

## 12. Strict and Absolute Liability

---

### Contents

A common law principle	85
Protections from statutory encroachments	87
Australian Constitution	87
Principle of legality	87
Justifications for encroachments	87

### A common law principle

12.1 There is a common law presumption that ‘*mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence’.<sup>1</sup> The general requirement of *mens rea* is said to be ‘one of the most fundamental protections in criminal law’,<sup>2</sup> and it reflects the idea that

it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).<sup>3</sup>

12.2 Ashworth and Horder write:

The essence of the principle of *mens rea* is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and consequences.<sup>4</sup>

12.3 Some criminal offences, however, do not require proof of fault—these are described as strict liability and absolute liability offences. The Terms of Reference for this Inquiry ask the ALRC to consider laws that apply strict or absolute liability to *all* physical elements of a criminal offence. However, at this stage of its inquiry, the ALRC is interested in submissions on offences with any strict or absolute liability element which people consider to be unjustified.

12.4 This chapter discusses the source and rationale of the *mens rea* principle; how the principle is protected from statutory encroachment; and when it may be justified to create a criminal offence that does not require proof of fault. The ALRC calls for submissions on two questions.

---

1 *Sherras v De Rutzo* [1895] 1 QB 918, 921.

2 Attorney-General’s Department, ‘A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers’ (2011).

3 *Ibid.*

4 Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 2013) 155.

**Question 12–1** What general principles or criteria should be applied to help determine whether a law that imposes strict or absolute liability for a criminal offence is justified?

**Question 12–2** Which Commonwealth laws unjustifiably impose strict or absolute liability for a criminal offence, and why are these laws unjustified?

12.5 In Australia, criminal offences are generally characterised in one of three ways:

- *mens rea* offences—the prosecution must prove a physical element (*actus reus*) and a mental element (*mens rea*);
- strict liability offences—the prosecution is not required to prove fault, but there is a defence of reasonable mistake available;<sup>5</sup> and
- absolute liability offences—proof of fault is not required and no defences are available.<sup>6</sup>

12.6 In *He Kaw Teh v R* (1985), Brennan J explained the operation of *mens rea* as an element in criminal offences:

It is implied as an element of the offence that, at the time when the person who commits the *actus reus* does the physical act involved, he either—

(a) knows the circumstances which make the doing of that act an offence; or

(b) does not believe honestly and on reasonable grounds that the circumstances which are attendant on the doing of that act are such as to make the doing of that act innocent.<sup>7</sup>

12.7 Historically, criminal liability at common law necessarily involved proof of *mens rea*.<sup>8</sup> In *Williamson v Norris* (1899), Lord Russell CJ said:

The general rule of the English law is that no crime can be committed unless there is *mens rea*.<sup>9</sup>

12.8 In his *Commentaries on the Laws of England* (1765), William Blackstone wrote that, to ‘constitute a crime against human laws, there must be first a vicious will, and secondly, an unlawful act consequent upon such vicious will’.<sup>10</sup>

5 Generally, an honest and reasonable mistake in a set of facts, which, if they had existed, would make the defendant’s act innocent, affords an excuse for doing what would otherwise be an offence: *Proudman v Dayman* (1941) 67 CLR 536, 541 (Dixon J).

6 *Wampfler v R* (1987) 67 CLR 531. See further, Australian Law Reform Commission, ‘Principled Regulation: Federal Civil and Administrative Penalties in Australia’, Report 95 (2003) [4.4].

7 *He Kaw Teh v R* (1985) 157 CLR 523, 582.

8 Sir William Holdsworth, *A History of English Law* (Methuen, 2nd ed, 1937) vol 8, 432.

9 *Williamson v Norris* [1899] 1 Q.B 14 (Lord Russell CJ).

10 Sir William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) Book IV, Ch 2, 21.

12.9 However, as discussed further below, strict liability offences were increasingly developed in the mid to late 19th century, particularly so-called ‘regulatory offences’.<sup>11</sup>

12.10 In Australia, the common law presumption of fault-based liability is also reflected in statute. Section 5.6 of the *Criminal Code* (Cth) creates a rebuttable presumption that, to establish guilt, fault must be proven for each physical element of a Commonwealth offence.

## Protections from statutory encroachments

### Australian Constitution

12.11 The *Australian Constitution* does not expressly require that criminal offences include the element of *mens rea*.

### Principle of legality

12.12 The principle of legality provides some protection to the principle of *mens rea*.<sup>12</sup> When interpreting a statute, courts will presume that Parliament did not intend to create a strict liability offence, unless this intention was made unambiguously clear.<sup>13</sup>

12.13 In *He Kaw Teh* (1985), a majority of the High Court interpreted a provision in the *Customs Act 1901* (Cth), which made it an offence to import drugs, as requiring the prosecution to prove that the defendant had an intention to traffic the drugs. Gibbs CJ stated:

[i]t is unlikely that the Parliament intended that the consequences of committing an offence so serious should be visited on a person who had no intention to do anything wrong and no knowledge that he was doing so.<sup>14</sup>

## Justifications for encroachments

12.14 Professor Richard Singer has written that defences of strict liability crimes essentially rest on four grounds:

- (1) only strict criminal liability can deter profit-driven manufacturers and capitalists from ignoring the well-being of the consuming public;
- (2) the inquiry into *mens rea* would exhaust courts, which have to deal with thousands of ‘minor’ infractions every day;
- (3) the imposition of strict liability is not inconsistent with the moral underpinnings of the criminal law generally because the penalties are small, and conviction carries no social stigma;
- (4) the legislature intended to create strict liability, and can constitutionally do so.<sup>15</sup>

---

11 Before this time, convictions for criminal offences without proof of intent were found ‘only occasionally, chiefly among the nuisance cases’: Francis Bowes Sayre, ‘Public welfare offenses’ (1933) 33 *Columbia Law Review* 56.

