

11. Burden of Proof

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A common law principle

11.1 In criminal trials, the prosecution bears the burden of proof. This has been called ‘the golden thread of English criminal law’¹ and, in Australia, ‘a cardinal principle of our system of justice’.² The High Court of Australia observed in 2014 that

[o]ur system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person.³

1 *Woolmington v DPP* [1935] AC 462, 481–2 (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 JD Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [7085]; Glanville Williams, *The Proof of Guilt* (Stevens & Sons, 3rd ed, 1963) 184–5.

2 *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ). See also *Momcilovic v The Queen* (2011) 245 CLR 1, [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 *Lee v The Queen* [2014] HCA 20 (21 May 2014) [32]. See also *X7 v Australian Crime Commission* (2013) 248 CLR 92, [46] (French CJ and Crennan J), [100]–[102] (Hayne and Bell JJ), [159] (Kiefel J); *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

11.2 This principle and the related principle that guilt must be proved beyond reasonable doubt are fundamental to the presumption of innocence.⁴

11.3 This chapter discusses the source and rationale for the principle that the burden of proof is borne by the prosecution; how this principle is protected from statutory encroachment; and when laws that reverse the onus of proof in criminal trials may be justified.

11.4 This chapter is about the burden of proof in criminal, rather than civil, law. It considers examples of criminal laws that reverse the legal burden of proof. However, it also briefly discusses some laws that reverse the onus of proof in civil matters that were raised by submissions to this Inquiry.

11.5 The presumption of innocence has been recognised since ‘at latest, the early 19th Century’.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’.⁶ In 2005, the House of Lords said that the underlying rationale for the presumption of innocence was that to place the burden of proof on a defendant was ‘repugnant to ordinary notions of fairness’.⁷

11.6 Professor Andrew Ashworth has expanded on the rationale 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.⁸

11.7 In the High Court of Australia, French CJ called the presumption of innocence ‘an important incident of the liberty of the subject’.⁹

11.8 However, the principle that the accused does not bear a legal burden of proof has not been treated as unqualified. The legal burden of proving the defence of insanity rests on the party that raises it. Additionally, Parliament may reverse the onus of proof.¹⁰ In 2014, the High Court noted that

4 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, [54].

5 *Attorney General’s Reference No 4 of 2002*; *Sheldrake v DPP* [2005] 1 AC 264, [9] (Lord Bingham).

6 *Woolmington v DPP* [1935] AC 462, [7].

7 *Attorney General’s Reference No 4 of 2002*; *Sheldrake v DPP* [2005] 1 AC 264, [9] (Lord Bingham).

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

9 *Momcilovic v The Queen* (2011) 245 CLR 1, [44].

10 In *Woolmington v DPP*, Viscount Sankey noted that that the ‘golden thread’ of the burden of proof lying with the prosecution was subject to an exception for proof of insanity as well as ‘any statutory exception’: *Woolmington v DPP* [1935] AC 462, 481.

[i]t has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof.¹¹

11.9 In *Williamson v Ah On*, Isaacs J suggested that it may be justified in some circumstances to reverse the burden of proof:

The broad primary principle guiding a Court in the administration of justice is that he who substantially affirms an issue must prove it. But, unless exceptional cases were recognized, justice would be sometimes frustrated and the very rules intended for the maintenance of the law of the community would defeat their own object. The usual path leading to justice, if rigidly adhered to in all cases, would sometimes prove but the primrose path for wrongdoers and obstruct the vindication of the law.¹²

Legal and evidential burdens

11.10 There is a distinction between a legal and an evidential burden of proof. These terms are defined in the *Criminal Code* (Cth):

legal burden, in relation to a matter, means the burden of proving the existence of the matter.¹³

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.¹⁴

11.11 Generally, the prosecution will bear both the legal and evidential burden of proof.¹⁵ However, an offence may be drafted so that the accused bears either the evidential or legal burden, or both, on some issues.¹⁶ Lord Hope in the House of Lords described what it means for the accused to bear either the legal or evidential burden of proof on an issue:

A ‘persuasive’ [legal] burden of proof requires the accused to prove, on a balance of probabilities, a fact which is essential to the determination of his guilt or innocence. It reverses the burden of proof by removing it from the prosecution and transferring it to the accused. An ‘evidential’ burden requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The prosecution does not need to lead any evidence about it, so the accused needs to do this if he wishes to put the point in issue. But if it is put in issue,

11 *Kuczborski v Queensland* [2014] HCA 46 [240] (Crennan, Kiefel, Gageler and Keane JJ). The majority of the High Court was relying on the decision in *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 12, 17–18. See also *Attorney General’s Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [9] (Lord Bingham).

12 *Williamson v Ah On* (1926) 39 CLR 95, 113.

13 *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*) s 13.1(3). The legal burden is sometimes called the persuasive burden. *Cross on Evidence* describes the legal burden as ‘the obligation of a party to meet the requirement of a rule of law that a fact in issue must be proved (or disproved) either by a preponderance of the evidence or beyond reasonable doubt, as the case may be’: Heydon, above n 1, [7010].

14 *Criminal Code* (Cth) s 13.3(6). *Cross on Evidence* states that the evidential burden is ‘the obligation to show, if called upon to do so, that there is sufficient evidence to raise the existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation’: Heydon, above n 1, [7015].

15 Where the prosecution bears the legal burden the standard of proof is beyond reasonable doubt, unless another standard of proof is specified: *Criminal Code* (Cth) s 13.2.

16 Where the defendant bears the legal burden the standard of proof is the balance of probabilities: *Ibid* s 13.5.

the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt about his guilt.¹⁷

11.12 The Guide to Framing Commonwealth Offences states that ‘placing a legal burden of proof on a defendant should be kept to a minimum’.¹⁸ This principle is also reflected in the *Criminal Code*, which provides that where the law imposes a burden of proof on the defendant, it is an evidential burden, unless the law expresses otherwise.¹⁹

11.13 This chapter is largely concerned with laws that reverse the legal burden of proof, rather than the evidential burden of proof. In other jurisdictions, an evidential burden of proof is not generally considered to offend the presumption of innocence.²⁰ For example, in *R v DPP; Ex parte Kebilene*, Lord Hope said:

Statutory presumptions which place an ‘evidential’ burden on the accused, requiring the accused to do no more than raise a reasonable doubt on the matter with which they deal, do not breach the presumption of innocence.²¹

11.14 It is beyond the practical scope of this Inquiry to consider whether particular reversals of the evidential burden of proof are justified.²² However, Professor Jeremy Gans submitted that placing an evidential burden on an accused can be problematic, ‘especially where the reversal applies to a key culpability element of a serious criminal offence’.²³

11.15 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) has stated that

an offence provision which requires the defendant to carry an evidential or legal burden of proof will engage the right to be presumed innocent because a defendant’s failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.²⁴

Essential elements of offence

11.16 It is possible to distinguish between the defining elements of an offence (its physical and mental—or ‘fault’²⁵—elements) and an exception, exemption, excuse,

17 *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 378–79.

18 Attorney-General’s Department, ‘A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers’ (2011) 51.

19 *Criminal Code* (Cth) ss 13.3(1), 13.4. Section 13.4 provides that a defendant will only bear a legal burden if the law expressly specifies that the burden of proof is a legal burden; or requires the defendant to prove the matter; or creates a presumption that the matter exists unless the contrary is proved.

20 Ian Dennis, ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ [2005] *Criminal Law Review* 901, 904.

21 *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 379. See also Dennis, above n 20, 904.

22 A search for the phrase ‘evidential burden’ across Commonwealth statutes returns 1367 results.

23 J Gans, *Submission 2*.

24 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) 37.

25 *Criminal Code* (Cth) pt 2.2 div 5.

qualification or justification to it (often referred to as defences).²⁶ Such defences include, for example, self-defence or duress.

