LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON LEGAL AFFAIRS

(Reference: Inquiry into strict liability offences)

Members:

MR Z SESELJA (The Chair)
MS K MacDONALD (The Deputy Chair)
DR D FOSKEY

TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 28 NOVEMBER 2006

Secretary to the committee:
Ms R Jaffray (Ph: 6205 0199)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

The committee met at 9.35 am.

CORBELL, MR SIMON, Attorney-General, Minister for Police and Emergency Services and Minister for Planning
LEON, MS RENEE, Chief Executive, Department of Justice and Community Safety

THE ACTING CHAIR (Ms MacDonald): Good morning. The committee has authorised the recording, broadcasting and rebroadcasting of these proceedings in accordance with the rules contained in the resolution agreed by the Assembly on 7 March 2002 concerning the broadcasting of Assembly and committee proceedings.

Before the committee commences taking evidence, let me place on record that all witnesses are protected by parliamentary privilege with respect to submissions made to the committee in evidence given before it. Parliamentary privilege means special rights and immunities attached to parliament, its members and others necessary to the discharge of functions of the Assembly without obstruction and without fear of prosecution.

While the committee prefers to hear all evidence in public, if the committee accedes to such a request the committee will take evidence in camera and record that evidence. Should the committee take evidence in this manner, I remind the committee and those present that it is within the power of the committee at a later date to publish or present all or part of that evidence to the Assembly. I should add that any decision regarding publication of in camera evidence or confidential submissions will not be taken by the committee without prior reference to the person whose evidence the committee may consider publishing.

Welcome, Attorney-General, Ms Leon and officials. I'm deputy chair of the committee. Mr Seselja, who is now the chair of the committee, is unfortunately unwell today, so I'll be chairing these hearings. Mr Seselja wanted it placed on the record that he is most apologetic that he cannot make it today. We are inquiring into strict liability offences. Minister, do you wish to make an opening statement?

Mr Corbell: Thank you for the opportunity to appear before you this morning. I have a brief opening statement to read, and then I, Ms Leon and officials would be happy to assist the committee with any questions.

Over the past five years, the ACT government has been progressively developing the ACT Criminal Code. It's a long-term project that will reform the whole of the criminal law in the ACT. This project was commenced by the previous government and it is a job that we are continuing and will be in a position to complete.

The Criminal Code is one of the more ambitious projects undertaken by the government. The reforms are primarily based on the model criminal code, developed by the national Model Criminal Code Officers Committee and established by the Standing Committee of Attorneys-General. The code is being implemented chapter by chapter. It is a very large task, and since December 2001 the criminal code has grown in volume. To date it consists of six chapters which deal with a wide range of matters. Chapters 1 and 2 deal with preliminary matters and, most importantly, with the general principles of criminal responsibility. Chapter 3 contains offences relating to

theft, fraud, bribery and related matters. Chapter 4 deals with property offences and computer crime. Chapter 6 contains the ACT's serious drug offences and chapter 7 contains offences against the administration of justice. By enacting the code, the criminal law of the ACT is becoming more accessible and easier to understand because the general principles of criminal responsibility are being, first of all, located in a single document and, secondly, explained in plain English.

There are other advantages for the ACT. The police, the courts and the profession have been familiar with chapter 2 of the code for many years because of their work in relation to commonwealth offences. It will be less confusing for ACT law enforcement and the legal profession once all the principles of criminal responsibility are fully implemented because then the same rules will apply whether an ACT or commonwealth offence is involved.

The bill is also an important step in achieving uniformity in the criminal law across Australia. Uniformity is gradually becoming a reality, with all jurisdictions in the country having enacted various parts of the model criminal code since it was first proposed in 1992. It is worth mentioning that the ACT has taken a leading role in this effort in passing the six chapters that I mentioned earlier.

Of course, the focus of your inquiry today is chapter 2 of the code. Chapter 2 sets out general principles of criminal responsibility which will eventually apply to all ACT offences, and, of course, your inquiry is of particular interest in relation to the application of strict and absolute liability. Under chapter 2, strict or absolute liability must be expressly stated in order for them to apply, otherwise the code will import fault elements into the offence.

I would really like to stress this concept to the committee because it explains a large part of the apparent increase in the number of strict liability offences being debated in the Assembly since commencement of chapter 2 at the beginning of 2003. 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.

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. I think it is fair to say that this was a pretty unsatisfactory state of affairs.

Chapter 2 has been extremely valuable, because it puts up front whether an offence is a strict or absolute liability offence or not. In doing so, it avoids the need for courts and practitioners to engage in debates about whether the Assembly intended strict or absolute liability to apply.

I would like to stress, however, that chapter 2 does not change the nature of strict liability per se. Rather, it restates the common law and seeks to clarify when offences are offences of strict or absolute liability. Of course it is for the legislature to say

when strict or absolute liability will apply. This is obviously an important concept, and I am sure colleagues on the committee can see the advantage of the legislature expressly stating its intentions rather than leaving it to the courts to work out after a person has been charged. The result overall, through the approach that I have outlined, is greater clarity and certainty in the criminal law.

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.

For existing offences, this has required redrafting. As the committee is aware, this redrafting process is known as harmonisation. Harmonisation is essentially the process of reviewing offence provisions to ensure that they are in a form consistent with the principles of the code. During the harmonisation process, the offences are reformulated so that the physical elements and fault elements can be clearly identified, or in circumstances where there are no fault elements so strict or absolute liability is expressly stated.

The government has continued the staged approach to the adoption of chapter 2 of the model criminal code, initiated by the previous government, to spread the work involved in making the necessary consequential amendments. This staged approach will also assist practitioners and courts to adjust to the changed approach and help to minimise confusion.

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.

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 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.

I think it would be fair to say that we would all agree that strict liability should never

be imposed solely to address resource requirements or administrative convenience. The government seeks to be open and accountable about the criteria it uses for creating strict liability offences. We continuously work towards a coherent, consistent and principled approach in applying strict liability. I see this inquiry as a vehicle where we can explain our positions on the use of strict liability and come, hopefully, to some agreement or common ground so that we don't need to continue the time-consuming debates in the Assembly on the merit or otherwise of strict liability, in particular offence provisions.

This committee inquiry has the potential to put an end to the frustration that I think is felt by many members of the Assembly in debate. I also hope that the committee can assist the government in improving its policies on the imposition of strict and absolute liability. The government is committed to continuous improvement of its policies in relation to all aspects of the law. With that, I thank you for the opportunity to make a statement and I and officers are happy to try and answer any questions you have.

THE ACTING CHAIR: Thank you, Attorney-General.

DR FOSKEY: I was interested, Mr Corbell, to hear you say at the end of your presentation that you were looking forward to reducing time wasted on debating this in the Assembly. You would be aware that in scrutiny of bills meetings this is an issue that arises quite constantly, particularly because of the application of the Human Rights Act, which this government has adopted.

We also remember, of course, that it's the Assembly, in a sense, that prescribes strict liability offences. Perhaps one of the losses with majority government is a reduction in the ability of the Assembly as a whole to decide what will be a strict liability offence. I guess you and I might differ on that particular aspect of it.

Mr Corbell: I think we would, Dr Foskey, but I won't enter into that discussion today.

DR FOSKEY: No. My opinion is that it is valuable to have these discussions in the Assembly, and in another position you might think that too. The thing that I want to explore is that it seems to me that strict liability as a provision really only works in terms of a deterrence quality, and often it is related to issues where we would rather people didn't do them. I guess most offences are like that, but my concern is that most people don't consider, unfortunately, the penalties if they're caught performing the action; some people don't even know that their action is an offence—say, in relation to some of the strict liability provisions we've seen this year in relation to pest animals and plants.

There are the obvious examples like pornography and so on where one believes they do know it's an offence, but there are other provisions, especially when they're new, that people don't know about. So that means that the deterrent impact of strict liability doesn't work until that person gets caught, when, hopefully, they're deterred from doing it again. So the first thing I want to explore is to what extent strict liability is meant to be a deterrent and how one ensures, therefore, that people know about it.

Ms Leon: It is perhaps a debate for another time about the philosophy of criminal law as to the extent to which it is a deterrent and the extent to which it is fulfilling

community expectations that wrongdoing ought to incur a penalty, so obviously both of those motivations inform the creation of offences across the criminal law.

In relation to the particular example that you raised, the Pest Plants and Animals Act, this provision does go to the very point that you referred to about the risk that people won't be aware that a certain offence is a strict liability offence. I should say at the outset, of course, that it is well known that ignorance of the law is no excuse. There might be many offences on the statute book, whether they are strict liability or not, that the average person might claim they were not aware that they were offences. Nevertheless, ignorance of the law is not an excuse with respect to any criminal offence, whether it is strict liability or otherwise.

The issue of strict liability has been said to engage that issue more starkly because, I think, it is considered that the average person would think that they needed to have a certain intention before they could be found guilty of an offence. So, assuming that the average person does have that level of knowledge of the criminal law, strict liability offences are said to raise concerns about the issue of the person's knowledge that certain activity absent any criminal intent could nevertheless be an offence.

But you will see in many of the strict liability offences, and the Pest Plants and Animals Act is one of those, that the state of mind of the person is limited by reference to what can reasonably be presumed to be their knowledge. For example, the pest plants and animals offence refers to a person who is in the conduct of a business supplying plants, so it is reasonable for the legislature to presume that a person who is conducting a business supplying plants should be expected not to supply prohibited pest plants and that there is an onus on that person maintaining a profession in that industry to maintain their knowledge of the regulatory requirements upon them and not to supply plants that are prohibited as pest plants.

Of course, if that prohibition were applied more generally and there might be a great class of people who had not been supplied with the information about what prohibited pest plants were, then there would be an onus on government to undertake better information exposure so that people would have an opportunity to at least know what were prohibited pest plants so that they could avoid committing the offence. But this provision only applies to people who are undertaking that business and therefore it can be expected that they ought to know or make themselves aware of which plants are prohibited.

DR FOSKEY: I am sorry I chose such a bad example, Ms Leon.

