rather than

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63 Scrutiny Committee Report 38, 14 October 2003, p 14
spend the money and time to pursue what might be a legitimate defence; any agency which encouraged this tendency would be acting improperly;

- strict 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 Australia or overseas; offences which do not apply this principle have the potential to operate unfairly;

- strict liability has the potential to adversely affect small and medium enterprises; steps should be taken to ameliorate any such consequences arising from the different compliance and management resources of smaller entities;

- any potential adverse effects of strict liability on the costs of those affected should be minimised to the extent that this is possible; in particular, parties who are subject to strict liability should not have their costs increased as a consequence of an agency reducing its costs;

- external merit review by the AAT or other independent tribunal of relevant decisions made by agencies is a core safeguard of any legislative or administrative scheme; every agency which administers strict liability offences should review those provisions to ensure that this right is provided;

- new and existing strict liability schemes should have adequate resources to ensure that they are implemented to maximise safeguards; a lack of proper resources may result in the inadequate operation of those safeguards;

- strict liability should not be accompanied by an excessive or unreasonable increase in agency powers of control, search, monitoring and questioning; any such increase in powers may indicate that the legislative and administrative scheme has structural flaws;

- there should be a reasonable time limit within which strict liability proceedings can be initiated; it would be unfair to those affected if they were to be charged perhaps years after an alleged breach;

- as a general rule, strict liability should be provided by primary legislation, with regulations used only for genuine administrative detail; it would be a breach of parliamentary propriety and personal rights for regulations to change the basic framework or important aspects of a legislative scheme; and

- the use of strict liability in relation to the collection of personal information about members of the public from third parties has the potential to intrude into the legitimate rights of the people whose details are being collected; in such cases the entire process should be transparent, with all affected members
of the public being notified of their rights and remedies under the Privacy Act.64

3.29 The ACT Government has used as a justification the possibility of ‘serious harm’ as a justification for strict liability offences.65 The most recent report of the Scrutiny Committee commented on the validity of the ‘serious harm’ justification for strict liability offences.66 The Scrutiny Committee stated:

The Committee does not find this line of justification persuasive. It said in Scrutiny Report No. 43 of the Sixth Assembly, in relation to the Building Legislation Amendment Bill 2007 that “an argument that the task of the prosecution should be made easier by removal of fault elements … standing alone, is not a good argument to derogate from the Human Rights Act”. This general point was made more eloquently by Sachs J, of the Constitutional Court of South Africa:

…the presumption of innocence … serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and seriousness of a crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, house-breaking, drug-smuggling, corruption…the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial cases.67
4 OTHER REVIEWS OF STRICT LIABILITY OFFENCES

NSW Legislation Review Committee

4.1 The NSW Parliament’s Legislation Review Committee [LRC] undertook a review of strict and absolute liability in 2006. The LRC noted that it had ‘repeatedly considered whether particular provisions of bills and regulations that create strict or absolute liability offences trespass unduly on personal rights and liberties’\(^{68}\), making the following comment:

The Committee has taken the view that requiring the prosecutor to prove all elements of an offence, including the intention of the person to do the act, is an essential safeguard for the rights of an accused person, particularly the fundamental right to be presumed innocent.\(^{69}\)

4.2 The Committee specifically considered what principles should apply to bills or regulations that create offences of strict or absolute liability and to determine whether such offences trespass unduly on personal rights and liberties.\(^{70}\)

4.3 The Committee’s discussion paper released in June 2006, set out a number of proposed principles for determining whether a crime or an element of a crime should be characterised as one of strict or absolute liability and sought submissions on the proposed principles. The Committee noted that such principles reflected a sound basis for the consideration of strict and absolute liability attaching to proposed legislation.\(^{71}\)

4.4 The Committee, in its report on the issue, adopted the following principles to be applied by it when considering bills:

\(^{68}\) Legislation Review Committee [NSW], Discussion Paper No 2, 8 June 2006, p 1
\(^{69}\) Legislation Review Committee [NSW], Discussion Paper No 2, 8 June 2006, p 1
\(^{70}\) Legislation Review Committee [NSW], Discussion Paper No 2, 8 June 2006, p 1
\(^{71}\) Legislation Review Committee [NSW], Discussion Paper No 2, 8 June 2006, pp v-vi
General principles to govern the use of strict or absolute liability:

1) Fault liability is one of the most fundamental protections of the criminal law and to exclude this protection is a serious matter. It should only ever be excluded if, and to the extent that, there are sound and compelling public interest justifications for doing so.

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

3) The intention to impose strict or absolute liability should be explicitly stated in legislation.

4) As a general rule, strict and absolute liability should be provided by primary legislation, except for offences with minor penalties.

5) 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.

Applicability of defences to strict and absolute liability offences

6) Appropriate defences should be available to ensure that a person is not punished for a strict liability offence if there are exonerating circumstances and if punishment would not serve the objective of the legislation.

Penalties for strict and absolute liability offences

7) Strict liability offences should not be punishable by imprisonment, unless there are highly compelling and extraordinary public interest justifications for doing so.

8) Absolute liability offences should not be punishable by imprisonment.

9) Monetary penalties for particular strict and absolute liability offences must be set at an appropriate and justifiable level having regard to the lack of fault of the person punished and the legislative objective.

Additional principles in relation to absolute liability

10) Absolute liability should be used only if there is a highly compelling justification.

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.

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

13) The size of a monetary penalty should reflect the fact that liability is imposed regardless of any mistake of fact.72

4.5 It should be noted that the Legislation Committee’s findings and action relate to its own approach to assessing legislation, and not to the initial approach at the point of developing policy and translating that policy into legislation prior to its coming into the legislature for consideration. As there was no government response requested by the Committee the views of the Government on the Committee’s proposed course of action are unknown.

4.6 While NSW does have a manual for the preparation of legislation, issued by the Parliamentary Counsel’s Office, it does not contain any policy guidance on strict and absolute liability offences, except to say:

Legally contentious provisions (such as provisions for changing the onus of proof), unusual evidentiary provisions and any departures from standard powers of entry or search should be considered by an officer of the Attorney General’s Department …before the Parliamentary Counsel is requested to include them in a Bill.73

Senate Scrutiny of Bills Committee

4.7 In 2001, the Senate Standing Committee on the Scrutiny of Bills undertook a reference into the application of strict and absolute liability in the Commonwealth. Submissions received by this committee addressed the issues in terms of:

- the merits and advantages of such provisions;
- the criteria under which they were made; and
- the perceived benefits which they brought to public administration.74

4.8 The Committee concluded a number of principles and recommendations should be the framework of Commonwealth policy and practice in relation to strict and absolute liability. These are set out in full at Appendix E.

4.9 The principles developed comprised:

73 NSW Government Parliamentary Counsel’s Office, Manual for the Preparation of Legislation, August 2000, p 8
basic principles;
- merits of strict liability and criteria for its application;
- principles of protection for those affected by strict and absolute liability;
- principles for the sound administration of strict liability; and
- the application of criteria to existing and proposed Commonwealth strict and absolute liability offences.

4.10 The Committee made general recommendations about the Legislation Handbook requiring agencies to abide by the principles outlined in Chapter 4 of its report when developing new or amending legislation which includes absolute or strict liability and agencies taking into account the principles specified in the day-to-day administration of strict and absolute liability offences.75

4.11 In February 2004, the Commonwealth Attorney-General's Department [AGD] released a document called 'A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers'. This document was produced as a 'resource to assist in the framing of proposed criminal offences, civil penalties and certain other enforcement provisions that are intended to become part of Commonwealth law', consolidating a range of principles and precedents relevant to the framing of offences and enforcement provisions gathered over the years.76 It is a comprehensive document, possibly pre-empting the Senate Scrutiny Committee's report, and setting out in detail considerations for the development of offences, penalties and enforcement powers.

4.12 The Commonwealth Government subsequently responded in June 2004 to the Committee's report, advising:

- the use of strict and absolute liability is necessary in certain circumstances for ensuring the effective application and prosecution of Commonwealth offences. However, the Government recognises that "no fault" liability should be applied only in instances where it is necessary and appropriate;

guidelines reflecting the Commonwealth’s policy on strict and absolute liability formed part of the AGD’s submission to the Committee. The Committee’s views have figured prominently in the development and evaluation of Commonwealth policy on such matters over many years;

- the Government recognises and values the need to maintain fundamental concepts of criminal law liability, such as the need for the prosecution to prove beyond a reasonable doubt both the physical and fault elements of criminal offences. The Criminal Code reflects the common law and Commonwealth policy position that a person should only be guilty of an offence if the prosecution can prove fault (intention, knowledge, recklessness or negligence) for each element of the offence. The only exceptions to this position are where there is express legislative provision that an offence or element of an offence carries absolute or strict liability.77

4.13 However, the Government did not accept the need to require agencies to comply with the principles set out in the Committee’s report, arguing that 'decisions should continue to be made by reference to the specific provisions of each piece of legislation' and noting that:

- agencies need to seek the agreement of the Minister for Justice and Customs on the criminal law aspects on new legislative proposals;
- the guidelines on strict and absolute liability submitted to the Committee guide ministerial decisions on legislative proposals;
- most of these guidelines are consistent with the principles set out in the Committee’s Report.78

**Commonwealth drafting guidelines**

4.14 As noted above, the Commonwealth Government has published a reference guide for drafters of legislation, which sets out a number of principles relating to strict and absolute liability. These include:

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77 Government Response to the Senate Standing Committee on Scrutiny of Bills, Sixth Report of 2002, Executive Summary
78 Government Response to the Senate Standing Committee on Scrutiny of Bills, Sixth Report of 2002, p 3
• giving careful consideration to the use of strict and absolute liability;
• strict or absolute liability to apply to specific elements;
• jurisdictional elements attract absolute liability;
• cross-references to provisions attract strict liability.79

4.15 The Guide notes that the following propositions contained in the Senate Scrutiny Committee’s report accord with government practice over recent years:

• fault liability is one of the most fundamental protections of criminal law; to exclude this protection is a serious matter;
• strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; it would not be proper to base strict liability on mere administrative convenience or on a rigid formula;
• 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 Commonwealth criteria of 60 penalty units ($6,600 for an individual and $33,000 for a body corporate) appears to be a reasonable maximum;
• 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;
• strict liability may be appropriate where its application is necessary to protect the general revenue;
• strict liability should not be justified on the sole ground of minimising resource requirements;
• strict liability may be appropriate to overcome the ‘knowledge of law’ problem; and
• absolute liability offences should be rare and limited to jurisdictional or similar elements of offences.

4.16 The Guide also sets principles for the appropriate use of defences, stating:

A matter should only be included in a defence, thereby placing the onus on the defendant, only where the matter is peculiarly within the knowledge of the defendant; and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.80

4.17 This latter principle appears to be a justification for reversing the onus of proof and may well be a valid and effective mechanism.

5 CONCLUSIONS AND RECOMMENDATIONS

5.1 The Legal Affairs Committee undertook this inquiry to assess what guidelines, if any, governed the characterisation of offences so far as strict and absolute liability are concerned. It appears that such offences are becoming more numerous, although without precise empirical data it is not possible to say to what extent, if any, such offences are increasing. However, because of their potential to impact on an accused person’s rights, the Committee is of the view that strict and absolute liability should only be imposed in restricted circumstances and where there is a clear public benefit so that any possibility of detriment to an accused person is minimised.

5.2 Notwithstanding the potential impact on a person’s human rights, the Committee acknowledges that there are circumstances where strict or absolute liability may be appropriate and where the imposition of such liability will outweigh individual and human rights considerations.

The policy framework

5.3 The Committee once again points to the Attorney-General’s submission, which notes at the outset that strict and absolute liability offences are ‘are primarily aimed at conduct on the less serious side of the criminal spectrum’ and ‘to ensure the integrity of a regulatory scheme or it is necessary to assist in enforcing the criminal law’.  

5.4 The Committee considers that the justification of ‘enforcing the criminal law’ is very broad indeed and too broad to be an appropriate justification. A characteristic of all penalties is to enforce the criminal law and the justification for strict and absolute liability must be more specifically expressed if it is to have validity.

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81 Submission 2, Attorney-General, p 1
5.5 The Attorney-General’s submission also argues that the application of strict and absolute liability ‘serves to protect the community by enforcing a high standard of care’ and that without the ability to deal with minor regulatory offences in this way, the standard of care is potentially undermined, possibly rendering some legislation ineffective.82

5.6 The Committee considers that this argument is somewhat overstated. Consider the example given by Civil Liberties Australia of proposed Tree Protection legislation. Under the proposed bill it would have been very easy for individuals to be caught inadvertently by provisions in that legislation and to offend without intention. The justification for the original provision was that it would be too difficult to prove intent. While there is a public interest in retaining significant trees, there is also an individual interest in not being caught by legislation unknowingly and a public interest in having a fair and just legal system. As a response to concerns raised during the initial consideration of the bill, the Government amended the legislation prior to enactment to apply the offence provisions to particular classes of people. This accords with the general principle that where people have particular expertise and could be expected to have the relevant knowledge, strict liability is appropriate for conduct.

5.7 The Committee is concerned that over-reliance on the ability to provide for ‘minor regulatory offences’ as ones of strict or absolute liability may be inappropriate. There needs to be a real and transparent justification for making offences strict or absolute liability so that people are not unwittingly caught by them. There is also a concern in the Committee’s mind about the definition of ‘minor regulatory offence’ – what does this actually mean?

5.8 To return to the tree example, is the removal of a tree illegally a minor regulatory offence? If the tree is of major significance for one reason or another does that take the offence out of the minor category?

5.9 The Government also argues that the ‘standard of care is potentially undermined, possibly rendering some legislation ineffective’. The Committee is of the view that the use of the words ‘potentially’ and ‘possibly’ substantially

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82 Submission 2, Attorney-General, p 9
undermines the Government’s justification for the use of strict and absolute liability offences.

5.10 One of the difficulties for the Committee is the extent to which strict and absolute liability offences are offences which cannot be regarded as 'minor regulatory offences'. The Committee has been unable to gauge accurately the prevalence and seriousness of such offences. The Committee notes that the harmonisation program is in effect an audit of the statute book to assess whether offences already in existence comply with the requirements under the Criminal Code. However, the Committee is also of the view that all strict and absolute liability offences or elements of offences should be reviewed with a view to assessing the prevalence of such offences on the statute books and also to assess their appropriateness.