11.17 Generally, the prosecution bears the legal burden of proving the defining elements of an offence, as well as the absence of any defence. However, the accused will generally bear an evidential burden of proof in relation to defences. This is reflected in s 13.3(3) of the *Criminal Code*, which provides:

A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

11.18 Part 2.3 of the *Criminal Code* contains the generally available defences, and s 13.3(2) of the *Criminal Code* provides that the defendant bears the evidential burden of those defences.

Protections from statutory encroachment

Australian Constitution

11.19 The *Australian Constitution* does not expressly protect the principle that the burden of proof in a criminal trial should be borne by the prosecution. There is a long history of Commonwealth laws which reversed the traditional onus of proof but were held not to contravene Ch III of the *Constitution*.²⁷

11.20 But in *Nicholas v The Queen*,²⁸ the High Court reserved its position regarding the validity of a law which deemed to exist and to have been proved to the satisfaction of the tribunal of fact, any ultimate fact which is an element of the offence charged. In particular, as French CJ explained in *International Finance Trust Company Ltd v New South Wales Crime Commission*,²⁹ the Parliament cannot direct courts exercising federal jurisdiction as to the outcome of the exercise of that jurisdiction. Further, in *International Finance*, this principle was applied by French CJ, Gummow, Heydon, and Bell JJ, as an aspect of the *Kable* doctrine,³⁰ to the exercise of non-federal jurisdiction.

26 Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 464. Jeremy Gans has noted that '[t]he term defences, while ubiquitous in criminal law, is imprecise': Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2012) 287. The distinction between defining elements and defences can be difficult to draw: see, eg, Glanville Williams, 'Offences and Defences' (1982) 2 *Legal Studies* 233, 256. This is considered further below when discussing justifications for reversing the burden of proof.

27 *Nicholas v The Queen* (1998) 193 CLR 173, [152]–[156].

28 *Nicholas v The Queen* (1998) 193 CLR 173.

29 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, [49]–[55].

30 *Kable v DPP (NSW)* (1996) 189 CLR 51. In *Kable*, the High Court held that state parliaments may not confer functions on state courts incompatible with the exercise of federal judicial power under Ch III of the *Constitution*.

11.21 In *Carr v Western Australia*, 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.³¹

11.22 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*’.³² The right to a fair trial is considered in detail in Chapter 10.

Principle of legality

11.23 The principle of legality provides some protection for the principle that the prosecution should bear the burden of proof in criminal proceedings.³³ In *Momcilovic v The Queen*, French CJ held that:

The principle of legality will afford ... [the presumption of innocence] 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 accused person in criminal proceedings will ordinarily be construed as imposing the evidential burden.³⁴

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.

11.24 However, the principle cannot be used to override the clear and unequivocal language of a section. It does not ‘constrain legislative power’.³⁵

11.25 *Momcilovic* concerned the construction of s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), which deems a person to be in possession of a substance based upon occupancy of premises in which drugs are present, unless the person satisfies the court to the contrary. The question in *Momcilovic* was whether s 5 imposed a legal burden or an evidentiary burden on the defendant.

31 *Carr v Western Australia* (2007) 232 CLR 138, [103].

32 Ibid [104]. 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.

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

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

35 Ibid [43] (French CJ).

11.26 In *Momcilovic*, the High Court confirmed that the section placed a legal burden on the accused.³⁶ French CJ remarked that '[o]n their face the words of the section defeat any attempt by applying common law principles of interpretation to read down the legal burden thus created'.³⁷

International law

11.27 The *International Covenant on Civil and Political Rights* (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.³⁸

11.28 The protection of the presumption of innocence is provided in the same terms in art 11(1) of the *Universal Declaration of Human Rights*,³⁹ and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention*).⁴⁰

11.29 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.⁴¹ However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.⁴²

Bills of rights

11.30 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms.⁴³ The Fifth and 14th Amendments to the US Constitution guarantee a right not to be deprived of life, liberty or property without due process of law⁴⁴ and have been interpreted by the US Supreme Court as including a presumption of innocence.⁴⁵

11.31 The *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right to be presumed innocent until proved guilty.⁴⁶ The *New Zealand Bill of Rights Act 1990* (NZ) contains a similar provision.⁴⁷

36 Ibid [56] (French CJ), [466]–[468] (Heydon J), [512], [581] (Crennan and Kiefel JJ), [665]–[666], [670] (Bell J).

37 Ibid [56].

38 *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).

39 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

40 *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).

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

42 *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.

43 The protection provided by bills of rights and human rights statutes is discussed more generally in Ch 1.

44 *United States Constitution* amend V, XIV.

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

46 *Canada Act 1982 c 11* s 11(d).

47 *New Zealand Bill of Rights Act 1990* (NZ) s 25(c).

11.32 In Australia, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) both provide that a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.⁴⁸

11.33 The English common law has long stressed the ‘duty of the prosecution to prove the prisoner’s guilt’⁴⁹—indeed, this has been described as the ‘governing principle of English criminal law’.⁵⁰ Additionally, since its enactment, the *Human Rights Act 1998* (UK) requires that, so far as it is possible, legislation must be read and given effect in a way that is compatible with *European Convention* rights—including the presumption of innocence in art 6(2).⁵¹ It has been noted that this has ‘had a major impact on the law relating to the burden of proof’.⁵²

Limits in bills of rights

11.34 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’.⁵³

Laws that reverse the legal burden

11.35 A range of Commonwealth laws place a legal burden on the defendant in respect of particular issues.

Criminal Code

11.36 There are a number of provisions in the *Criminal Code* that place a legal burden on the defendant. These include terrorism offences, drug offences, child sex offences, and offence relating to unmarked plastic explosives.

Terrorism offences

11.37 Some terrorism offences impose a legal burden on the defendant. For the offence of membership of a terrorist organisation, it is a defence to prove that the defendant took reasonable steps to cease to be a member of a terrorist organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.⁵⁴

11.38 Section 102.6 creates the offence of getting funds to, from, or for a terrorist organisation. A person will not commit an offence if he or she proves that the funds were received solely for the purpose of the provision of legal representation for a

48 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1); *Human Rights Act 2004* (ACT) s 22(1).

49 *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey LC).

50 *Attorney General’s Reference No 4 of 2002*; *Sheldrake v DPP* [2005] 1 AC 264, [3] (Lord Bingham).

51 *Human Rights Act 1998* (UK) c 42, s 3(1).

52 Richard Glover and Peter Murphy, *Murphy on Evidence* (OUP Oxford, 2013) 11.

53 *Canada Act 1982 c 11* s 1. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

54 *Criminal Code* (Cth) s 102.3(2).

person in proceedings relating to terrorist organisation offences, or assisting the organisation to comply with Australian law.⁵⁵ The Law Council of Australia submitted that it was unclear why the defendant should bear the legal and not the evidential burden on this issue, observing that ‘the justification for the departure is unclear in this case and may be unjustified’.⁵⁶

11.39 A number of stakeholders to this Inquiry raised concerns with the evidential burden placed on the defendant in the offence of entering, or remaining in, a declared area.⁵⁷ Entering a ‘declared area’ is an offence unless the defendant can provide evidence that the area was entered solely for one or more legitimate purposes.⁵⁸

11.40 The Gilbert and Tobin Centre for Public Law submitted that ‘[t]he offence does not technically reverse the onus of proof, and it is not an offence of strict or absolute liability. However, it has essentially the same effect, as criminal liability will be prima facie established wherever a person enters or remains in a declared area’.⁵⁹ Australian Lawyers for Human Rights submitted that the effect of the provision is ‘clearly to place the burden of proving their innocence upon the defendant’.⁶⁰

11.41 The Human Rights Committee noted that

in addition to proving that they entered into or remained in the declared area solely for one of the prescribed legitimate purposes, they would also need to provide factual evidence that they did not enter into or remain in the declared area solely or in part for an illegitimate purpose.⁶¹

11.42 It concluded that the declared area offence was likely to be incompatible with the right to a fair trial and the presumption of innocence.⁶²

Drug offences

11.43 The *Criminal Code* contains a series of deeming provisions in relation to the requisite intention for a number of drug offences. For example, when the defendant is found to be dealing with a threshold ‘trafficable’ quantity of a controlled drug, the person is deemed or presumed to have either: the intention to traffic;⁶³ the intention to

55 Ibid s 102.6(3).

56 Law Council of Australia, *Submission 75*. See also J Gans, *Submission 2*.

57 See, eg, Law Council of Australia, *Submission 75*; Australian Lawyers for Human Rights, *Submission 43*; Human Rights Law Centre, *Submission 39*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

58 *Criminal Code* (Cth) s 119.2.

