Submission to the Standing Committee on Legal Affairs in relation to its inquiry into Strict Liability Offences

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An offence provision 'reverses' the onus of proof where it casts on the defendant an obligation to carry either an evidential or legal burden of proof in respect of the existence (or non-existence) of some fact. (Of course, a defendant needs to discharge this burden of proof only where the prosecution has discharged the burden(s) cast upon it by the offence provision.)

The **strict liability offence and the absolute liability offence are but examples** of a provision that 'reverses' the onus of proof in this way. (The effect of stipulating that an offence is one of strict liability or of absolute liability is explained below.)

Reversal of the onus of proof can occur in other ways, and it is submitted that the Committee should seek an extension of its terms of reference to permit it to report on the circumstances in which it is appropriate for an offence provision to cast on a defendant an obligation to carry a burden to prove the existence of some fact. What follows is written on the assumption that the terms of reference have been extended in this way.

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We need to start with Section 22(1) of the *Human Rights Act 2004*:

> (1) Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

It follows that the prosecution (P) must prove to the trier of fact that the defendant (D) committed the offence. That is, D may stand mute and may not be obliged to adduce any evidence at all, let alone prove that some fact exists or not, in order to escape conviction.

If this is the correct starting point, then a great many offences are so worded as to breach the presumption of innocence. This results from the fact that for the purpose of assigning the onus of proof, the courts draw a distinction

> between [1] a requirement which forms part of the statement of a general rule and [2] a statement of some matter of answer, whether by way of exception, exemption, excuse, qualification, exculpation or otherwise (called an "exception"), which serves to take a person outside the operation of a general rule (numerical references added): *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 257, per Dawson, Toohey and Gaudron JJ.

Speaking very generally, in respect of a fact that falls within [1], P must prove that the fact exists (or, that it does not exists, depending on how the rule is framed). In respect of a fact that falls within [2] (but of course only where P has proved the facts falling within [1]) D must to some extent (depending on whether the burden is evidential or legal) prove that the fact exists (or, that it does not exist) in order to avoid the trier of fact finding that D is guilty of the offence.

A common law example concerns the offence of murder where on the facts a question arises as to whether D is insane. That is, the courts stated the governing rule in terms that

> P must prove the existence of three ultimate facts, being
> - that D killed the victim (V);

- that D intended to kill V; and
- that D had no lawful excuse to kill V;

but that D could avoid a conviction (upon proof of these three facts by P) by proving that D was insane at the rime D killed V.

This statement of the rule assumes of course that D could intend to kill V even though insane at the time. This was, however, how the courts did look at the matter.

In other words, the courts regarded the facts that P had to prove as elements of the offence, and the facts D had to prove to escape conviction as matters of defence. The courts in respect of very many statutory offences draw a similar distinction.

Any such statutory offence (or any remaining common law offence) of this character, on its face derogates from the presumption of innocence. It does so because in these cases, D will be convicted unless he or she proves some matter of defence. Thus, D cannot simply stand mute, but must adduce some evidence. But the derogation from s 22(1) may be justifiable under HRA section 28:

28 Human rights may be limited
Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

Whether the derogation is justifiable under HRA section 28 will depend on a range of matters, but the issue will not arise at all unless as a matter of interpretation the offence is understood by the court to impose on the D some kind of onus of proof.

The first area for reform of the law – the drafting of offence provisions to make absolutely clear which party has what kind of onus of proof.

Here, I propose that an offence provision should be drafted in such a way as to make absolutely clear what are:

- **[1] the element(s) of the offence -** in respect of which the prosecution would carry a legal burden to prove the existence of those facts that must exist in order to permit the trier of fact to find that those elements exist**; and**

- **[2] any matter(s) of defence -** in respect of which the defendant would carry either an evidential or a legal burden to prove the existence of those facts that must exist in order to permit the trier of fact to find that those matters of defence exist (with the result that D would be found not guilty even though P has proved that the elements of the offence exist).