Ms Leon: Perhaps another example that is familiar to all of us is the question of speeding. We are all expected to know that it is an offence to speed and, before we are permitted to get a licence to drive, we have to demonstrate that we are aware of the range of matters that are prohibited. There is, I suppose, a spectrum from those matters which every driver must be presumed to know through to matters which the government accepts that not everyone will know and therefore either doesn't make strict liability offences of them or undertakes sufficient community informing activity that people can be expected to know that certain conduct is prohibited. So there obviously will be a spectrum, and the question of the state of knowledge of people in the community will be one of the factors that the government takes into account in

determining whether an offence is a strict liability offence or not. The child pornography offences, for example, don't assume that everyone ought to know the age of everyone else, but they do place a very high responsibility on people to be sure that they know the age of people who are being used as subjects in that kind of film. Elements of the offence do not require any intention.

Mr Corbell: There are also, it is worth noting, opportunities for defence; for example, the defence of reasonable mistake. I am advised the defence of reasonable mistake of fact would apply in a situation such as speeding, for example. For example, if your speedometer was not working correctly and you believed that you were travelling at the speed limit whereas, in fact, you were exceeding it, that is a defence available to someone. So, even in the strict liability context, there is opportunity for mistake of fact to be taken account of. So there are safeguards in that regard for someone who believes that they were abiding by the law and had reasonable reason to believe that, and that can be taken account of by a court.

DR FOSKEY: Thank you. I went out to the Belconnen Remand Centre yesterday, Attorney-General.

Mr Corbell: I hope you can see now why we need a new remand centre.

DR FOSKEY: I have never argued that point.

Mr Corbell: No, I know you haven't.

DR FOSKEY: But I am more firm, and I do believe it should be incumbent upon every member of the Assembly to go, and I will be advising my colleagues of that.

Mr Corbell: Absolutely.

DR FOSKEY: One thing I was informed of was the increased number of people presenting there with a mental illness and, as you are well aware, of the default role of the criminal system in dealing with such people. I am interested in exploring that one a little bit. If a person had the opportunity to appear before a court, they might be able to argue reduced culpability on the ground of having a mental illness which was known to reduce that amount of knowledge in actions. Is there any chance of exploring that one, Ms Leon?

Ms Leon: Where people who are presented before the courts have a mental illness which casts some doubt on their capacity to understand the offence with which they are charged, there will be issues about their fitness to plead, irrespective of whether the offence is a strict liability offence or otherwise. The question about the person's capacity to understand will equally go to questions of whether they have the capacity to form the requisite intention as to whether they have the capacity to have the requisite state of knowledge. There is a general defence that relates to that in chapter 2 of the code, which provides that a person is not criminally responsible for an offence if, when carrying out conduct, they were suffering from a mental impairment and the effect of the mental impairment was that they did not know the nature and quality of the conduct or did not know that the conduct was wrong, or could not control the conduct. So there is a general defence for mental impairment. The issues that you

raise are ones that go to criminal responsibility, irrespective of whether it is strict liability or otherwise.

MR STEFANIAK: I note in the papers I have that the review of the New South Wales parliament lists a number of principles for strict and absolute liability offences. I note that this committee and the Assembly seem to try to do that. For example, the maximum penalty available or recommended for a strict or absolute liability offence is $5,000, 50 penalty units. I note that sometimes that may not seem possible. You talked about speeding and you both quite correctly stipulated some possible defences, even though that is a strict liability offence. I suppose another strict liability offence—correct me if I am wrong—would be drink-driving, where there are occasionally jail terms imposed, albeit relatively minor ones in terms of the legislation. How many other strict liability and absolute offences are there—it is not clear from the papers—where there is actually a jail term imposed? I don't know if the committee has been given a list for that, but I think that it would probably assist it. It may be that sometimes that is desirable for the public good.

Ms Leon: I could not give you necessarily a comprehensive answer of the number of offences involved, but I can give you an example of some matters that have strict liability elements to the offence. They involve serious drug offences. As we would all know, for example, from the very famous trial of Schapelle Corby, the fact of whether you knew or not that your bag contained a prohibited quantity of drugs is irrelevant to the offence. Although that was in another jurisdiction, those provisions concerning the trafficking of drugs usually involved an element of the offence being one of strict liability. So they would be in the more serious category of offences.

MR STEFANIAK: But in our jurisdiction, for trafficking in a certain quantity of drugs—for example, if someone had two kilos of cannabis—there is the provision that, whilst it is well and truly above 100 grams and deemed to be a trafficable quantity, the defendant can satisfy on the balance of probabilities the defence of having it for his or her own use, for example, and not for trafficking. If the defendant can satisfy the jury on that, there is a defence there for that. The strict liability there is the actual amount.

Ms Leon: Strict liability goes to the elements of the offence in that.

MR STEFANIAK: Yes.

Ms Leon: And, as with the strict liability principles generally that the minister referred to, even if strict liability is an element of the offence, that does not mean that there might not be defences available to that.

MR STEFANIAK: Yes. There do seem to be more and more of these more regulatory types of offences. We have talked about the environment. We have not talked so much about the criminal law, but I have noticed strict and absolute defences in a lot more regulatory types of things, like building regulations, environmental controls and health issues. There seem to be more and more strict and absolute liability offences being put in there. What is the reason for that?

Ms Leon: I think that there might have been the appearance of a significant increase in strict liability offences as a result of the harmonisation process, but we were very

careful during the harmonisation process that we were not intending to, and the department does not think that we did, create any new offences of strict or absolute liability. So, prior to the criminal code process, these offences were unclear as to whether they were strict or absolute liability. As the attorney set out, it is very undesirable that a person being charged with an offence won't really know until they come before a court the extent of what they are going to have proved against them. So one of the aims of the code has been to clarify and codify those principles of criminal responsibility so that it is clear when the offence with which a person is charged is one that requires the prosecution to prove beyond a reasonable doubt all those elements of the offence, including intention, or whether it is one of strict liability.

In the harmonisation process, having passed those general principles of criminal responsibility in chapter 2 of the code, the harmonisation process then had the department and then, of course, the Assembly going through the entire set of existing offences and, where they were offences that under existing principles would have been classified as strict liability offences already, making that explicit in the statute. So the harmonisation process did not set out to create new strict or absolute liability offences, only to identify those offences which, under the ordinary, pre-existing principles of construction, would have been strict or absolute liability offences.

MR STEFANIAK: So, in other words, the appearance is that there might be more, but in reality you are saying you are just clarifying.

Mr Corbell: That is correct.

MR STEFANIAK: For the sake of simplicity—erring on the side of caution too, I suppose—if something is obviously a strict liability offence, you stipulate that.

Ms Leon: That is right.

DR FOSKEY: I seek clarification on that. Does harmonisation then mean that the strict liability offences and other repercussions are likely to be similar to those in other jurisdictions around Australia? Is that what harmonisation means?

Mr Corbell: Yes.

DR FOSKEY: Does that mean that a person caught for the same offence in Queensland, assuming they had been through this process, can expect to be treated the same as they would be in the ACT?

Ms Leon: The aim of the model criminal code is to produce a much greater level of uniformity in the criminal law across Australia, but obviously all state and territory governments do still retain the capacity to vary that code if they wish. So, in all of these exercises where the Australian jurisdictions seek to get greater harmony, there is always some balance, some tension, inevitable between the desires of particular jurisdictions to criminalise certain conduct more harshly and the concurrent desire to maintain uniformity. No doubt that tension will appear from time to time in relation to the code, but the aim is to have, to the greatest extent possible, both the principles of criminal responsibility and the nature of the offences harmonised across Australia.

DR FOSKEY: But that harmonisation does not mean that every state will end up with the same offences being subject to strict liability codes.

Ms Leon: Harmonisation requires the application of the same principles, so by and large it will result in similar results.

MR STEFANIAK: I am a great believer that the punishment should fit the crime, but New South Wales has made a recommendation that strict and absolute liability offences should be applied only where the penalty does not include imprisonment. Obviously, with drug offences and some offences where elements have a strict liability component, you cannot get away from a term of imprisonment, but what are you doing in terms of future legislation to ensure that that principle, of which probably some on this committee would be supportive, applies for any future strict liability and absolute liability offences?

Mr Corbell: We apply the principles in the drafting of all legislation. As I indicated in my opening statement, one of the considerations and one of the principles is that strict liability is appropriate only in circumstances where the gravity of the offence and the penalties or consequences are low. That is the principle that is applied. Obviously, there are other, more serious, offences where, as Ms Leon indicates, there is a strict or absolute liability component, but then there are other components as well. But in terms of an offence which is solely around strict liability, the consequences are low and the gravity of the offence is low, so that those are the principles which we apply.

MR STEFANIAK: This committee has recommended from time to time that, as a rule of thumb, where the totality of the offence is strict or absolute liability the maximum penalty should be 50 penalty units. Do you accept that?

Ms Leon: The general policy that we apply is that strict liability will be appropriate where the penalty is generally limited to a monetary penalty and generally where the maximum is not more than six penalty units. But I think it is worth remembering that this is one of a list of principles and all of those need to be taken into account. It does not take one to go very far down the path of some of the offences in relation to, for example, child pornography to see that one ought to be able to look at all of these on a case-by-case basis and apply all of the principles, of which one will be that strict liability offences are generally only appropriate where it is a non-imprisonment penalty and where it is a relatively low penalty. That will be the general position, but obviously other factors about the gravity of the offence and the circumstances that the person ought to have known about will come into play.

MR STEFANIAK: I am thinking more, I suppose, in terms of the regulatory type matters.

Ms Leon: Quite. In relation to those, those other considerations about the kinds of issues one considers in relation to child pornography don't so much come into play.

MR STEFANIAK: No, they don't; nor would the drug offences.

DR FOSKEY: I want to explore more the logistics side of the regime. Generally

speaking, strict liability offences have a fine applicable to them. One of the concerns that the scrutiny of bills committee has raised is that sometimes the fines seem to be set rather high. One thing I learned yesterday was that fine defaulters in the ACT do not have many alternatives if they do not pay their fines, that they are likely to find themselves suffering a day or two under lock and key. I am just wondering about the cost effectiveness of the regime. Does it, for instance, save the government money in terms of having to go to court? Does it cost them money in terms of making sure that those fines are paid at the expense of maintaining—you can see that I am not a lawyer as I just do not have the words and I am always looking for them—fine defaulters in detention?