12 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

13 *He Kaw Teh v R* (1985) 157 CLR 523, 528 (Gibbs CJ); *Sherras v De Rutzo* [1895] 1 QB 918.

14 *He Kaw Teh v R* (1985) 157 CLR 523, 530 (Gibbs CJ).

12.15 Ashworth and Horder write:

The main argument [for strict liability offences] is a form of protectionism or ‘social defence’. It maintains that one of the primary aims of the criminal law is the protection of fundamental social interests. Why should this function be abandoned when the violation of those interests resulted from some accident or mistake by D?<sup>16</sup>

12.16 Strict liability offences began to be developed in the mid to late 19th century.<sup>17</sup> Regulatory offences were created that were designed to protect individuals from the risks that came with greater industrialisation and mass consumerism. For example, Professor Richard Singer highlights England’s *Sale of Food and Drug Act 1860* as one of the first legislative moves towards strict liability.<sup>18</sup>

12.17 A landmark English strict liability case is *R v Woodrow* (1846) in which a tobacco supplier was convicted of selling adulterated tobacco despite having no knowledge of this fact.<sup>19</sup> On appeal, the Court of Exchequer held that while a conviction was appropriate, so too was a smaller penalty.<sup>20</sup> *R v Woodrow* and subsequent decisions marked the ‘conscious beginning in England of the movement to do away with the requirement of *mens rea* for petty police offences’.<sup>21</sup>

12.18 Some may argue that because it is easier to convict a person of a strict liability offence, strict liability offences are a more effective deterrent to criminal conduct.<sup>22</sup> For example, people may be less likely to drive dangerously if they know they can be convicted of a driving offence whether or not it can be shown that they intended to drive dangerously.<sup>23</sup>

12.19 Another reason sometimes given to justify strict liability offences is that it is onerous on the prosecution to prove the state of mind of the accused.<sup>24</sup> ‘The inquiry into *mens rea* would exhaust courts, which have to deal with thousands of “minor” infractions every day.’<sup>25</sup>

15 Richard Singer, ‘The Resurgence of Mens Rea: The Rise and Fall of Strict Liability’ (1989) 30 *Boston College Law Review* 337, 389. Singer then discusses the merits of these arguments.

16 Ashworth and Horder, above n 4, 161.

17 Before this time, convictions for criminal offences without proof of intent were found ‘only occasionally, chiefly among the nuisance cases’: Sayre, above n 11, 56. Whereas at common law it was generally true to say that to convict D, P had to prove *actus reus* and *mens rea*, in modern times a doctrine has grown up that in certain classes of statutory offences, which may be called for convenience ‘regulatory offences’, D can be convicted on proof of P by *actus reus* only: Colin Howard, *Strict Responsibility* (Sweet & Maxwell, 1963) 1.

18 Singer, above n 15, 345.

19 *R v Woodrow* (1846) 15 M & W 404, 153 ER 907. This case was cited in *Sherras v De Rutzo* [1895] 1 QB 918.

20 *R v Woodrow* (1846) 15 M & W 404, 153 ER 907 908.

21 Sayre, above n 11, 59.

22 See Senate Standing Committee for the Scrutiny of Bills, ‘Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation’ (26 June 2002) 263; Singer, above n 15, 389.

23 On strict liability for reckless driving, see: Parliament of New South Wales, ‘Legislation Review Committee: Strict and Absolute Liability’ (Discussion Paper No 2, 2006) 11.

24 *R v Woodrow* (1846) 15 M & W 404, 153 ER 907 913 (Baron Parke). See also, Senate Standing Committee for the Scrutiny of Bills, above n 22, 285.

25 Singer, above n 15, 389.

---

12.20 In some cases strict or absolute liability offences may also assist prosecuting agencies where offences need to be dealt with expeditiously to ensure public confidence in the regulatory regime.<sup>26</sup>

12.21 The Commonwealth Guide to Framing Offences 2011 provides that the application of strict and absolute liability to *all* physical elements of a criminal offence should only be considered appropriate where:

The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences.

There are legitimate grounds for penalising persons lacking ‘fault’, for example because they will be placed on notice to guard against the possibility of any contravention. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made an honest and reasonable mistake of fact.<sup>27</sup>

12.22 Although some laws that apply strict or absolute liability to all physical elements of a criminal offence may be justified, the ALRC invites submissions identifying laws that are *not* justified, and explaining why these laws are not justified.

---

26 Senate Standing Committee for the Scrutiny of Bills, above n 22, 264.

27 Attorney-General’s Department, above n 2, 23.