The drafting exercise is complicated by section 59 of the *Criminal Code 2002*:

59 Legal burden of proof—defence

A burden of proof that a law imposes on the defendant is a legal burden only if the law expressly—
(a) provides that the burden of proof in relation to the matter in question is a legal burden; or
(b) requires the defendant to prove the matter; or
(c) creates a presumption that the matter exists unless the contrary is proved.

Example for par (b)
The XYZ Act 2002, section 10 (1) creates an offence of exhibiting a film classified 'R' to a child. Section 10 (2) provides—

(2) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that the defendant believed on reasonable grounds that the child was an adult.

Section 10 (2) provides a defence to an offence against section 10 (1). A defendant who wishes to rely on the defence has a legal burden of proving that the defendant believed on reasonable grounds that the child was an adult.

By section 56(3) of the Code, the "***legal burden***, in relation to a matter, means the burden of proving the existence of the matter".

Where the offence provision is not worded in such a way as to trigger section 59, but is nevertheless interpreted by the court so that it does provide for some matter(s) of defence, the governing rule is stated in section 58 of the Code:

58 Evidential burden of proof—defence

(1) Subject to section 59 (Legal burden of proof—defence), a burden of proof that a law imposes on a defendant is an evidential burden only.

(2) A defendant who wishes to deny criminal responsibility by relying on a provision of part 2.3 (Circumstances where there is no criminal responsibility) has an evidential burden in relation to the matter.

(3) Subject to section 59, a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence (whether or not it accompanies the description of the offence) has an evidential burden in relation to the matter.

Examples

1 The XYZ Act 2002, section 10 (1) creates an offence of producing a false or misleading document. Section 10 (2) provides—
(2) This section does not apply if the document is not false or misleading in a material particular.
Section 10 (2) is an exception to section 10 (1). A defendant who wishes to rely on the exception has an evidential burden that the document is not false or misleading in a material particular.

2 The XYZ Act 2002, section 10 (1) creates an offence of a person making a statement knowing that it omits something without which the statement is misleading. Section 10 (2) provides—
(2) This section does not apply if the omission does not make the statement misleading in a material particular.
Section 10 (2) is an exception to section 10 (1). A defendant who wishes to rely on the exception has an evidential burden that the omission did not make the statement misleading in a material particular.

3 The XYZ Act 2002, section 10 (1) creates an offence of disclosing certain information about a restraining order. Section 10 (2) provides—
(2) This section does not apply if the disclosure is made to a police officer.

> Section 10 (2) is an exception to section 10 (1). A defendant who wishes to rely on the exception has an evidential burden that the disclosure was made to a police officer.
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> NoteAn example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).
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> (4) To remove any doubt, for a strict liability offence that allows the defence of reasonable excuse, a defendant has an evidential burden in relation to the defence.
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> (5) The defendant no longer has the evidential burden in relation to a matter if evidence sufficient to discharge the burden is presented by the prosecution.
>
> (6) The question whether an evidential burden has been discharged is a question of law.
>
> (7) In this Act:
> ***evidential burden***, in relation to a matter, means the burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Why is reform of this kind needed? Because it is notoriously difficult to predict how a court will interpret an offence provision. In many cases it very difficult to predict whether the offence provision has been drafted in such a way that some particular ultimate issue of fact falls into category [1] - element of the offence, or category [2] - a matter of defence.

In *Chugg*, Dawson, Toohey and Gaudron JJ said that "the categorization of a provision as part of the statement of a general rule or as a statement of exception reflects its meaning as ascertained by the process of statutory construction". In this process, the courts take account of the form of the offence provision, but as their Honours said:

> Although the form of language may provide assistance, ultimately the question whether some particular matter is a matter of exception is to be determined "upon considerations of substance and not of form": *Dowling v Bowie* [(1952) 86 CLR, at p 140].

The courts have been reluctant to resolve the matter simply by looking at the form of the offence provision because they recognise, as pointed out by Julius Stone long ago, that

> [there is no] difference in logic between the quality of a class contained in the definition of the class, and a quality of a class as contained in an exception to the class … Every qualification of a class can equally be stated without any change in meaning as an exception to a class not so qualified. Thus the proposition 'All animals have four legs except gorillas', and 'all animals which are not gorillas have four legs', are, so far as their meanings are concerned, identical: 'Burden of Proof and the Judicial Process: A Commentary on Joseph Constantine Steamship, Ltd v Imperial Smelting Corporation, Ltd' (1944) 60 LQR 262 at 279-280.