5.11 To argue that strict and absolute liability are primarily restricted to minor regulatory offences is also misleading, particularly in today’s legislative framework, where such areas of law as employer liability, environmental protection and public health and safety require high standards of conduct and provide for significant penalties if those standards are breached.

5.12 The Committee is further concerned that the ACT Government is seeking to justify the imposition of strict and absolute liability by reliance on the potential for 'serious harm' and concerns in relation to the prosecutorial difficulty in proving fault. The Committee is of the view that strict and absolute liability should only be imposed for valid reasons and the prevalence or seriousness of a crime or the objective of making the prosecution’s task easier are not valid justifications for the imposition of strict or absolute liability.

**RECOMMENDATION 1**

5.13 The Committee recommends that the Attorney-General undertake an 'audit' of the statute book to determine a) the prevalence of strict and absolute liability offences on the ACT statute book and b) the appropriateness of characterising offences as ones of strict or absolute liability.
RECOMMENDATION 2

5.14 The Committee recommends that the audit also identify offences in terms of the penalty provided for so that an analysis can be made of the prevalence of the seriousness of strict and absolute liability in ACT law.

Guiding principles

5.15 One of the fundamental issues for the Committee for consideration was the application of guiding principles. The Committee notes the different approaches taken by the NSW Legislation Review Committee and the Senate Scrutiny of Bills Committee. The NSW Committee has adopted a number of principles by which it itself assesses offences set out in legislation. However, the Senate Scrutiny of Bills Committee has recommended that the legislative drafters themselves apply certain principles prior to the introduction of legislation into the parliament.

5.16 The ACT's Scrutiny Committee itself has not suggested a framework for government to assess legislation, relying instead on the Government to establish this. However, the Legal Affairs Committee considers that, in the interests of transparency and in order to fulfill key strategic objectives of the Parliamentary Counsel’s Office, it is necessary that the OPC develop a framework for drafting legislation and the framing of offences, similar to that in place in the Commonwealth.

5.17 The Committee is firmly of the view that it should be at the initial stage of legislative drafting that regard should be had to guidelines or principles relating to strict liability and that it should not be the responsibility of the Scrutiny Committee to draw a government’s attention to any such deficiencies. The Committee notes one of the key strategic objectives set out in the Department of Justice and Community Safety’s annual report is to ’ensure, as far as practicable, that ACT laws …can withstand vigorous scrutiny'83.

83 Department of Justice and Community Safety, Annual Report 2006-2007, p 46
5.18 One means to do this is to ensure that appropriate and specific guiding principles for the drafting of offence provisions in legislation are developed.

**RECOMMENDATION 3**

5.19 The Committee recommends that the Office of Parliamentary Counsel develop and implement guiding principles for the drafting of offence provisions in legislation.

**Knowledge of subordinate legislation**

5.20 The Committee is further concerned that, where offences are characterised as strict or absolute liability there should some consideration of the likelihood that persons might be caught inadvertently by the legislation. If it appears that they might, then knowledge or intention must be an element of the offence.

5.21 The Committee notes that this test encompasses some of the Scrutiny Committee principles, but considers that the question should be asked during the development stage of the legislation and not at the stage when the legislations is being submitted for Assembly consideration.

**RECOMMENDATION 4**

5.22 The Committee recommends that consideration be given to the likely impact of draft legislation on individuals prior to enactment, with provisions containing a knowledge or intent element if any potential impacts are unreasonably or unfairly detrimental to an individual.

5.23 Alternatively, the Committee recommends that a similar provision to section 9.4 (2) (c) of the Criminal Code (Cth), which provides a defence based on mistake or ignorance of subordinate legislation, be inserted into the ACT Criminal Code.

**RECOMMENDATION 5**

5.24 The Committee recommends that a similar provision to section 9.4 (2) (c) of the Criminal Code (Cth), which provides a defence based on mistake or ignorance of subordinate legislation, be inserted into the ACT Criminal Code.
Onus of proof

5.25 The Committee also considers that many of the problems for individuals which arise when charged with strict or absolute liability offences do so because it is often not clear which party bears the onus of proof and whether that burden of proof is the legal or evidential burden. The Committee considers that this should be made clear in the legislation.

RECOMMENDATION 6

5.26 The Committee recommends that offence provisions should be drafted to make it absolutely clear which party bears the burden of proof and what kind of burden of proof is required.

Zed Seselja MLA
Chair
7 February 2008
APPENDIX A: Submissions and hearings

List of submissions

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Public Hearing

28 November 2006

Mr Simon Corbell MLA, Attorney-General
Ms Renee Leon, Chief Executive, Department of Justice and Community Safety
Mr Anthony Williamson, Director, Civil Liberties Australia
Mr Bill Rowlings, CEO/Secretary, Civil Liberties Australia

Mr Peter Bayne
APPENDIX B: Extracts from Scrutiny Committee reports
MAJOR EXTRACTS FROM SCRUTINY COMMITTEE REPORTS

Extract: Scrutiny Report 38, 14 October 2003

Introductory comment: The rights aspects of offences of strict or absolute liability

Before turning to the Crimes Amendment Bill 2003 and the Workers Compensation Amendment Bill 2003 (No 2), the Committee proposes to comment again on the rights issues involved when a law creates an offence of either strict or absolute liability.

The three-fold categorisation of criminal offences as found in the Criminal Code 2002

Following the approach taken by Australian common law, the Code allows for three categories of statutory criminal offence. (What immediately follows is based on Wampfler (1987) 11 NSWLR 541 at 546.)

1. Those in which there is an original obligation on the prosecution to prove mens rea.

Under the Code, (and leaving aside some refinement) this is the position in relation to all offences unless the offence is stipulated to be one of either strict or, alternatively, absolute liability.

2. An offence of strict liability is one in which mens rea will be presumed to be present unless and until material is advanced by the defence of the existence of honest and reasonable belief that the conduct in question is not criminal in which case the prosecution must undertake the burden of negativing such belief beyond reasonable doubt. In other words, an accused will not be guilty if they acted under an honest and reasonable mistake as to the existence of facts, which, if true, would have made their act innocent.

The accused is further protected in that "[i]f relevant evidence is given in support of the defence, the prosecution is required to persuade the jury that there was no mistake or that the mistake was unreasonable": The Commonwealth Criminal Code: A Guide for Practitioners (2002) at 177.

This line of defence is not available on the basis that the accused was ignorant of the law, or made a mistake of as to the effect of the law. Nor is it "a defence of reasonable behaviour or due diligence": ibid at 185. What this means is further explained below. The Guide adds however that "this rigour is softened to some extent by the provision of a defence which excuses accidental breach of provisions which impose strict or absolute liability": ibid. The reference here is to section 39 of the Code, which deals
with "Intervening conduct or event". This defence is, however, much narrower than a due diligence defence. Some further protection is afforded by section 40 (duress); section 41, ("Sudden or extraordinary emergency"); section 42 (self-defence); and section 43 (lawful authority).

3. An offence of absolute liability in which mens rea plays no part and guilt is established by proof of the objective ingredients of the offence.

Sections 39 to 43 are also relevant in relation to offences of absolute liability.

The Code provides no guidance as to how the legislature should choose in which category to place an particular offence (and it is not suggested that it should). Thus, an offence in category 2 or 3 might be one in respect of which a term of imprisonment could be fixed.

Nor does the Code preclude the legislature from departing from this categorisation and, in particular, from adding to the statements of the elements of the offence a discrete defence, such as that the accused acted with due diligence, or had a reasonable excuse.

The rejection of due diligence as an explanation for the conduct of the accused

The foundation for adoption of a due diligence explanation is the principle that "the defendant lacked a guilty mind because he had done all that could be done to avoid the happening of the offence": AIS Pty Ltd v Environment Protection Authority (1992) 29 NSWLR 487 at 499, per Carruthers J. (If it was described as true defence, the accused would at least bear an evidential burden of proof to make it out; alternatively, it might be described in way which placed on the accused only a tactical onus to adduce evidence from which the inference might be drawn that he or she had acted with diligence.)

Australia courts have not recognised that as a matter of common law interpretation of a statutory offence, they should find that an accused can raise a due diligence explanation; see AIS Pty Ltd v Environment Protection Authority (1992) 29 NSWLR 487. (The court did not foreclose the development of such a defence, and one has been developed by the Canadian courts; see R v The Corporation of The City of Sault Ste. Marie [1978] 2 S.C.R. 1299, below.)

The effect of not allowing for a due diligence explanation to be advanced by the accused may be illustrated by example taken from an earlier report of the Committee.

... subclause 11(1) of the Hawkers Bill 2002 provides:
A person commits an offence if —

(a) the person carries on business as a hawker at a location in a public place for more than 30 minutes at a time; and

(b) the person is not licensed to sell goods or services at the location.

By subclause 11(4), this is a strict liability offence. The effect of this is as follows.

A prosecutor would need to satisfy the magistrate beyond reasonable doubt that the defendant performed the physical elements of the offence, as these are stated in subclause 11(1).

The prosecutor would not, however, need to adduce any evidence to prove what the Criminal Code 2002 calls a fault element; that is, that the defendant intended to perform one of the physical elements, or had knowledge that he or she was performing one of the physical elements, or was reckless as to whether he or she was so doing, or through negligence performed one of the physical elements.

But the defendant may adduce evidence that he or she, when carrying out the conduct making up the physical element, considered whether or not facts existed, and was under a mistaken but reasonable belief about the facts. If, had the facts existed, the conduct would not have been an offence, the defendant is not criminally responsible; see Criminal Code 2002, s 36.

The defendants position is made somewhat easier in that if he or she satisfies the magistrate that the evidence adduced is such that the magistrate could (but not necessarily would) find that defendant had made such a mistake about the facts, the prosecutor must then prove beyond reasonable doubt that there was no mistake, or that the mistake was unreasonable.

On the other hand, there are some limitations.

- By s 36, a defendant cannot be mistaken about the facts unless he or she has considered whether or not facts existed. There is then, in effect, a duty of inquiry in circumstances where the defendant’s conduct might result in the commission of the offence.
- It is not a defence of reasonable ignorance of the facts. Nor is it a defence of reasonable ignorance of the law.
- It is not a defence that reasonable steps were taken by the defendant to obey the law. For example, a defendant charged under subclause 11(1) of the Hawkers Bill 2002 might have taken along a clock so that he or she could ascertain when the 30 minutes expired. If that clock were stolen, and the defendant remained at the site for 35
minutes, defendant could not argue that their having taken reasonable steps to be aware of the time was a basis for invoking the reasonable mistake of fact defence.

A rights perspective

It is apparent that, following the Commonwealth, it is proposed to rewrite the statute book of the Australian Capital Territory to follow the three-fold categorisation contemplated by the Code. This undoubtedly has benefits. Whereas it is now largely a matter of a reader of a statutory offence provision making a guess as how a court would classify the offence, the statutes of the Territory will now (generally speaking) either make no provision in relation to whether the accused must have a guilty mind, (in which case the offence will be in category 1), or, will stipulate that the offence is in one or other of category 2 or 3. On the other hand, there are some problems from a rights perspective.

First, in this process of reform of the statute book, some existing defences are being removed.

Secondly, and more fundamentally, there is a question whether the placing of a particular offence in category 2 or 3 offends against the rights of the accused. This requires some explanation, but it may be said with confidence that whatever version of a bill of rights the Assembly were to adopt, the way in which threefold categorisation is applied raises a potential rights issue.

The Canadian Charter of Rights and Freedoms (found in the Constitution Act, 1982, as enacted by the Canada Act, 1982, 1982 (U.K.), c. 11) provides an example. The two relevant provisions are in sections 1 and 7:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

It is clear from the Canadian case-law that where at least imprisonment is a possible punishment, that some offences must be such that they are category 1 offences, and that all other offences must be category 2 offences but with the additional requirement that an accused must be able to advance a due diligence explanation.
The rationale for this approach (the exact components of which are a matter of debate in Canadian courts) was stated by Lamer CJ in *R v Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 183-184, (emphasis added):

In *Re B.C. Motor Vehicle Act*, supra, this Court held that the combination of absolute liability and possible imprisonment violates s. 7 of the Charter and will rarely be upheld under s. 1. This is because an absolute liability offence has the potential of convicting a person who really has done nothing wrong (i.e., has acted neither intentionally nor negligently). In *R. v. Vaillancourt*, supra, I stated that whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, even a mere provincial regulatory offence, there is, as a principle of fundamental justice, a minimum mental state (or fault requirement) which is an essential element of the offence. *Re B.C. Motor Vehicle Act* inferentially decided that even for a mere provincial regulatory offence at least negligence is required, in that at least a defence of due diligence must always be open to an accused who risks imprisonment upon conviction. The rationale for elevating mens rea from a presumed element in *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, to a constitutionally required element, was that 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. In *Vaillancourt*, this Court held that for certain crimes, the special nature of the stigma attaching to a conviction and/or the severity of the available punishment necessitate subjective mens rea. I stated, at p. 654:

It is thus clear that there must be some special mental element with respect to the death before a culpable homicide can be treated as a murder. That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction.

It should be noted that under the Canadian Charter, the court must first assess whether a right has been breached (such as, in these cases, the right stated in section 7), and then assess whether that breach can be justified under section 1. In this latter respect, the courts take into account two matters, as stated in *R v Chaulk*, [1990] 3 S.C.R. 1303 at 1335-36:

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:

(a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right or freedom in question as "little as possible"; and

(c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

It can then be readily seen why the courts often disagree about whether a particular statutory provision is inconsistent with the Charter. There can, however, be no doubt about the impact of the Charter on the freedom of the legislature to fix the elements of a crime.

The way that sections 1 and 7 operate in this context can be further seen from the Canadian Supreme Court decision in Re B.C. Motor Vehicle Act [1985] 2 SCR 486. The Court considered a statute (the Motor Vehicle Act of British Columbia) which provided for minimum periods of imprisonment for the offence of driving on a highway or industrial road without a valid driver’s licence or with a licence under suspension. Section 94(2) of the Act, moreover, provided that this offence was one of absolute liability in which guilt was established by the proof of driving, whether or not the driver knew of the prohibition or suspension.

The majority judgment of the Court (per Lamer J) began with the propositions that:

2 A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person’s right to liberty under s. 7 of the Charter of Rights and Freedoms (Constitution Act, 1982, as enacted by the Canada Act, 1982, 1982 (U.K.), c. 11).

