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Submission

Civil Liberties Australia

to the

ACT LEGISLATIVE ASSEMBLY STANDING COMMITTEE ON LEGAL AFFAIRS:
INQUIRY INTO THE USE AND CREATION OF STRICT AND ABSOLUTE LIABILITY OFFENCES

Strict Liability

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Introduction

1. CLA would like to thank the Standing Legal Affairs Committee (SLAC) of the ACT Legislative Assembly for the opportunity to make a submission on issues surrounding the creation of strict and absolute liability offences in the ACT.

2. CLA believes that issues surrounding strict and absolute liability offences are fundamentally important in creating and enforcing just and fair laws. Poorly-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.

The legal background

3. There is a popular misconception that the criminal law, at its simplest, determines whether an accused person committed certain prohibited conduct and, if he/she did so, to pass sentence for that conduct. Such a conception is fundamentally wrong. The criminal law is only partially concerned with the conduct of the accused. It is equally, if not more so, concerned with the decisions or choices of accused persons to engage in that conduct. As such, the state of mind of an accused person is pivotal in determining whether they have committed an offence. The law is judging the accused person's mental culpability as much as it is judging their actions or conduct.

4. This is not a novel concept, but rather it is the cornerstone of legal systems in countries that follow the British common law tradition. For centuries judges have been relying on the Latin maxim *actues non facit nisi mens sit rea* – a person may not be guilty unless the mind be guilty. For this reason, as a general principle, most offences have two core elements which the prosecution must satisfy:
   (a) *actus rea* – that the accused engaged in certain conduct; and
   b) that the accused possessed some degree of mental culpability with respect to that conduct, such as intent, recklessness or negligence.

5. These principles are now encapsulated in section 11 of the *Criminal Code Act 2002* (ACT) which provides that:

> An offence consists of physical elements and fault elements

Section 17 of the Act then provides that:

> A fault element for a particular physical element may be intention, knowledge, recklessness or negligence

Section 22 of the Act then goes on to provide that:

> (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.

6. In light of these provisions the SLAC rightly concluded, in CLA's view, that the operation of criminal law principles in the code reflect "the fundamental principal that a person is not to be found guilty of a criminal offence unless they are proved to have intended to commit the acts that constitute the physical elements of the offence."[1]

Philosophical reasons for requiring proof of mental culpability

7. The justifications for requiring the proof of a *mens rea* or *fault element* are well established within legal and moral philosophy. As Blackstone noted more than 200 years ago: "…to constitute a crime against human law, there must first be a vicious will, and secondly, an unlawful act consequent upon such vicious will."[2]

8. Andrew Ashworth propounds that:

> If a person is to be censured publicly by being labelled a criminal and made liable to a sentence, then the court should be satisfied not merely that that person caused the consequence but also that he or she did so culpably. **Anyone can cause injury, death or damage by misfortune or coincidence, but that should not be enough for**

[1] ACT Legislative Assembly Standing Legal Affairs Committee, *Scrutiny of Bills Report No. 2, 14 February 2005* , p 5.
[2] ACT Legislative Assembly Standing Legal Affairs Committee, *Scrutiny of Bills Report No. 38, 14 October 2003,* p 10.

> **criminal liability, however great the harm**… a principal distinction of criminal liability is the requirement that the harm be caused culpably.[3]

9. He then goes on to note that the moral significance of the above proposition was well captured in the dictum of Oliver Wendell Holmes that even a dog distinguishes between being kicked and being stumbled over.[4]

10. A similar view was taken by Chief Justice Lamer in *R v Wholesale Travel Group Inc.,* [1991] 3 S.C.R. 154 when he said that

> …whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of the law, or even a provincial regulatory offence, there is, a principle of fundamental justice, a minimum mental state which is an essential element of the offence… it is a fundamental principal of justice that the penalty imposed on the accused and the stigma which attaches to that penalty and/or the conviction itself, necessitate a level of fault which reflects the particular nature of the crime.

11. Simply put, the effect of convicting someone of a strict liability offence is that a person may be convicted on the basis of their actions alone. As such, people will be – and have been in the past – convicted of strict and absolute liability offences where they have acted in a certain way, even though they did not intend or could not foresee that they would engage in the conduct or that the result would eventuate.