Ms Leon: In relation to the opportunities for people who are fine defaulters and are unable to pay their fines, there are a number of opportunities that people have prior to their being imprisoned. They include, where the matter goes before the Magistrates Court, entering into the equivalent of a payment plan, so that they undertake to pay off their fines on a regular payment instalment basis. On that basis, the court will suspend enforcement of the penalty. The second option that they also have before the court is that fines can be waived in cases of hardship. So there are opportunities other than detention in some cases.

It is a much broader question that you ask as to whether it ends up costing the government more to enforce the criminal law than the benefits that it derives from it. I think it is difficult to undertake that equation unless one can quantify the benefit of a law-abiding and well-regulated society. Many people abide by the laws, and the entire community benefits from them as a result. It is difficult to quantify the benefit of all of that effective application of the law and then to weigh that against the cost of, perhaps, detaining a small number of fine defaulters who did not pay the fines and weren't able to satisfy a court that there was a hardship-related reason for them not to.

I think that in undertaking that economic analysis it is important not to only take into account the particular costs of that single offence but also to bear in mind the economic benefit of the entire regulatory scheme and the social benefit to the whole community of the regulatory scheme that is involved. I am not aware that there are lots of people who are imprisoned for offences against trees or offences against the development laws. The fine defaults that the system sees are primarily in the traffic area. I think we are all in some agreement that this is an area where the strict liability offences are justified.

DR FOSKEY: That might be an issue of enforcement and the ability to fine people who commit those other offences.

Mr Corbell: Certainly with trees that is the case, Dr Foskey. In terms of planning law, I think it is more straightforward to apply, and we are seeing improvements in compliance around development approvals, building approvals and so on. Those measures have been successfully upheld in review through the AAT in particular in recent months. I think the issue you are touching on here is also the broader issue of whether there is an alternative to imprisonment for fine defaulters. I would agree that, in principle, it is not desirable for people to have some form of imprisonment, whether it is periodic detention or whatever it may be. However, the alternatives that have been raised, such as community service, doing some work for the community to pay

off your debt to society, are potentially, if I recall correctly the advice I received, more expensive than simply serving a term, a weekend or a couple of weekends, in periodic detention. That is, on the face of it, an example of where the costs outweigh the benefits, potentially. The community is actually paying more for someone who is refusing to pay their fine.

THE ACTING CHAIR: Surely that is questionable anyway. How do you evaluate what lesson a person is going to get by doing community service in contrast to serving periodic detention? They may well take more of a lesson from it.

Mr Corbell: As I say and as Ms Leon indicates, the moral elements of this are much more difficult to quantify and the psychological elements are much more difficult to quantify, but, in terms of straight monetary costs to the territory, I think it is difficult to justify saying that the person owes $5,000 or $10,000 in fines and it is going to cost us another $20,000 or $30,000 to allow them to pay off the fines.

DR FOSKEY: It should not be the major consideration, either.

Mr Corbell: I am not saying it is the only or major consideration, but it is a significant consideration.

DR FOSKEY: It is, but I am also aware that there are people for whom two or three days in prison might not be a deterrent. It might be just the cost that they pay. Just to take up Ms MacDonald's point a little further on community service, if, for instance, it was for a road offence and it enabled them to see the impact of speeding on various people it could have quite a strong deterrent effect.

Mr Corbell: Restorative justice is an opportunity. Restorative justice is an option that is becoming more and more available to the courts where they deem that appropriate.

DR FOSKEY: Turning to the role of explanatory statements, another point raised by the scrutiny of bills committee is that, where there is a strict liability offence created or an increase in the penalty, that should be explained in full in the explanatory statement. It might mitigate against the need to talk about it in the Assembly if it is well explained.

Ms Leon: We usually do refer to the general principles that the government has made public about why and when it applies strict and absolute liability. I think that, as the attorney said in his opening statement, the hope is that as those principles become better understood in the Assembly it will be more straightforward to see that they are the principles that are being applied. There is always a balance to be struck between whether one explains particular clauses in much greater depth than other clauses, so one tries to obtain a balance about explaining clauses that are new and controversial and feeling less of a need to explain clauses that are simply the ordinary application of well-understood principles. Where we were proposing an offence that was somewhat at the outer border of these principles of strict or absolute liability, one might feel the need for greater explanation than where it is what one might call a common-or-garden strict liability offence that clearly falls within the existing principles.

THE ACTING CHAIR: Thank you, Attorney-General, and Ms Leon.

ROWLINGS, MR BILL, Chief Executive Officer, Civil Liberties Australia
WILLIAMSON, MR ANTHONY, Director, Civil Liberties Australia

THE ACTING CHAIR: Welcome. You were present when I read the card earlier so you do not need me to read it again.

Mr Rowlings: We've got it up here anyway.

THE ACTING CHAIR: Yes, and I am sure that you understand it. Could you start by stating your names and the capacity in which you appear today; if you wish to make an opening statement, we would be happy to hear that.

Mr Williamson: A very brief one. Civil Liberties Australia is of the view that the ACT Assembly needs to take great care when enacting strict and absolute liability offences or making elements of offences strict or absolute liability. Strict or absolute liability offences run against the ordinary grain of criminal law. It is a time-honoured principle in criminal law, as opposed to civil law, that in order to be found guilty someone not only has committed a prohibited action, but also has what lawyers would know as mens rea, which is Latin for a guilty mind. Strict and absolute liability offences dispense with the need to prove that someone has a guilty mind. That threshold of requiring the guilty mind has always been a mechanism for protecting the innocent and making sure that people are not unduly punished and that people are not punished for accidents.

Let me make a few comments. The attorney commented that he is hopeful that as a result of this inquiry there will be less debate within the Assembly with regard to strict and absolute liability offences. With great respect, I would have to take exception to that comment. It is one of the most important jobs of the legislature, and the members of it, to pass criminal laws, because those laws have the potential to intrude upon people's lives, their money, their assets and in some cases their freedom. I would hope that the opposite is in fact the case: that when matters of strict and absolute liability arise, the parliament here takes great care to debate these matters at great length, and they are not just glossed over. Do you want to add anything, Bill?

Mr Rowlings: I will make some comments as we go—and at the end if necessary.

THE ACTING CHAIR: Can I just ask this before I move to my colleagues. You made the comment that the Attorney-General made the comment that it was not intended—let me look at my notes—

Mr Rowlings: He said he hoped it would reduce time-wasting debate in the Assembly.

THE ACTING CHAIR: That was one comment made; I was interested in going not to that particular point but rather to the point that the intention was not to create new offences but to clarify those offences with strict and absolute liability. Do you believe that new offences have been created as a result?

Mr Rowlings: Absolutely.

Mr Williamson: Yes. A good example—

THE ACTING CHAIR: And would you point to those, please.

Mr Williamson: Yes. A good example, in our view, is the Criminal Code Harmonisation Bill. The bill re-enacted a number of previously existing offences—some 50-odd; I am not sure of the precise number—and made them offences of strict or absolute liability. The submission put to this committee before was that these were already strict liability offences—that they were just being updated for the purpose of the code and hence there was nothing new. We would disagree. Prior to the code, an offence was determined to be an offence of strict liability if a judge, after constructing the particular terms of the legislation and after considering submissions on the part of both the Crown and the defence, took the view that it was a strict or absolute liability offence. A number, if not the bulk, of the offences updated in the Criminal Code Harmonisation Bill have not been subject to judicial review. Hence, we cannot say with any certainty whether they would or would not have been found to have been strict or absolute liability offences. The best we can do is speculate. Until a judge or a competent court has ruled as such, we do not know that they were such. In our view, there were a number of offences created in the harmonisation process that are new offences because they have not been deemed previously to have been strict liability offences and at best we can just speculate that they might have been.

Mr Rowlings: Can I point to the danger of this as well?

MR STEFANIAK: Are you talking of any in particular?

Mr Williamson: I cannot recall all the offences in the bill. I would make one point with respect to that bill. In 2003, this committee recommended to the Assembly that, when passing strict and absolute liability offences, the explanatory memorandum for that bill should outline, with respect to each offence, why that offence dispenses with the need to prove mens rea or a fault element, why no-one has to have a guilty mind and why it is in the public interest, the interests of justice, for that to be done. That was the recommendation of this committee in 2003. The Criminal Code Harmonisation Bill did not contain such recommendations. Although it did have an explanatory memorandum, that memorandum did not make reference to the offences and why they should be strict liability offences as per the recommendation of this committee in the past.

THE ACTING CHAIR: Mr Rowlings, you were going to say something about the danger.

Mr Rowlings: If a law is unclear because it had not actually been decided by judges, and under harmonisation it was clarified and became a new strict liability offence, effectively it is a new law created under strict liability by the legal bureaucracy, not by the judges and the courts. This committee has always, I think, wanted the judges and the courts to make judicial decisions. We do not really want a system where the legal bureaucracy in JACS is making judicial decisions, but that is what has happened under the harmonisation of the ones that have been mentioned.

Mr Williamson: Further to your previous question, Madam Acting Chairperson, about whether there have been any new offences created and how many offences there

are, I would note that in 2005 a question was put on the notice paper by a member of the Assembly asking the Attorney-General how many such offences had been created and how many exist. His response was that there are so many that it would be a significant burden on his department to go and do that. The fact that he would come back with a response that says that it is such a burden he cannot do it would suggest to me—it is quite instructive—that there have indeed been a lot of such offences created.

DR FOSKEY: That was the earlier Attorney-General, Mr Stanhope?

Mr Williamson: That was Mr Stanhope; that is correct.

MR STEFANIAK: I think Simon said the same thing earlier.

DR FOSKEY: No, he did not say that.

THE ACTING CHAIR: Dr Foskey.

DR FOSKEY: I want to thank you for your submission, which does this committee a service in going back over some of the committee's previous work in another Assembly. I am interested in a bit of exploration as to the imposition of an inordinate number of strict liability offences. I think that your cursory examination of bills passed in 2005, 2006 or a period thereof indicates something like eight to 30 strict liability offences that were enacted during a sitting week in legislation that members often may not have examined thoroughly. I am wondering about the impact on the separation of powers. Do you think it has any repercussions there, given that an Assembly is making decisions that a judge might otherwise have made?