3 In other words, absolute liability and imprisonment cannot be combined.

It is important to appreciate why the Court regarded section 94(2) of the Act as an absolute liability offence. Lamer J said:

8 The effect of s. 94(2) is to transform the offence from a mens rea offence to an absolute liability offence, hence giving the defendant no opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without
guilty intent. Rather than placing the burden to establish such facts on the defendant and thus making the offence a strict liability offence, the legislature has seen fit to make it an absolute liability offence coupled with a mandatory term of imprisonment (emphasis added).

In other words, the Court regards an offence as one of absolute liability if the defendant cannot avoid liability by showing that they acted without guilty intent. This is usually taken to mean that the defendant shows that they took reasonable steps to avoid committing the offence. D Stuart, Canadian Criminal Law (3rd ed, 1995) 173

It has been noted, however, that in relation to an offence of strict liability created by law of the Australian Capital Territory, that while section 36 of the Criminal Code 2002 provides the defendant with an opportunity to prove that his action was due to an honest and reasonable mistake of fact, it does not provide for a defence of taking reasonable care to avoid committing the offence.

Thus, when in Re B.C. Motor Vehicle Act the Supreme Court refers to the rights problems attaching to offences of absolute liability, they may, it is arguable, be referring to a strict liability offence as that if defined in the Criminal Code 2002.

Having begun with a conclusion, Lamer J’s judgment then elaborated on why "absolute liability and imprisonment cannot be combined". Some pertinent bits of his judgment follow:

**Absolute Liability and Fundamental Justice in Penal Law**

69 It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin actus non facit reum nisi mens sit rea.

...  

75 A law enacting an absolute liability offence will violate s. 7 of the Charter only if and to the extent that it has the potential of depriving of life, liberty, or security of the person.

76 Obviously, imprisonment (including probation orders) deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to
impose imprisonment. There is no need that imprisonment, as in s. 94(2), be made mandatory.

77 I am therefore of the view that the combination of imprisonment and of absolute liability violates s. 7 of the Charter and can only be salvaged if the authorities demonstrate under s. 1 that such a deprivation of liberty in breach of those principles of fundamental justice is, in a free and democratic society, under the circumstances, a justified reasonable limit to one's rights under s. 7.

...

79 Before considering s. 94(2) in the light of these findings, I feel we are however compelled to go somewhat further for the following reason. I would not want us to be taken by this conclusion as having inferentially decided that absolute liability may not offend s. 7 as long as imprisonment or probation orders are not available as a sentence. The answer to that question is dependant upon the content given to the words "security of the person".

With reference to section 1, Lamer J said:

85 Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.

One point left open in this judgment was whether violation of section 7 is triggered by the requirement of minimum imprisonment, or solely by the availability of imprisonment as a sentence. After this case, other Canadian courts have held that "the possibility of imprisonment in default of payment of the fine .... threatens the liberty interest such that section can be relied upon": D Stuart, Canadian Criminal Law (3rd ed, 1995) 175.

Ramifications for proposed laws of the Territory

The effect of a Bill of Rights
Bringing this home to the Territory, there is reason to think that if a Bill of Rights were to be adopted, and were the Assembly to continue to adopt the approach of the Criminal Code in the way it determines the nature of the fault element in criminal offences, there will often be a question whether the result in a particular case will be in breach of the Bill of Rights.

If this Canadian approach were to be followed, (and its general thrust is supported by a decision of the European Court of Human Rights and by some English judicial commentary: see B Emmerson and A Ashworth, Human Rights and Criminal Justice (2001) at 278), then there is a rights objection to any law of the Australian Capital Territory which creates either an offence of absolute liability, or of strict liability, in respect of which offence the defendant may be imprisoned.

There may well be a rights objection even in cases where imprisonment is not a possible penalty. In the words of Lamer CJ in R v Wholesale Travel Group Inc., [1991] 3 S.C.R. 154 at 183, the question in every case will be whether "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". If the fault element in the statutory offence is not one the court thinks sufficient to meet the standards of fundamental justice, the provision will be in breach of the bill of rights.

The Committee makes these points here in recognition that a Bill of Rights will be proposed in a forthcoming bill. It may not, of course, contain a provision identical to section 7 of the Canadian Charter, but it is likely that it will contain a provision on the basis of which the reasoning in cases like Re B.C. Motor Vehicle Act [1985] 2 SCR 486 can be applied. It is noted that the proposed Human Rights Bill 2003 would state in clause 9.4: "Every one charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law": Towards an ACT Human Rights Act (May 2003) at Appendix A, 19.

This is significant because another basis for this reasoning is a provision to the effect that an accused is presumed to be innocent until proved guilty according to law; see R v Wholesale Travel Group Inc., [1991] 3 SCR 154 at 195ff, and under New Zealand law, see P Rishworth et al, The New Zealand Bill of Rights 2003) at 666 and 684.

The questions for the Assembly

Of course, as matters stand, the issues raised above are for the Assembly to determine, and not for a court. It will be a question whether, notwithstanding that the proposed law might be open to an rights objection, there are, as Canadian law would allow, circumstances that justify the possibility of imprisonment.
The Committee suggests that the significance of the rights issue in respect of any Territory which creates either an offence of absolute liability, or of strict liability, and in particular one in respect of which offence the defendant may be imprisoned, is such that when such a law is proposed that the Explanatory Statement should address the issues that the Committee pointed to in its earlier Report; that is:

- 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.

In a letter of the Chief Minister of 18 August 2003, (for which the Committee thanks the Chief Minister), the Committee notes that these matters have been addressed.

To take an aspect of the second dot point first, the Committee responds that its concern has not been with whether a defence of reasonable excuse be provided, but with whether an accused should be able to adduce evidence to the evidential burden standard that he or she acted with due diligence. This is a narrower line defence.

In relation to the content of an Explanatory Statement, this Committee agrees with the position taken by its counterpart Committee in the Commonwealth Parliament, the Senate Standing Committee for the Scrutiny of Bills. Its general view on the content of an Explanatory Statement is as follows.

The Committee emphasises that an Explanatory Memorandum should include a full explanation of the background to the bill and its intended effect. This is particularly the case where it includes provisions which may affect personal rights or parliamentary propriety. An Explanatory Memorandum should be more than a brief introduction followed by notes on clauses which largely reproduce the clauses themselves. The purpose of an Explanatory Memorandum is to assist parliamentarians during passage of the bill and to be a guide for those affected by its proposed provisions. It is therefore necessary for it to include all matters relevant to this purpose. This would usually include a substantial discussion of these issues in addition to the notes on clauses. (From Report No 2 of 2003, at 68).

This comment (which is found in several other reports) was made in relation to a proposed offence of strict liability. Moreover, the Committee noted in particular that the Explanatory Statement had not addressed the issue of "whether options other than the imposition of strict criminal liability were considered". In other Reports, the Committee has made it clear that an Explanatory Statement should advise "of the
reason for these impositions of strict criminal liability” (from Report No 1 of 2003, at 9), or, as was said in another Report, where a bill creates an offence of strict liability, “the reasons for its imposition should be set out in the Explanatory Memorandum which accompanies the bill”: The Work of the Committee during the 39th Parliament November 1998-October 2001, at 35.

The Committee notes that it now common for the Explanatory Statement, or the Minister on a query from the Senate Committee, to provide a justification for the creation of an offence of strict or absolute liability; see for example in Report No 2 of 2001 at 30-31.

In relation to the harmonisation process that flowed from the enactment of the Criminal Code, the Committee took the position that it should be confirmed in each case that no new strict liability offences had been created. It appears to be the case that in relation to amendments to legalisation of this character, all that the Committee generally requires is this assurance. It does not require that there be a lengthy justification. On the other hand, the Committee would point out to the Parliament any case where the imposition of strict liability appeared to be a trespass on personal rights.

The Committee also understands that the Department of Prime Minister and Cabinet has advised, in Legislation Circular no 5 of 2002, that matters coming within the senate Committee’s terms of reference should be fully and clearly explained in the Explanatory Statement.

Is there a framework for determining what fault element should be prescribed?

If the questions debated in the Canadian courts are ones an Territory court will consider under a Bill of Rights, then it may be expected that it will seek to formulate some general approach as to how it will resolve the issue. This is a matter that has concerned the Committee, and has been the subject of correspondence between it and the Chief Minister in his capacity as Attorney-General. The Committee acknowledges and thanks the Chief Minister for his letter of 18 August 2003 in response to our letter of 31 March 2003.

The Committee accepts that it is not appropriate in every case for an Explanatory Statement to state why a particular offence is one of strict (or absolute) liability. It nevertheless thinks that it should be possible to provide a general statement of philosophy about when there is justified some diminution of the fundamental principle that an accused must be shown by the prosecution to have intended to commit the crime charged. There will also be some cases where a particular justification is called for, such as where imprisonment is a possible penalty.
One general line of approach is to distinguish between true crimes which are wrongs in themselves (mala in se), and which punish acts that are morally wrong. In *R v The Corporation of The City of Sault Ste. Marie* [1978] 2 S.C.R. 1299 at 1303, Dickson J said:

The doctrine of the guilty mind expressed in terms of intention or recklessness, but not negligence, is at the foundation of the law of crimes. In the case of true crimes there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without mens rea: (footnotes omitted) Blackstone made the point over two hundred years ago in words still apt: "... to constitute a crime against human law, there must be first a vicious will, and secondly, an unlawful act consequent upon such vicious will ...." 4 Comm. 21.

Just what are true crimes in this sense is a matter for debate, but is usually settled by reference to the common law of crime.

On the other hand are offences variously referred to as "statutory," "public welfare," "regulatory," "absolute liability," or "strict responsibility," which are not criminal in any real sense, but are prohibited in the public interest. Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like. In this appeal we are concerned with pollution: ibid at 1302-1303.

(The Latin tag *mala prohibitia* is often applied to these rimes.)

The judgment of Dickson J in this case is a valuable summary of the debate as to just what should be the fault element in relation to such offences.

[1309] *The Mens Rea Point*

The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental [1310] element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent
person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such.

Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.

Public welfare offences evolved in mid-nineteenth century Britain as a means of doing away with the requirement of mens rea for petty police offences. The concept was a judicial creation, founded on expediency. That concept is now firmly imbedded in the concrete of Anglo-American and Canadian jurisprudence, its importance heightened by the every-increasing complexities of modern society.

Various arguments are advanced in justification of absolute liability in public welfare offences. Two predominate. Firstly, it is argued that the protection of social interests requires a high standard of care and attention on the part of those who follow certain pursuits and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them. The removal of any possible loophole acts, it is said, as an incentive to take precautionary [1311] measures beyond what would otherwise be taken, in order that mistakes and mishaps be avoided. The second main argument is one based on administrative efficiency. Having regard to both the difficulty of proving mental culpability and the number of petty cases which daily come before the Courts, proof of fault is just too great a burden in time and money to place upon the prosecution. To require proof of each person's individual intent would allow almost every violator to escape. This, together with the glut of work entailed in proving mens rea in every case would clutter the docket and impede adequate enforcement as virtually to nullify the regulatory statutes. In short, absolute liability, it is contended, is the most efficient and effective way of ensuring compliance with minor regulatory legislation and the social ends to be achieved are of such importance as to override the unfortunate by-product of punishing those who may be free of moral turpitude. In further justification, it is urged that slight penalties are usually imposed and that conviction for breach of a public welfare offence does not carry the stigma associated with conviction for a criminal offence.
Arguments of greater force are advanced against absolute liability. The most telling is that it violates fundamental principles of penal liability. It also rests upon assumptions which have not been, and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked. The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law at trial and, however one may [1312] downplay it, the opprobrium of conviction. It is not sufficient to say that the public interest is engaged and, therefore, liability may be imposed without fault. In serious crimes, the public interest is involved and mens rea must be proven. The administrative argument has little force. In sentencing, evidence of due diligence is admissible and therefore the evidence might just as well be heard when considering guilt. ...

Public welfare offences involve a shift of emphasis from the protection of individual interests to the protection of public and social interests. (Footnote omitted.). The unfortunate tendency in many past cases has been to see the choice as between two stark alternatives; (i) full mens rea; or (ii) absolute liability. In respect of public welfare offences (within which category pollution offences fall) where full mens rea is not required, absolute liability has often been imposed. ..... There is an increasing and impressive stream of authority which holds that where an offence does not require full mens rea, it is nevertheless a good defence for the defendant to prove that he was not negligent. .....  

The doctrine proceeds on the assumption that the defendant could have avoided the prima facie offence through the exercise of reasonable care and he is given the opportunity of establishing, if he can, that he did in fact exercise such care.

The case which gave the lead in this branch of the law is the Australian case of Proudman v. Dayman (1941) 67 C.L.R. 536 where Dixon J. said, at pp. 540-41:

"It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence. ..."
This case, and several others like it, speak of the defence as being that of reasonable mistake of fact. The reason is that the offences in question have generally turned on the possession by a person or place of an unlawful status, and the accused’s defence was that he reasonably did not [1315] know of this status: e.g. permitting an unlicensed person to drive, or lacking a valid licence oneself, or being the owner of property in a dangerous condition. In such cases, negligence consists of an unreasonable failure to know the facts which constitute the offence. It is clear, however, that in principle the defence is that all reasonable care was taken. In other circumstances, the issue will be whether the accused’s behaviour was negligent in bringing about the forbidden event when he knew the relevant facts. Once the defence of reasonable mistake of fact is accepted, there is no barrier to acceptance of the other constituent part of a defence of due diligence.

This general issue is also the subject of comment by the Senate Committee in its Sixth Report of 2002. Its major principles and recommendations were as follow.

**Basic principles**

The Committee concluded that there were certain basic principles which should constitute the starting point for Commonwealth policy on strict and absolute liability, as follows:

- fault liability is one of the most fundamental protections of criminal law; to exclude this protection is a serious matter;

- strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; it would not be proper to base strict liability on mere administrative convenience or on a rigid formula;

- the Commonwealth Criminal Code should continue to provide general principles of criminal responsibility applicable to all Commonwealth offences, with a central provision being section 5.6, which creates a rebuttable presumption that to establish guilt fault must be proven for each physical element of an offence;

- the Criminal Code should continue to provide that the presumption that fault must be proven for each element of an offence may be rebutted only by express legislation provision under section 6.1 for strict liability and section 6.2 for absolute liability;

- the general defence of mistake of fact with its lower evidentiary burden is a substantial safeguard for those affected by strict liability; the Criminal Code should continue to expressly provide for this defence;
the Criminal Code should continue to expressly provide that strict or absolute liability does not make any other defence unavailable;

\[=\] strict liability should, wherever possible, be subject to program specific broad-based defences in circumstances where the contravention appears reasonable, in order to ameliorate any harsh effect; these defences should be in addition to mistake of fact and other defences in the Criminal Code.

\[=\] strict liability offences should, if possible, be applied only where there appears to be general public support and acceptance both for the measure and the penalty; 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 Commonwealth criteria of 60 penalty units ($6,600 for an individual and $33,000 for a body corporate) appears to be a reasonable maximum.