    Even more unsettling is the fact that, in the case of absolute liability offences, it is possible for a person to be convicted for acting or engaging in conduct where any other reasonable person in society may likely have acted in a similar fashion in the circumstances. In such a case, an accused person would be prevented from adducing evidence to show that their actions were entirely reasonable in the circumstances.[5]

    It is our position that such possible outcomes are highly undesirable and offend common sense. They would be draconian in nature and have the potential to cause great injustice and undue hardship on accused people.

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[3] Andrew Ashworth, "Is the Criminal Law a Lost Cause?", *Law Quarterly Review*, 2000 (116), 225-256, 240-241.
[4] *Ibid,* p 241.
[5] The defence of mistake of fact is not open to people charged under absolute liability offences: see section 24(2)(b) *Criminal Code Act 2002* (ACT)

To repeat the above comment "anyone can cause injury, death or damage by misfortune or coincidence, but that should not be enough for criminal liability, however great the harm."[6]

12. CASE STUDY

13. In the case of *He Kaw Teh v The Queen* (1985) 157 CLR 523, the accused was convicted of two offences under section 233B(1)(b) and (c) of the *Customs Act 1901* (Cth) of possessing and importing of 2.78kg heroin. At trial the court found that offences under these provisions were strict liability offences. The defendant maintained that he was unaware that he had the heroin in his possession (i.e. it was 'planted') and hence he should not be liable. He was convicted and sentenced to life imprisonment.

14. The High Court held on appeal that it would be unjust for offences under section 233B of the *Customs Act* to continue to be analysed as strict liability offences, as they had been up until that point. In reaching this position Gibbs CJ observed that

> 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.[7]

15. As the Parliament had not explicitly designated whether or not the offences contained in section 233B of the *Customs Act* were 'normal' or strict liability offences, the Court found that it would be unjust for the Court to hold section 233B as a strict liability offence. Accordingly, it affirmed the appeal and sent the case back to the trial court, directing that a full 'mens rea' in the conventional sense.[8]

[6] Andrew Ashworth, "Is the Criminal Law a Lost Cause?", *Law Quarterly Review*, 2000 (116), 225-256, 240-241.
[7] *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 529-30 per Gibbs CJ.
[8] Note that this case was decided before the codification of Commonwealth criminal law through the *Criminal Code Act 1995* (Cth). Subsequent to that Act an offence is presumed not to be a strict liability offence unless it is expressly stated: see *Criminal Code Act 1995* (Cth) schedule 1, s 5.1 and 5.6.

Recent Territory law with respect to strict and absolute liability offences

16. The SLAC recommended in 2003 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 the principal that an accused must be shown to have committed the physical elements of the offence with a guilty mind, and indicate why an alternative was not adopted."[9]

17. Unfortunately recent Bills have failed to comply with the recommendations of the Committee. For example, in 2005 the *Criminal Code Harmonisation Bill 2005* (ACT) was introduced. It provided for more than 50 strict or absolute liability offences. The explanatory memorandum accompanying the Bill stated that the Bill "does not propose to create any new strict liability offences, 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."[10]

18. However, it is quiet misleading to say all these offences were strict or absolute liability offences before the move towards codification of the Territory's laws. The question of whether an offence was a strict or absolute liability offence was determined by the courts applying criterion set out in the High Court case of *He Kaw Teh v The Queen* (1985) 157 CLR 523.

    As such, it would have been more accurate to say that the Bill created strict and absolute liability offences where the drafters of the Bill (and subsequently the Assembly) have speculated that the equivalent of these offences existing before codification of the Territory's laws may have been found by a court to be strict or absolute liability offences. It is probable that, although some of the offences contained in the Bill might have been found to be strict or absolute liability offences prior to codification, others probably wouldn't, and hence can be considered new strict liability offences.

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[9] ACT Legislative Assembly Standing Legal Affairs Committee, *Scrutiny of Bills Report No. 38, October 2003,* p 16.
[10] Explanatory Memorandum, *Criminal Code Harmonisation Bill 2005* (ACT), p 4.