59 Gilbert and Tobin Centre of Public Law, *Submission 22*.

60 Australian Lawyers for Human Rights, *Submission 43*.

61 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) 37–38.

62 Ibid 38.

63 *Criminal Code* (Cth) s 302.5.

cultivate for a commercial purpose;⁶⁴ or the intention to manufacture for a commercial purpose.⁶⁵

11.44 The legal onus lies on the defendant to defeat these presumptions—that is, the defendant must prove, on the balance of probabilities, that he or she did not have the requisite intention for the offence.

11.45 The drug offences in the *Criminal Code* were introduced in 2005,⁶⁶ and were based on the Model Criminal Code, developed by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC) after nationwide consultation.⁶⁷

11.46 However, the MCCOC did not recommend that presumptions placing the legal burden on the defendant be included in the *Criminal Code*. The MCCOC instead recommended that the defendant bear only an evidential burden in relation to the requisite intention. In making its recommendation, the Committee considered that

[t]he task of the prosecution is eased to the extent that guilt is presumed in the absence of evidence to the contrary. But testimony from the accused, other evidence or circumstances inconsistent with the inference of intent to traffic in the drug, will displace the presumption and require the prosecution to prove guilt beyond reasonable doubt.⁶⁸

11.47 It considered that a presumption placing an evidential burden on the defendant was an appropriate compromise between the needs of effective law enforcement and the presumption of innocence. The MCCOC observed:

Compromises which weaken or abandon the principle that individuals are innocent until proved guilty require compelling justification when the consequences of conviction are severely punitive, as they are in the trafficking offences ... Though acceptance of the need for trafficable quantity presumptions involves a compromise, it is a compromise which preserves the principle that the prosecution must prove guilt whenever there is evidence which contradicts the presumption. There are compelling reasons against further dilution of the rule that individuals accused of crime are innocent until they are proved to be guilty.⁶⁹

11.48 Commentators have noted that such presumptions are ‘unique relative to most other drug trafficking threshold systems across the world, where deemed supply laws are explicitly avoided’.⁷⁰ Such provisions have been justified ‘under goals of delivering

64 Ibid s 303.7.

65 Ibid s 305.6. A similar set of deeming provisions operates in relation to offences involving precursors: Ibid div 306.

66 *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth).

67 Explanatory Memorandum, *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005*; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, ‘Model Criminal Code Chapter 6 Serious Drug Offences’ (Report, 1998).

68 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 67, 81.

69 Ibid 82–85.

70 Caitlin Hughes et al, ‘Australian Threshold Quantities for “Drug Trafficking”: Are They Placing Drug Users at Risk of Unjustified Sanction?’ (Trends and Issues in Crime and Criminal Justice 467, Australian Institute of Criminology, 2014) 2.

proportionality and effective responses to those who inflict widespread suffering—drug traffickers’.⁷¹ However, the proportionality of this response has been questioned:

the drug users who find themselves at the margins of the drug trafficking thresholds are most likely to be the more marginalised users (eg more unemployed and socially disadvantaged) ... which reduces their capacity to successfully prevent an unjust sanction. ... [I]t is known that an ‘unjustified conviction for dealing will often impose social and individual harms which far exceed the harm associated with the drug in question’.⁷²

11.49 Heydon J in *Momcilovic* commented on the placement of the legal burden of proof on the defendant in relation to possession in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). He noted that, while ‘unpalatable’, such placement facilitates

proof of possession much more than a simple placement of the evidential burden on the accused would. It increases the likelihood of the accused entering the witness box more than a reverse evidential burden would. That is because there is a radical difference between the two burdens. A legal burden of proof on the accused requires the accused to disprove possession on a preponderance of probabilities. An evidential burden of proof on the accused requires only a showing that there is sufficient evidence to raise an issue as to the non-existence of possession. The legal burden of proving something which the accused is best placed to prove like non-possession is much more likely to influence the accused to testify than an evidential burden, capable of being met by pointing to some piece of evidence tendered by other means and perhaps by the prosecution.⁷³

Child sex offences outside Australia

11.50 The defendant bears a legal burden in relation to a number of defences to sexual offences against children outside Australia.⁷⁴ Section 272.9(5) imposes a legal burden on a defendant to prove that they did not intend to derive gratification from a child being present during sexual activity. The Law Council of Australia submitted in relation to this offence that

[t]he gravity of the subject matter of the offence, coupled with the serious penalty it attracts, could have very serious consequences for a person charged with this offence. In such circumstances, it may not be appropriate that the only recourse available to a defendant is to discharge a legal burden.⁷⁵

Plastic explosives

11.51 The *Criminal Code* creates a number of offences in relation to trafficking in,⁷⁶ importing or exporting,⁷⁷ manufacturing⁷⁸ or possessing⁷⁹ unmarked plastic explosives.

71 Ibid 6.

72 Ibid 5 (quoting Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, ‘Model Criminal Code Chapter 6 Serious Drug Offences’ (Report, 1998)).

73 *Momcilovic v The Queen* (2011) 245 CLR 1, [467].

74 *Criminal Code* (Cth) ss 272.9–10, 272.13, 272.16–272.17.

75 Law Council of Australia, *Submission 75*.

76 *Criminal Code* (Cth) s 72.12.

77 Ibid s 72.13.

78 Ibid s 72.14.

79 Ibid s 72.15.

If no detection agent (a marking requirement for plastic explosives)⁸⁰ is detected in a sample of an explosive when tested, a legal burden lies on the defendant to disprove that the plastic explosive breaches a marking requirement.⁸¹

11.52 A legal burden is also placed on the defendant to establish a defence to charges relating to unmarked plastic explosives, including that he or she had no reasonable grounds for suspecting that the plastic explosive breached that marking requirement.⁸²

Taxation

11.53 The *Taxation Administration Act 1953* (Cth) contains a number of provisions that reverse the burden of proof. The legal burden lies on the defendant to establish defences to the charges of making false or misleading statements,⁸³ and incorrectly keeping records.⁸⁴

11.54 Additionally, s 8Y provides that when a corporation commits a taxation offence, a person who is concerned in, or takes part in the management of a corporation shall be deemed to have committed the taxation offence. It is a defence to prove that the person did not aid, abet, counsel or procure the act or omission of the corporation concerned, and was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the corporation. The legal burden lies on the defendant to establish this defence.⁸⁵

11.55 The Australian Institute of Company Directors (AICD) expressed concern about this provision, arguing that the legal burden on the defendant should be removed and ‘the normal principles of justice and fairness that apply to all other citizens prosecuted for criminal offences’ restored.⁸⁶

11.56 In 2009, the Council of Australian Governments (COAG) agreed to a set of principles relating to personal liability for corporate fault and developed guidelines for their application.⁸⁷ The Principles provided that provisions that place an evidential or legal onus on a director to establish a defence that he or she is not liable for corporate fault (for example, a defence to show that reasonable steps were taken to avoid committing the contravention) ‘must be supported by rigorous and transparent analysis and assessment, so as to clearly demonstrate why it is considered that such a provision is justified from a public policy perspective’.⁸⁸ Relevant considerations for justification include where:

- there is a serious risk of potential significant public harm resulting from the offence;

80 Ibid s 72.33(2).

81 Ibid s 72.35.

82 Ibid s 72.16(1).

83 *Taxation Administration Act 1953* (Cth) s 8K.