Mr Williamson: At the end of the day, these offences are created by the Assembly; that is the nature of the process. But the reality is—and I can say this with some experience, having worked as an adviser in this place—that most members will not read these bills. They will vote along party lines. Some members in this place will not even know what a strict liability offence is, but they are voting to create them anyway. Technically we say that the Assembly has created these offences, and hence this is the intention of the Assembly; but, given the reality on the ground, a lot of these offences are being created by members voting on them. They do not really know what they have done or understand the implications of creating these offences. I think that is a big problem.

Mr Rowlings: I would like to add to that. There is a saying that revenge is a kind of wild justice but the more man's thoughts run to it the more the law ought to weed it out. In strict liability offences, there is a kind of wild injustice which the more the legal bureaucracy's thoughts run to it the more the Legislative Assembly should weed it out. That is what is at stake here. It is really handing over the power to create offences to the bureaucracy because it is easier for the bureaucracy to handle those offences. That is really the bottom line of what we are talking about—creating types of offences that are easy to administer.

That is really what this is about. It is much easier for JACS, the people in the department and the system to administer these than it is to go to court and fight and prove things. Very basically, that is it. It comes down to whom you represent. I am

astonished here today to find that there are two of us, with an observer, putting in a submission—unpaid, free—to this committee representing hundreds of thousands of people out there. You have got six people from JACS and the court, including the Attorney-General, all paid and all on high salaries. We are the only ones here who have any knowledge of what is going on. When you talk about strict liability offences, the community does not know about this. The people who are affected by these are not the lawyers behind us, people like us or people in the know. They are the poor, uneducated, ignorant people who get caught up in these types of offences. That is exactly what is wrong with it.

DR FOSKEY: You heard me give some examples today. Had I had time to really look into various bits of legislation, I would have. You are referring to a class of people that I was pretty much told did not exist because the examples I chose were poor ones. Could you please give some examples of where the kinds of people that you are referring to can be particularly impacted by strict liability offences that have been put through this Assembly?

Mr Williamson: Let me give a good example of an offence that was proposed. It was not actually put through this Assembly, because there was quite a bit of debate on this particular offence, which is more of an exception to the rule: quite often these offences go through undebated. It was an offence contained in the Tree Protection Bill 2005. That bill created an offence under clause 15 (4) that a person—meaning any member of our community—commits an offence if that person does something that damages or is likely to damage a protected tree. Clause 15 (6) went on to make that an offence of strict liability.

When I read it out, it might not sound like much, but it is saying that someone is going to be found guilty of an offence if they have damaged a protected tree. In proving that offence there is no need to prove that they knew that it was a protected tree. There is no need to prove that they intended to do damage to that tree; they could have just accidentally damaged that tree. Ordinarily, at criminal law, you would have to prove that there was some type of mental culpability here—that they had gone out of their way to destroy it, that they had acted recklessly. There would have been no requirement to prove that had this offence been passed.

Had that offence been enacted, it would have impacted on potentially hundreds, if not thousands, of people with a protected tree on their premises. Quite a lot of them would not know what a protected tree is. As I recall, a protected tree was a tree entered into a register to be kept by the conservator of trees or something. Most people would have no clue that they had a tree on their premises that was subject to protected tree status. Even if they did, they might just accidentally damage a tree. You could be reversing out of the driveway and accidentally clip it. Are we really going to punish people for that when they have got no mental culpability and they do not really know what they are doing? That proposed offence is a particularly good example.

At the time the offence was being debated, I was involved in discussions with the environment department, who were the advocates of the offence. It was pointed out to them that this was the potential impact of this offence—that people could just accidentally damage trees, that they would not know that a tree was a protected tree. The environment department's attitude was this: "Well, we've had trouble getting

convictions in the past. It is just easier if we do this." They were not at all fussed or fazed that these implications could arise.

MR STEFANIAK: That is a good example. You can compare it with another law—a not dissimilar law—of malicious damage to property. There are obviously all the relevant fault elements there, and you have to have a malicious intention to do so. There is mens rea there. I just wonder whether, in framing the strict liability offences, the drafters could have regard to the fact that there are similar, existing laws that might militate against having a strict liability offence such as this one. You set it out quite nicely in your submission. Quite clearly, on a reading of that, if someone accidentally drove over a tree, prima facie they would be guilty of that. That is quite different from someone who actually intends to damage or take—

Mr Rowlings: Or knowingly acts.

MR STEFANIAK: Or knowingly acts.

Mr Rowlings: We have no objection to strict liability offences for the professional classes where it can be reasonably expected that these people are in the industry, as was pointed out in—

MR STEFANIAK: For example, your prohibited pest plant example.

Mr Rowlings: Exactly. I mean people who should know. They are entirely different from your average Joe in the street who is ignorant of the law, regardless of what was said about ignorance of the law being no excuse. That is legally correct, but morally bankrupt, in my opinion.

MR STEFANIAK: What about where there is limited strict liability, though? The example was given of some drug offences and pornography offences—socially undesirable things. There was the example of drug offences, especially with people with more than the prohibited quantity of a substance, where, using cannabis as an example, if you have more than 100 grams, it is deemed to be possession for supply.

The defendant has a defence to that—to satisfy, on the balance of probabilities, that they had it for their own use. That is not irregularly used in the courts—and sometimes successfully. That to me seems to be a reasonable mix. Yes, they are serious offences, and there is a strict liability element there. Do you say that, even in those sorts of situations, you should not have strict liability, or do you accept that there is a social need for—

Mr Rowlings: We accept that those cases should be decided in the Legislative Assembly. The suggestion that we do not have debate in the Legislative Assembly to define those parameters was fairly horrific. That is exactly the role of the Assembly—to say, "Well, which one of these offences is the type of offence where those things should apply?" The problem with this proposal and the harmonisation is that everything tends to be lumped into strict liability. There is a leaning towards strict liability first up, because it is convenient for the people who have to administer the law. That is the danger.

Mr Williamson: Yes. To be clear, the tree protection example was not a drafting mistake. It was not an instance of the drafters not knowing the—

MR STEFANIAK: No, no. It was deliberate.

Mr Williamson: The department went out of their way to insist that this should be in there because it was easier for them.

MR STEFANIAK: That is my concern. I can see why in those more serious offences. I think that type of principle has been around for about 30 years, and it probably works reasonably well. But what concerns me are things like the Tree Protection Bill where a department will do that simply for the sake of convenience. That will be very different from existing law. I use the malicious damage example because I think it fits in perfectly with what the environment department were trying to do here—make a strict liability offence where it was inappropriate. I wonder just how often that is occurring. These are the sorts of things you monitor. The scrutiny of bills committee does too, but do you see a greater propensity now for government departments to try to slip in strict liability and absolute liability offences which normally, in the law, would be offences where there is a little bit more latitude given?

Mr Williamson: I know of a couple. I know of a public servant in the Commonwealth Public Service. He is a friend of mine and he works for the legal policy area of one of the departments. They were bragging—boasting—about how many penalty units they could make for a strict liability offence. They thought it was clever. They had a little competition going to see how many strict liability offences they could put in and how big they could boost the penalty before people went, "No, you've hit the roof." So yes.

Mr Rowlings: It is fairly obvious. The JACS submission and the Attorney-General's submission were that there is a whole list of principles that need to be weighted before you make the decision on whether something is a strict liability offence. And that is the case. But one of those principles is ease of prosecution. If you are in charge of prosecuting and one of the principles you have to apply is ease of prosecution, don't you think it would be natural to give more weight to that than you are going to—

MR STEFANIAK: It is never easy in the ACT.

Mr Rowlings: It is fairly obvious which one you are going to put the weighting on, isn't it? You do not have to be Einstein to work this out. That is the danger. Under harmonisation, that is exactly what has happened. The excuse has been used to lump in a whole lot of strict liability offences—offences which were not strict liability offences and may never have been strict liability offences. Judges might have gone in a different direction. They were not given judicial review, so they have been decided by bureaucrats. I do not believe that that is the way to go. The danger is that we are arguing on these particular cases, but we know that over time, whatever way something leans, it will accelerate. If there are more strict liability clauses coming in—and there are—that is just going to gather pace. That is the danger. The danger is that everything becomes strict liability.

DR FOSKEY: Let me return to an example that I gave with the Attorney-General,

which was the pest plants example, one that you explore in your submission. I was assured by the Attorney-General and the chief executive of JACS that this strict liability would apply only to people who should have known better because it was their business to bring plants in. Again, I am just wondering about the grey areas. There always are grey areas. I am thinking about the stallholder at the local market. When JACS return later, I will ask them to clarify this for me. A lot of plants are sold this way. Also, a lot of plants are just brought in by people visiting their friends in Queanbeyan or elsewhere. I will ask how a person—a stallholder who might be someone who lives in the bush and does not have very much money—would deal with the situation. You are not JACS, so you can only speculate, but I am interested in that speculation.

Mr Williamson: The pest plants and animals example is a good example. Section 11 of the act creates a defence that a person commits an offence if the person in the conduct of a business of supplying plants supplies plants to someone else and the plant that is supplied is a prohibited pest plant. That is a strict liability offence. On one level you could say that if you are running a business and you are dealing with plants every day you should know what is and is not a pest plant. But in reality, although the owner of a nursery might be a qualified horticulturalist or whatever the term is, they might have a 16-year-old who comes in on the weekend just for a bit money to sell plants. They would not know what a prohibited plant is. Even they would fall foul of that offence if they sold that plant.

Although it is important to try and put limitations on strict liability offences—and there is a good effort made in the Pest Plants and Animals Act—you can see how there is scope for the act to have a pretty wide and oppressive effect on some people who, despite the best efforts of the Assembly to narrow the scope of the offence, will still be caught up in it anyway. The 16-year-old who comes into work at the weekend is a good example of that.

Mr Rowlings: Another thing that concerns me in this area goes back to the poor, the uneducated and the ignorant—the people who do not know. These are the people who get caught up in these things. I was surprised to hear how easily 50 penalty units and $5,000 rolled off the tongues of people who set these laws and do not understand that $5,000 might be three, four or five years income for some people who are going to be subject to penalties up to that level. In a room like this, with people in suits and so on, it is quite easy forget that these are the people who get caught up. It is not your educated people who can afford $5,000; it is the poor, the ignorant, and the badly educated—the ones that do not understand the laws. They are the ones who, generally, cannot afford more than $5, much less up to $5,000.