19. The explanatory memorandum for the Bill creating these offences did not elaborate as to why it was necessary that these offences did not require the establishment by the prosecution of a guilty mind, nor did the explanatory memorandum canvas alternatives for these offences which would not have involved the imposition of strict or absolute liability. Cleary this was not in keeping with the 2003 recommendations of the SLAC.

20. Notwithstanding the findings and recommendations of the SLAC that the creation and imposition of strict and absolute liability offences should be an exception rather than the rule, there nonetheless appears to be a disturbing amount of strict and absolute liability offences enacted in the ACT. Sampling of legislation passed by the ACT Legislative Assembly suggests that between 8 and 30 strict liability offences are enacted during a sitting week.[11] It is noteworthy to reflect on questions placed on the Assembly notice paper on 25 August 2005 that sought to ascertain how many strict and absolute liability offences had been enacted in recent years, and how many were proposed to be enacted under Bills before the Assembly.[12] In response the Attorney General argued that, *inter alia*, that it would be a significant task for his department to collate information, and for that and other reasons, declined to provide an answer.[13] The fact that it would be a 'significant task' for the Attorney-General's Department to collate information on the creation of strict and absolute liability offences is instructive of just how many have been and continue to be enacted.

21. It is abundantly clear that the reality is that strict and absolute offences are not exceptional but are becoming increasingly more common.

RECOMMENDATION 1: CLA supports the recommendation of the SLAC contained in *Scrutiny of Bills Report No. 38* that all explanatory memorandums of all Bills containing strict and absolute liability offences contain a justification for the dispensation of a fault element and explain why an alternative way of drafting the offence was not adopted.

[11] This figure is gained from a cursory examination of the Bills passed in late 2005/early 2006. It is not statistically based.
[12] ACT Legislative Assembly Hansard, 22 September 2005, page 3693.
[13] The Chief Minister also argued there was other factors entitling him not to answer the questions, including his view that any answers may be misleading. (see: ACT Legislative Assembly Hansard, 22 September 2005, page 3694.)

RECOMMENDATION 2: That the ACT Legislative Assembly take note of the common enactment of strict and absolute liability offences and undertake not to enact strict or absolute liability offences unless there is a pressing and compelling need for them.

RECOMMENDATION 3: CLA urges the government to reconsider the imposition of strict and absolute liability in the offences created under the *Criminal Code Harmonisation Bill 2005* (ACT) and. In keeping with the recommendation of the SLAC, CLA urges the government to provide an explanation as to why each of the offences created is a strict or absolute liability offence, and why the offences created could not have been drafted without imposing strict or absolute liability.

The attitude of government departments re strict and absolute liability offences

Working definitions

22. Before commenting on CLA's view with respect to the attitude of some government departments towards the creation of strict and absolute liability offences, CLA thinks it is important to clarify its understanding of what is and what is not a criminal offence to avoid any confusion.

23. It is common amongst some government departments to draw a distinction between criminal offences, and 'civil' or 'regulatory' offences[14]. The distinction is undoubtedly often used to make it seem more acceptable to depart from the general principles of criminal law. CLA believes that such distinctions are misleading and unhelpful.

24. 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. This is distinct from other types of legal proceedings where the State is not always a party, and the outcome sought is either restorative damages or some form of interlocutory measure.

    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

[14] See for example the distinction alluded to by the Scrutiny of Bills Committee in ACT Legislative Assembly Standing Legal Affairs Committee, *Scrutiny of Bills Report No. 2, 14 February 2005* , p 9.

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.

25. CLA's approach to the characterisation of offences is in keeping with that of the European Court of Human Rights. In dealing with the question of whether proceedings before it should be labelled as 'criminal' rather than 'civil' it enquires into whether the proceedings are brought by a public authority and, *inter alia*¸ whether there are severe or punitive consequences.[15] As a result the court has declared offences that were labelled as 'civil' offences under the domestic law of European countries to be 'criminal' offences for the purposes of the European Convention.[16] This has been so even where the penalty was only a fine.[17]

> **RECOMMENDATION 4: That neither the ACT Government nor Legislative Assembly draw a distinction between 'regulatory' or 'civil' offences and 'criminal' offences in discussing or characterising offences** which involve some form of punishment or coercive mechanism of the State.