84 Ibid s 8L.

85 Ibid s 8Y(2).

86 Australian Institute of Company Directors, *Submission 42*.

87 Council of Australian Governments, ‘Personal Liability for Corporate fault—Guidelines for Applying the COAG Principles’ (2012).

88 Ibid.

- the size and nature of the penalties indicate a very serious offence; and
- the offence is a core element of the relevant regulatory regime.⁸⁹

11.57 The onus of proof on defendants in s 8Y of the *Taxation Administration Act* was not amended in the legislative response to the COAG principles, the *Personal Liability for Corporate Fault Reform Act 2012* (Cth). Explanatory notes accompanying the Exposure Draft of the amending Bill elaborated on this decision:

the Government has taken into account a range of factors outlined in the COAG guidelines, including the magnitude of harm that the offending conduct would likely cause, the effectiveness of corporate penalties in preventing this conduct and the availability of evidence to the prosecution and the director.

Section 8Y provides a defence to directors who can show, on the balance of probabilities, that they were not involved in the company's offending. As such, section 8Y operates, in substance, as an accessorial liability provision. It would not be feasible to shift the burden and require the prosecution to prove a director's involvement in the company's offence, especially as such information could be peculiarly within the knowledge of the director.

As a matter of practicality a director would be in a significantly better position to be able to adduce evidence that shows they were not involved in the company's offending rather than explicitly require the prosecution to establish their involvement.

The ATO relies on section 8Y to prosecute those directors who repeatedly and seriously neglect their company's tax obligations. If the ATO is unable to prosecute these individuals, it could significantly undermine the public's confidence in the fairness of the tax system and the ATO's ability to enforce the law.⁹⁰

11.58 The AICD submitted that the 'retention of this provision has not been sufficiently justified pursuant to the COAG approach. Further, and more importantly, no justification has been provided as to why it is appropriate to undermine the Rule of Law by deciding to retain this provision'.⁹¹

Copyright

11.59 The *Copyright Act 1968* (Cth) contains a number of criminal offences in relation to copyright infringement.⁹²

11.60 The Act creates a presumption in relation to proof of subsistence and ownership of copyright, providing that statements contained on the labels, marks, certificates or chain of ownership documents are presumed to be as stated, unless the contrary is established.⁹³ It also includes presumptions relating to computer programs,⁹⁴ sound recordings⁹⁵ and films.⁹⁶

89 Ibid.

90 Explanatory Document, *Personal Liability for Corporate Fault Reform Bill 2012—Tranche 3* (2012) 3.

91 Australian Institute of Company Directors, *Submission 42*.

92 *Copyright Act 1968* (Cth) pt V div 5.

93 Ibid s 132A.

94 Ibid s 132AAA.

95 Ibid s 132B.

96 Ibid s 132C.

11.61 A presumption is a statement of facts that are taken to exist unless proven otherwise. A presumption that a matter exists unless the contrary is proved places a legal burden on the defendant.⁹⁷ A defendant must rebut such a presumption on the balance of probabilities.

11.62 The presumptions relating to criminal offences in the *Copyright Act* were introduced by the *Copyright Amendment Act 2006* (Cth). Provisions in the *Copyright Act* that provided that statements made on certificates and other documents were admissible in a prosecution as ‘prima facie evidence’ of the facts so stated were amended by the 2006 Act, and new presumptions relating to films and computer programs added.⁹⁸

11.63 The Explanatory Memorandum stated that amendments were intended to ‘strengthen’ the presumptions in the Act, and to ‘assist copyright owners and reduce costs in the litigation process’.⁹⁹ The Explanatory Memorandum also stated that the aim was to introduce consistency with other, civil, presumptions in the Act. The Australian Digital Alliance and the Australian Libraries Copyright Committee submitted that

[p]resumptions in the context of criminal cases circumvent a key safeguard in our justice system: that the onus is on the prosecutor or plaintiff to prove the liability of the accused or defendant to the relevant standard of proof. This principle is a key protection against unjustified incursions on personal liberty. It is troubling that the reason given for the introduction of some of the presumptions was ‘to assist copyright owners in the litigation process’. Provisions which make criminal liability for copyright infringement easier to prove act as deterrents to the use of copyright material, conceivably leading to self-censorship of what may very well be a legal use of material in given case. The result is a net loss of creative expression.¹⁰⁰

11.64 Commenting on similarly worded presumptions relating to civil copyright infringement proceedings, Luke Pallaras observed that

in some instances, a shift in the evidential burden may be sufficient to fulfil the policy goals of the presumption; but in other cases only a shift in the legal burden would suffice. For instance, where the purpose of a presumption is to prevent time and delay caused by establishing issues that are probabilistically likely to be the case (such as copyright subsisting in an alleged work, or the plaintiff’s ownership of copyright), only a shift in the evidential burden appears justified.¹⁰¹

97 *Criminal Code* (Cth) s 13.4(c). In *Telstra Corporation Ltd v Phone Directories Company Pty Ltd*, Perram J commented on the meaning of unless the contrary is ‘established’, stating that ‘[established] does not refer to an attempt at proof, or the presence of prima facie evidence; rather, it refers to a fact as having been proven “on the balance of probabilities”’: *Telstra Corporation Limited v Phone Directories Company Pty Ltd* (2010) 194 FCR 142, [122].

98 Explanatory Memorandum, *Copyright Amendment Bill 2006*.

99 *Ibid.*

100 ADA and ALCC, *Submission 61*.

101 Luke Pallaras, ‘Falling between Two Stools: Presumptions under the *Copyright Act 1968* (Cth)’ (2010) 21 *Australian Intellectual Property Journal* 100, 104.

11.65 By contrast, the Commonwealth Director of Public Prosecutions supported a reversal of the legal burden, submitting in an Inquiry into the amending Bill that the ‘presumption recognises that copyright is a highly technical area and marshalling the evidence necessary to prosecute matters is a difficult and lengthy process’.¹⁰²

11.66 The Guide to Framing Commonwealth Offences states that ‘presumptions have a similar effect to defences, and are only appropriate in certain circumstances’.¹⁰³ The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) has stated that presumptions should be kept to a minimum and justification for them provided in the Explanatory Memorandum.¹⁰⁴

Other laws

11.67 A number of other laws reverse the legal burden of proof. For example, the defendant bears a legal burden to establish defences to a number of offences in the *Migration Act 1958* (Cth). For the offence of arranging marriage between other persons to assist a person to obtain permanent residence, it is a defence if the defendant proves he or she believed on reasonable grounds that the marriage would result in a genuine and continuing marital relationship.¹⁰⁵

11.68 Under the *Great Barrier Reef Marine Park Act 1975* (Cth) the defendant bears the legal burden of proving that entry into a compulsory pilotage area was unavoidable.¹⁰⁶ For the offence of an unauthorised vessel entering an area to be avoided under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), the defendant bears a legal burden to establish a defence of unforeseen emergency.¹⁰⁷

11.69 The *Work Health and Safety Act 2011* (Cth) prohibits a person from being subjected to discriminatory treatment for exercising a function or right under the legislation, such as serving as a health and safety representative or raising a concern about work health and safety.¹⁰⁸ The defendant bears the legal burden of proving that a prohibited reason was not the dominant reason for engaging in discriminatory conduct.¹⁰⁹ This reversal of the burden of proof has been justified on the basis that ‘it will often be extremely difficult, if not impossible, for the prosecution to prove that the person engaged in discriminatory conduct for a prohibited reason’.¹¹⁰

102 Commonwealth Director of Public Prosecutions, Submission No 53 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Copyright Amendment Bill 2006*, 2006.