MR STEFANIAK: I do not know if that is accurate. Firstly, I suppose with any penalties the maximum is rarely, if ever, used, so you are looking at a fraction of it. Even with strict liability offences, you say it is invariably the poor who are the ones who cannot afford to be pinged. I do not know if in a place like Canberra that is really accurate. I would have thought it has general applicability right across the community. All sorts of people could be unwittingly pinged for some of these offences. Some of them might be poor but some of them may not be.

On that basis, that is one of the reasons this committee is looking at what would be the

maximum that should be allowed. I think it settled on $5,000 or 50 units. I think that is similar elsewhere as a reasonable rule of thumb, given the way the penalty structure across all sorts of offences applies these days.

Mr Rowlings: I think you would have to say again that it depends on the offence. This is where the debate is needed in the Legislative Assembly. We do not want legal bureaucrats deciding these issues.

MR STEFANIAK: It is a very good example you give of up to $5,000 for damaging a tree, whereas I think the maximum fine for high-level PCA is $3,000. What is worse—someone who is absolutely blotto at about 0.25 who has a maximum fine of $3,000 applicable or someone who, maybe unwittingly or maybe even partly deliberately, knocks a tree down.

They do not like a tree which is on their land; it is causing them a problem. If they knock it down, they would be subject to a fine of $5,000. In terms of what the community would regard as the more wrongful act, the more dangerous act, surely the drunk going at 0.25 is far more dangerous than someone who wants to get rid of a tree, even knowingly with a $5,000 penalty, let alone if it is a strict liability offence.

Mr Rowlings: The issue of balancing out the proportions in penalty units is probably one that might be a general reference for this committee every few years or something.

MR STEFANIAK: Yes, that is probably a sensible suggestion.

Mr Rowlings: They get out of kilter. There is no doubt about that.

DR FOSKEY: Just for interest, are you aware of how the level of a penalty point is decided? I am not really asking, but does it come to the Assembly when it is decided that a penalty point stops being a penalty unit? If it goes up, for example, from 50 to 100, is that a disallowable instrument?

Mr Williamson: It is in the Legislation Act. The Legislation Act provides the rate of penalty unit, and every so often it is revised. That is where it is found—in the Legislation Act.

DR FOSKEY: That is something on which one would like, I think, to see quite a bit of discussion in the Assembly.

MR STEFANIAK: There is a rule of thumb for times—although it does not necessarily follow—when there is a level of imprisonment without a penalty unit. I think in the Crimes Act there is a level of penalty units where they do not specify a fine as well as a term of imprisonment. But that is a bit higgledy-piggledy too. It is not a general sort of thing. You have so many offences where there is a fine and penalty units. Sometimes there does not seem to be a huge amount of logic in it. Yes, it is probably a good idea for an Assembly committee to look at that.

Mr Rowlings: I think it is. It just occurred to me that we may be able to help. We quite often have interns from the ANU law school who do two-month assessments over the summer period or whatever. It might be something on which we could work

cooperatively with you. We could, say, get a bright student to do the preliminary research on it, to help the Assembly decide something along those lines.

THE ACTING CHAIR: We already have that established. Here in the committee secretariat we had an ANU intern.

MR ROWLINGS: So you can access the same free labour as us.

THE ACTING CHAIR: Yes, we have.

Mr Rowlings: I think it would be worth considering that that is something that could be done.

THE ACTING CHAIR: We like to think of it as a learning experience for them.

MR STEFANIAK: We would ask the police and bailiff as well, I think, so it is wide ranging.

Mr Rowlings: Exactly. Can I come back to something Dr Foskey asked earlier about cost-benefit analysis? I heard a different question to the one that was answered, and I am not sure which one was correct. I thought your question related to it being easier to prosecute and get fines under strict liability, rather than how much it costs for the justice system to prosecute and so on.

DR FOSKEY: Yes; agreed.

Mr Rowlings: There is absolutely no doubt that it is simpler and easier to collect under a strict liability than it is where you have to go to court and prove mens rea. It is automatic. You write the speeding ticket, it is done and that is it; whereas if it is not strict liability it is a much more expensive and time-consuming process.

DR FOSKEY: What if, as you suggest and recommend in your submission, strict liability is managed to be contained to commercial operators who are affected by that? Is there a danger that paying those fines just becomes an expense a business operator bears because it is actually more cost effective for them to continue with that activity? Drug dealers might be the best example I can think of here. In a sense, that just becomes part of the operational cost of their business. Is that also an issue which is relevant to strict liability?

Mr Rowlings: That I think raises other issues that are to do with drug dealers and policing the community and so on.

DR FOSKEY: Let us go back to the commercial plant dealer, then. For some reason or other there is a good trade in a particular prohibited plant. They decide to put their head down and go with it.

Mr Rowlings: You would have "repeat offender", in which case legislation should cope with the fact of repeated offences. That would seem to be the way to deal with that. If you are concerned about that it would, I imagine, mean one or two extra clauses that talk about repeated offences, which would strike at that issue.

Mr Williamson: One issue that I think is related to your question is the distinction that is sometimes drawn, when we are talking about strict liability offences, between true criminal offences and civil offences. We have put in our submission that we think that is a very unhelpful distinction. An offence is an offence if the state is pursuing you for some type of punishment. For something to be of a civil nature, it is more or less to recover damages and put someone back in the position that they would have otherwise been in but for the act or the wrong.

We really find discussion about civil penalties and criminal penalties not to be useful. To us all offences are offences. They are of a criminal nature. They involve the state pursuing someone ultimately to extract some kind of punishment, usually by way of fine.

It is a distinction that the European Court of Human Rights has found quite unpalatable in recent decisions. By calling a strict liability offence a civil offence and not a true criminal offence, it seems to somehow trivialise it. They are offences. Although the penalties are usually towards the lower end of the spectrum, there can be other implications as well for a finding of guilt, because you have a conviction at that point. As well as being fined, you have a conviction that could affect your employment prospects and so forth. I might have digressed a bit from your question.

DR FOSKEY: It is actually a reasonable point to make as well—that example of the pornography and whether the person was of an age where they could have been seen to have freely entered into an arrangement. That is not always at the lower end of the spectrum as well. There is a certain amount of judgment about what is there and what is not.

Mr Rowlings: You always find in civil liberties that you are defending the indefensible. Let me just take the child pornographer, for whom I have no time whatsoever. How do you tell whether somebody is 12 or not?

DR FOSKEY: You ask for their birth certificate.

Mr Rowlings: I cannot believe that anybody would do that. That does not seem to me to be the point at issue in that particular illustration. It is pornography. It is not really whether somebody is 11 years and 11 months or 12 years and one month.

Mr Williamson: Related to my point, as well as making serious offences seem trivial it can cut the other way. You can have someone that commits a very serious pornography type offence and, because it might be characterised as a civil offence in nature, it seems to somehow trivialise the offence.

DR FOSKEY: It could have that effect. It could also rely on public opinion. Public opinion, which is not always informed opinion, goes one way. A strict liability offence might be sanctioned by the community, whereas in fact it is very anti human rights and so on.

Mr Rowlings: Classic. That is exactly what happens, as you well know. Something runs in the media and it ends up with members of the Legislative Assembly being the

safeguards of sanity in dealing with things in the proper manner and not being railroaded by what is running in the media.

Strict liability offences are a bit like the equivalent of mandatory sentencing, but they are mandatory at the behest of the legal bureaucracy to make life easier for government, lawyers and revenue collectors, rather than for the people. I think that is the real danger in this—that in weighting principles, the ease and convenience for those administering the law will get greater prominence than some of the other principles that are to be weighed.

MR STEFANIAK: I tend to agree with you, except that I do not know about the mandatory sentencing analogy. I think that is probably more a reaction in relation to the perceived problems with the courts.

THE ACTING CHAIR: That is one that we will probably keep arguing about.

MR STEFANIAK: I take your point in relation to strict liability offences, though.

Mr Rowlings: It is taking it away from the normal system and the way our system has worked. That is the point. That is why I meant the mandatory part of it.

THE ACTING CHAIR: Thank you very much for your time today, and also for your submission. As Dr Foskey said earlier, it is very helpful to our inquiry. We will be in contact with you with the transcript for you to check over. Once the report has come down, you will get a copy of that as well.

Mr Rowlings: Thank you very much. Can I ask a question of Robina on the process. The process was this: we got our submission in very early for this, like the first week or something. Then it was available, I assume, to the government before they gave their submission. Is that how these things work? Should they work that way or not?

THE ACTING CHAIR: They were authorised at the first opportunity. They were not available on the web, but they would have been available to the government, had they wanted them.

Mr Rowlings: Do you think that is the appropriate way for this to work? Why do we not see the government's submission before we put ours in? That would be a far preferable way for us to operate, rather than the other way around. Again we come back to who has the resources and who gets paid for doing the work.

THE ACTING CHAIR: That is another whole conversation. If you want to have a chat with Robina after the hearing, I am sure she would be happy to talk to you about it.

Mr Rowlings: All right.

THE ACTING CHAIR: We appreciate the fact that you have put it in. We are aware that you are not paid to do this. It is run as per the normal way that committees receive submissions, authorise them and make them available as soon as possible.

Mr Rowlings: Okay. It just means that in future we will hold our submission back until the last day. That is what we would do. The effect of our submission coming in and being available to government is that we will not do it that way anymore.

DR FOSKEY: I do not know that they actually spoke to your submission.

Mr Rowlings: No, but before they wrote their submission they had ours. We would rather have had their submission before we wrote ours.

DR FOSKEY: Please feel free to write a supplementary submission.

THE ACTING CHAIR: That is right. You can do a supplementary one.

Meeting adjourned from 10.58 to 11.17 am.

BAYNE, PROFESSOR PETER, Professor, Australian Catholic University, and adviser to the Standing Committee on Legal Affairs, sitting as the Scrutiny of Bills and Subordinate Legislation Committee

THE ACTING CHAIR: I welcome Professor Peter Bayne. You have the card in front of you; do you understand that these hearings are privileged and are being broadcast?

Prof Bayne: Yes.