Attitudes of Government departments and agencies

26. CLA holds serious concerns about the attitude of some government departments towards the creation and use of strict and absolute liability offences. CLA believes that some government departments and agencies advocate the creation of such offences deliberately to alleviate the extent of their burden of proof (through the DPP) before securing a conviction. The attitude arises from departments experiencing what they believe are adverse outcomes experienced in trying to prosecute certain offences. Often they have failed to discharge their burden in court, and, as a result, have appropriately 'lost' the matter. Instead of re-evaluating their approach to prosecuting the matter, and collecting better evidence in future matters, they

[15] See *Benham v United Kingdom* (1996) 22 E.H.R.R. 293.
[16] *Ibid.*
[17] *Schmautzer v Austria* (1996) 21 E.H.R.R. 511; *Garyfallou A.E.B.E. v Greece* (1999) 28 E.H.R.R 344.

simply endeavour to have the law changed to better suit them in future proceedings.

27. In CLA's view such an attitude is on the surface disappointing. It is analogous to a sporting team who, having lost a match, endeavours to have the laws of the sport changed to suit them for next time instead of working (or as the analogy would hold, training harder) to win the next game.

    Below the surface, such an attitude is a wholesale misuse of government power. Power should not be used to make the powerful more so; government power's proper use is to protect and safeguard the least powerful members of society.

Administrative efficiency

28. Government departments and prosecutors often argue that it is simply too difficult to prove 'fault' or a 'guilty mind', even though an accused person did in fact have such mental capability. This has previously been acknowledged by the Assembly's Standing Legal Affairs Committee when it referred to the argument put succinctly by Dickson J in *R v The Corporation of the City of Sault St. Marie* [1978] 2 S.C.R. 1299. He noted that

    > …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 individual's intent would allow almost every violator to escape.

29. This is certainly a valid consideration and needs to be afforded some weight when deciding whether an offence should involve strict or absolute liability. But it should only be one consideration amongst many.

    Unfortunately some government departments think of it as the only or the determinate consideration. In CLA view this is unacceptable and the argument needs to be balanced against competing considerations. Government Departments often fail to acknowledge that a consequence of changing the law to convict people who do possess 'fault' or a 'guilty mind' is

that people who may have committed the physical elements of an offence as a pure accident will also be convicted and punished even though they posses no mental culpability. Simply put, they fail to acknowledge that the price to be paid for fewer 'guilty' people escaping the conviction will be an increase in the scope for 'innocent' or 'undeserving' people to be convicted and punished.

30. An example of the above problem was the attitude of Environment ACT in its efforts to have strict liability offences enacted to punish those who damage protected trees in the ACT:

CASE STUDY

In 2005 the *Tree Protection Bill 2005* (ACT) was before the ACT Legislative Assembly for debate. Environment ACT were the lead government agency with the responsibility for preparing the Bill which, amongst other things, provided the legislative framework for a regime to protect certain trees deemed to be of environmental, cultural, or social benefit to the community.

Section 15(4) of the Bill provided that:

> (a) A person commits an offence if the person does something that damages, or is likely to damage, a protected tree.
> (b) Maximum penalty: 50 penalty units.

Section 15 (6) of the Bill provided that

> 2) An offence against subsection (4) is a strict liability offence

Environment ACT argued it was necessary to have a strict liability offence of this nature because they would find it too hard to prove a fault element in many cases where people would damage a tree, and hence they would escape conviction.

Although this may have been true, they refused to acknowledge that – as a consequence of the way in which the offence was drafted – it would see people who damaged trees as a result of genuine accidents and mistaken actions, which is inevitable in a garden city such as Canberra, would also be exposed to liability. For example, a person reversing a car in

a front yard might have accidentally damaged a tree, and as a result would be liable for conviction under section 15(4).