This comment followed his earlier statement that:

> The doctrinal basis of the rules as to the burden of proof here involved is a supposed distinction between, on the one hand, a rule defined so as to exclude a given situation, and on the other hand, a rule defined without reference to that situation which is then made subject to an exception for that situation. It is the distinction between a rule containing its qualification within itself, and a rule the qualification upon which proceeds from a proposition outside the rule. … It follows that which party has the burden of proof of Fact

> A depends on whether Fact A is included among the facts defining the scope of the general rule, or is merely contained in an exception to the rule: ibid.

Of course, an offence provision may be worded so as to make absolutely clear that some issue of fact is or is not an element of the offence (and of course if it is not, it will be a matter of defence). As Stone put it, the answer 'may resolve itself into this – does the qualification happen to be stated in the body of the rule? Or does it happen to be stated as a separate exception?'. He added that this way of proceeding is a 'degeneration from meaning to formal order': ibid at 281.

But many offence provisions are not absolutely clear on this issue, and in these cases the courts have had to resolve the issue by reference to considerations more functional than the wording of the provision.

In the end, the courts resolve the issue in a way that better serves the function of promoting a just outcome. I have attempted a non-exhaustive statement of the non-formal factors that may be relevant in a particular situation to the answer to the question of whether a particular ultimate fact in issue is an element, or, a matter of defence:

> - What answer will best serve the object and policy of the rule?
> - In criminal matters, the courts give great weight to the policy of the 'golden thread' (*Woolmington, Chugg*) to the effect that there is bias towards holding that the legal burden in relation to an ultimate fact lies on P.
> - Which party affirms the existence of the ultimate fact? …
> - Which party is better placed to carry the burden of proof? In particular, which party has access to, or knowledge of, the facts that will be relevant to proof of the ultimate fact?
> - Which answer will avoid a party having to prove a negative, given that it is harder to prove the negative of a proposition of fact rather than its affirmative?
> - Are there a number of possible grounds on which the rule might not apply? If there are, then the practicalities of a trial, as well as other considerations, suggest that the party who raises the issue of whether a particular ground applies carries the burden in relation to proof of that ground. Otherwise, the other party would need to negative the whole range of possible grounds of excuse: Peter Bayne, *Uniform Evidence Law: Text and Essential Cases* (2003) at 111, footnotes omitted.

It is also very clear that a provision such as section 58(3) of the Code does not resolve the issue. It merely describes (see the words in bold) some of the ways in which a court may describe a matter of defence. It provides:

> (3) Subject to section 59, a defendant who wishes to rely on any **exception, exemption, excuse, qualification or justification** provided by the law creating an offence (whether or not it accompanies the description of the offence) has an evidential burden in relation to the matter.

In my book, I said of this kind of provision that

> The courts have interpreted these provisions in a way that renders them largely ineffective. It is held that whether some ultimate issue of fact that falls to be determined is in substance an 'exception, exemption, proviso, excuse, or qualification' depends on whether the court classifies that issue as an element of the offence or a matter of defence. Only where, as a matter of substance, the relevant ultimate issue of fact is a matter of defence, will the burden of proof in relation to that issue be on D; above at 110, citing *Chugg* (1990) 170

CLR 249 at 258; *Donoghue v Terry* [1939] VLR 165 at 170; and *Francis v Flood* [1978] 1 NSWLR 113 at 116ff.

The scrutiny Committee of the Legislative Assembly has often drawn attention to this general issue and urged that the drafting make it absolutely clear what party has what kind of onus of proof. In *Scrutiny Report No 27 of the Fifth Assembly* (11 March 2003) it noted that the Code has not solved this problem. With some slight amendment, extracts from this report follow.

