

## 9. Burden of Proof

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### A common law principle

9.1 In criminal trials, the prosecution bears the burden of proof. This has been called ‘the golden thread of English criminal law’<sup>1</sup> and, in Australia, ‘a cardinal principle of our system of justice’.<sup>2</sup> This principle and the related principle that guilt must be proved beyond reasonable doubt are fundamental to the presumption of innocence.<sup>3</sup>

9.2 However, Parliament can reverse the onus of proof:

It has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof.<sup>4</sup>

9.3 This chapter discusses the source and rationale for this principle; how this principle is protected from statutory encroachment; and when laws that reverse the onus of proof in criminal trials may be justified.<sup>5</sup> The ALRC calls for submissions on two questions about this presumption.

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1 *Woolmington v DPP* [1935] AC 1 481–482 (Viscount Sankey). This statement was affirmed in *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 501 (Mason CJ and Toohey J). See also, Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2012) [7085]; Glanville Williams, *The Proof of Guilt* (Steven & Sons, 3rd ed, 1963) 184–5.

2 *Sorby v The Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ). See also, *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [44] (French CJ). See also Heydon, above n 1, [7085]; Williams, above n 1, 871; Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 71.

3 In *Momcilovic v The Queen* (2011), French CJ said: ‘The presumption of innocence has not generally been regarded in Australia as logically distinct from the requirement that the prosecution must prove the guilt of an accused person beyond reasonable doubt’: *Momcilovic v The Queen* (2011) 245 CLR 1, 51 [54].

4 *Kuczborski v Queensland* [2014] HCA 46 [240] (Crennan, Kiefel, Gageler & Keane JJ). The majority of the High Court was relying on the decision in *The Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 12, 17–18.

5 This chapter is about the burden of proof in criminal, rather than civil, law.

**Question 9–1** What general principles or criteria should be applied to help determine whether a law that reverses or shifts the burden of proof is justified?

**Question 9–2** Which Commonwealth laws unjustifiably reverse or shift the burden of proof, and why are these laws unjustified?

9.4 The presumption of innocence developed at common law towards the end of the 18th century.<sup>6</sup> In his *Commentaries on the Laws of England* (1765), William Blackstone said that ‘it is a maxim of English law that it is better that ten guilty men should escape than that one innocent man should suffer’.<sup>7</sup>

9.5 In 1935 the UK House of Lords said the presumption of innocence principle was so ironclad that ‘no attempt to whittle it down can be entertained’.<sup>8</sup> More recently, the House of Lords has said that shifting the burden of proof onto a defendant was ‘repugnant to ordinary notions of fairness’.<sup>9</sup>

9.6 In the High Court of Australia, French CJ called the presumption of innocence ‘an important incident of the liberty of the subject’.<sup>10</sup>

9.7 Andrew Ashworth has summarised some of the rationales for the presumption of innocence.

[T]he presumption is inherent in a proper relationship between State and citizen, because there is a considerable imbalance of resources between the State and the defendant, because the trial system is known to be fallible, and, above all, because conviction and punishment constitute official censure of a citizen for certain conduct and respect for individual dignity and autonomy requires that proper measures are taken to ensure that such censure does not fall on the innocent.<sup>11</sup>

9.8 The *Guide to Framing Commonwealth Offences* provides that ‘placing a legal burden of proof on a defendant should be kept to a minimum’.<sup>12</sup> This rule is also reflected in the *Criminal Code Act 1995* (Cth) which provides that where the law imposes a burden of proof on the defendant, it should be an evidential burden,<sup>13</sup> unless the law expresses otherwise.<sup>14</sup>

6 John Langbein, ‘The Historical Origins of the Privilege against Self-Incrimination at Common Law’ (1994) 92 *Michigan Law Review* 1047, 1070.

7 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) 352.

8 *Woolmington v DPP* [1935] AC 1 [7].

9 *Sheldrake v DPP* [2004] UKHL 43 [9].

10 *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [44] (French CJ).

11 Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 *International Journal of Evidence and Proof* 241, 251.

12 Attorney-General’s Department, ‘A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers’ (2011) 53.

13 *Momcilovic v The Queen* (2011) 245 CLR 1; *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. There are two types of burdens: legal and evidentiary. The legal burden is ‘the obligation of a party to meet the requirement of the rule of law that a fact in issue must be proved’. The evidential burden is an obligation to show, if called upon to do so, that there is ‘sufficient evidence to raise the existence of a fact’. An evidentiary burden will be discharged where a defendant leads evidence

## Protections from statutory encroachments

### Australian Constitution

9.9 While the *Australian Constitution* does not expressly protect the presumption of innocence, academic and juridical discussion has suggested that the presumption may be considered part of the broader concept of a fair trial entrenched in common law.

9.10 In *Carr v Western Australia* (2007), Kirby J spoke about an ‘important feature of the Australian criminal justice system’:

Trials of serious crimes, such as the present, are accusatorial in character. Valid legislation apart, it is usually essential to the proper conduct of a criminal trial that the prosecution prove the guilt of the accused and do so by admissible evidence. Ordinarily ... the accused does not need to prove his or her innocence.