The problems with this provision were articulated by Vicki Dunne MLA when she opposed the provision during debate on the Bill, arguing:

> What does that mean for Mr and Mrs Waramanga? It means that if the government charges them with an offence under this bill the burden of proof is cut dramatically. It would be lowered to such a point that they may be punished for a genuine accident. If Mr and Mrs Waramanga have a protected tree in their front yard and Mr Waramanga accidentally drives into it, he could be charged under proposed section 15 (6) of this act, even though he did not intend to damage the tree and he was not morally blameworthy.

Moreover, a person need only engage in action that is likely to damage a protected tree, so if they accidentally reversed a car in a manner likely to damage they tree, even though they did not actually cause any damage, they would still be liable.

Clearly the 'wide net' this provision cast was out of all proportion with the objectives it was intended to achieve. It was a legislative sledgehammer to crack a nut. It was a good example of a government agency advocating the use of strict liability to fix a perceived problem without giving due consideration to the implications that might arise.

It should be noted that the Minister subsequently intervened and amended the provision to reduce the harsh effects the Bill would have had. After amendments were moved by the Minister for the Environment, the strict liability of general application that was contained in section 15 (4) was removed, replaced with a strict liability offence that only applied to people involved in property development business, or business related to trees.[18]

31. It is often argued in defence of provisions that have the potential to create injustice because of their scope, such as in the case study above, that the government will exercise its discretion and only lay charges when it believes it is reasonable to do so. CLA rejects this argument and notes the comments of Justice Thomas in *Re Gold Cost City Council By-Laws* {1994] 1 Qd R when he stated that:

[18] See: *Tree Protection Act 2005* (ACT), s16(5).

> I am unimpressed with governmental authorities which create unreasonably wide prohibitions and justify them with the statement 'trust us'. Wills J expressed a similar sentiment in 1904: "I dislike extremely legislation which is felt to be so unfair if universally applied that it can only be justified by saying that in particular cases it will not be enforced. I think that is as bad a ground for defending legislation as one could well have. (*Stiles v Galinski* [1904] 1 KB 615 ay 625).

32. It is true that often the legal burden is set quiet 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 principal 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.

    Although introducing more strict and absolute liability offences may result in fewer 'guilty' people escaping conviction, it will also result in more people being convicted in circumstances where it is inappropriate and unjust that they are.

> **RECOMMENDATION 5: That government departments and agencies are given clear and unambiguous instructions that strict and absolute liability offences have the potential, when applied zealously, to create much injustice. As such, government departments and agencies should be instructed not view strict and absolute liability offences as a simple means to secure convictions in the furtherance of any agency or department objectives.**

Offences relating to particular trades and professions

33. Another argument advanced in support of some strict liability offences are justified on the basis that a person who did not posses a '*mens rea'* or 'fault element' because the offence is only applicable to members of a particular profession. This argument was put in the explanatory memorandum for the *Pest Plants and Animals Bill 2005* (ACT) where the Minister for the Environment argued that certain strict liability offences are justified in the public interest

> In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale is that people engaged in the conduct of for example a business of supplying plants, as opposed to members of the general public who purchase plants from a commercial supplier, can be expected to be aware of their duties and obligations.[19]

34. Section 11 of the *Pest Plants and Animals Act 2005* (ACT) provides a strict liability offence in the following terms:

> 11(1) person commits an offence if—
> (a) the person, in the conduct of a business supplying plants, supplies a plant to someone else; and
> (b) the plant supplied is a prohibited pest plant.
>
> Maximum penalty: 50 penalty units.

35. On one level, it might be argued that this limitation on liability is a form of 'fault'; the accused has been negligent, although not within the strict legal meaning of the word, in that they have failed to act in a way which could be expected of them by reason of knowledge and expertise that they can be expected to posses above and beyond ordinary members of the public by virtue of their trade or profession. In proving a conviction, the prosecution would need to prove that the accused was a member of a particular trade or profession, which by implication means that the prosecution is proving the existence of certain knowledge and expertise on the part of the accused.

36. CLA accepts that strict and absolute liability offences are less onerous when directed to people who, because of their trade or profession, should be expected to be aware of their duties and obligations. Whilst CLA maintains that strict and absolute liability offences should be exceptional, they are more acceptable and justifiable when their application is restricted to people who can be reasonably expected to known their conduct was wrong by virtue of their trade or profession, as opposed to the general public at large.