103 Attorney-General’s Department, above n 18, 53.

104 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 3 of 2010* (2010) 14.

105 *Migration Act 1958* (Cth) s 240(3). See also ss 219, 229(5)–(6), 232(2)–(3).

106 *Great Barrier Reef Marine Park Act 1975* (Cth) s 59H(1).

107 *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s 619(9). See also sch 2A, cl 18; *Torres Strait Fisheries Act 1984* (Cth) ss 49(2), 49A(3); *Offshore Minerals Act 1994* (Cth) s 404(4).

108 *Work Health and Safety Act 2011* (Cth) ss 104, 105. See also s 107 which prohibits requesting, instructing, inducing, encouraging, authorising or assisting discriminatory conduct.

109 *Ibid* s 110.

110 Explanatory Memorandum, *Work Health and Safety Bill 2011* (Cth).

Bail

11.70 The presumption of innocence may be understood in both a broad and narrow sense.¹¹¹ In its broader sense the presumption of innocence encompasses the criminal process more generally, including the notion that ‘pre-trial procedures should be conducted, so far as possible, *as if* the defendant were innocent’.¹¹² The narrower sense of the presumption of innocence refers to the principle that the prosecution should bear the burden of proof of guilt,¹¹³ and is the focus of this chapter.

11.71 Procedures relating to bail engage the presumption of innocence in its wider sense. The NSW Law Reform Commission has distinguished the use of the language of ‘presumption’ in the bail context from other criminal law contexts. It notes that ‘when the law speaks of a presumption, it is usually in relation to an issue of fact’. By contrast, presumptions relating to bail ‘do not concern proof of facts, but decision-making and the burden of persuasion’.¹¹⁴

11.72 The Law Council of Australia submitted that Commonwealth laws that reverse the presumption in favour of bail ‘may undermine the presumption of innocence, as a key component of a fair trial’.¹¹⁵

11.73 Examples of such laws include s 15(6) of the *Extradition Act 1988* (Cth) (*Extradition Act*) which requires that special circumstances must be established before a person remanded under the *Extradition Act* can be granted bail; and s 15AA of the *Crimes Act 1914* (Cth) (*Crimes Act*) which reverses for terrorism offences the presumption in favour of bail.

11.74 In explaining the necessity for a presumption against bail in the *Extradition Act*, the Attorney-General’s Department stated:

The current presumption against bail for persons sought for extradition is appropriate given the serious flight risk posed by the person in extradition matters, and Australia’s international obligations to secure the return of alleged offenders to face justice in the requesting country. ... The removal or substantial qualification of the existing presumption (which has been a feature of Australia’s extradition regime since the mid-1980s) may impede Australia’s ability to meet our extradition treaty obligation to return the person to the requesting country to face criminal charges or serve a sentence.¹¹⁶

111 Ashworth notes that the scope and meaning of the presumption of innocence are ‘eminently contestable’: Ashworth, above n 8, 243.

112 Ibid.

113 Ibid 244.

114 NSW Law Reform Commission, *Bail*, Report 133 (2012).

115 Law Council of Australia, *Submission 75*.

116 Attorney-General’s Department, Submission No 7 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, 2011.

11.75 The Independent National Security Legislation Monitor has noted the ‘extreme unlikelihood of a person charged with a terrorism offence being released on bail (in almost all cases the accused will be detained for the protection of the community).¹¹⁷

11.76 Reversing the presumption in favour of bail has been subject to criticism. In relation to the *Extradition Act*, the House of Representatives Standing Committee on Social Policy and Legal Affairs has observed:

The Committee expresses its concern regarding the presumption against bail, and notes that the Explanatory Memorandum to the Bill and the evidence provided by the Attorney-General’s Department fail to provide adequate justification on this point. The Committee does not doubt that bail is likely and rightly to be refused in the majority of extradition cases, and considers that this amendment will have little effect on the outcome of bail application in such cases. However, as a matter of principle, the Committee notes that it has not been convinced of the need for the Bill to prescribe a presumption either against or in favour of bail.¹¹⁸

11.77 The Australian Human Rights Commission identified the reversal of the presumption of bail for terrorism offences ‘as a disproportionate interference with the right to liberty under art 9 of the ICCPR as well as the presumption of innocence under art 14(2) of the ICCPR’.¹¹⁹

Civil laws

11.78 The ‘cardinal’¹²⁰ common law principle examined in this chapter is that the prosecution should bear the onus of proof in criminal proceedings. Accordingly, this chapter focuses on criminal laws that reverse the legal burden of proof.

11.79 In a civil claim, the burden of proof will generally lie on the plaintiff on all essential elements. As Walsh JA in *Currie v Dempsey* explained:

The burden of proof in the sense of establishing a case, lies on a plaintiff if the fact alleged ... is an essential element of his cause of action, eg, if its existence is a condition precedent to his right to maintain the action.¹²¹

11.80 The distinction between civil and criminal proceedings may not always be clear. The ALRC’s 2003 report on civil and administrative penalties noted that

[t]he traditional dichotomy between criminal and non-criminal procedures no longer accurately describes the modern position, if it ever did. The functions and purposes of civil, administrative and criminal penalties overlap in several respects. Even some

117 Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (2012) 54.

118 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Advisory Report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011* (2011) 20.

119 Australian Human Rights Commission, Submission No 18 to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010).

120 *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ).

121 *Currie v Dempsey* (1967) 69 SR (NSW) 116, 125.

procedural aspects, such as the different standards of proof for civil and criminal sanctions, are not always clearly distinguishable.¹²²

11.81 The Institute of Public Affairs, in its submission, observed that '[g]overnments increasingly regulate behaviour through the civil law, rather than the criminal law'.¹²³ Professor Anthony Gray has noted the existence of 'a broader debate regarding the ongoing utility of such a distinction, whether there should be recognised a "third category" of proceedings that are properly neither civil nor criminal, and the essence of what is and should be considered to be a crime'.¹²⁴

11.82 The Human Rights Committee has noted that civil penalty provisions

may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.¹²⁵

11.83 Matters to consider in assessing whether a civil penalty is 'criminal in nature' include the classification of the penalty; the nature of the penalty, including whether it is intended to be punitive or deterrent in nature, and whether the proceedings are instituted by a public authority with statutory powers of enforcement; and the severity of the penalty.¹²⁶

11.84 The ALRC has not undertaken a comprehensive survey or review of provisions that shift the burden in civil proceedings. However, submissions to this Inquiry discussed the reversal of the burden of proof in a number of civil provisions.¹²⁷ These are discussed briefly below.

Proceeds of crime

11.85 The *Proceeds of Crime Act 2002* (Cth) (*Proceeds of Crime Act*) establishes a scheme to confiscate the proceeds of crime.¹²⁸

11.86 The Act provides for the making of an 'unexplained wealth order': an order requiring the person to pay an amount equal to so much of the person's total wealth as the person cannot satisfy the court is not derived from certain offences.¹²⁹ A court may

122 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC Report 95 (2003) 84.

123 Institute of Public Affairs, *Submission 49*.

124 Anthony Gray, 'The Compatibility of Unexplained Wealth Provisions and Civil Forfeiture Regimes with *Kable*' (2012) 12 *QUT Law and Justice Journal* 18, 19.

125 Parliamentary Joint Committee on Human Rights, 'Offence Provisions, Civil Penalties and Human Rights' (Guidance Note No 2, Parliament of Australia, 2014).