9.11 Kirby J said that this feature of the criminal justice system is ‘not always understood’, yet

it is deeply embedded in the procedures of criminal justice in Australia, inherited from England. It may even be implied in the assumption about fair trial in the federal *Constitution*.<sup>15</sup>

9.12 In separate judgments in *Dietrich v The Queen* (1992), Deane and Gaudron JJ also relied on Chapter III of the *Australian Constitution*, which establishes the judicial branch of government, as authority for the protection of a fair trial.<sup>16</sup>

### Principle of legality

9.13 The principle of legality provides some protection for the principle that the prosecution should bear the burden of proof in criminal proceedings.<sup>17</sup> When interpreting a statute, courts will presume that Parliament did not intend to reverse or shift the burden of proof, unless this intention was made unambiguously clear.<sup>18</sup> In *Momcilovic v The Queen* (2011), French CJ held that

The common law ‘presumption of innocence’ in criminal proceedings is an important incident of the liberty of the subject. The principle of legality will afford it such protection, in the interpretation of statutes which may affect it, as the language of the statute will allow. A statute, which on one construction would encroach upon the presumption of innocence, is to be construed, if an alternative construction be available, so as to avoid or mitigate that encroachment. On that basis, a statute which could be construed as imposing either a legal burden or an evidential burden upon an

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to prove a fact in dispute or cross-examines a prosecution witness: Heydon, above n 1, [7015]. This chapter is concerned with laws that reverse or shift the *legal* burden of proof.

14 *Criminal Code Act 1995* (Cth) ss 13.1–13.3.

15 *Carr v Western Australia* (2007) 232 CLR 138, 172 (Kirby J in dissent, obiter). See further, Anthony Gray, ‘Constitutionally Protecting the Presumption of Innocence’ (2012) 31 *University of Tasmania Law Review* 132; *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J) and 362 (Gaudron J); Fiona Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’ (1997) 23 *Monash University Law Review* 248, 248.

16 *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J) and 362 (Gaudron J). See also, *Nicholas v The Queen* (1998) 193 CLR 173, 208–209 (Gaudron J). On fair trials more generally, see Ch 8.

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

18 *Momcilovic v The Queen* (2011) 245 CLR 1.

accused person in criminal proceedings will ordinarily be construed as imposing the evidential burden.<sup>19</sup>

9.14 The question in *Momcilovic* was whether s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) imposed a legal or evidentiary burden on a defendant to prove on the balance of probabilities that they had no knowledge of the presence of drugs in their possession:

The principle of legality at common law would require that a statutory provision affecting the presumption of innocence be construed, so far as the language of the provision allows, to minimise or avoid the displacement of the presumption. But, for the reasons which follow, its application to s 5 cannot yield a construction other than that required by the clear language of that section, which places the legal burden of proof on the accused.<sup>20</sup>

### **International law**

9.15 The ICCPR protects the presumption of innocence:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.<sup>21</sup>

9.16 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.<sup>22</sup> However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.<sup>23</sup>

### **Bills of rights**

9.17 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. The Fourteenth Amendment to the US Constitution guarantees a right not to be deprived of ‘life, liberty or property’<sup>24</sup> and has been interpreted by the US Supreme Court as including a presumption of innocence.<sup>25</sup> The *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right to be presumed innocent until proven guilty.<sup>26</sup>

9.18 The *European Convention for the Protection of Human Rights and Freedoms* provides

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19 Ibid [44] (French CJ).

20 Ibid [512] (Crennan & Kiefel JJ).

21 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(2).

22 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

23 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

24 *United States Constitution* amend IV.

25 *Re Winship* [1970] 397 US 358 (1970).

26 *Canada Act 1982 c 11, Sch B Pt 1* (*‘Canadian Charter of Rights and Freedoms’*) s 11(d). The protection provided by bills of rights and human rights statutes is discussed more generally in Ch 1.

Everyone charged with a criminal offence shall be presumed to be innocent until proved guilty according to law.<sup>27</sup>

9.19 The Victorian *Charter of Human Rights* protects the presumption that the legal onus of proving the facts of a case rests on the party asserting a wrong.<sup>28</sup> As does the ACT's *Human Rights Act* (2004).<sup>29</sup>

## Justifications for encroachments

9.20 Lord Bingham has noted that although the presumption of innocence has been recognised since at latest the early 19th century, it has 'not been uniformly treated by Parliament as absolute and unqualified'.<sup>30</sup>

9.21 Laws reversing the onus of proof have been justified for a few reasons. For example, it is sometimes said to be justified where it is particularly difficult for a prosecution to meet a legal burden.<sup>31</sup> For example, in cases concerning offences against the *Migration Act 1958* (Cth) such as *Williamson v Ah On* (1926), Isaacs J explained that the evidentiary burden will necessarily shift depending on which party has the requisite knowledge and evidence to adduce the truth in proceedings:

The burden of proof at common law rests where justice will be best served having regard to the circumstances both public and private.<sup>32</sup>

9.22 The seriousness of an offence is also sometimes used to justify reversing the onus of proof, particularly where there appears to be a significant threat to the safety of the public.<sup>33</sup>

9.23 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.<sup>34</sup>

9.24 Some laws reversing the onus of proof may be justified. The ALRC invites submissions identifying such Commonwealth laws that are *not* justified, and explaining why these laws are not justified.

27 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6(2).

28 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1).

29 *Human Rights Act 2004* (ACT) s 22(1).

30 *Sheldrake v DPP* [2004] UKHL 43 [9].

31 *Williamson v Ah On* (1926) 39 CLR 95, 113 (Isaacs J).

32 *Ibid* 113.

33 However, in the South African Constitutional Court, Sachs J said: 'The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption... the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases': *State v Coetzee* [1997] 2 LRC 593, 677 [220].

34 *Canada Act 1982 c 11, Sch B Pt 1* ('Canadian Charter of Rights and Freedoms') s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