37.

> **RECOMMENDATION 6: That in exceptional cases where the ACT Legislative Assembly enacts strict or absolute liability offences, it should endeavour, wherever possible, to confine its operation to those who could be reasonably expected to know the conduct prohibited was wrong by virtue of their trade or profession.**

[19] Explanatory Memorandum, *Pest Plants and Animal Bill 2005* (ACT), page 3.

Penalties

38. CLA also notes that it often argued that where strict and absolute liability offences are used in the furtherance or regulatory regimes that the penalty accompanying these offences is minimal, normally a fine of some description. The Australian Senate's Standing Committee into Constitutional and Legal Affairs has proposed that strict liability offences should only be imposed where

> the penalty does not include imprisonment and has set a general maximum penalty of 60 penalty units for offences involving strict or absolute liability offence.[20]

39. CLA accepts these recommendations but also expresses its concern over the stigma a conviction carries with it. Notwithstanding the comparatively minor penalties that a strict liability offence may impose, the recording of a conviction may nonetheless do substantial damage by way of the stigma that it carries. When applying for a job, for example, the mere fact that someone would be obliged to disclose that they have a conviction may do that person substantial damage, even though the conviction may be for a 'trivial' offence.

    The reality is that some prospective employers will not look into the details and the circumstances of the conviction; they will draw adverse inferences and act in a manner detrimental to the convicted person merely upon learning of the conviction.

40. The detrimental impact that the stigma of being convicted of committing an offence extends further than just employment matters. It can have an effect on a person in their family and social life as well. It is therefore overly simplistic and short-sighted to suggest that comparatively small fines accompanying many strict and absolute liability offences justify the ease at which convictions can be secured. A conviction for any offence will invariably have implications beyond any fiscal burden that a fine might incur.

[20] Australian Senate, *Standing Committee into Constitutional and Legal Affairs*, Sixth Report of 2002.

41. The injustice of being a 'convicted person' becomes particularly pronounced where the offence is of a regulatory or administrative nature. It is offensive to ordinary standards of natural justice that a person should be subject to further hardship owing to the fallout from the stigma of being convicted of an offence, where no mental culpability has been proven, just to aid 'administrative efficiency' and make life easier for bureaucrats. This is abuse of a position of power.

42. CLA proposes lessening the harsh consequences of the stigma of a minor regulatory conviction by amending relevant legislation so that such offences would not form part of a person's criminal record. Courts could still have information of past convictions for such offences when passing sentence for further similar or other offences, but any conviction would not be disclosable to employers or other sections of the public when more serious offences would be.

RECOMMENDATION 7: That the penalties accompanying strict and absolute liability offences should be minor. They should NEVER involve any form of imprisonment. A maximum of 50 penalty units should be used, and should only be departed from where there are strong and compelling reasons.

RECOMMENDATION 8: The legislature should give consideration to the implications that a conviction may involve to a convicted person beyond the mere fiscal imposition of a fine, i.e. the stigma and associated consequences that a conviction entails.

RECOMMENDATION 9: That the convictions for a strict or absolute liability offence of an 'administrative' or 'regulatory' nature should not form part of a person's criminal record.

Implications under the ACT Human Rights Act

Section 22(1)

43. It is arguable that strict and absolute liability offences may offend section 22(1) of the *Human Rights Act 2004* (ACT). Section 22(1) provides that "everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law."

44. One view is that the essence of section 22(1) is the presumption of innocence. As noted above, section 22 of the *Criminal Code Act 2002* (ACT) provides that an offence contains a physical and a fault element. Therefore if a person is presumed innocent of an offence, until proven otherwise, the presumption must be that the person did not commit the physical elements and did not possess the fault elements of an offence. They should not be found guilty until these two elements are proved by the prosecution.

    As the prosecution does not have to prove fault with strict and absolute offences, the accused cannot be said to enjoy a presumption of innocence until proven guilty; that which ordinarily would have to be proven with respect to an ordinary offence does not have to proven. On this view, the departure from the presumption is not measured against the legality of the provision in question, but against presumptions that underpin the law and are common to most offences.