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Provisions of Bills that place any kind of burden of proof on a defendant must be assessed in terms of whether this amounts to an undue trespass on the presumption of innocence. It is thus important that the Assembly be able to ascertain that any such shifting of onus is the result of a particular provision. In addition, any lack of clarity in the criminal law is a matter of concern from a rights perspective.

In earlier Reports, the Committee argued that drafters might adopt techniques that resolved these issues. The Committee offers another analysis of this issue in the light of the impact of the Criminal Code 2002. Although it greatly assists, it has not removed all of the pre-Code areas of doubt surrounding burdens of proof in relation to statutory offences. (The effect of the Commonwealth Code in this respect is noted in *The Commonwealth Criminal Code: A Guide for Practitioners* (Commonwealth Attorney-General's Department, March 2002), at 345-346, although the Territory Code, by the use of Examples, may go further in resolving some doubts)

The issue can be posited in terms of clause 44 of this [Bushfire Reconstruction Authority Bill 2003].

44 (1) A licensee commits an offence if the licensee fails to ensure that the proceeds of a collection conducted by the licensee are applied only for the purposes of the collection.

(3) This section does not apply to the deduction of lawful and proper expenses in accordance with the conditions (if any) of the licensee's licence or the regulations.

Under subclause 44(3) the question arises: Which party (or parties) would bear a burden of proof in proof or disproof of whether the deductions were in accordance with the conditions of the licence?

Given that clause 44 does not expressly impose an evidential or a legal burden on the defendant, the only burden that could be carried by the defendant would be an evidential burden of establishing that that matter exists; Code subsection 58(1). This is the burden to adduce or point to evidence that suggests a reasonable possibility that that matter exists: Code subsection 58(7).

Whether the defendant does carry such an evidential burden will turn on whether the issue of whether the deductions were in accordance with the conditions of the licence would be classified as one or other of an "exception, exemption, excuse, qualification or justification"; Code subsection 58(3).

Leaving aside for the moment the statement of Examples appended to subsection 58(3), the Code provides no guidance as to how to determine this issue. In *The Commonwealth Criminal Code: A Guide for Practitioners* (Commonwealth Attorney- General's Department, March 2002), at 344-345, it is noted:

> The references to "excuse" or "justification" can be taken to apply to established defences found in particular chapters of the Code. For example, the defendant is required to bear the evidential burden when relying on "reasonable excuse", a defence frequently employed in federal legislation. In general, excuses and justifications are readily recognisable. That cannot be said of exceptions, exemptions or qualifications. Though the distinction drawn in the Code between "elements" and matters of defence or exception parallels a familiar common law distinction, the criteria which govern its application are not apparent in Chapter 2 itself. In practice, a measure of certainty has been achieved by adopting standardised drafting techniques in framing offences, which distinguish between elements and matters of defence or exception.

The Guide then went on to illustrate how what may appear to be an exception may be characterised as an element of the offence, such that the prosecution would bear both an evidential and legal burden. The Guide also illustrated the use in some Commonwealth laws of certain drafting techniques that make clearer whether some matter is in substance a matter of exception, etc such as to require the defendant to discharge an evidential burden of proof. One technique is to make use of interpretative notes to the relevant provision (see Guide 347). Another is to make an express statement in the provision as to whether the defendant bears any kind of burden of proof.

In this respect, the Committee notes the Examples appended to subsection 58(3) of the Code. In each, a statement of the elements of an offence in one subsection of a section of an Act is then qualified in a separate subsection by a statement that commences "This section does not apply if ---". The text to the examples then asserts that the qualification is an exception, and that a defendant would carry an evidential burden in respect of the matter stated after the occurrence of the word "if". (If the defendant did discharge that burden, the prosecution would then need to disprove the matter beyond reasonable doubt.)

These examples are part of the Code. While the examples are part of the Act, it is not perhaps entirely clear what will be their effect. Each of the examples might be taken simply as a guide as to how that particular kind of offence provision should be understood. On the other hand, a court might more broadly take it that the use of the words "This section does not apply if ---" will in all circumstances mean that the matter that follows must be proved by the defendant (although only to the evidential burden standard).