**Merits of strict liability and criteria for its application**

The Committee concluded that the supposed merits of strict liability and criteria for its application should be subject to strong safeguards and protections for those affected. The principles governing such protection are set out later in this Chapter. It should be noted, however, that the Committee has included qualifications on some of the following principles relating to merits of strict liability identified by Commonwealth agencies:

\[=\] 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; as with other criteria, however, this should be applied subject to other relevant principles;

\[=\] strict liability should not be justified by reference to broad uncertain criteria such as offences being intuitively against community interests or for the public good; criteria should be more specific;

\[=\] strict liability may be appropriate where its application is necessary to protect the general revenue;

\[=\] strict liability should not be justified on the sole ground of minimising resource requirements; cost saving alone would normally not be sufficient, although it may be relevant together with other criteria;
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;

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; in such cases the defence of mistake of fact should apply;

two-tier or parallel offences are acceptable only where the strict liability limb is subject to a lower penalty than the fault limb, and to other appropriate safeguards; in addition, it should be clearly evident that the fault limb alone would not be sufficient to effect the purpose of the provision;

infringement notices should be used only for strict liability offences and are acceptable subject to the usual safeguards;

absolute liability offences should be rare and limited to jurisdictional or similar elements of offences; in contrast to the present Commonwealth policy absolute liability should not apply to offences in their entirety in relation to inadvertent errors including those based on a mistake of fact; and

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.

Principles of protection for those affected by strict and absolute liability
The Committee concluded that agencies have not given enough attention to the interests of parties affected by strict and absolute liability. It has, therefore, developed the following principles which should be taken into account when deciding on the need for such offences and the form they will take:

the process of deciding whether to introduce strict liability for an offence should recognise that this may have adverse effects upon those affected; the legitimate rights of these people should be paramount and take precedence over administrative convenience and perceived cost savings in program administration;

agencies should acknowledge that there may be areas where existing strict liability offences or the way they are administered may be unfair; in these cases agencies should review the offences under the general coordination of the Attorney-General’s Department;
strict liability should not be implemented for legislative or administrative schemes which are so complex and detailed that breaches are virtually guaranteed regardless of the skill, care and diligence of those affected; any such scheme would be deficient from the viewpoint of sound public administration;

strict liability offences should be designed to avoid the likelihood that those affected, particularly by the issue of an infringement notice, will pay the lower penalty simply because it is easy and convenient to do so, rather than spend the money and time to pursue what might be a legitimate defence; any agency which encouraged this tendency would be acting improperly;

strict 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 Australia or overseas; offences which do not apply this principle have the potential to operate unfairly;

strict liability has the potential to adversely affect small and medium enterprises; steps should be taken to ameliorate any such consequences arising from the different compliance and management resources of smaller entities;

any potential adverse effects of strict liability on the costs of those affected should be minimised to the extent that this is possible; in particular, parties who are subject to strict liability should not have their costs increased as a consequence of an agency reducing its costs;

external merit review by the AAT or other independent tribunal of relevant decisions made by agencies is a core safeguard of any legislative or administrative scheme; every agency which administers strict liability offences should review those provisions to ensure that this right is provided;

new and existing strict liability schemes should have adequate resources to ensure that they are implemented to maximise safeguards; a lack of proper resources may result in the inadequate operation of those safeguards;

strict liability should not be accompanied by an excessive or unreasonable increase in agency powers of control, search, monitoring and questioning; any such increase in powers may indicate that the legislative and administrative scheme has structural flaws;

there should be a reasonable time limit within which strict liability proceedings can be initiated; it would be unfair to those affected if they were to be charged perhaps years after an alleged breach;
as a general rule, strict liability should be provided by primary legislation, with regulations used only for genuine administrative detail; it would be a breach of parliamentary propriety and personal rights for regulations to change the basic framework or important aspects of a legislative scheme; and

the use of strict liability in relation to the collection of personal information about members of the public from third parties has the potential to intrude into the legitimate rights of the people whose details are being collected; in such cases the entire process should be transparent, with all affected members of the public being notified of their rights and remedies under the Privacy Act.

The Committee's view

The major points that emerge from the above may be summarised.

First, it is clear that from a rights perspective, the issue of the nature of the fault elements in relation to an offence is one to be taken seriously. The Canadian cases show that issues surrounding the security of the person and the presumption of innocence are implicated whenever a statute creates an offence where the fault element is less than full *mens rea*.

The Assembly needs to be conscious of this issue as it deals with each proposed statutory offence and, more generally, as it deals with the issues that will be thrown up by the proposed Territory Human Rights Bill.

Secondly, the Committee adheres to its position, stated in earlier Reports, that in relation to a proposed statutory offence of strict or absolute liability, the Explanatory Statement should offer a justification of the reasons for the amelioration of principle that an accused must be shown to have committed the physical elements of the offence with a guilty mind, and should indicate why an alternative (and in particular the option of providing a due diligence defence) was not adopted.

Thirdly, there is room for debate as just what is an appropriate framework for sorting out the issue of when there should be such an amelioration. 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. With respect to the Chief Minister, the Committee feels that it is appropriate for the Attorney to indicate at least some minimum general standards.

Fourthly, in relation to harmonisation Bills, the Committee adopts the same approach as the Senate Committee.
Extract Report 14, 15 August 2005
Criminal Code Harmonisation Bill 2005

Report under section 38 of the Human Rights Act 2004
Has there been a trespass on personal rights and liberties?

The Bill would create a large number of offences of strict liability (albeit in many cases as a restatement of the existing law). In each case, the issue which arises is whether there is thus an incompatibility with the presumption of innocence stated in HRA subsection 22(1). The Committee draws attention to the lack of explanation and justification in terms of compliance with this provision.

Background
The Explanatory Statement explains the process of harmonisation as follows:

Harmonisation is essentially the process of reviewing and revising ACT offence provisions to ensure that they are in a form consistent with the principles of the [Criminal Code 2002]. …

The general approach in harmonising the offences has been to reformulate offence provisions in line with chapter 2 [of the Code], to state more clearly the physical and fault elements of an offence. A physical element of an offence may be conduct, a result of conduct, or a circumstance in which result or conduct occurs and forms the basic description of an offence. A fault element for a particular physical element may be intention, knowledge, recklessness or negligence. The Code provides for an implied fault element where an offence does not specify a fault element in relation to a particular physical element or at all.

The last proposition follows from section 22 of the Code:

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.
But section 22 does not state that the law creating the offence must provide for a fault element, and indeed subsection 11(2) states “the law that creates the offence may provide that there is no fault element for some or all of the physical elements”. The Code indicates two different ways in which this may be done: first, by providing that the offence is one of strict liability (section 23), or, secondly, by providing that the offence is one of absolute liability (section 24). In either case, the result is that “there are no fault elements for any of the physical elements of the offence”; (the difference between the two cases is that in relation to the first, but not the second, the defence of mistake of fact (see Code section 36) is available).

Thus, in relation to a particular statutory offence to which it applies, (being all offences created after 1 January 2003 – see below), the effect of section 22 is that if the offence is not specified to be one of strict liability, or of absolute liability, a court must take it as a fault offence as described in section 22. (Of course, the statute creating the offence may prescribe some different fault element).

Chapter 2 of the Criminal Code does not generally apply to a pre-2003 offence: subsection 8(1). In relation to the default rule in section 22, the reason for this temporal limitation is that many offence provisions enacted prior to 1 January 2003 are not stated to be ones of strict or absolute liability, but would probably be found by the courts to be of this effect. Thus, to avoid the result that on the operation of section 22 these offences would necessarily be construed as not imposing strict or absolute liability, section 22 does not apply to offence provisions enacted prior to 1 January 2003. The point of this temporal limitation is to allow time for a ‘harmonisation process’ – that is, for the assessment, in stages, of all offence provisions enacted prior to 1 January 2003 to determine whether or not they should be reformulated in a way that states expressly that the offence is to be one of strict (or, alternatively, absolute) liability. This Bill is the first stage of this process. It repeals offence provisions in 32 Acts and 6 regulations, and in some cases replaces them with provisions which state expressly that the relevant offence is one of strict liability. (There is no proposal to create an offence of absolute liability.)

Thus, this Bill would create a significant body of criminal law. Of course, in most cases, there would be no change to the substance of the existing law. But this Committee must report on every provision of a Bill. Moreover, the Human Rights Act 2004 has a significant effect on the way principles of criminal liability may be stated, and on what conduct may be made criminal. To restate the substance of the existing law in a new provision does not obviate the need for scrutiny in HRA terms. Thus,
every provision of the Bill should be scrutinised, in particular to determine if a rights issue arises.

This is however a difficult task, given the dearth of explanation in the Explanatory Statement. This Committee report must then take a broad brush approach, and will begin by stating basic principles concerning criminal liability stated in both the Criminal Code and the Human Rights Act 2004.

Basic principles concerning criminal liability and the impact of the Human Rights Act 2004

(a) The physical and fault elements of an offence

Subsection 11(1) of the Code states the long accepted notion that “[a]n offence consists of physical elements and fault elements”. Simplifying matters for the sake of explanation:

- a physical element may be “conduct” – and conduct means (among other things) “an act”; and
- a fault element for a particular physical element – which may (among other comparable states of mind) be an intention to do the acts which make up the conduct that comprises the physical elements of the offence.

For example, proposed subsection 14(1) of the Animal Welfare Act 1992 (see Schedule 1, amendment 1.11 of the Bill) would provide:

(1) A person must not use spurs with sharpened or fixed rowels on an animal.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

This provision states the physical element of the offence – that is, the act of using spurs with sharpened or fixed rowels on an animal. It should be noted that the conduct of a person using spurs, etc could not amount to the physical element of this offence unless the conduct was “voluntary” – that is, that the conduct “is a product of the will of the person whose conduct it is” (subsection 15(2)).

This provision does not state the fault element for the offence. More specifically, it does not state that the person must have intended to do the acts which comprise the conduct which is the fault element. (Saying this allows for the possibility that a person might as a product of their will (that is, voluntarily) use spurs, etc, but without the intention of so doing. For the sake of explanation, it is not necessary to consider a particular example.) However, the effect of the default rule in Code subsection 22(1) is that intention is the fault element for the physical element. Thus,
proposed subsection 14(1) of the Animal Welfare Act 1992 must be read as if it stated that a person must not intend to use spurs, etc.

(b) Establishing guilt

Sections 12, 56 and 57 then state basic principles to govern how guilt of an offence must be established. Section 12 provides:

12 Establishing guilt of offences

A person must not be found guilty of committing an offence unless the following is proved:

(a) the existence of the physical elements that are, under the law creating the offence, relevant to establishing guilt;

(b) for each of the physical elements for which a fault element is required—the fault element or 1 of the fault elements for the physical element.

[For completeness, it should be noted that by the Criminal Code (Administration of Justice Offences) Amendment Bill 2005 it is proposed to renumber the clause above as subclause 12(1), and add a subclause 12(2) – see above.]

Subsection 56(1) provides that the prosecution “has the legal burden of proving every element of an offence relevant to the guilt of the person charged”, and subsection 57(1) that a legal burden of proof on the prosecution “must be discharged beyond reasonable doubt”.

(c) The impact of the Human Rights Act 2004

The principles just stated are consistent with, and might be required by the Human Rights Act 2004. HRA subsection 22(1) states:

22 (1) Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

A major effect of this presumption is that the prosecution must prove that the defendant committed the physical elements of the offence, and intended to so do so (or had a comparable state of mind). That is, only by such proof can the presumption of innocence be overcome. (It is arguable that the presumption embodies the principle that such proof must be beyond reasonable doubt, but this is debateable and does not need to be further considered here.)
It may also be said that a person cannot be said to be guilty – in other words, not be innocent - unless the offence provision does state a fault element of intention. It might be said that guilt lies in the person’s moral responsibility for what they did, and that this is established only on proof of their

- having committed the acts that comprise the conduct as a voluntary act of will, and
- having had an intention to commit those acts.

If this analysis is correct, (and it is supported by a great deal of judicial interpretation of other human rights instruments), then there is a human rights issue arising out of the HRA whenever an offence is worded so that

- the fault element of intention (or a comparable state of mind) is not prescribed as an element of the offence – for example, where the offence is stated to be one of strict liability, or of absolute liability; or

- in some other way there is in effect a presumption that the defendant committed the physical elements of the offence, and/or intended to so do so.

Where either is the case, there is on the face of it an incompatibility with HRA subsection 21(1). There will then be an issue whether that incompatibility is justifiable under HRA section 28:

**Human rights may be limited**

28 Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

This question can only be answered in the context of the particular offence provision. Taking the common case where an offence is stated to be one of strict liability, it will be relevant to take into account:

- that the defendant may invoke defences permitted by the *Criminal Code*, such as, in particular, the mistake of fact defence under section 36, (which does not, however, permit the person to submit that they took reasonable care to avoid committing the physical elements of the offence);
• whether there is specific provision for a reasonable care, or reasonable excuse
defence, or some other defence, and whether in respect of any defence the defendant
bears a legal burden of proof or only an evidential burden; and

• the “policy” justifications offered for derogating from the right to fair trial and/or
the presumption of innocence, which in general terms could include the nature of the
conduct prohibited, and in particular whether it is a regulatory offence, and the
difficulties of proof of some matter faced by the prosecution, compared to the ease of
proof of that matter by the defendant (in which case proof of that matter is with more
justification placed on the defendant).