THE ACTING CHAIR: Excellent; it will save me reading the entire card again. Mr Seselja has profusely apologised; he is not well today so he can't be with us, which is why I am chairing the hearing.

Thank you for putting in a submission. Do you wish to make an opening statement?

Prof Bayne: Yes, thanks. Perhaps I will summarise the main points. It's a fairly technical area of the law but nevertheless one which raises acute policy issues that are embedded in or arise out of the Human Rights Act. What the paper addresses, and an issue that has come up, of course, many times over the years in the work of the scrutiny committee, is the situation where an offence provision in a statute is worded in such a way that, in order to escape being found guilty, the person charged, the defendant, has to either prove the existence of some fact or even adduce evidence of the existence of some fact.

This engages the presumption of innocence. This is the view I'm taking, anyway, and I think it's one that is generally taken. The presumption of innocence is recognised in section 22 (1) of the Human Rights Act:

> Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

What that means is very debatable. The presumption of innocence is really a label that is attached to a number of quite discrete common law doctrines or common law notions, and it's thought that they're picked up with that. But I'm taking the view that what the presumption of innocence picks up is the principle that sort of underlies our criminal justice system: where a defendant is charged with an offence, he or she can remain mute throughout the entire proceeding; that is, they are not obliged to say anything, they're not obliged to put any evidence before the court, or adduce any evidence, as lawyers say. They can simply remain mute and say to the prosecution, "You have to establish that we are guilty." That, I think, is a notion that is reflected in the presumption of innocence.

If, therefore, you have a statute which casts upon the defendant some kind of obligation to say something, to put some evidence before the court, either through their own mouth, through the mouth of another witness or through proof of a document, which nearly always is produced through evidence from a witness anyway, you're engaging the presumption of innocence. And there's a question about whether the law is compatible with the Human Rights Act.

Let us just remind ourselves: compatibility is not simply a question of whether one can say the law derogates from the presumption of innocence; it's also a question of whether that might be, nevertheless, justifiable under section 28.

That opening remark is a little bit broader than what I said in the very first paragraph of the paper, where I suggested that a reverse onus of proof problem arises where it casts on the defendant an obligation to carry either an evidential or a legal burden of proof in respect of the existence of some fact. Just to make it plain—I'm sure the committee understands, but it might be useful to say—where the defendant carries an evidential burden of proof in respect of the existence of some fact, the defendant has to adduce evidence which would be a basis for a jury acting reasonably or a magistrate acting reasonably to find that that fact exists.

If that burden is discharged then the prosecution, in effect, has to prove that that fact does not exist. Where the defendant has a legal burden of proof, he or she must establish to the satisfaction of the trier of fact—the jury or the judge et cetera—that the fact exists, not necessarily beyond reasonable doubt. In fact, in a criminal matter it would nearly always be on the balance of probabilities, but there's nothing to stop a statute actually requiring proof beyond reasonable doubt.

I put it somewhat broader. I think there's a presumption of innocence issue even if the defendant merely has to adduce some evidence of a fact. I'll point to a situation just down the track a bit where that could arise.

I will sort of do it in reverse order in some ways from what I have in the paper. The issue that has most concerned the scrutiny committee, and which has been the subject of debate with the government over the years, arises in relation to cases where the statute imposes strict liability in relation to either all the elements of the offence or only one of the elements of the offence. Where the statute provides that the offence is one of strict liability, the result is that the prosecution need not prove that the defendant had any particular state of mind; he certainly did not have the state of mind of intending to commit the acts which amount to a breach of the provision. So the fault element is removed. All the prosecution has got to prove is that the defendant did commit the acts which make up the offence and then the defendant is liable, whether or not he or she intended to commit those acts.

That rule is modified by a provision in the Criminal Code of certain defences that are available to a defendant even if the offence is one of strict liability. Of course, if the defendant wants to invoke one of these defences the defendant has to not only adduce evidence to establish the defence but also carry an evidential burden in relation to the offence. Those defences I've listed in the paper. The defences include reasonable mistake of fact. There are also defences in relation to intervening acts et cetera.

What the code does not do—and this was a matter of a lot of debate when the code was being debated—is provide for a defence of having taken reasonable care. In other words, a defendant might be aware of the offence provision, might be aware of strict liability; often they will be. If they take reasonable care to avoid committing those acts that constitute the offence but, notwithstanding that, they do commit those acts, they are liable, because strict liability exists in that situation.

I'm making this point because in the early days when the committee was pointing out that the offence was one of strict liability and that the presumption of innocence was engaged—and it pointed out how—the government tended to say, "Oh, yes, but look at all the defences in the code when the offence is one of strict liability." What the committee then pointed out was that that was all very well but those defences do not include a person having taken reasonable care to avoid committing the acts that constitute the offence. That is just by way of saying what I've said in the paper and what committee reports have said many times: why an offence of strict liability engages a presumption of innocence and how it does.

The situation is more serious, if you like, from a human rights point of view when the offence is one of absolute liability, because here the defendant's ability to escape liability is much more limited. We've been through this; many committee reports have dealt with this issue. The committee has pointed out to the government or to the proponent of a bill—because it has arisen in some private members' bills as well—that the bill would lead to the enactment of strict liability offences and absolute liability offences, pointed out that there is a human rights issue arising and has then said something about it.

What it has come down to in the last couple of years is that quite often the committee doesn't say much about it because it usually recognises that there is a justification—it often points to the fact that the penalty provision is quite low—and then it goes on to say that in the circumstances if the committee accepts the justification then it doesn't see any problem. Indeed, sometimes it points out the merits of the justification.

But from time to time the issue still flares up; that is, the committee spots a provision in a bill which imposes strict or absolute liability and it doesn't feel that the proponent of the bill has given enough in the way of justification of the provision. In the absence of that justification, there is a real issue of compatibility with the Human Rights Act, or even if there is justification there might still be an issue of compatibility.

What I'm suggesting in the paper is that this committee endorse the view that it has taken in relation to strict liability offences or absolute liability offences; that is that the explanatory statement to the bill must identify what offences will be ones of strict and/or absolute liability and it must offer a justification for the derogation from presumption of innocence that arises out of the imposition of that offence, the imposition of strict or absolute liability.

The committee took that position early on. The government initially—I'm talking about the last Assembly—was reluctant to offer anything in the way of a justification, more or less saying, "Well, it's up to the committee to spot a problem and say something about it; we shouldn't have to say anything about it." It's now very common for explanatory statements to offer something in the nature of a justification for the imposition of strict or absolute liability; sometimes it says quite a bit, sometimes it says a little. All I'm saying is that this committee should endorse the position that a justification be offered.

The second thing that I'm suggesting, and I think this would go a long way to making the debate between the committee and the government somewhat less heated sometimes—it would also give a great deal of guidance to the legal profession and the

courts—is that JACS, as the government's advisers, should prepare a paper which would be endorsed by the relevant minister and would outline what is the government's general position as to when strict or absolute liability is justified. This is something that the commonwealth government has done through its Minister for Justice and Customs, in a paper which I've referred to throughout my paper. I can't see any reason why this government, or our government if you like, or JACS, couldn't do the same thing.

In the paper I have summarised the basic points that were made in that commonwealth paper. I've summarised the basic position taken by the Senate Standing Committee for the Scrutiny of Bills, because they tend to take a somewhat different position, but I've also referred to this committee's reports in its scrutiny of bills function where it has attempted to elaborate a framework.

I really think that the time has come when JACS should publish a statement of its framework within which the government will determine whether or not to impose strict or absolute liability. Of course in a particular case it may wish to say: "We've imposed strict liability here. We recognise that we've done it in circumstances which don't fit within the framework, and here are the reasons why we've done it."

One particular situation where that will always be the case, I think, is where the potential punishment for a provision is imprisonment, because where you have an offence of strict or absolute liability and imprisonment is the potential penalty I think there is a serious question whether that is compatible with the Human Rights Act, even taking into account the justification clause in section 28.

There is a body of Canadian authority which tends in that direction very clearly, there are English cases that are clearly tending in that direction, and European cases. So of where the provision in the legislation is imposing strict liability and prison is a potential punishment there is a real question. It may be that, in the framework document that I'm suggesting, JACS would recognise that and say, "Well, this is when we do it." It might be hard for them to do it in advance; that's something they'll have to deal with at the time. It seems to me that that's a really important reform—that JACS make a move to prepare that kind of document.

One can go a bit further. The scrutiny committee has from time to time suggested that the government should explain not only why it's imposing strict or absolute liability but also why it is not providing for an offence of due diligence or not allowing the defendant to say, "I can prove I took reasonable care." That's something that's a bit more controversial. The government has certainly resisted ever doing that, notwithstanding that it does from time to time—and one doesn't discourage this, of course—impose strict liability and then explicitly provide for a defence of reasonable care. When it does that, the scrutiny committee reports will usually pick it up and say that that's a fine thing to do; that reduces the compatibility problem.

In the best possible world the explanatory statement would do that; it would say, "We're not providing for that defence here." They don't ever do that, but the committee might want to consider whether to add that to it. In other words, the explanatory statement should justify the imposition of strict or absolute liability and then also justify why they're not providing for a defence of reasonable care.

I suspect the government will not want to go down that second step, but the government position is interesting. When the committee first raised this, the response that came back from the government was, "We don't like using concepts like reasonable care; they give too much power to the judges to decide what the law should be." In fact, the committee at one point said, "Okay, we agree with that." But then I've noticed that some provisions of bills are putting these defences in, so the government's policy on that is not entirely consistent.

That is all I want to say about strict and absolute liability. I can pause there if you like, if you've got any questions, before I deal with the other two aspects of the paper.

THE ACTING CHAIR: I'm sorry could you repeat that?

Prof Bayne: I just said I might pause there, if you've got any questions. What I'm saying will be familiar to you all, but, as I said, it comes down to my view. It comes down to getting a government statement which gives us a framework, a basic principle.

I'll just add this: where the explanatory statement is concerned, I think it's possible to have a pro forma sheet. It would be a reasonably easy matter for those who are preparing the explanatory statements to identify each provision that does impose strict or absolute liability and then say, "Well, we have a number of justifications"—they might have one, two, three justifications—and in relation to each provision say which of one, two or three, or more than one, two or three, applies to it. I can't see that it's a really big burden on the drafters to identify the strict and absolute liability provisions and say something about them. And I have to say that most bills are now doing it.