45. On the other hand it may be argued that such offences do not offend section 22(1) as the presumption is not absolute, but displaced when the accused is "proved guilty according to law." As "according to law" a strict or absolute liability offence and does not require the prosecution to prove fault, in proving merely the physical element, the accused has been proved guilty "according to law." So guilt in these circumstances would not be contrary to section 22(1).

46. CLA notes that section 32 of the *Human Rights Act* empowers the ACT Supreme Court to issue a declaration of incompatibility if the court is satisfied that a law is inconsistent with human rights. CLA does not offer a legal opinion as to which is the best way to view the interaction between section 22(1) of the *Human Rights Act* and strict and absolute liability offences and hence whether they trespass upon human rights, but encourages the legal community to litigate this point so the ACT Legislative Assembly and the community can benefit from the court's view on this matter.

    However, CLA knows of no stronger notion in the law than the presumption of innocence.

Section 10(2)

47. Section 10(2)(b) of the *Human Rights Act* provides that "no one may be… treated or punished in a cruel, inhuman or degrading way." Arguably it is cruel to punish someone under a strict or absolute liability offence where no mental or moral culpability has been established. As cited in the examples above (page XXXX) it is arguably cruel to punish someone or subject them to the stigma of a conviction where their guilt may be found on conduct that occurred as a result of an accident. Other relevant factors might include disproportionality between the effect and punishment a strict and absolute liability offence might entail, and the objectives it is trying to achieve, if it is in fact trying to address a 'minor' offence.

48. CLA again simply notes the possible inconsistency with human rights, and encourages the legal community to litigate this point so the ACT Legislative Assembly and the community can benefit from the court's view on this matter.

Other matters arising out of the Human Rights Act

49. CLA notes that many detractors of the *Human Rights Act* oppose it on the basis that it empowers an unelected judiciary to strike down laws of an elected legislature. With respect to the ACT *Human Rights Act,* this argument is extremely dishonest, and demonstrates an ignorance of the operation of the Act. The Act does not empower the court to strike down laws, rather it only empowers the court to issue a "declaration of incompatibility." Section 32(3) of the Act makes it clear that:

> The declaration of incompatibility does not affect—
>
> (a) the validity, operation or enforcement of the law; or
> (b) the rights or obligations of anyone.

50. As such, a declaration only serves to give the Legislative Assembly and the community the benefit of the non-binding expert legal opinion of the ACT Supreme Court.

51. Another important point to remember is that under section 32(1) a declaration can be sought where

(a) a proceeding is being heard by the Supreme Court; and
(b) an issue arises in the proceeding about whether a Territory law is consistent with a human right.

52. There is nothing in this section preventing the prosecution in criminal matters, or counsel for the government in civil matters, from bringing issues of potential incompatibility of Territory law and human rights to the attention of the court. There is no reason why the government has to wait for a defendant to seek a declaration of incompatibility. Where litigation is afoot concerning strict and absolute offence, the government could essentially turn it into a 'test case.'

The Government is therefore positioned to bring some of the above questions to a head by highlighting potential inconsistencies with human rights and encouraging the court to consider whether a declaration of incompatibility is needed.

RECOMMENDATION 10: Using the prism of section 32 of the *Human Rights Act 2004* (ACT), CLA encourages the Government , through the litigation that it is involved in, and the legal community at large, to encourage the ACT Supreme Court to consider whether strict and absolute liability offences infringe rights contained in the *Human Rights Act*

Concluding remarks

53. Strict and absolute liability offences exist and operate against a background of complex legal principles and public policy considerations. There can be no hard and fast criteria for determining when an offence, or an element of an offence, should impose strict or absolute liability. It will invariably be a balancing exercise, but CLA proposes the legislature should be mindful of the following general criteria and considerations:

- **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;**
- **Administrative efficiency, ie, making it easier for public servants t to achieve policy and departmental objectives is a valid consideration, but only one consideration amongst many, and should not afforded excessive weight in deciding whether an offence should be one of strict or absolute liability;**
- **Strict and absolute offences are more justifiable when they do not subject persons at large to liability, but are directed at people with specialist expertise or knowledge.**

ENDS *Tuesday 2 April 2006*

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