In relation to the second dot point, the Committee acknowledges that qualification of
an offence of strict liability with an allowance that the defendant may rely on a
defence of reasonable excuse operates to confer on the courts “the power to
determine the content of such defences. Defences in this form are categories of
indeterminate reference that have no content until a court makes its decision”: Taikato
v The Queen (1996) 186 CLR 454 at 464-466, per Brennan CJ, Toohey, McHugh and
Gummow JJ. Thus, provision for such a defence does create a problem, for it is
undesirable that the legislature in effect delegates its legislative power to the courts.
The Committee’s point however is that provision for such a defence to an offence of
strict liability will make it easier to justify the derogation of the presumption of
innocence and/or of a fair trial that occurs when the offence does not contain a fault
element. The absence of such a defence makes justification harder.

Placing a burden of proof on a defendant – sometimes called a reverse burden of
proof – does not by itself necessarily raise a rights issue. The rights issue arises
whenever the offence provision places on a defendant a burden to establish to the
court that he or she did not commit one of the physical elements of the offence, or did
not intend to commit the acts that make up the physical element. Relieving the
prosecution of its obligation to prove that the defendant both committed the physical
elements of the offence, and intended to so do so, gives rise to an incompatibility
with HRA section 18 and/or section 21. The presence of a reverse burden of proof
clause in the offence will indeed make it easier, in terms of HRA section 28, to justify
relieving the prosecution of this task where the matter of defence to be proved by the
defendant would show that he or she lacked moral responsibility for their actions.
The reason why there is a focus on whether the defendant bears a legal burden to
establish the matter of defence, rather than the lower level evidential burden (see
below), is that the former will make justification more difficult. (Of course, the
absence of either such allowance to the defendant will make the task of justification
harder.)
Illustration of how a link between the provision of strict liability and a reverse burden of proof may affect assessment of justification under HRA section 28

The three dot points stated just above provide a very general framework for an assessment of whether a particular strict liability offence is compatible with the Human Rights Act 2004. Consideration of 3 provisions of the Bill will illustrate the complexity of the task. The Committee cannot take its commentary further because the Explanatory Statement provides very little detail in the way of explanation.

(i) Where the offence is stated to be one of strict liability and, apart from the Code defences, the defendant has no opportunity to prove facts which would establish a basis for a finding of not guilty.

This sort of case is illustrated by proposed subsection 27A of the Adoption Regulation 1993 (see Schedule 1, amendment 1.6 of the Bill):

27A Offence to destroy etc register

(1) A person commits an offence if the person destroys, defaces or damages the register of adoptions.

   Maximum penalty: 5 penalty units.

(2) An offence against this section is a strict liability offence.

In this case, that this is an offence of strict liability gives rise to an incompatibility with HRA section 18 and/or section 21, and in assessing whether this is justifiable under HRA section 28, account would be taken of:

- the lack of any kind of allowance for a defendant to avoid guilt by proving in any way that he or she took reasonable care to avoid destroying, defacing or damaging the register – this factor would point to lack of justification under HRA section 28;

- that the defendant could adduce evidence (to the standard of the evidential burden) that he or she had made a mistake of fact (see Code section 36), or to make out some other defence allowed for in Code part 2.3) - this factor provides some basis in support of justification; and
the ‘policy’ justifications offered for derogating from the right to fair trial and/or the presumption of innocence – these factors are context dependent and may point for or against justification.

(ii) Where the offence is stated to be one of strict liability and, in addition to the Code defences, the defendant is given an opportunity to discharge a legal burden of proof in relation to facts which would establish a basis for a finding of not guilty.

This kind of case is illustrated by proposed subsections 12A(3), (4) and (5) of the Animal Welfare Act 1992 (see Schedule 1, amendment 1.11 of the Bill), which provides:

(3) A person commits an offence if—

(a) the person lays a poison; and

(b) there is a reasonable likelihood that the poison will kill or injure a domestic or native animal.

Maximum penalty: 10 penalty units.

(4) An offence against subsection (3) is a strict liability offence.

(5) It is a defence to a prosecution for an offence against subsection (3) if the defendant proves that the defendant took all reasonable steps to avoid death or injury to domestic and native animals.

The analysis of this case would be different to that in the first example. Here, a defendant could seek to avoid guilt by proving that he or she took reasonable steps to avoid death or injury. This factor would provide some basis in support of justification. However, detracting from the force of this factor is that the defendant would (as a result of the use of the words “if the defendant proves”) carry a legal burden of proof to establish that they had taken reasonable steps, etc: see Code paragraph 59(b).

(In this Bill, see too: proposed sections 12A and 20 of the Business Names Act 1963 (see Schedule 1, amendment 1.74 of the Bill); proposed section 58 of the Community Title Act 2001 (see Schedule 1, amendment 1.85 of the Bill); and proposed section 24 of the Lakes Act 1976 (see Schedule 1, amendment 1.190 of the Bill)).

(iii) Where the offence is stated to be one of strict liability and, apart from the Code defences, the defendant is given an opportunity to discharge only an evidential
burden of proof in relation to facts which would establish a basis for a finding of not guilty.

This kind of case is illustrated by proposed section 12 of the Animal Welfare Act 1992 (see Schedule 1, amendment 1.11 of the Bill), which provides:

12 Administering poison

(1) A person commits an offence if the person administers poison to a domestic or native animal.

   Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

(2) This section does not apply if —

   (a) the person has a reasonable excuse; or ….

It is likely that this provision would not be read as casting on the prosecution – as a necessary part of its case-in-chief - a legal burden to prove that a defendant did not have a “reasonable excuse”. Rather, to avoid guilt (and assuming that the prosecution proves the physical elements of the offence, that is, that the defendant administered poison, etc), the defendant would need to prove, according to the evidential burden standard, that they had a reasonable excuse. What this means is that they would need to present or point to “evidence that suggests a reasonable possibility that the matter exists or does not exist” (see Code subsection 58(7)). If they did so, then the prosecution then has the legal burden of disproving that the defendant had a reasonable excuse: see Code subsection 56(2). What this means is that the prosecution would need to establish to the court beyond reasonable doubt that the defendant did not have the reasonable excuse which the defendant has shown to exist as a reasonable possibility. (The prosecution could choose to attempt to do so in a case-in-reply to the case of the defendant.)

The analysis of this case would be different to that in the first and second examples. Here, a defendant could seek to avoid guilt by proving that he or she had a reasonable excuse, and would need to do so only to the evidential burden standard. Given the lighter nature of this burden (see above), this factor would provide a better basis in support of justification than is the case in relation to example (ii).

(In this Bill, see too: proposed section 49 of the Bail Act 1963 (see Schedule 1, amendment 1.45 of the Bill); proposed sections 11A and 108 of the Residential Tenancies Act 1997 (see Schedule 1, amendment 1.231 and 1.232 of the Bill); and
proposed section 49 of the *Fisheries Act 2000* (see Schedule 1, amendment 1.148 of the Bill).

The Committee’s comments on the Bill

Against this background, the Committee offers the following comments on the rights issues that arise from the provisions of the Bill.

1. Taking the same view as the Scrutiny of Bills Committee of the Senate has done in relation to ‘harmonisation’ bills, the Committee suggests that the Explanatory Statement should confirm in relation to each new offence provision that no new strict liability offences have been created; (compare Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39th Parliament November 1998 – October 2001*, para 2.108).

The Explanatory Statement for this Bill contains a very general statement to this effect:

The Bill does not propose to create any new strict liability offences, [but] only to state strict liability where a number of factors, including the nature of the offence, the language employed and the level of penalty infers a legislative intent for strict liability. Strict liability is usually employed where it is necessary to ensure the integrity of a regulatory scheme, such as those relating to public health and safety, the environment and the protection of the revenue.

2. Given that the offences are being restated after the commencement of the operation of the *Human Rights Act 2004*, there is a need for justification in any case where the restatement creates an offence of strict liability. It is not sufficient that on some date prior to the HRA, the Assembly passed an equivalent provision. In the current era, derogation of a right to a fair trial, and/or of a presumption of innocence, requires explicit justification.
3. A particular rights issue which arises is the extent to which the restatement of an offence affects the availability of defences that are currently available in respect of that offence. There is an inroad made on existing rights where the proposed provision does not restate a defence now found in the relevant offence provision; in particular, where that defence would enable the defendant, by showing for example the existence of a reasonable excuse, to show that he or she was not morally culpable.

4. Coming now to the Bill, the Explanatory Statement (at pp 2-3) indicates that one question addressed was whether it was desirable to retain a specific defence provided for in the particular pre-1 January 2003 offence, or, on the other hand, to reformulate the provision so that the matter that was formerly a matter of defence would now be stated as an element of the offence, with the result that it was a matter to be established by the prosecution. The Committee raises no issue at all about such provisions, given that in taking this step, the new provision better protects the presumption of innocence.

Secondly, the Bill does provide, but in very brief terms, a justification for the creation of offences of strict liability. It states merely:

Strict liability is usually employed where it is necessary to ensure the integrity of a regulatory scheme, such as those relating to public health and safety, the environment and the protection of the revenue.

This statement does not permit an evaluation of the policy justifications for the imposition of strict liability.

A third question addressed was whether in relation to any specific defence, the defendant would carry an evidential burden, or a legal burden. The Explanatory Statement indicates that the general common law approach has been adopted, to the effect that in only a few cases has a legal burden been imposed. The Explanatory Statement also acknowledges that, in such cases, the possibility of conflict with HRA subsection 22(1) becomes more acute. In this respect, the Explanatory Statement states:

The Bill largely imposes only an evidential burden except in section 12A of the *Animal Welfare Act 1992*; sections 12A and 20, *Business Names Act 1963*; section 58, *Community Title Act 2001* and section 24, *Lakes Act 1976*. Placing the burden on the defendant engages the presumption of innocence, protected by section 22(1) of the *Human Rights Act 2004* (HRA), but it is considered imposing the burden on the defendant is
permissible in each case as a reasonable limitation under section 28 of the HRA. For example, section 20 of the Business Names Act 1963 provides that it is for the defendant to prove they took reasonable steps to comply with the requirements for the use and display of their business name. The matter to be proven furthers the regulatory objective that a business name is used and displayed in compliance with the section. Also, the reasonable steps taken by the defendant will be matters that are peculiarly within the knowledge of the defendant. Other indications that it is a reasonable limitation upon the right are the low maximum penalty of $500 (5 penalty units) and no imprisonment.

The Committee notes that no justification is offered so far as concerns the other provisions mentioned.

Finally, the Explanatory Statement addresses the question of whether the existing reasonable excuse defences should be retained. It states:

In addition, amendments have been made in the Bill rationalising the use of the reasonable excuse defence. What constitutes a reasonable excuse largely depends on the purpose of the offence provision as well as the circumstances of the particular case. This introduces a high level of uncertainty into the application of the defence. In many cases the defence is unnecessary because the excuses it is intended to cover are now covered by the defences contained in part 2.3 of the Code. Information was sought from ACT Government agencies about the excuses that might have been intended to be covered by existing reasonable excuse provisions. In the majority of cases the advice was that the general defences in part 2.3 covered the excuses. However, reasonable excuse has been retained for the offences in the Bail Act 1992, the Residential Tenancies Act 1997 and for notice to produce offences (see for example, section 49(3), Fisheries Act 2000) because it is impracticable to attempt to specify every possible justifiable excuse that may apply.

In the Committee’s view, this explanation is deficient in that it does not specifically indicate where a reasonable excuse defence which currently attaches to a pre-1 January offence, is proposed by the Bill to be removed in the restatement of that offence in this Bill. This should not be a difficult or time-consuming exercise, and if undertaken it will place the Assembly in a position where it can assess whether a reasonable excuse defence should be retained.

The Committee also suggests that the Assembly should treat with caution an argument resting on what someone (however well-informed) in an agency of government has to say about the intention behind an existing provision of a statute. It is the Assembly which makes the law, not the sponsoring government agency.
Even if one can speak of the Assembly having a collective intention, it cannot be assumed that whatever was in the mind of the public servants within the sponsoring agency was in the mind of the Assembly. This line of argument has some force only if some document placed before the Assembly, or some statement by a Minister in debate, spelt out the ‘intention’ of the particular offence provision.

The Committee draws these matters to the attention of the Assembly.
Extract: Scrutiny Report no 17, 17 October 2005


The Committee appreciates the time and effort involved in the preparation of the responses of the Attorney-General and the spirit in which they are made – that is, as a contribution to a “rights” dialogue between the proponent of a legislative measure (and in particular the executive branch of government) and the Assembly.

The following comments of the Committee are offered in the same spirit, and pick up some issues of general significance.


1. The Attorney-General’s first comment (“On page 14, etc”) may indicate misunderstanding of the Committee’s comments on the harmonisation process.

The Committee began by adopting the statement in the Explanatory Statement as to what the harmonisation process involved. It then went on to explain – to the purpose of facilitating consideration in the Legislative Assembly of the rights issues involved – why there was a process of harmonisation on foot.

The Committee noted that the effect of section 8 of the Criminal Code 2002 was that section 22 did not apply to offences created before 1 January 2003. It sought to explain that the point of section 8 was to avoid the result that, in most cases, any pre-1 January 2003 offence would necessarily be regarded one which embodied the fault elements of intention or recklessness, as appropriate; or, to put it another way, the offences could not be regarded as imposing strict liability. (The cases where this would not be so would be those few (if any) where the pre-1 January 2003 offence did provide that it was to be one of strict or absolute liability).

The Committee then stated (at bottom of page 14) its understanding of why there was a “harmonisation process”, and at the top of page 15 that “in most cases” (referring to a case where an existing offence was repealed and a new offence created) “there would be no change to the substance of the existing law”.

The Committee understood that the point of the harmonisation process was not to apply strict and absolute liability to offences – if this is meant to convey the idea that
this was a new step in the way offences may be stated. Read as a whole, Report No 14 makes it clear that the point of the harmonisation process was to restate existing strict or absolute liability offences in a form that, having regard to section 22 of the Code, would ensure that the offences would continue to be ones of strict or absolute liability.

2. To turn now to the substance of the Attorney’s response, there can be no doubt that every offence of strict or absolute liability contained in Territory law will be vulnerable to challenge on the ground that it is in conflict with the Human Rights Act 2004; (the possible bases for a challenge are explained in Report No 14 of 15 August 2005). It might be guessed that in the vast majority of cases, the Supreme Court would find, by application of HRA section 28, that any derogation of an HRA right was justified. Nevertheless, the issue of compatibility is a real one in respect of every strict liability offence created by the Criminal Code Harmonisation Bill 2005. In the first place, it is an issue to be addressed by the Assembly.

