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Submission of the

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

to the

NSW Legislation Review Committee

Inquiry into

Strict and Absolute Liability

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Contents

CONTENTS	1
EXECUTIVE SUMMARY	2
1. COMMENTS ON PROPOSED PRINCIPLES IN RELATION TO STRICT OR ABSOLUTE LIABILITY	3
1.1 FAULT LIABILITY.....	3
1.1.1 <i>Public interest and social circumstance</i>	3
1.2 ADMINISTRATIVE CONVENIENCE.....	4
1.3 DEFENCES	4
1.4 APPROPRIATE PENALTIES.....	4
1.4.1 <i>Imprisonment</i>	4
1.4.2 <i>Escalating penalties</i>	5
1.4.3 <i>Assessment of penalties</i>	5
1.5 DRAFTING AND SOURCES OF LIABILITY	6
2. ADDITIONAL PRINCIPLES FOR ABSOLUTE LIABILITY:	6
2.1 SIZE OF PENALTY.....	6
2.2 WHEN STATE OF MIND NOT RELEVANT	7
2.3 PUNISHMENT OF INADVERTENT ERRORS.....	7
3. CONCLUSION	7

Executive Summary

1. The New South Wales Council for Civil Liberties (CCL) supports the Legislation Review Committee in its attempt to identify principles that will prevent the creation of strict and absolute liability offences which trespass unduly on personal rights and liberties.
2. CCL generally supports the principles outlined in the June 2006 discussion paper, however the Council feels that a number of the principles require further clarification or reinforcement and that a some extra principles are necessary if the government is to ensure that strict and absolute liability is only imposed in circumstances where it is just and fair.
3. Specifically, CCL makes the following recommendations to the committee:
 - Strict liability offences should only be created by Act of Parliament. Legislation should contain a general statement that no NSW offence is an offence of strict liability unless the provision creating the offence expressly provides otherwise.
 - Where strict liability is imposed, courts should always retain the discretion to take the circumstances of an offence into account when imposing a punishment.
 - Strict liability offence should never carry penal sentences.
 - Strict liability financial penalties should not be subject to systems of administrative escalation that lead automatically to more serious punishments. Consequential punishments for non-compliance with an initial penalty should only be imposed by a court that has had a proper opportunity to consider the circumstances of the case.
 - A strict liability offence should only be enacted after a thorough social impact assessment. This assessment should consider who would be affected by the new provision and the likely desirable or undesirable consequences of imposing strict liability on that group of offenders.

1. Comments on proposed principles in relation to strict or absolute Liability

4. CCL makes the following observations in relation to the proposed principles:

1.1 Fault liability

- *Proposal: fault liability is one of the most fundamental protections of the criminal law and to exclude this protection is a serious matter and should only ever be done if there are sound and compelling public interest justifications for doing so*

5. Fault liability is a fundamental protection, but 'compelling public interest justifications' is a vague term that requires clarification. This principle should contain detailed impact assessment requirements, as discussed below.

1.1.1 Public interest and social circumstance

6. Any evaluation of the public interest in this context should include a thorough assessment of the social impacts that would flow from imposing strict or absolute liability in a given circumstance. This evaluation should identify:
- The group(s) of people likely to be convicted of an offence; and
 - The likely desirable or undesirable consequences of imposing a particular penalty on members of that group without regard for the circumstances of the offence or the social and financial circumstances of the offender.
7. Social disadvantage has a direct bearing on the seriousness of the consequences faced by a person who breaches strict liability provisions. Disadvantaged individuals are often less able to pay fines and therefore more likely to be suffer serious consequential penalties. They are also more likely to live in areas where lack of alternative travel options will mean that disqualification from driving will lead to unlicensed driving.
8. The net result is that disadvantaged persons are far more likely to suffer deprivation of liberty as a result of strict liability legislation than other members of the community. For this reason, the degree to which a particular strict liability offence will have an impact on disadvantaged groups should always be carefully considered.
9. Rigorous assessment of social impact is crucial if government is to ensure that this type of legislation operates fairly because, once enacted, strict liability offences allow no scope for courts to make adjustments for unforeseen circumstances.

Fault liability should only be displaced after a thorough social impact assessment

1.2 Administrative convenience

- *Proposal: strict and absolute liability should not be used merely for administrative convenience*
10. CCL agrees that strict liability should never be used for administrative convenience. Similarly, unrelated consequential punishments should not be imposed for administrative convenience in cases where penalties imposed under a strict liability offence are not complied with. The administrative response should be limited to enforcing the original penalty rather than imposing additional penalties. Additional penalties should only be imposed by a court.

1.3 Defences

- *Proposal: defences, such as due diligence, that take account of circumstances in which punishment for the prohibited conduct would be inappropriate should be available*
 - *Proposal: legislation creating strict and absolute liability offences should expressly provide that any other defences remain available*
11. CCL endorses these principles as important safeguards against unjust conviction. It is important that legislation be able to deal with a wide variety of circumstances without resulting in injustice.

1.4 Appropriate Penalties

1.4.1 Imprisonment

- *Proposal: strict and absolute liability offences should be applied only where the penalty does not include imprisonment;*
12. CCL agrees with the committee that strict liability should never be applied in circumstances where it will result in imprisonment.