DR FOSKEY: Professor Bayne, I wonder if you would mind just commenting on a couple of things that have been said earlier this morning. Have you been watching the proceedings?

Prof Bayne: No, sorry, I haven't.

DR FOSKEY: It's fascinating TV—better than cricket. I just want to ask you first of all to comment on something Mr Corbell said. He may have meant this quite flippantly, but nonetheless it has been commented on by the civil liberties people. He said that he would like the report from this inquiry to be such that it reduces the time—I think he used the word "wasted" but maybe "spent"—in the Assembly discussing these issues. I commented that, given that it's actually the Assembly that sets, in a sense, the strict liability offences, because the legislation comes through us, that didn't seem appropriate. Then Mr Rowlings from Civil Liberties Australia said some stronger things. I would like your comment about the role of the Assembly in setting strict liability offences and its relationship to the separation of powers, which we uphold pretty strongly in this country.

Prof Bayne: I'm not sure it's got much of a relationship. It's fairly obvious that the Assembly passes the laws and that's the place where they're debated. In terms of time being spent on it, I think that a great deal has been achieved in the last two or three years. Historically, this goes back probably even to the start of the last Assembly, not

the current one. There certainly has been a degree of annoyance in government circles that the committee were saying, "You should justify why you're imposing strict or absolute liability." But that issue seems to have sort of resolved.

My impression is that the government is now, for the larger part, offering a justification. I am speaking as the person who prepares the drafts, of course, for your committee, and, whereas in the past the committee would often say, "Well, we think there's a problem here because there's no justification," the committee's reports are now often saying to the Assembly, "Well, we don't think there is a problem, one, because the government has justified in general terms why it's doing it, and, secondly, the offence provision is well within the parameters of what the committee has thought to be appropriate."

In other words, if the penalty units are, I think, 50 or less, the committee sees no issue at all in terms of the level of penalty being a problem. Then it says, "Well, if there's a justification and if this level of penalty seems appropriate, the committee simply draws it to the attention of the Assembly," and I'd be surprised if there's any debate in the Assembly about it. The government responses aren't even addressing it. The only time it's coming up now as an issue is where there's either a complete lack of justification and it would seem fairly clear that one should be provided and/or where the penalty is more than the 50 penalty points, particularly if it's imprisonment.

These are the ones that classically require a rights debate. To imprison a person, even though they did not intend to commit the acts that constitute the offence and they took reasonable care to avoid committing those acts, seems to me to really raise a question of compatibility with the Human Rights Act. I don't know what the Supreme Court here will do, but there's plenty of authority to say that that's incompatible. If that issue causes debate in the Assembly, I would only think that's a good thing.

I don't know who has advised Mr Corbell about that, but my impression is that the heat has gone out of it. There was a lot of heat in the last Assembly. With the first bill that came up in this Assembly, the classification of films et cetera legislation, the government did offer a justification, and the committee's report was, "Thank you for doing that. We now have got a better understanding." Since then I don't think it has really been a big issue. As I said, the only time I think there's been any kind of degree of sharpness in the committee report that would require the government to spend time justifying it or might cause debate in the Assembly is where there really is an issue of compatibility.

I hope I've given you the answer, but I don't think it is such a big issue as it has been. The further thing was that, if JACS was to do what the commonwealth has done and publish a framework document that said, "This is our policy," the committee could then consider it and say, "That's okay by us" or "We've got a reservation about this." That would make it much easier for the committee to quickly say something to the Assembly about whether there was an issue or not. So I think that would advance things rather than complicate them.

DR FOSKEY: The second point that I want to raise with you is again something Mr Rowlings said—that strict liability and absolute liability provisions make it easier for the bureaucracy.

Prof Bayne: Well, they make it easier to prosecute a person; that's axiomatic. That's the point of it. But that's why you need a justification for doing it. If you look at the justifications that are offered for this in the commonwealth document and by the Senate committee—the Senate committee has a somewhat stricter view than the commonwealth document—they are usually in terms of, "We need to do this to make it easier to prosecute because this offence is one of a regulatory nature." It's like regulating the content of food or something like that: if we are put to prove all the elements of the offence, including the fault element, and more particularly the fault element, we won't be able to enforce the law and we'll still have adulterated food.

What usually runs together with that is the notion that, okay, some person is going to be convicted of a criminal offence but it's not one which carries any moral stigma. Where there's a moral stigma attached to the commission of the offence, there's a very strong argument that you should not have strict or absolute liability. The classic example has been adulterated food—although it's quite serious, of course—or where someone has failed to comply with some condition of a licence or something. There are always objectives behind these things—public health, public safety. The argument has been that the dictates of public health and public safety trump the presumption of innocence in this particular case.

We've been doing that for 100 or more years in our legislation and it's generally accepted that that is justifiable. The other argument, which often goes along with the ones I've been making, is that the element of the offence which strict or absolute liability attaches to—the facts underlying whether that fact exists or not—are ones peculiarly within the knowledge of the defendant. So it's fair to force the defendant to adduce some evidence on the point, bearing in mind that the rule that operates here is that in relation to the defences it's an evidential burden only. I've pointed out that reasonable care is not included.

One can take a purist view and say, "Any time there's an offence that includes elements of strict or absolute liability or if all the elements are strict or absolute liability, it makes it easier for the prosecution." That's the very point of them and the question is: is it justifiable to do it? Legal tradition and practice over 100 or more years suggest that, yes, it is justifiable—in certain circumstances. That's the very reason the committee has said, "Tell us why you're doing it."

THE ACTING CHAIR: Did you want to add anything further?

Prof Bayne: To the others?

THE ACTING CHAIR: Yes.

Prof Bayne: Yes, I'll be very quick. The debate has been on the strict and absolute liability offences, but there are plenty of other provisions in legislation which cast an obligation on the defendant even simply to adduce evidence of a fact. You get an averment provision. A provision of an act will say that, if on a trial et cetera the government produces a certificate from a government analyst that a certain substance has a certain chemical configuration, production of the certificate is evidence of that fact. That doesn't establish a presumption that that's the fact; it doesn't put the court

in a position where it has to accept that that's the fact. If the defendant wants to contest that it is the fact that that chemical has got a certain configuration, the defendant has to lead some evidence about the product. It's what we call the tactical burden. They don't generally give rise to much problem; I rarely comment on them in the reports. But you could have an averment provision which did cast upon the defendant a significant practical burden or what we call tactical burden—and they also raise issues.

Again, what I've said about it is simply that that's an issue that the commonwealth report paper deals with; a JACS publication should as well. You can also get a reversal of an onus of proof in ways other than by strict or absolute liability provisions. Again, I've simply said, "Well, where that's the case, there's a human rights issue," and again JACS could produce a paper which gave us a bit of a framework.

This point I'll finish up with because it's very technical. There are still issues arising as to whether, when it's on its proper construction, a provision of a law does put on the defendant an evidential burden of proof to establish a fact. Very quickly: there's an assumption made that when you're looking at an offence provision you can classify some parts of it as constituting the elements of the offence, which means those matters which the prosecution must establish, and you can then classify some parts of it as providing for a defence, as providing for matters which the defendant has to establish. When you analyse it—and philosophers have done this at length—it's a meaningless distinction, because the mere form of the provision can lead you one way or the other, and form shouldn't govern anything; substance should.

Secondly, even form is not a guide to many provisions. It seems that the problem lies in the Criminal Code; the code is allowing for this uncertainty to continue. I think the most desirable reform is to reform the Criminal Code so that any proponent of a bill that wanted to impose on the defendant an obligation of proof, so the matter is a matter of defence, would have to use certain wording to achieve that—and then you'd remove the problem altogether; we'd know where we stand.

But the Criminal Code doesn't do that. If the bill uses certain wording, a legal burden is imposed. If it doesn't use that wording, it may nevertheless be that an evidential burden still lies on the defendant. My suggestion is that certain wording has to be used to create either a legal or an evidential burden. The default position would be an evidential burden; then, if the government wanted to have a legal burden, it would have to expressly say so. But you'd have to amend the Criminal Code to do that, and the government may not want to do that because the Criminal Code is being adopted across all Australian jurisdictions.

The other way to do it is for the government to announce as a matter of drafting practice that it will only use certain formulas if it wishes to achieve the result that a defendant has an evidential burden or a legal burden. I don't know whether they'll do it, but it is a situation that raises a rights issue and the law should be clear. We shouldn't be in a position where lawyers looking at a provision of an act can say, "We can't tell for certain whether this imposes an obligation on the defendant to prove something or not." We simply shouldn't be in that position; but we are, and that's the issue that I've addressed in the first part of the paper. It's highly technical. I do not know what I can suggest to the committee, except simply perhaps to report that it had

submissions on this and see what the government says about it. It is highly technical; it would take me another hour to explain it, but I won't try to do that, you'll be relieved to know.

THE ACTING CHAIR: Thank you very much, professor, for your appearance and your submission.

Short adjournment.

CORBELL, MR SIMON, Attorney-General, Minister for Police and Emergency Services and Minister for Planning
PHILLIPS, MR BRETT, Deputy Chief Executive, Department of Justice and Community Safety

THE ACTING CHAIR: Attorney-General, thank you for coming back. Mr Phillips, I understand you are stepping in for Ms Leon.

Mr Phillips: Yes. Ms Leon apologises for not being able to attend the second session.

THE ACTING CHAIR: Attorney and Mr Phillips, you would be aware of some of the comments that have been made by Civil Liberties Australia and Professor Peter Bayne since you appeared earlier today. I invite you to reply to those comments. I am sure you would be happy to respond further once the transcript has gone out and you have had a chance to look in full at what has been said. We would appreciate that. Would you like to make a bit of a response now to some of the issues that came up earlier today?

Mr Corbell: I will ask Mr Phillips to do so. He has followed the other evidence this morning a bit more closely than I have, but we will be able to respond to a couple of issues. I ask him to do that.

Mr Phillips: I understand that CLA were concerned about a number of the strict liability offences in the harmonisation bill being new offences. I would just repeat or reiterate the evidence that you received earlier from Ms Leon that none of the offences that we drafted in relation to the first harmonisation bill were intended to be anything more than the offences currently on the statute book at the time.