3. The Attorney-General’s response accepts, and this is gratefully acknowledged by the Committee, that assessment by the Assembly of whether a particular offence of strict or absolute liability is in conflict with the HRA will be assisted by a statement in the relevant Explanatory Statement of why this is considered desirable. The Committee needs to make clear, as it may have failed to do, that it does not seek a “policy” justification as such, but rather a justification that will bear on the relevant legal questions; in particular, whether the apparent conflict with the HRA can be justified under HRA section 28.

4. The Attorney-General points, however, to the practical restraints involved in providing a justification, and in particular so far as concerns the Criminal Code Harmonisation Bill 2005. In this light, the Committee has reconsidered the comments it made in Report No 14, and restates them as follows:

(a) In relation to each offence provision in the “Harmonisation Bill”, the Explanatory Statement should confirm that no new offence of strict or absolute liability has been created. The Committee does not see a problem in such statement being made in very general terms, as was done in relation to the Criminal Code Harmonisation Bill 2005.

(b) Subject to qualification, the Committee does not consider that there is a need for an Explanatory Statement in relation to a “Harmonisation Bill” to provide a justification in relation to each offence of strict or absolute liability. If a challenge is made in a court proceeding, the need for justification will arise. But the Committee accepts that it is not practicable to expect such detail in the Explanatory Statement for a “Harmonisation Bill”. Without being exhaustive, there are two qualifications. First, justification should be provided where the
punishment for breach of the offence might involve imprisonment. In such cases, the possibility of incompatibly with the HRA is quite high, and the Assembly needs to carefully consider the issue. Secondly, in relation to a particular offence, the Committee may call for justification. The circumstances in which it might cannot be stated with any particularity.

(c) The Committee accepts the point made by the Attorney-General on several occasions that it is generally undesirable to permit a defendant to invoke a defence of “reasonable excuse”. It acknowledges (1) that a defendant may invoke one or more of a number of Code defences in relation to an offence of strict or absolute liability (although a lesser range is applicable in relation to an offence of absolute liability); and (2) that where it is desirable to make further provision for a defence, a more specific defence should be tailored to meet the need; (compare A Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers, (Commonwealth Minister of Justice, February 2004) at 27).

Nevertheless, the Committee considers that it has a duty to inform the Assembly where it sees that a “Harmonisation Bill” repeals an existing offence which does permit a “reasonable excuse” defence (or indeed of any kind of non-Code defence), and then restates that offence in a fashion which does not restate that defence. Where this occurs, there is an inroad on existing rights, and a Member may wish to propose either that the particular defence be reinstated, or that some other more tailored defence be inserted.

To this end, the Committee (and the Assembly) will be assisted if the Explanatory Statement to the “Harmonisation Bill” provides a table of the kind the Attorney-General has provided with his response of 20 September to Committee Report No 14.

(d) Where in relation to a particular offence, a legal burden of proof is placed on a defendant to establish a fact, the Explanatory Statement should provide justification for this course. With some exceptions, this is done in the Explanatory Statement for the Criminal Code Harmonisation Bill 2005.

End of Extract
Update on strict liability offences

Two Supreme Court Justices have addressed the impact of the Human Rights Act 2004 on strict liability offences, and what they have to say suggests that the Committee should alter its position on just what rights are engaged by the creation of such an offence.

Hausmann v Shute [2006] ACTSC 54 concerned section 22 of the Road Transport (Alcohol and Drugs) Act 1977 (ACT), whereby a person commits an offence where he or she has been the driver of a motor vehicle on a public street or in a public place, and, on being required to provide a sample of breath for breath analysis, refuses to provide a sample of breath for analysis, or fails or refuses to provide a sample of breath in accordance with the reasonable directions of the police officer who made the requirement. If failure to provide a sufficient breath sample as directed is established, the Act does not provide for any defence. (On the date of the alleged offence, section 22 of the Criminal Code 2002, which prescribes intention as the fault element for the physical elements of an offence, was not in effect.) An offence may be punished in various ways depending in part on who was the offender, and imprisonment is an option in relation to all offenders.

It appears that Higgins CJ and Connolly J characterised the offence as one of strict liability so that the prosecutor need prove beyond reasonable doubt only that the defendant committed the physical elements of the offence – that is, that he or she refused or failed to provide a sample of breath for analysis. Their Honours indicated that the only limitation applicable was the principle stated by Dixon J in Proudman v Dayman (1941) 67 CLR 536 at 540: “As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant’s act innocent affords an excuse for doing what would otherwise be an offence”. Their Honours held that “in interpreting implicit matters of excuse allowed by s 22 (RT (A & D) Act)”, which is presumably a reference to Proudman v Dayman, “if a defendant discharges the evidential burden of pointing to or adducing evidence which, if it were accepted, would constitute a reasonable and lawfully acceptable excuse for non-compliance, then the prosecution has the legal onus to exclude that hypothesis beyond reasonable doubt”.

In reaching this view, their Honours cited the non-operative provisions of the Code that stipulate that in such a case, a defendant bears only an evidential burden in relation to a matter of defence; (see section 58, and note that they referred at paras 34-35 to other Code defences applicable in relation to a strict liability offence). They may also have been influenced by the Human Rights Act 2004 (HRA). They acknowledged
that “[t]here is … nothing in the HR Act which prevents the legislature from enacting offences of strict liability” but then cited subsection 18(1):

Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.

What their Honours said about this statement bears directly on the question of whether a strict or absolute liability offence will be compatible with the HRA, and indeed on other kinds of criminal laws. They said:

39. That provision would be inconsistent with disproportionate punishments or the imposition of punishment for conduct for which the actor is not, on any rational view, responsible.

40. There are offences, such as occupational health and safety offences, which call for a high degree of foresight on the part of the responsible person. It is no affront to justice to impose strict or even absolute liability for such offences particularly where public safety is involved. Examples which spring readily to mind are food manufacturing and occupational health and safety.

41. Liability for the offence in question here, would, consistently with the public policy underlying the legislation, not be avoided simply because the subject failed successfully to undertake the test by reason of intoxication, whether as a result of lack of comprehension of instructions or of lack of physical coordination.

Given that their Honours’ reasoning appears to be an application of orthodox common law interpretation,84 the above comments may not form part of the binding elements of their Honours’ reasoning (or, in technical language, are not part of the ratio decidendi but merely obiter dicta), The comments are, however, of considerable significance for three reasons.

First, they indicate that their Honours will find in HRA subsection 18(1) a limit to the extent to which the Legislative Assembly can, compatibly with the HRA, provide for offences of strict or absolute liability. They reason that the words “the right to liberty and security of person” carry the consequence “that disproportionate punishments or the imposition of punishment for conduct for which the actor is not, on any rational view, responsible” derogate from section 18(1), and, consequently, some strict liability offences may be HRA incompatible unless qualified by provision for the defendant to rely on some defence. This approach contrasts with the Committee’s

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84 Although they might have done so, their Honours did not invoke HRA subsection 30(1): “(1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred”. With respect, Lander J was in error in asserting (at para 127) that the HRA was “not relevant”, for clearly HRA subsection 30(1) was relevant.
recent preference to see strict and absolute liability offence provisions as engaging the presumption of innocence in HRA section 22(1).

Secondly, the comments suggest that the question whether a law imposes a disproportionate sentence is better addressed under subsection 18(1) than (as the Committee has suggested) under HRA section 10.

Thirdly, while their Honours do not refer explicitly to HRA section 28 as a basis to justify a law that derogates from the right stated in subsection 18(1), they appear to do so by allowing that there may a “rational view” open that would justify imposition of strict or absolute liability. This appears to be a quite generous view of what may be justified under section 28, and one broader than is often adopted by courts in other jurisdictions.

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85 In Scrutiny Report No 2 of the Sixth Assembly, concerning the Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004, the Committee suggested that “a court may see the issue as being whether an offence of strict or absolute liability ... is compatible with a person’s ‘right to liberty and security of the person’” (though mistakenly citing HRA subsection 24(1) rather than subsection 18(1). It also suggested that “a rights objection may be founded on s 22(1) of the HRA: ‘Every one charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law’”. The Committee has more recently invoked subsection 22(1), but in the light of Hausmann v Shute [2006] ACTSC 54, per Higgins C and Connolly J, subsection 18(1) may be the more obvious basis. Just how much turns on the debate is unclear. The Attorney-General accepts that “strict and absolute liability engage the right to fair trial [in HRA subsection 21(1)]”; see Government Submission to the Standing Committee on Legal Affairs Inquiry into Strict Liability Offences in the ACT at 6 (cite in footnote below).
Strict and Absolute Liability Offences

Extract: Scrutiny Report 43, 13 August 2007

Building Legislation Amendment Bill 2007
This is a Bill for an Act to amend legislation consequent on the enactment of the Planning and Development Act 2007 to implement planning system reform, and for other purposes. The Bill would make several substantive new reform amendments as well as to make consequential amendments to the Building Act 2004. The Bill also makes minor amendments to the Construction Occupations (Licensing) Act 2004, and the Planning and Development Act 2007 to better facilitate the Building Act’s interaction with those laws. A central focus of the Bill is to facilitate making private sector building certifiers a one-stop-shop for all of the plan approvals and associated certifications necessary to erect buildings that are exempted from requiring development approval.

Report under section 38 of the Human Rights Act 2004
Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?

Strict liability offences

The proposed amendments would create a number of strict liability offences, and thus there arises under the Human Rights Act 2004 (HRA) an issue as to whether, in each case, and in terms of HRA section 28, the provision is a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or the presumption of innocence (HRA subsection 22(1)).

The Committee suggests that the comprehensive nature of the justification offered in this Explanatory Statement provides an opportunity for the Assembly to discuss just what are acceptable lines of justification for a derogation of these rights. The Committee offers its own analysis to assist debate.

At page 9, the Explanatory Statement lists the offences that would be created by the Bill, and indicates which of them would be strict liability offences. The Committee appreciates this guidance.

On the face of it, the proposed amendments derogate from the statement of rights in the Human Rights Act 2004; in particular from “the right to liberty and security of person” stated in subsection 18(1), and/or the presumption of innocence stated in subsection 22(1). (The reason the Committee cites subsection 18(1) is explained in Scrutiny Committee Report No 41, concerning the Water Resources Bill 2007.) There is thus raised the question of whether the derogation is justifiable under HRA section 28.
Section 28 provides:

**Human rights may be limited**

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

While it may require refinement, the Explanatory Statement explanation (page 12) of the effect of section 28 is an acceptable guide:

In effect, section 28 requires that any limitation or restriction of human rights must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

In summary, the Committee considers that there is sufficient justification for the imposition of strict liability in the ways proposed. This is explained below. In addition, in no case does the penalty exceed 60 penalty points. The Committee also notes that some of these offences are qualified by provision for a defendant to raise a defence that will add to the range of defences that may normally be raised in relation to a strict liability offence (see as indicated at pages 10-11 of the Explanatory Statement). The additional defences are designed to permit a defendant argue that he or she took “reasonable precautions and exercised appropriate diligence to avoid the contravention” (page 12). In such cases, there is an additional reason to think that the strict liability offence is HRA compatible.

Taking these matters into account, the Committee does not consider that there is an issue of HRA compatibility. Nevertheless, the Committee suggests that the comprehensive nature of the justification offered in this Explanatory Statement provides an opportunity for the Assembly to discuss just what are acceptable lines of justification for a derogation of these rights. The Committee offers its own analysis to assist debate.

The Committee notes in appreciation that the Explanatory Statement does provide a comprehensive justification for the imposition of strict liability. The primary line of justification offered appears on its face to be a sufficient basis for concluding that the provision of strict liability offences in the Bill is HRA compatible if regard is also had to the relatively minor penalties that may be imposed. On the other hand, the other lines of justification offered appear to have little if any weight.

In the end, of course, it is for each member of the Legislative Assembly to arrive at her or his own assessment of the matter.
The primary line of justification for the creation of strict liability offences in the Bill

The Explanatory Statement states (page 10):

The rationale for their inclusion as strict liability offences is to protect the health and safety of the public, and the fiscal and functional value of buildings. That is because failures by certifiers to exercise due skill care and diligence in exercising their relevant responsibilities in verifying that the minutia of technical design information shown in building plans, and building work as executed, have proven to result in -

- unsafe or unhealthy buildings; or
- buildings unable to be used for their intended purpose; or
- buildings that when complete have to be demolished or altered to make them comply with laws including urban planning control instruments or the Building Code of Australia.

This is a generally accepted line of justification for the imposition of strict liability in relation to a regulatory offence. As is the case with many other professionals and tradespeople, certifiers have a positive duty to take care. This is particularly so where the Government has entrusted to them the primary responsibility for ensuring compliance with the law that regulates matters such as health, safety and environmental protection. The imposition of strict liability offences will create an added incentive to certifiers to ensure that they do exercise due skill care and diligence in exercising their relevant responsibilities. This point is implicit in the statement at page 11 that:

Strict liability offences reduce risks to the community. An *adequately deterrent scheme* to ensure building work is done only as approved under the Building Act reduces the risk of the community being affected by bad, inappropriate, inefficient, unsound, unsafe or unhealthy buildings or buildings that have inappropriate access or facilities fro [sic] people with disabilities.

There is further elaboration of this point at pages 13, where the Explanatory Statement offers an argument in support of the point that while a strict liability offence is a derogation of the presumption of innocence stated in section 22(1) of the *Human Rights Act 2004*, this is justifiable under section 28 of the Act. It is said:
Of necessity the application of the HRA in circumstances such as those mentioned above does require some value judgments to be made. A judgment must be made about the value to society of the presumption of innocence as opposed to the protection of the community from development with unacceptable impacts on neighbours and the general community, the protection of the environment, and the protection of human health and safety. In assessing whether rights have been trespassed upon within permissible limits it is necessary to consider the objective of the offence and whether the trespass is proportionate to the objective served by the offence provision.

There then follows statements about the place of the building code in combating environmental degradation, followed by the argument that

[the ACT Construction Occupations Registrar must be provided with an adequately deterrent scheme to ensure the protection of the community and the environment from unlawful building construction or demolition. It is also crucial that the registrar have the ability to act quickly and decisively, particularly in circumstances where delay may result in irreparable damage.

*Other lines of justification*

There are other justifications offered that might appear to carry less weight. The Explanatory Statement states (page 11):

Strict liability offences are an efficient and cost effective deterrent for breaches of regulatory provisions.

