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Senate Standing Committee
for the Scrutiny of Bills

**Government Response
to the
Senate Standing Committee for the Scrutiny of Bills**

**Sixth Report of 2002 -
Application of Absolute and Strict Liability Offences in
Commonwealth Legislation**

Executive summary of Government response to the Sixth Report of 2002

1. The Government welcomes the Sixth Report of 2002 by the Senate Standing Committee for the Scrutiny of Bills (the Committee), entitled 'Application of Absolute and Strict Liability Offences in Commonwealth Legislation'.
2. 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.
3. Guidelines reflecting the Commonwealth's policy on strict and absolute liability formed part of the Attorney-General's Department (AGD) 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.
4. 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.
5. The Government generally supports the recommendations and principles set out in the Committee's Report.
6. The Committee made four recommendations. This response addresses each one.

Substantive responses to each Recommendation of the Sixth Report

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

Government response to Recommendation 1: accepted

2. The Committee recommends that the Legislation Handbook should require agencies to abide by the principles regulating the application of strict and absolute liability set out in the Report when developing new or amending legislation which includes strict and absolute liability; the Attorney-General's Department should coordinate this process.

Government response to Recommendation 2: partially accept

The Government recognises the merits of regulating the application of strict and absolute liability by principles such as those set out in the Committee's Report. The Legislation Handbook already requires agencies to consult with AGD on legislative provisions that create criminal offences and impose pecuniary or imprisonment penalties, empower officials to enter premises or examine property or documents, reverse the onus of proof, or empower a person to certify conclusively that certain facts exist. The Government also requires agencies to seek agreement from the Minister for Justice and Customs on the criminal law aspects of new legislative proposals. The guidelines on strict and absolute liability submitted to the Committee guide ministerial decisions on legislative proposals. Most of the guidelines are the same as or consistent with the principles set out in the Committee's Report.

The Government does not accept the need to require agencies to comply with the principles. Decisions should continue to be made by reference to the specific provisions of each piece of legislation. However, any departure by an agency from these principles should be justified to the Minister for Justice and Customs when seeking his approval and in the Explanatory Memorandum to the relevant Bill. Parliamentary scrutiny allows Government decisions to be reviewed.

The Government generally supports the principles set out in the Committee's Report subject to the following comments.

- **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*.**

The Government considers the defence of mistake of fact (in relation to strict liability) and other defences in Part 2.3 of the *Criminal Code* to be sufficient safeguards for strict and absolute liability offences.

- **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**

The Government supports this recommendation and considers that its consultation mechanisms combined with Parliamentary scrutiny processes (including Parliamentary legislation committees) protect the public interest sufficiently.

- **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**

The Government supports this general principal. However, a higher maximum pecuniary penalty may be appropriate where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment.

- **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**

The Government does not agree to limit the use of absolute liability to jurisdictional or similar elements of offences. The Government may want to apply absolute liability to all elements of an offence to deal with matters where an offender's mistake of fact should not be an excuse. Such matters might relate to national security, health, safety or the environment.

Any proposal to apply absolute liability in such circumstances would still be subject to Parliamentary scrutiny and justification in the relevant explanatory material (as per the Committee's First Report of 2003 at page 20).

- **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**

The Government supports the ongoing review of legislation to ensure its appropriateness. Such reviews are the responsibility of individual agencies. However, it is a requirement that agencies consult with the Attorney-General's Department and seek the agreement of the Minister for Justice and Customs on the criminal law aspects of new legislative proposals.

- **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**

The Government does not believe such a project is warranted. The Criminal Code Harmonisation Project has already achieved a significant degree of certainty and consistency in the application of strict and absolute liability. The requirement that agencies consult with the Attorney-General's Department and seek the agreement of the Minister for Justice and Customs on the criminal law aspects of legislative proposals continues to promote greater consistency.

- **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**

The Government disagrees. Infringement notices linked to strict or absolute liability offences give individuals a choice between paying the penalty and defending the charge in court. Such notices are used for relatively minor offences with low penalties and they alleviate pressure on overcrowded State and Territory criminal justice systems; freeing that system up to deal with more serious offences.

- **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**

The Government disagrees. Strict and absolute liability offences are criminal matters. The question of whether a person has breached an offence of this type is determined by the criminal courts on proof of evidence presented by the prosecution. Merit review by the AAT or other tribunal is not appropriate.

- **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 licences should be conducted in a transparent manner with adverse decisions subject to external independent merits review**

It is possible for the breach of a licence condition to be an offence or element of an offence. However, varying, suspending, cancelling or refusing to renew a licence because of a breach of a licence condition is an administrative sanction, not a criminal one.

The Government notes that the Attorney-General referred to the Australian Law Reform Commission matters relating to civil and administrative penalties including the level of those penalties, enforcement of the penalties and their relationship with criminal law. The Commission's report was tabled in Parliament in March 2003 and covers matters raised in relation to licensing schemes.

- **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 Government disagrees. Strict and absolute liability offences are criminal matters. The question of whether a person has breached an offence of this type is determined by the criminal courts on proof of evidence presented by the prosecution. Internal review procedures are not appropriate.

- **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**

The Government supports this recommendation and considers that its consultation mechanisms combined with Parliamentary scrutiny processes (including Parliamentary legislation committees) sufficiently protect industry interests. This protection is enhanced further by the Government's policy on best practice process for regulation announced in the Prime Minister's *More Time for Business* statement on 24 March 1997. The policy requires a regulation impact statement (RIS) to be prepared for all proposed new or amending legislation which directly affects business or which has a significant indirect effect on business or restricts competition. The Office of Regulation Review in the Productivity Commission is responsible for advising agencies on RIS requirements, and assessing and reporting on compliance with those requirements.

- **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**

The Government does not support this proposal.

Criminal offences are created by legislation and should not be modified in their operation by internal agency guidelines.

Decisions on prosecution are made by the Director of Public Prosecutions in accordance with the Commonwealth's Prosecution Policy, which includes considering whether there is sufficient evidence to establish that an offence has been committed.

- **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**

The Government believes that the merits of a statutory review mechanism for strict liability schemes should be assessed on a case-by-case basis.

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

Government response to Recommendation 3: not accepted

This is not warranted because:

- the Criminal Code Harmonisation Project achieved a significant degree of certainty and consistency in the application of strict and absolute liability,

- it is already a requirement that agencies consult with the Attorney-General's Department and seek the agreement of the Minister for Justice and Customs on the criminal law aspects of legislative proposals, which promotes greater consistency,
- all existing strict and absolute provisions have been the subject of Parliamentary scrutiny, and
- no evidence is available to support a conclusion that any of the existing strict and absolute liability schemes are operating in a way which was not intended at the time of passage of the relevant enabling legislation.

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

Government response to Recommendation 4: partially accept

Subject to the comments made in the Government's response to recommendation 2, the Government agrees that agencies should take into account the principles outlined in the Committee's Report. However, any decisions on how those guidelines should be adopted or promulgated within an individual agency should rest with that agency.