126 *Ibid.*

127 See, eg, FamilyVoice Australia, *Submission 73*; Law Society of NSW Young Lawyers, *Submission 69*; National Farmers' Federation, *Submission 54*; Institute of Public Affairs, *Submission 49*; Jobwatch, *Submission 46*; Australian Council of Trade Unions, *Submission 44*; Australian Christian Lobby, *Submission 33*; Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*.

128 *Proceeds of Crime Act 2002* (Cth) s 6. See also Chs 7 and 9.

129 *Ibid* s 179A.

make an unexplained wealth order if a preliminary unexplained wealth order¹³⁰ has been made, and the court is not satisfied that the person's wealth was not derived from an offence.¹³¹

11.87 The burden of proving that the person's wealth is not derived from an offence lies on that person.¹³² The person need not have been charged or convicted of any offence.

11.88 Gray has argued that civil forfeiture regimes are criminal in nature:¹³³

Such provisions typically allow forfeiture of the asset although the person who owns the asset has not been proven at the criminal standard to have committed a crime by which the asset was directly or indirectly obtained.¹³⁴

11.89 Section 179E was added to the *Proceeds of Crime Act* in 2010,¹³⁵ with the rationale that,

[w]hile the Act contains existing confiscation mechanisms, these are not always effective in relation to those who remain at arm's length from the commission of offences, as most of the other confiscation mechanisms require a link to the commission of an offence. Senior organised crime figures who fund and support organised crime, but seldom carry out the physical elements of crimes, are not always able to be directly linked to specific offences.¹³⁶

11.90 The reversal of the onus of proof in unexplained wealth orders has been said to be appropriate because '[d]etails of the source of a person's wealth will be peculiarly within his or her knowledge'.¹³⁷ However, the Scrutiny of Bills Committee was concerned about the 'potential impact of such an onerous provision on a person's civil liberties'.¹³⁸

11.91 The operation of the unexplained wealth provisions is subject to the oversight of the Parliamentary Joint Committee on Law Enforcement.¹³⁹ That Committee may require law enforcement bodies to appear before it to give evidence.¹⁴⁰ Additionally, the Commissioner of the Australian Federal Police must report to the Committee each financial year.¹⁴¹

130 An order requiring a person to appear before the court for the purpose of enabling the court to decide whether or not to make an unexplained wealth order: *Ibid* s 179B(1).

131 *Ibid* s 179E(1).

132 *Ibid* s 179E(3).

133 Gray, above n 124, 32.

134 Gray, above n 32, 135–36.

135 *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth). Further amendments were made by the *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2015* (Cth) to 'strengthen the Commonwealth's unexplained wealth regime': Explanatory Memorandum, *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014*.

136 Revised Explanatory Memorandum, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*.

137 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Tenth Report of 2009* (September 2009).

138 *Ibid*.

139 *Proceeds of Crime Act 2002* (Cth) s 179U(1).

140 *Ibid* s 179U(2).

141 *Ibid* s 179U(3).

11.92 An independent review of the *Proceeds of Crime Act* in 2006 found that, while there was consensus among international law enforcement bodies about the appropriateness of a reversal of the burden of proof in unexplained wealth provisions,

it falls short of the wider consensus I believe is necessary to support the introduction of unexplained wealth provisions. Unexplained wealth provisions are no doubt effective but the question is, are they appropriate considering the current tension between the rights of the individual and the interests of the community? ... On balance I believe it would be inappropriate at this stage to recommend the introduction of these provisions.¹⁴²

11.93 By contrast, in 2012, a Parliamentary Joint Committee on Law Enforcement inquiry into unexplained wealth legislation concluded that:

in practice, it is difficult to conceive of scenarios by which an individual had significant amounts of unexplained wealth with no way of accounting for their legitimate accumulation, if that was in fact what had occurred ... The committee is therefore of the view that, with appropriate safeguards, unexplained wealth laws represent a reasonable, and proportionate response to the threat of serious and organised crime in Australia.¹⁴³

11.94 The Law Council of Australia submitted to this Inquiry that traditional criminal court processes should apply in civil confiscation proceedings, ‘whereby the onus remains with the prosecution to establish that the property was unlawfully acquired’.¹⁴⁴

Fair Work Act 2009 (Cth)

11.95 The General Protections in the *Fair Work Act 2009 (Cth)* (*Fair Work Act*) prohibit an employer from taking adverse action¹⁴⁵ against an employee because an employee has exercised a workplace right;¹⁴⁶ has temporarily been absent from work due to illness or injury;¹⁴⁷ has participated or not participated in industrial activity;¹⁴⁸ or because of an employee’s protected attribute.¹⁴⁹

11.96 Under s 361, adverse action taken against an employee will be presumed to be action taken for a prohibited reason unless the employer responsible for taking the adverse action proves otherwise. This placement of the burden of proof on an employer is not novel: the first industrial relations statute, the *Commonwealth Conciliation and Arbitration Act 1904 (Cth)*, placed the onus on an employer to show that an employee

142 Tom Sherman, ‘Report on the Independent Review of the Operation of the *Proceeds of Crime Act 2002 (Cth)*’ (Attorney-General’s Department, 2006) 37.

143 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) 10.

144 Law Council of Australia, *Submission 75*.

145 Adverse action includes dismissing the employee, or injuring the employee in his or her employment: *Fair Work Act 2009 (Cth)* s 342(1).

146 *Ibid* s 340.

147 *Ibid* s 352.

148 *Ibid* s 346.

149 The protected attributes are a person’s race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin: *Ibid* s 351.

was dismissed for some reason other than membership of a trade union or entitlement to the benefit of an industrial agreement or award.¹⁵⁰

11.97 The National Farmers' Federation submitted that the reverse onus of proof in the *Fair Work Act* 'offends the common law presumption of innocence and undermines confidence in the judicial process'. It argued that the 'common law presumption of innocence should be restored'.¹⁵¹ The Institute of Public Affairs also criticised this provision, arguing that it is 'unsatisfactory to expect the employer to rely on their own records to defend themselves from a claim, while the plaintiff carries little of the burden'.¹⁵²

11.98 On the other hand, a number of stakeholders argued that the reversal of the burden of proof in the *Fair Work Act* was justified.¹⁵³ The Australian Council of Trade Unions (ACTU) argued that the reverse onus was essential 'because it is difficult for an applicant to prove the reason for the respondent's action'.¹⁵⁴ Jobwatch argued that employers have a monopoly on knowledge in these circumstances:

Employee claims should not be open to defeat by a mere denial by the employer, as it is more difficult for employees to procure the necessary evidence. Section 361 helps to rectify this unequal access to evidence which stems largely from the power imbalance that exists between the parties.¹⁵⁵

11.99 A number of judicial decisions have addressed the rationale for a reversal of the burden of proof, summarised by the ACTU's submission:

In *Bowling v General Motors-Holden Pty Ltd*, Smithers and Evatt JJ noted that 'the real reason for a dismissal may well be locked up in the employer's breast and impossible, or nearly impossible, of demonstration through forensic purposes'. Northrop J of the Federal Court came to a similar conclusion in *Heidt Chrysler Australia Ltd*. He acknowledged that 'the circumstances by reason of which an employer may take action against an employee are, of necessity, peculiarly within the knowledge of the employer'. ... In *Australasian Meat Industry Employees' Union v Belandra Pty Ltd*, North J stated, 'A reverse onus on the issue of the reason for conduct makes good sense because the reason for the conduct is a matter peculiarly within the knowledge of the respondent'. This passage was quoted with approval by Ryan J in a 2008 case: *Police Federation of Australia v Nixon*.¹⁵⁶

Discrimination laws

11.100 With the exception of the *Racial Discrimination Act 1975* (Cth), Commonwealth anti-discrimination laws contain a reverse legal burden of proof with

150 *Commonwealth Conciliation and Arbitration Act 1904* (Cth) ss 9(1), (3). See further Anna Chapman, Kathleen Love and Beth Gaze, 'The Reverse Onus of Proof Then and Now: The *Barclay* Case and the History of the *Fair Work Act*'s Union Victimisation and Freedom of Association Provisions' (2014) 37 *UNSW Law Journal* 471.