The Committee considers that considerations of cost and efficiency do not of themselves warrant derogation of fundamental principles of criminal justice stated in the Human Rights Act. This point also applies to the argument that “[t]he necessity to prove intent affects the level of resources needed to investigate and prosecute” (page 11). It is hard to see how this carries any weight, given that this presumably applies to all kinds of prosecutions.

This last comment also applies to the argument (page 11) that strict liability offences “are appropriate where the prosecutor is in a position to readily assess the truth of a matter and that an offence has been committed”.

It is also said (page 11) that strict liability offences can be dealt with by infringement notice, which is a cheaper and less time consuming alternative to a court prosecution, where laws provide for infringement notices covering the offence.
It is hard to see how this advances a justification for derogating from the Human Rights Act.

Another commonly advanced justification is made at page 11:

- A widely publicised instance of that Registrar’s inability to prosecute could seriously erode public confidence in the integrity of the construction occupations licensing scheme embodied in the *Construction (Occupations) Licensing Act 2004* and its operational Acts such as the Building Act. Evidence of intention or recklessness is often difficult to obtain in the absence of admissions or independent evidence. This in turn can reduce the effectiveness of using the prospect of prosecutions as a deterrent to impugned behaviour.

The weakness of this argument is that it applies as much to any offence where there is a fault element – including of course the very serious offences found in the statute book. It amounts to an argument that the task of the prosecution should be made easier by removal of fault elements, and this, standing alone, is not a good argument to derogate from the Human Rights Act.

Finally, it is argued (page 11) that

- The provision for strict liability offences is consistent with recently enacted ACT legislation. The pre-existing provisions in the Building Act and the *Construction (Occupations) Licensing Act 2004* provide for strict liability offences. Strict liability offences are also used in other jurisdictions including the Commonwealth.

While the first point here is correct, and deserving of weight as a line of justification, the other two points carry no weight. The Committee has often pointed out that Territory laws that pre-date the operation of the Human Rights Act were passed in a different era of rights awareness and application. Similarly, whatever is the practice in another Australian jurisdiction has little bearing on how the Human Rights Act affects legislative practice in the Territory.

The Committee draws this matter to the attention of the Assembly.
Issues for clarification

First, the Committee notes that no offence is qualified by a “reasonable excuse” defence, and accepts the point in the Explanatory Statement that “there is a high level of uncertainty in the application of [such a] defence” (page 12).\(^{86}\) It cannot however follow the further point made that

an explicit ‘reasonable excuse’ defence is unnecessary because the Criminal Code, Part 2.3, (Circumstances where there is no criminal responsibility), now provides defences covering ‘reasonable excuse’ matters. For that reason the Bill does not provide explicit ‘reasonable excuse’ defences.

The Committee understands that the Criminal Code, Part 2.3 does not allow of a “due diligence” line of defence, which in ordinary language might be considered an example of a reasonable excuse. The Committee considers that the Minister might provide further explanation of the point made in the Explanatory Statement.

The second matter concerns the effect of sections 58 and 59 of the Criminal Code 2002. While subsection 58(1) states that “a burden of proof that a law imposes on a defendant is an evidential burden only”, this rule is expressly subject to section 59. The latter states:

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

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

The Committee raises this issue in the light of the statement at page 13 of the Explanatory Statement that:

To facilitate consistency with the HRA, strict liability offences -
impose on the defendant an evidential burden only. An evidential burden means that a defendant need only point to evidence that suggests a reasonable possibility that the matter in question exits. It is lower than a legal burden and is less of a limitation on the presumption of innocence. The prosecution must then disprove the existence of any defence beyond reasonable doubt; ...

\(^{86}\) The Committee notes however that provision for a defence in these terms is still found in Territory Bills; see for example clause 53 of the Surveyors Bill 2007.
The provision in a law that an offence is one of strict liability offence only imposes on the defendant an evidential burden if regard is had to the defences in the Criminal Code, Part 2.3, and then to subsection 58(2) of the Code. (This provides: “(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”).

In relation to defences to an offence of strict liability that are additional to those in Criminal Code, Part 2.3, the position may be – depending on the wording of the defence – that the defendant carries a legal burden of proof of the matters required to establish the defence. In such cases, the prosecution does not need to disprove any matter beyond reasonable doubt.

In the light of Code subsection 59(b) (see above), some defences – giving their wording - provided for by the provisions of the Bill do appear to impose on a defendant a legal burden of proof of the matters required to establish the defence - see proposed subsections 50B(3) and (4) (clause 1.42) and proposed subsections 64(4) and (5) (clause 1.53).

The Committee considers that the Explanatory Statement should point out this matter in its explanation of these proposed subsections, lest a reader be confused by the general statement concerning strict liability offences recorded above.

*End of Extract*
APPENDIX C: Analysis of ACT Scrutiny of Bills and Subordinate Legislation
Table – scrutiny committee criticisms of strict and absolute liability offences in proposed legislation

<table>
<thead>
<tr>
<th>Scrutiny Report No</th>
<th>Legislation</th>
<th>Strict/absolute liability</th>
<th>Type of criticism/comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fifth Assembly</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>38</td>
<td></td>
<td></td>
<td>General comment on principles and human rights considerations</td>
</tr>
<tr>
<td>43</td>
<td>Building Bill 2003 – [cl 135(1)]</td>
<td>Strict liability</td>
<td>Imprisonment a possible penalty [human rights consideration]</td>
</tr>
<tr>
<td>43</td>
<td>Dangerous Substances Bill 2003</td>
<td>Strict liability</td>
<td>= Large no of offences = Some not mentioned in ES = No general justification offered as in Building Bill</td>
</tr>
<tr>
<td></td>
<td>Dangerous Substances Bill 2003, clauses 42 - 46</td>
<td>Absolute liability</td>
<td>No justification in Explanatory Statement to justify the imposition of absolute liability in the clauses</td>
</tr>
<tr>
<td>44</td>
<td>Criminal Code Amendment Bill 2003 – s 324(1)</td>
<td>Absolute liability</td>
<td>= Imprisonment a possible penalty = Offence contains a significant element of absolute liability = Somewhat ameliorated by s324(3) [defence of lack of intent]</td>
</tr>
<tr>
<td></td>
<td>Criminal Code Amendment Bill 2003 – s 361(1) and s 363(1)</td>
<td>Absolute liability</td>
<td>= Imprisonment a possible penalty = Offence contains a significant element of absolute liability = ES offers a justification but failed to refer to rights issue flowing from the penalty</td>
</tr>
<tr>
<td></td>
<td>Criminal Code Amendment Bill 2003 – s 361(1), s 362(1) and s363(1)</td>
<td>Strict liability</td>
<td>= No justification in ES = No reference to rights issue</td>
</tr>
<tr>
<td></td>
<td>Criminal Code Amendment Bill 2003 – s363(1)</td>
<td>Strict liability</td>
<td>= Some justification in ES = No reference to rights issue</td>
</tr>
<tr>
<td>44</td>
<td>Education Bill 2003</td>
<td>Strict liability</td>
<td>Committee notes that a number of offences created</td>
</tr>
<tr>
<td></td>
<td>Justice and Community Safety Legislation Amendment Bill 2003 (no2)</td>
<td>Strict liability</td>
<td>Committee notes that amendment to the Cooperatives Act 2002 creates strict liability offence</td>
</tr>
<tr>
<td>45</td>
<td>Nurse Practitioners Legislation Amendment Bill 2003 – cl 13 amending s51 of the Pharmacy Act 1931</td>
<td>Absolute liability</td>
<td>= Offence punishable by imprisonment</td>
</tr>
<tr>
<td>Scrutiny Report No</td>
<td>Legislation</td>
<td>Strict/absolute liability</td>
<td>Type of criticism/comment</td>
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<tr>
<td>45</td>
<td>Nurse Practitioners Legislation Amendment Bill 2003 – cl 16 amending the Poisons Act 1933</td>
<td>Absolute liability</td>
<td>Offence punishable by imprisonment</td>
</tr>
<tr>
<td>45</td>
<td>Occupational Health and Safety Amendment Bill 2004</td>
<td>Strict liability</td>
<td>No of SL offences created In relation to some, no mention in ES In relation to some clauses, there is some justification offered for making the offence one of strict liability No general explanation offered</td>
</tr>
<tr>
<td>45</td>
<td>Occupational Health and Safety Amendment Bill 2004 – sections 34D and 34E</td>
<td>Absolute liability</td>
<td>No of absolute liability offences created Imprisonment is a possible penalty No justification offered for the imposition of absolute liability</td>
</tr>
</tbody>
</table>

**Sixth Assembly**

<table>
<thead>
<tr>
<th>Scrutiny Report No</th>
<th>Legislation</th>
<th>Strict/absolute liability</th>
<th>Type of criticism/comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Classification (Publications, Films And Computer Games) (Enforcement) Amendment Bill 2004</td>
<td>Strict</td>
<td>Bill creates a number of offences ES states executive policy in relation to the offences Penalty does not exceed 60 penalty units and imprisonment not an option</td>
</tr>
<tr>
<td>2</td>
<td>Classification (Publications, Films And Computer Games) (Enforcement) Amendment Bill 2004</td>
<td>Absolute</td>
<td>Bill creates a number of offences imprisonment a possible punishment D can avoid conviction if proves certain matters, usually that he or she acted with reasonable care in some respect For the first time the SC raises the burden of proof provisions – legal and evidential</td>
</tr>
<tr>
<td>Scrutiny Report No</td>
<td>Legislation</td>
<td>Strict/absolute liability</td>
<td>Type of criticism/comment</td>
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<tr>
<td></td>
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<td></td>
<td>Penalty does not exceed 60 penalty units</td>
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<td></td>
<td></td>
<td></td>
<td>Imprisonment not a penalty</td>
</tr>
</tbody>
</table>
| 4                  | SL2004-56 – Dangerous Substances (General) Regulations 2004 [s447(1)(f)] | Absolute | No justification in ES
|                    |             |                          | Penalty does not exceed 60 penalty units |
|                    |             |                          | Imprisonment not a penalty |
|                    |             |                          | Penalty does not exceed 10 penalty units |
|                    |             |                          | Imprisonment not a penalty |
| 6                  | Animal Diseases Bill 2005 – numerous provisions | Strict | Penalty does not exceed 50 penalty units
|                    |             |                          | Justification in the ES |
| 10                 | Human Rights Commission Bill 2005 – cl 85 and 95 | Strict | Penalty does not exceed 50 penalty units |
| 11                 | SL 2005-8 - Utilities (Gas Restrictions) Regulation 2005 S 14(20, 16) | Strict | ES does not address any of the issues in justification of making the offences ones of strict liability |
| 14                 | Criminal Code Harmonisation Bill | Strict | Large no of SL offences created
|                    |             |                          | Incompatible with presumption of innocence [s22 (1) of the HRA] |
|                    |             |                          | No justification in ES |
|                    |             |                          | General comment on SL & AL offences and criminal responsibility [reproduced in full in App B] |
| 14                 | Domestic Animals (Cat Containment) Amendment Bill 2005 | Strict | Creates 3 SL offences – ss 82 and 84 and Regulation 12
<p>|                    |             |                          | Max penalty does not exceed 50 penalty points |
|                    |             |                          | No justification in ES |
| 14                 | Sentencing And Corrections Reform Amendment Bill 2005 | Strict | Whether the derogation from the presumption of innocence (HRA s 22(1)) is justified by reason of the nature of the activity the subject of the offence (HRA s 28) |
|                    |             |                          | Penalty of up to 7 years imprisonment |</p>
<table>
<thead>
<tr>
<th>Scrutiny Report No</th>
<th>Legislation</th>
<th>Strict/absolute liability</th>
<th>Type of criticism/comment</th>
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</thead>
<tbody>
<tr>
<td>15</td>
<td>SL2005-15 being the Periodic Detention Amendment Regulation 2005 (No 1) made under the Periodic Detention Act 1995</td>
<td>Strict</td>
<td>could be warranted only on proof by the prosecution that the defendant was reckless about whether the person stalked was a police officer</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>there is no provision for a defendant to raise any defence other than those allowed by the Criminal Code 2002</td>
</tr>
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<td></td>
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<td></td>
<td>defendant could rely on the defence of ‘mistake of fact’ provide for by subsection 36(1) of the Criminal Code 2002</td>
</tr>
<tr>
<td>17</td>
<td></td>
<td></td>
<td>SL offence in subordinate legislation</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Reiterated comments in Rpt 38 and Report 2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>ES did not deal with the SL offence issue in the way previously suggested by the Committee</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Nor did it expressly identify the new s 20 as a SL offence</td>
</tr>
<tr>
<td>20</td>
<td>Casino Control Bill 2005</td>
<td>Strict</td>
<td>whether the derogation from the presumption of innocence (HRA s 22(1)) is justified by reason of the nature of the activity the subject of the offence (HRA s 28)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>ES contained satisfactory justification</td>
</tr>
<tr>
<td>20</td>
<td>Workers Compensation Amendment Bill 2005 (No 2)</td>
<td>Strict</td>
<td>whether the derogation from the presumption of innocence (HRA s 22(1)) is justified by reason of the nature of the activity the subject of the offence (HRA s 28)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>50 penalty units not exceeded</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Justification in ES</td>
</tr>
<tr>
<td>Scrutiny Report No</td>
<td>Legislation</td>
<td>Strict/absolute liability</td>
<td>Type of criticism/comment</td>
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<tr>
<td></td>
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<td></td>
<td>- ES did address second of the two principles consistently advocated by the Scrutiny Cttee – availability of a defence</td>
</tr>
</tbody>
</table>
| 22                | SL2005-39 being the Road Transport Legislation Amendment Regulation 2005 (No. 1) | Strict                    | - Max penalty 20 penalty units  
|                   |                                                                              |                           | - ES addressed first principle but not the second – failed to indicate whether D could rely on a defence |
| 25                | Radiation Protection Bill 2006                                               | Strict                    | - No of offences created  
|                   |                                                                              |                           | - Adequate justification in ES  
|                   |                                                                              |                           | - Max of 50 penalty points |
| 25                | SL2006-9 being the Utilities (Water Conservation) Regulation 2006 made under the Utilities Act 2000 | Strict                    | - ES addresses neither of the two principles set out in Rpt 38 |
| 26                | Legal Profession Bill 2006                                                   | Strict                    | - whether the derogation from the presumption of innocence (HRA s 22(1)) is justified by reason of the nature of the activity the subject of the offence (HRA s 28)  
|                   |                                                                              |                           | - Creates a number of offences, but these not identified in ES as SL offences  
|                   |                                                                              |                           | - no justification in ES  
|                   |                                                                              |                           | - 50 penalty units not exceeded |
| 27                | Administrative (Miscellaneous Amendments) Bill 2006                          | Strict                    | - whether the derogation from the presumption of innocence (HRA s 22(1)) is justified by reason of the nature of the activity the subject of the offence (HRA s 28)  
|                   |                                                                              |                           | - no justification in ES or identification of SL offences  
<p>|                   |                                                                              |                           | - penalty of up to 6 months imprisonment as an alternative to the imposition of a fine of up to 50 penalty points |</p>
<table>
<thead>
<tr>
<th>Scrutiny Report No</th>
<th>Legislation</th>
<th>Strict/absolute liability</th>
<th>Type of criticism/comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>30</td>
<td>SL2006-31 being the Road Transport Legislation (Taxi Licences) Amendment Regulation 2006 (No. 2)</td>
<td>Strict</td>
<td>Appropriate comment and justification in ES</td>
</tr>
<tr>
<td>30</td>
<td>SL2006-32 being the Road Transport (Public Passenger Services) Amendment Regulation 2006 (No. 1)</td>
<td>Strict</td>
<td>Appropriate comment and justification in ES</td>
</tr>
<tr>
<td>30</td>
<td>SL2006-39 being the Animal Diseases Regulation 2006 made under the <em>Animal Diseases Act 2005</em></td>
<td>Strict</td>
<td>Appropriate comment and justification in ES</td>
</tr>
<tr>
<td>33</td>
<td>Fisheries Amendment Bill 2006; proposed subsection 46(1A)</td>
<td>Strict</td>
<td>Queried whether proposed section a justifiable derogation of the presumption of innocence Justification in ES and moderate penalty</td>
</tr>
<tr>
<td>37</td>
<td>Animal Welfare Legislation Amendment Bill 2006 – proposed s 19A, s 33 and 42 and 52</td>
<td>Strict</td>
<td>ES makes a general statement that Bill would create SL offences but does not itemise the proposed sections</td>
</tr>
<tr>
<td>37</td>
<td>Corrections Management Bill 2006 [clauses 145(2) and 147(3)]</td>
<td>Strict</td>
<td>whether the derogation from the presumption of innocence (HRA s 22(1)) is justified by reason of the nature of the activity the subject of the offence (HRA s 28) possibility of imprisonment as a penalty and queried whether this a justifiable derogation defence of 'reasonable steps to comply with the direction' which may make it justifiable</td>
</tr>
<tr>
<td>Scrutiny Report No</td>
<td>Legislation</td>
<td>Strict/absolute liability</td>
<td>Type of criticism/comment</td>
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</tr>
<tr>
<td>37</td>
<td>Planning and Development Bill 2006 [clauses 152, 193, 194, 196, 354, 360, 371, 381, 386 and 387]</td>
<td>Strict</td>
<td>whether the derogation from the presumption of innocence (HRA s 22(1)) is justified by reason of the nature of the activity the subject of the offence (HRA s 28)</td>
</tr>
<tr>
<td>41</td>
<td>Water Resources Bill 2007</td>
<td>Strict</td>
<td>Question whether the offences a justifiable derogation under the HRA [right to liberty and presumption of innocence]</td>
</tr>
<tr>
<td>42</td>
<td>Long Service Leave (Building and Construction and Contract Cleaning Industries) Legislation Amendment Bill 2007</td>
<td>Strict</td>
<td>Question whether the offences a justifiable derogation under the HRA [right to liberty and presumption of innocence]</td>
</tr>
<tr>
<td>43</td>
<td>Building Legislation Amendment Bill 2007</td>
<td>Strict</td>
<td>Question whether the offences a justifiable derogation under the HRA [right to liberty and presumption of innocence]</td>
</tr>
<tr>
<td>43</td>
<td>Domestic Animals Amendment Bill 2007</td>
<td>Strict</td>
<td>Question whether the offences a justifiable derogation under the HRA [right to liberty and presumption of innocence]</td>
</tr>
<tr>
<td>43</td>
<td>Surveyors Bill 2007</td>
<td>Strict</td>
<td>Question whether the offences a justifiable derogation under the HRA [right to liberty and presumption of innocence]</td>
</tr>
<tr>
<td>Scrutiny Report No</td>
<td>Legislation</td>
<td>Strict/absolute liability</td>
<td>Type of criticism/comment</td>
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<tr>
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</tr>
</tbody>
</table>
| 45                | Crimes (Street Offences) Amendment Bill 2007 | Strict | Question whether the offences a justifiable derogation under the HRA [right to liberty and presumption of innocence]  
No ES which addresses the SL nature of the offences  
Offences are not ‘regulatory’ as are many SL offences |
| 45                | Legal Profession Amendment Bill 2007 | Strict | Bill imposes a no of SL offences  
ES identifies them and contains adequate justification |