There are a number of factors that we use in relation to framing strict liability offences, if I may indulge the committee in relation to the way we process. We look at a number of factors which support the use of strict liability offences. They include whether physical elements are preconditions or jurisdictional elements, and the defendant's state of mind has little, if any, bearing on his or her culpability; where 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 risk of contravention; where offences deal with public health and safety, the environment, protection of the revenue and the maintenance of industry professional standards; 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; whether the defendant will be able to provide relevant evidence to support a claim that they acted without fault; where the penalty is generally limited to a monetary penalty, as previously suggested, and as a general rule the maximum monetary penalty is not more then 60 penalty units—I know that some of the submissions refer to 50 penalty units; where it is not solely to address resource requirements or administrative convenience; where the physical elements are not truly criminal—they are not criminal in any real sense but are acts which in the public interest are prohibited under penalty; and where the requirement of proof would undermine the deterrent effect so that a good many defendants might deliberately break the law or at least take too little care in avoiding its infringement. There are a number of factors, also, that we use to assist absolute liability.

I know Professor Bayne made a submission in relation to guidelines that he thought would be particularly useful. I can say that the department is developing offence framing guidelines as part of its ongoing work program. So those guidelines are currently under development.

THE ACTING CHAIR: That is interesting. We will probably look at the transcript of Professor Bayne's evidence and draft some questions for the department and the attorney in relation to that, which might be a better way of dealing with the issues raised.

Mr Corbell: Yes. If you have any specific questions I am happy to try to answer those.

DR FOSKEY: Most of my questions arise from evidence given since you appeared before us. What are the arrangements when, say, the environment department is creating a bill? How do they liaise with JACS in terms of deciding what provisions should go in as strict liability offences and so on?

Mr Corbell: There is pretty constant dialogue between the justice department and other departments. The example I will use is one for my own portfolio, the new planning legislation. Dr Foskey, you have seen an exposure draft of the new planning legislation, as have many others. There is a whole range of penalties in there which have strict and absolute liability around contravention of a building approval, a development approval and so on. Those penalties and those offences are the subject of quite detailed discussion between the department responsible for drafting the legislation—in this case ACTPLA—and, obviously, parliamentary counsel and the justice department.

There is no formal statutory framework. It is just part of the business of government that departments that are preparing legislation for their ministers meet with the justice department to discuss issues around the appropriateness of the penalty and offence framework that is proposed. That is outside of the more formal arrangements for circulation of legislation prior to its consideration by cabinet, where all legislation is circulated to departments prior to the cabinet consideration process and departments have the opportunity to formally comment as well as informally discuss the issues ahead of circulation.

Ultimately, the check is that if, for example, justice is unhappy with the response of departments to issues raised around offence provisions, they can and do brief me, and then those are matters that are dealt with in the cabinet process. So there is a range of mechanisms to make sure that there is proper, well-informed consideration of the appropriateness of offences and penalties.

DR FOSKEY: So that is a harmonisation process in itself, to get consistency across legislation from all departments, but would there be differences? It sounds as though it is up to the department preparing the legislation to spark off that process, but would there be differences between some departments about the amount of time they give JACS, for instance, because that would seem to be a relevant consideration?

Mr Corbell: Certainly the time frames do vary, but I think everyone within the

administration understands that you ignore the views of other key agencies at your peril, because you are not necessarily going to get cabinet agreement if, for example, the Attorney-General is being briefed to say that these offence provisions are completely inappropriate and cannot be supported. There is, I think, a sufficient series of disciplines inherent in the process of negotiation within government agencies that allow these issues to be fleshed out.

DR FOSKEY: A relatively small point was raised in terms of somebody whose business has to do with pest plants—although it was such a poor example, I am going to flog it—and for whom it is actually more profitable for the business to continue to retail pest plants and pay the fines. Is there some provision whereby repeat offenders are covered by penalties, given that Ms Leon made a point of saying that the desire is to catch people whose business it is to know that what they are doing is an offence and would incur a strict liability order?

Mr Corbell: I think it would depend on the circumstances. It would depend on what other provisions exist in legislation. Again, I am not familiar with pest plants and animals but, for example, in planning legislation if, say, a builder repeatedly ignored the provisions of a building approval, was fined several times but decided he would just keep going because it was more profitable to build the house rather than just paying the fine, there are other sanctions potentially available to government agencies. In that example, the builder's licence could be suspended or taken off them. So it would depend on the circumstances and it would depend on what other regulatory provisions there were to enforce compliance. It is very much a case-by-case analysis, but certainly there are many examples, particularly in all of the regulated professions, where there are disciplinary measures in place around the registration of people to perform certain occupations—builders, doctors, dentists, podiatrists. There is a whole regulatory regime around their actual registration as people in that class of profession, aside from the penalties they face around strict and absolute liability.

DR FOSKEY: Civil Liberties Australia ACT also found—I hope I am representing their point of view correctly—that the distinction that is made by JACS between criminal and civil offences is a little arbitrary and/or blurred. A member is sitting in the audience, but he is not allowed to say anything and has to rely on me representing him. Anyway, I just wonder if you could make comment there.

Mr Phillips: Only that in creating or framing an offence the government does not rely on distinction between a civil and a criminal classification. It looks at the offence and the wrong that is trying to be cured and then frames an offence based upon that wrong. I know that at commonwealth law—say, for example, in the Corporations Law—there are offences that are referred to as civil offences in civil proceedings in relation to company directors and various things like that, but that is not the way that we look at framing the legislation in the ACT.

DR FOSKEY: Given that strict liability offences are, prima facie, a breach of the Human Rights Act, do you think that the reasoning behind the decision of the human rights section of JACS to award compatibility certificates to bills that include strict liability offences should really go into some discussion, in the absence of us getting the thinking behind the certificate of compatibility, into how and why that strict liability offence is actually justified?

Mr Corbell: We would not accept the proposition that, simply because a piece of legislation has a strict or absolute liability offence within it, it is a breach of the Human Rights Act. I wouldn't agree with that proposition to start with. As to the explanation that is given in compatibility statements, as you know, compatibility statements at this point are really simply a certificate that certifies they have been assessed as consistent. There have been though, as you would be aware, instances where the government has chosen to provide more detailed justification for that compatibility assessment. The two examples I can think of are, first of all, the Mental Health (Treatment and Care) Act amendments around electroconvulsive therapy and the other around the preventative detention rules.

In both of those instances, the issues under consideration were extremely contentious and difficult and we thought it was in the interests of an informed debate in the Assembly that the complexity of these issues be teased out with additional material, but that is not the practice day to day and we would seek to use, as Ms Leon said in our evidence earlier this morning, the explanatory statement to outline what the issues are around the provision of particular strict and absolute liability offences and why they have been framed in the way they have. But, as Ms Leon indicated, not for common-or-garden variety offences but where it is going perhaps to more of a grey area or more of a complex area we would seek to explain that in the explanatory statement.

DR FOSKEY: Professor Bayne's evidence this morning suggested that if there were, as Mr Phillips indicated there will be, framing guidelines or a framework for application of strict liability offences, then it would only be where there was some deviation from that that the explanatory statement would be useful for us, as legislators or members of the Assembly and certainly the scrutiny of bills committee, to know why there was a deviation from that, that that would be a way of simplifying that process.

Mr Corbell: It possibly could. We haven't considered what the process would be in that regard at this point.

DR FOSKEY: Also, when a bill contains provisions that include a reversal of the burden of proof, which, in a sense, is what these are, the explanatory statement should contain a justification and also in relation to your saying earlier, when you began your answer to my question before last, that you do not believe that SLOs are prima facie a breach of the Human Rights Act. It is that reversal of the burden of proof that might make some people believe that it is. That is possibly a matter of opinion.

Mr Corbell: Some people may assert that, yes, but the government would not agree. I have to stress, I think, that we consider, as do all governments consider, strict liability offences as an established area of law-making, an accepted and effective way of managing compliance with regulatory schemes and with a range of other situations that have been outlined in the principles we have provided to the committee before and we just don't believe that there is a fundamental problem with the application of strict and absolute liability offences. It is an established area of law-making. There is much precedent around it and it works in achieving compliance in areas where, for public health, safety, environmental protection or whatever else, the range of other

circumstances that we outlined in our evidence earlier today, it achieves a good purpose for a common good. The government does not accept that the whole approach around strict and absolute liability is in question. There may be issues around the edges where we need to resolve areas of ambiguity, but it is not, in our view, the case that it is fundamentally under question.

DR FOSKEY: To go back to my pest plants example, which might not be such a bad one, I would like to have something cleared up. It is not about somebody who is a large wholesale seller of horticultural supplies and so on. It is about somebody with a stall at a market, for instance—in that grey area, I guess, between whether a person should be expected to know or not—who inadvertently has amongst their stock a plant that is a pest plant in the ACT. It could be someone from across the border, for instance, with different rules, although I don't believe the rules are that different. I am just wondering whether, in that case, they would be subject to the legislation or whether it would be understood that there is this grey area.

Mr Corbell: I think that public officials are pretty sensible most of the time in the way they do their jobs and, if there was an instance such as the one you outlined, you would expect a public official to make a judgment about whether or not it was appropriate to impose a penalty.

DR FOSKEY: They may choose just to give a warning.

Mr Corbell: Yes.

DR FOSKEY: Even though it is strict and absolute liability.

Mr Corbell: Yes, they may.

DR FOSKEY: So there is a little bit of movement there.

Mr Corbell: I think there is always a bit of movement around these things. Correct me if I am wrong, but I imagine that if a ranger came across someone selling plants at Jamieson trash 'n treasure and there happened to be a declared weed amongst them, they might just say, "Do you know that is a weed?" That is how I would expect public officials to conduct themselves.

Mr Phillips: Perhaps, Dr Foskey, I can recount something from a previous life. I acted as Commissioner for Fair Trading for a couple of years and we used to have shows every year with people coming in from interstate. There has to be that margin in there, because people will come in with different packages, different goods, and they will have different expectations. So there is that margin that is given by public officials.

THE ACTING CHAIR: We will finish there. Thank you for reappearing. As I said earlier, we will be in contact.

The committee adjourned at 12.17 pm.