151 National Farmers' Federation, *Submission 54*.

152 Institute of Public Affairs, *Submission 49*.

153 Law Society of NSW Young Lawyers, *Submission 69*; Jobwatch, *Submission 46*; Australian Council of Trade Unions, *Submission 44*.

154 Australian Council of Trade Unions, *Submission 44*.

155 Jobwatch, *Submission 46*.

156 Australian Council of Trade Unions, *Submission 44* (citations omitted).

respect to ‘indirect discrimination’—an ‘unreasonable rule or policy that is the same for everyone but has an unfair effect on people who share a particular attribute’.¹⁵⁷ If a defendant is shown to have imposed a condition, requirement or practice that has a disadvantaging effect on persons with a relevant attribute, they may avoid liability by establishing that the condition, requirement or practice is reasonable in all the circumstances.

11.101 A number of submissions considered the reversal of the burden of proof in anti-discrimination laws to be unjustified.¹⁵⁸ The Church and Nation Committee, Presbyterian Church of Australia submitted that there were a number of problems with this reversal:

Firstly, the person accused of discrimination is called ‘the discriminator’ ie the title itself proceeds from an assumption of guilt rather than innocence. Secondly, the alleged discriminator must prove—in the first instance—that s/he did not discriminate. This is a reversal of the procedure in criminal law where the burden of proof rests on the prosecution to ‘make a case’ that the defendant committed the act. The alleged discriminator should not have to prove—in the first instance—that they did not commit the act. The burden of proof should rest on the person bringing the claim of discrimination. Otherwise ... the process itself becomes the punishment and vexatious litigation ensues.¹⁵⁹

11.102 The ACTU argued that the reversal of the burden of proof in anti-discrimination law was justified. It contended that such a reversal was supported by a clear policy rationale:

Power imbalance—There is a significant imbalance in resources and expertise between complainants and respondents

Information asymmetry—The respondent has access to information and evidence that the complainant does not e.g. statistics

Practicality—The respondent is in the best position to explain the reason for the requirement. The complainant may not know the reason behind it

Reality—Use of the reverse onus reflects the realities of the situation because in practice the burden usually falls on the respondent anyway

Access to justice—It is ‘notoriously difficult’ for complainants to prove indirect discrimination has occurred.¹⁶⁰

Justifications for reversing legal burden

11.103 The following section discusses some of the principles and criteria that may be applied to determine whether a criminal law that reverses the legal burden of proof may be justified.¹⁶¹

157 Australian Human Rights Commission, *Indirect Discrimination* <www.humanrights.gov.au/quick-guide/12049>. See *Sex Discrimination Act 1984 (Cth)* s 7C; *Disability Discrimination Act 1992 (Cth)* ss 6(4), 30; *Age Discrimination Act 2004 (Cth)* s 15.

158 FamilyVoice Australia, *Submission 73*; Australian Christian Lobby, *Submission 33*; Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*.

159 Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*.

160 Australian Council of Trade Unions, *Submission 44* (citations omitted).

Proportionality

11.104 As discussed in Chapter 1, proportionality is, generally speaking, the accepted test for justifying most limitations on rights. The Human Rights Committee has noted that reverse burden offences are likely to be ‘compatible with the presumption of innocence where they are ... reasonable, necessary and proportionate in pursuit of a legitimate objective’.¹⁶² Some stakeholders expressly endorsed proportionality as a means of assessing justifications for reversals of the burden of proof.¹⁶³

11.105 In other jurisdictions, it is accepted that a reversal of the burden of proof may be justified in some circumstances. The approach of the European Court of Human Rights to reverse onus provisions is set out in *Salabiaku v France*:

Presumptions of fact and law operate in every legal system. Clearly, the [*European Convention*] does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law.

... Article 6(2) [of the *European Convention*] does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.¹⁶⁴

11.106 In the UK House of Lords, Lord Bingham summarised the proportionality test as it can be applied to the reversals of the burden of proof:

the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption.¹⁶⁵

11.107 Lord Bingham observed that such a test is context-specific, stating that ‘[t]he justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case’.¹⁶⁶

11.108 A number of considerations may be relevant to evaluating whether a reversal of the burden of proof is reasonable, necessary and proportionate in pursuit of a legitimate objective.

161 Some submissions to the Inquiry considered there to be no circumstances under which a reversal of the burden of proof was justified: Pirate Party Australia, *Submission 53*; Australian Institute of Company Directors, *Submission 42*; ADJ Consultancy Services, *Submission 37*; J Mulokas, *Submission 10*.

162 Parliamentary Joint Committee on Human Rights, ‘Offence Provisions, Civil Penalties and Human Rights’ (Guidance Note No 2, Parliament of Australia, 2014) 2.

163 Law Council of Australia, *Submission 75*; UNSW Law Society, *Submission 19*.

164 *Salabiaku v France* [1988] ECHR 19 [28].

165 *Attorney General’s Reference No 4 of 2002*; *Sheldrake v DPP* [2005] 1 AC 264, [21].

166 *Ibid.*

Where not an essential element of the offence

11.109 It is commonly acknowledged that shifting a legal onus onto the accused with respect to an element of an offence that is essential to culpability is an encroachment on the presumption of innocence, and more difficult to justify.¹⁶⁷ Shifting the burden of proof on such an issue involves the possibility of unfair conviction. In the Canadian Supreme Court, Dickson CJC said that

[i]f an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.¹⁶⁸

11.110 Where a defendant bears the legal burden of proof on an issue essential to culpability, the result may be ‘seriously unfair, since a conviction might rest on conduct which was not in any way blameworthy’.¹⁶⁹

11.111 By contrast, it may be more readily justifiable to shift the burden of proof on issues that are ‘optional exceptions to criminal responsibility’.¹⁷⁰

11.112 Distinguishing between an issue that is central to culpability for an offence and optional exceptions to it can be difficult. Such distinctions are not always resolved by whether the issue is cast as a defining element of an offence or a defence to it. In the House of Lords, Lord Steyn noted that

[t]he distinction between constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary. After all, it is sometimes simply a matter of which drafting technique is adopted: a true constituent element can be removed from the definition of the crime and cast as a defensive issue whereas any definition of an offence can be reformulated so as to include all possible defences within it. It is necessary to concentrate not on technicalities and niceties of language but rather on matters of substance.¹⁷¹

11.113 The Guide to Framing Commonwealth Offences recognises this difficulty. It states that placing the burden of proof on the defendant by creating a defence is more readily justified if the matter in question is not central to the question of culpability for the offence.¹⁷²

11.114 Professor Jeremy Gans suggests that defences such as reasonable excuse or due diligence are examples of optional exceptions to an otherwise fully defined offence. In such cases, a shift in the burden of proof is ‘clearly justifiable’.¹⁷³

167 See, eg. David Hamer, ‘The Presumption of Innocence and Reverse Burdens: A Balancing Act’ (2007) 66 *The Cambridge Law Journal* 142, 151–155; Kuan Chung Ong, ‘Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights’ (2013) 32 *University of Tasmania Law Review* 248, 262–63; Dennis, above n 20, 919; Ashworth, above n 8, 258–59; J Gans, *Submission 2*.

168 *R v Whyte* (1988) 51 DLR 4th 481, 493.

169 *Attorney General’s Reference No 4 of 2002*; *Sheldrake v DPP* [2005] 1 AC 264, [26] (Lord Bingham).