16 October 2007
APPENDIX D: Extract from Criminal Code 2002
Extract from **Criminal Code 2002**

**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.
APPENDIX E: Extract [Principles and Recommendations] Senate Scrutiny of Bills Committee Sixth Report of 2002
CHAPTER 4
PRINCIPLES AND RECOMMENDATIONS

Introduction

The Committee has concluded that the following principles and recommendations should be the framework of Commonwealth policy and practice in relation to strict and absolute liability.

Basic principles

The Committee concluded that there were certain basic principles which should constitute the starting point for Commonwealth policy on strict and absolute liability, as follows:

- fault liability is one of the most fundamental protections of criminal law; to exclude this protection is a serious matter;
- strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; it would not be proper to base strict liability on mere administrative convenience or on a rigid formula;
- the Commonwealth Criminal Code should continue to provide general principles of criminal responsibility applicable to all Commonwealth offences, with a central provision being section 5.6, which creates a rebuttable presumption that to establish guilt fault must be proven for each physical element of an offence;
- the Criminal Code should continue to provide that the presumption that fault must be proven for each element of an offence may be rebutted only by express legislation provision under section 6.1 for strict liability and section 6.2 for absolute liability;
- the general defence of mistake of fact with its lower evidentiary burden is a substantial safeguard for those affected by strict liability; the Criminal Code should continue to expressly provide for this defence;
- the Criminal Code should continue to expressly provide that strict or absolute liability does not make any other defence unavailable;
- strict liability should, wherever possible, be subject to program specific broad-based defences in circumstances where the contravention appears reasonable, in order to ameliorate any harsh effect; these defences should be in addition to mistake of fact and other defences in the Criminal Code;
- strict liability offences should, if possible, be applied only where there appears to be general public support and acceptance both for the measure and the penalty; 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
Commonwealth criteria of 60 penalty units ($6,600 for an individual and $33,000 for a body corporate) appears to be a reasonable maximum.

Merits of strict liability and criteria for its application

The Committee concluded that the supposed merits of strict liability and criteria for its application should be subject to strong safeguards and protections for those affected. The principles governing such protection are set out later in this Chapter. It should be noted, however, that the Committee has included qualifications on some of the following principles relating to merits of strict liability identified by Commonwealth agencies:

- 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; as with other criteria, however, this should be applied subject to other relevant principles;
- strict liability should not be justified by reference to broad uncertain criteria such as offences being intuitively against community interests or for the public good; criteria should be more specific;
- strict liability may be appropriate where its application is necessary to protect the general revenue;
- strict liability should not be justified on the sole ground of minimising resource requirements; cost saving alone would normally not be sufficient, although it may be relevant together with other criteria;
- 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;
- 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; in such cases the defence of mistake of fact should apply;
- two-tier or parallel offences are acceptable only where the strict liability limb is subject to a lower penalty than the fault limb, and to other appropriate safeguards; in addition, it should be clearly evident that the fault limb alone would not be sufficient to effect the purpose of the provision;
- infringement notices should be used only for strict liability offences and are acceptable subject to the usual safeguards;
- absolute liability offences should be rare and limited to jurisdictional or similar elements of offences; in contrast to the present Commonwealth policy absolute liability should not apply to offences in their entirety in relation to inadvertent errors including those based on a mistake of fact; and
• 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.

Principles of protection for those affected by strict and absolute liability

The Committee concluded that agencies have not given enough attention to the interests of parties affected by strict and absolute liability. It has, therefore, developed the following principles which should be taken into account when deciding on the need for such offences and the form they will take:

• the process of deciding whether to introduce strict liability for an offence should recognise that this may have adverse effects upon those affected; the legitimate rights of these people should be paramount and take precedence over administrative convenience and perceived cost savings in program administration;

• agencies should acknowledge that there may be areas where existing strict liability offences or the way they are administered may be unfair; in these cases agencies should review the offences under the general coordination of the Attorney-General's Department;

• strict liability should not be implemented for legislative or administrative schemes which are so complex and detailed that breaches are virtually guaranteed regardless of the skill, care and diligence of those affected; any such scheme would be deficient from the viewpoint of sound public administration;

• strict liability offences should be designed to avoid the likelihood that those affected, particularly by the issue of an infringement notice, will pay the lower penalty simply because it is easy and convenient to do so, rather than spend the money and time to pursue what might be a legitimate defence; any agency which encouraged this tendency would be acting improperly;

• strict 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 Australia or overseas; offences which do not apply this principle have the potential to operate unfairly;

• strict liability has the potential to adversely affect small and medium enterprises; steps should be taken to ameliorate any such consequences arising from the different compliance and management resources of smaller entities;

• any potential adverse effects of strict liability on the costs of those affected should be minimised to the extent that this is possible; in particular, parties who are subject to strict liability should not have their costs increased as a consequence of an agency reducing its costs;

• external merit review by the AAT or other independent tribunal of relevant decisions made by agencies is a core safeguard of any legislative or administrative
scheme; every agency which administers strict liability offences should review those provisions to ensure that this right is provided;

- new and existing strict liability schemes should have adequate resources to ensure that they are implemented to maximise safeguards; a lack of proper resources may result in the inadequate operation of those safeguards;

- strict liability should not be accompanied by an excessive or unreasonable increase in agency powers of control, search, monitoring and questioning; any such increase in powers may indicate that the legislative and administrative scheme has structural flaws;

- there should be a reasonable time limit within which strict liability proceedings can be initiated; it would be unfair to those affected if they were to be charged perhaps years after an alleged breach;

- as a general rule, strict liability should be provided by primary legislation, with regulations used only for genuine administrative detail; it would be a breach of parliamentary propriety and personal rights for regulations to change the basic framework or important aspects of a legislative scheme; and

- the use of strict liability in relation to the collection of personal information about members of the public from third parties has the potential to intrude into the legitimate rights of the people whose details are being collected; in such cases the entire process should be transparent, with all affected members of the public being notified of their rights and remedies under the Privacy Act.

Principles for the sound administration of strict liability

The Committee concluded that, in addition to conceptual safeguards, schemes of strict liability should also be administered in a way which provides maximum protection for those affected:

- administration of strict liability in the form of non-legislative procedures may have as significant an effect as acts and regulations; such non-legislative matters should therefore be subject to the same protections and safeguards as the legislative structure of the scheme;

- licence holders who hold a licence on condition that they comply with an act may be prejudiced by the inappropriate use of strict liability to vary, suspend, cancel or not renew their licence; processes in relation to licencees should be conducted in a transparent manner with adverse decisions subject to external independent merits review;

- compliance records have the potential to operate unfairly to the detriment of those affected; such records should be subject to comprehensive safeguards, including a limit on what they may include, access by those to whom a record relates and the ability to require deletion of stale or incorrect information;
• professional indemnity insurance in the context of strict liability penalties, especially those caused not by the putative offender but by third parties who may be overseas, has the potential to operate unfairly; agencies should be sensitive to this problem and consult with industry groups on ways to alleviate its consequences;

• comprehensive internal review procedures are an essential safeguard for strict liability; as with other aspects of administration of strict liability these should be transparent and detailed, clearly providing a process which is both independent and credible;

• the use of infringement notices should include safeguards for those affected, including detailed prescription of the form of a notice; the form itself should indicate all of the safeguards to which it is subject;

• consultation with industry is essential before any decision to introduce or vary strict liability, with the valid concerns of industry being taken into account; industry consultation should be genuine, not a formality to legitimise plans already finalised;

• it is undesirable if a strict liability scheme includes a large number of offences creating a substantial pool of contravening behaviour, resulting in selective and possibly inconsistent enforcement; to avoid this, agencies should ensure that enforcement guidelines are detailed and unambiguous and accompanied by adequate training;

• every scheme of strict liability should be administered through detailed, binding guidelines which should be agreed between the relevant agency and industry and tabled in both Houses; breach of the guidelines by an agency should preclude prosecution of those affected by the breach; and

• every scheme of strict liability should be subject to an independent review 12 months to two years after its commencement, with further review depending on the findings of the first review; industry should be given the fullest opportunity to participate in each review.

Application of criteria to existing and proposed Commonwealth strict and absolute liability offences

The Committee concluded that the application of criteria to Commonwealth strict and absolute liability should be subject to the following principles:

• the harmonisation process with its focus on maintaining the status quo in relation to strict and absolute liability in light of the introduction of the Criminal Code has been a useful exercise by the Attorney-General's Department;

• the Attorney-General's Department should have a mandatory role in coordinating laws proposed by all Commonwealth agencies which provide for strict or absolute liability, with the object of ensuring a consistent approach; the Attorney-General's
Department should undertake this function to the extent that it does not do so already; and

- the Attorney-General's Department should coordinate a new major project to analyse the substantive policy merits of existing harmonised strict and absolute liability offences; the object of the project should be to amend these provisions where necessary to achieve consistency of safeguards across all agencies.

**Recommendations**

1. The Criminal Code provisions relating to strict and absolute liability are appropriate and adequate and do not require amendment at this time.

2. The Legislation Handbook should require agencies to abide by the above principles when developing new or amending legislation which includes strict or absolute liability; the Attorney-General's Department should coordinate this process.

3. The Attorney-General's Department should coordinate a new project to ensure that existing strict and absolute provisions are amended where appropriate to provide a consistent and uniform standard of safeguards. This should also be included in the Legislation Handbook.

4. Agencies should take into account the above principles in the day-to-day administration of strict and absolute liability offences. The principles should be included where applicable in agency guidelines.

Barney Cooney
Chairman