Strict liability offences should never carry penal sentences.

1.4.2 Escalating penalties

13. It is important to note that financial penalties can in practice result in more serious punishments, particularly for socially disadvantaged offenders. Non-compliance with a financial penalty can lead to cancellation of their driver's license¹ or vehicle registration,² to community service orders³ and ultimately to imprisonment.⁴ Where a person's living arrangements or education mean they may not receive or understand penalty notices, or where their financial situation makes fines difficult to pay, a fine can easily escalate to a penal sentence.
14. This structure of escalating consequences may also lead indirectly to more serious offences. If an offender doesn't pay a fine they may lose their license or be subject to a community service order, if they need their car to get to work or cannot get time off for community service they can end up committing more serious offences, such as driving unlicensed or breaching the community service order.

Strict liability financial penalties should not be subject to systems of escalation that lead automatically to more serious offences or imprisonment.

1.4.3 Assessment of penalties

- *Proposal: monetary penalties should be assessed on a case by case basis and having regard to the lack of fault of the person punished and the legislative objective;*
15. All penalties should be assessed on a case-by-case basis, having regard not only to a person's lack of fault but also to the likely consequences of the penalty in the individual case. Particular regard should be had to whether – in light of the offenders work, family and financial circumstances – it is likely that imposing a given penalty may lead to further criminality or undue hardship for the individual or their family.
 16. Where a strict liability fine enforcement order is not complied with, the focus should be on enforcement of the original penalty. Where a penalty cannot be enforced the matter should be referred to a court before further punishments are imposed. Strict liability fines should not be enforced through the automatic imposition of unrelated measures such as cancellation of driver's license or vehicle registration.

Courts must have discretion in sentencing strict liability crimes offences. Consequential punishments for non-compliance with strict liability fines should only be imposed by a court that has had proper opportunity to consider the circumstances of the case.

¹ *Fines Act 1996* (NSW) s66.

² *Fines Act 1996* (NSW) s67.

³ *Fines Act 1996* (NSW) Pt 4 Div 5.

⁴ *Fines Act 1996* (NSW) s 87.

1.5 Drafting and sources of liability

- *Proposal: strict and absolute liability offences should be of a regulatory nature (eg, public safety or protection of the environment), not serious criminal offences;*
 - *Proposal: as a general rule, strict and absolute liability should be provided by primary legislation, with regulations used only for genuine administrative detail;*
 - *Proposal: 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; and*
 - *Proposal: the intention to impose strict or absolute liability should be explicit.*
17. CCL agrees that strict and absolute offences should generally be of a regulatory nature and that health & safety, environment law, company law and securities law are areas where it may be appropriate to determine liability in this way. However, even a regulatory offence should only designate strict liability after careful consideration of the likely circumstances of offenders who will be caught by the rule. For example, traffic and pollution rules are both 'regulatory' areas, but will often catch offenders in very different circumstances. Parliament should consider these circumstantial differences and the need to accommodate them before designating a strict liability offence.
18. The imposition of strict liability is a most serious matter and should be the province of parliament alone. These offences should only be created by express words in primary legislation. Courts should not generally be allowed to create offences of strict liability by implication, and the executive should not be permitted to designate strict liability offences by regulation.

- **Strict liability offences should only be created by Act of Parliament**
- **Legislation should provide that no NSW offence is an offence of strict liability unless the Act creating the offence makes express provision to the contrary.**

2. Additional principles for absolute liability:

2.1 Size of penalty

- *Proposal: the size of monetary penalty should reflect the fact that liability is imposed regardless of any mistake of fact*

19. The size of the penalty imposed must take into account the offender's capacity to pay as well as the fact liability is imposed regardless of mistake.

2.2 When state of mind not relevant

- *Proposal: 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;*
20. CCL agrees that such cases should be very rare and carefully considered. In addition they should be subject to the social impact assessment process outlined above in relation to strict liability.

2.3 Punishment of inadvertent errors

- *Proposal: absolute liability offences may be acceptable where inadvertent errors, including those based on a mistake of fact, ought to be punished.*
21. Absolute liability should only be imposed in situations where inadvertent errors ought to be punished. Even where such an approach is justified there must still be scope to vary the severity of the penalty according to the situation of the offender and the circumstances of the offence.

3. Conclusion

22. This imposition of strict or absolute liability can have very serious consequences for the rights of individuals and for broader society.
23. In view of these serious consequences, strict liability offences should only be created by the express words of parliament. Because strict liability gives courts less latitude to accommodate unforeseen circumstances, it is also crucial that parliament thoroughly assess the social consequences of imposing strict liability in a particular situation before legislation is enacted.
24. To further ensure that strict liability provisions operate fairly, courts must always have discretion to vary punishments to suit the circumstances of the offence, and minor strict liability penalties should not lead automatically to more serious punishments.
25. Strict and absolute liability are very blunt legal instruments. Whether by accident or design, these types of liability can easily infringe on an individual's rights, and only with the most rigorous safeguards can they be imposed without creating serious injustice.

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