170 J Gans, *Submission 2*.

171 *R v Lambert* [2002] 2 AC 545, [35].

172 Attorney-General’s Department, above n 18, 50.

173 J Gans, *Submission 2*.

11.115 In *Lambert*, the imposition of a legal burden on the accused to prove that he did not know that a package in his possession contained controlled drugs was considered to shift the burden on an essential element of the offence—it was an issue ‘directly bearing on the moral blameworthiness of the accused’.¹⁷⁴

11.116 In that case, Lord Steyn observed:

in a prosecution for possession of controlled drugs with intent to supply, although the prosecution must establish that prohibited drugs were in the possession of the defendant, and that he or she knew that the package contained something, the accused must prove on a balance of probabilities that he did not know that the package contained controlled drugs. If the jury is in doubt on this issue, they must convict him. This may occur when an accused adduces sufficient evidence to raise a doubt about his guilt but the jury is not convinced on a balance of probabilities that his account is true. *Indeed it obliges the court to convict if the version of the accused is as likely to be true as not.*¹⁷⁵

11.117 Professor Ian Dennis suggests that an exception to a principle that the defendant should not bear the burden of proof on an issue going to culpability—or ‘moral blameworthiness’—exists where the risk has been voluntarily assumed:

individuals who voluntarily participate in a regulated activity from which they intend to derive benefit accept the associated burden. This burden is the risk that they may have to account for any apparent wrongdoing in the course of that activity, even where the liability involves an adverse moral evaluation of their conduct. ... An analogy might be made with the duties to account that are frequently placed on office-holders in various legal contexts, such as the conduct of corporate enterprises.¹⁷⁶

Seriousness

11.118 The seriousness of a crime, it is sometimes suggested, justifies placing a legal burden of proof on the accused. However, this argument has also been criticised. Calling this the ‘ubiquity and ugliness argument’, Sachs J of the South African Constitutional Court in *State v Coetzee* said:

There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become ... 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.¹⁷⁷

11.119 In the UK, the seriousness of the problem addressed by the offence has been routinely considered as one factor in assessing whether a reversal of the burden of proof is a proportionate response. In *Lambert*, the imposition of a legal burden of proof

174 *R v Lambert* [2002] 2 AC 545, [35].

175 *Ibid* [38].

176 Dennis, above n 20, 920.

177 *State v Coetzee* [1997] 2 LRC 593 [220] at 677.

on the accused to prove that he did not know that a package in his possession contained controlled drugs was not considered a proportionate response to the ‘notorious social evil’ of drug trafficking.¹⁷⁸

11.120 In *Sheldrake v DPP*, a legal burden on the accused to show that there was no likelihood of driving with an excess of alcohol was not considered disproportionate, given the legitimate objective of ‘prevention of death, injury and damage caused by unfit drivers’.¹⁷⁹ However, in the conjoined appeal of *Attorney General’s Reference No 4 of 2002*, despite the public interest in preventing terrorism, the House of Lords did not consider it justified to impose a legal burden on the accused to prove that an organisation was not a proscribed organisation on the date he became a member or began to profess being a member of that organisation, and that he had not taken part in the activities of the organisation at any time while it was proscribed.¹⁸⁰

11.121 In *R v Williams (Orette)*, the legal burden of proof on the defendant in a firearms offence to show that he did not know and had no reason to suspect that an imitation firearm was convertible to a useable firearm was considered justified, with one of the reasons for this being the seriousness of firearm offences and the need to protect the public.¹⁸¹

11.122 Alternatively, where the offence is one where the penalty is not severe, it may be more readily justifiable to shift the burden of proof on an issue. Examples might include ‘regulatory offences whose primary purpose is the efficient operation of matters within the public sphere, such as transport, traffic, manufacturing, environmental protection, control of domestic animals and consumer relations’.¹⁸² Associate Professor David Hamer has argued that such regulations ‘play a crucial role in safeguarding the public interest. While the breach of regulations often carries the potential for extensive and severe harm, the penalties are often fairly minor’.¹⁸³

Difficulties of proof

11.123 Reversing the onus of proof is sometimes said to be justified where it is particularly difficult for a prosecution to meet a legal burden.¹⁸⁴

11.124 However, as the Guide to Framing Commonwealth Offences notes,

[t]he fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant. If an element of the offence is difficult for the prosecution to prove, imposing a burden of proof on the defendant in respect of that element may place the defendant in a position in which he or she would also find it difficult to

178 *R v Lambert* [2002] 2 AC 545, [17] (Lord Slynn), [41]–[42] (Lord Steyn), [84], [91], [94] (Lord Hope), [156]–[157] (Lord Clyde).

179 *Attorney General’s Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [41] (Lord Bingham).

180 *Ibid* [51] (Lord Bingham).

181 *R v Williams (Orette)* [2013] 1 WLR 1200.

182 Chung Ong, above n 167, 256.

183 Hamer, above n 167, 166.

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

produce the information needed to avoid conviction. This would generally be unjust.¹⁸⁵

11.125 The Institute of Public Affairs submitted that difficulties associated with proof are not a sufficient justification for a reversal of the burden of proof, stating that '[t]he common law legal system is ideal not for the ease with which it allows for prosecutions, but for the protections it offers against an overbearing state'.¹⁸⁶

11.126 Nonetheless, it may be considered justifiable to reverse the onus of proof on an issue that is 'peculiarly within the knowledge' of the accused. Such was the case in *R v Turner*, where the burden of proving that the defendant had the necessary qualification to kill game was considered to be peculiarly within the knowledge of the accused.¹⁸⁷ A number of submissions considered that a reversal of the burden of proof may be justified in circumstances where peculiar knowledge resides with the defendant.¹⁸⁸

11.127 The Consumer Action Law Centre submitted that in corporate misconduct matters, the requisite knowledge and evidence 'invariably exists within the corporate entity, so therefore it is appropriate that any burden of proof be reversed to that party'.¹⁸⁹ Jobwatch submitted that it may be appropriate to reverse the burden of proof 'if it is particularly difficult to prove a case due to an imbalance of resources that favours the defendant'.¹⁹⁰

11.128 Hamer has noted extraordinary proof imbalances are more likely to exist in the case of regulatory offences, and that reverse persuasive burdens 'provide a practical way for the regulator to manage the cost of prosecutions'.¹⁹¹

Conclusions

11.129 A number of Commonwealth criminal offences reverse the legal burden of proof and may be seen as interfering with the principle that a person is presumed innocent until proved guilty according to law.

11.130 Offences that reverse the legal burden of proof on an issue essential to culpability arguably provide the greatest interference with the presumption of innocence, and their necessity requires the strongest justification.

11.131 This chapter has identified a range of such laws, including deeming provisions in relation to serious drug offences, and directors' liability for taxation offences.

185 Attorney-General's Department, above n 18, 50.

186 Institute of Public Affairs, *Submission 49*.

187 *R v Turner* (1816) 5 M & S 206.

188 Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; The Tax Institute, *Submission 68*; Jobwatch, *Submission 46*; Australian Council of Trade Unions, *Submission 44*; Consumer Action Law Centre, *Submission 35*; UNSW Law Society, *Submission 19*.

189 Consumer Action Law Centre, *Submission 35*.

190 Jobwatch, *Submission 46*.

191 Hamer, above n 167, 166.

11.132 Further review of the reversals of the legal burden of proof in these laws may be warranted, including consideration of whether shifting the evidential burden only would be sufficient to balance the presumption of innocence with other legitimate objectives pursued by these laws.

11.133 This chapter has focused on reversals of the legal burden of proof in criminal laws, but notes that there can be a blurring of distinctions between criminal and civil penalties, such that some civil laws may be criminal in nature. Reversals of the burden of proof in such laws merit careful scrutiny.