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I would add to this last paragraph the following. On basic principle, as stated in High Court cases such as *Dowling v Bowie,* the preferable position is that each of the examples might be taken simply as a guide as to how that particular kind of offence provision – in that kind of statute - should be understood. The High Court has made it clear that the wording of the offence provision should not be read in isolation from the larger context of the particular statute and its purpose. Thus, the use of the words "This section does not apply if ---" in some other statute might not be read as having the result that the defendant is required to prove to the evidential burden standard the existence of the matters that follow the word “if”.

Moreover, the Examples attached to section 58(3) could not be taken as the expression of a legislative intention that a defendant is required to prove to the evidential burden standard the existence of matters only where those maters follow the phrase "This section does not apply if ---".

The basic point that follows is that the Examples attached to section 58(3) should have little if no relevance where in relation to some particular offence provision there is a provision preceded by the words "This section does not apply if ---". It is important to say this because the use of those words is now common.

For example, clause 155 of the Legal Profession Bill 2006 provides:

> 155 Requirement for registration to practice foreign law
> (1) A person commits an offence if—
> (a) the person practises foreign law in the ACT; and
> (b) the person is not—
> (i) an Australian-registered foreign lawyer; or
> (ii) an Australian legal practitioner.
> Maximum penalty: 50 penalty units.
>
> (2) This section does not apply to an overseas-registered foreign lawyer who—
> (a) practises foreign law in the ACT for 1 or more continuous periods that do not, in the aggregate, exceed 12 months in any 3-year period; or
> (b) is subject to a restriction imposed under the Migration Act 1958 (Cwlth) that has the effect of limiting the period during which work may be done, or business transacted, in Australia by the person.

Taking a literal view, it is arguable that P carries both an evidential and legal burden to prove the ultimates facts stated in clause 155(1), and that D carries an evidential burden to prove the ultimates facts stated in clause 155(2). (If D discharges this evidential burden then P must discharge a legal burden to prove the contrary.)

Taking a more functional view, as the High Court has generally endorsed, it is arguable that while P carries both an evidential and legal burden to prove that "the person practises foreign law in the ACT" (cl 155(1)(a)), D carries an evidential burden to prove the matters stated in cl 155(1)(b). The justification for this view is that it is easier for D to adduce evidence about the existence of these facts.

On the other hand, if cl 155(1) is read as casting on P carries both an evidential and legal burden to prove the ultimate facts stated in clause 155(1), it might be argued that cl 155(2) might be read in a similar way. The justification for this view is that there is no reason from the point of view of ease of proof to require P to carry both an evidential and legal burden to prove the ultimates facts stated in clause 155(1), but not in respect of those stated in cl 155(2).

(If this analysis is thought to be strained, I suggest a reading of *Dowling v Bowie* as illustrative of how a literal reading can be displaced by a more functional purposive approach.)

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The most desirable reform would be to replace sections 58 and 59 with a single section:

> 58 Burden of proof—defence
>
> (1) A burden of proof in relation to a matter is imposed on the defendant only if the law expressly—
> (a) provides that the burden of proof in relation to the matter in placed on the defendant; or
> (b) requires the defendant to prove the matter; or
> (c) creates a presumption that the matter exists unless the contrary is proved.
>
> (2) Subject to express provision to the contrary, a burden of proof that a law imposes on a defendant is an evidential burden only.

(3) A defendant who wishes to deny criminal responsibility by relying on a provision of part 2.3 (Circumstances where there is no criminal responsibility) has an evidential burden in relation to the matter.

(4) To remove any doubt, for a strict liability offence that allows the defence of reasonable excuse, a defendant has an evidential burden in relation to the defence.
(5) The defendant no longer has the evidential burden in relation to a matter if evidence sufficient to discharge the burden is presented by the prosecution.
(6) The question whether an evidential burden has been discharged is a question of law.
(7) In this Act:
evidential burden, in relation to a matter, means the burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Notes to this suggestion.

1. I do not suggest the retention of subsection 58(4) of the Code because it is largely if not entirely meaningless- see discussion above.

2. The point of this reform is to [1] make it very clear whether a particular offence provision derogates from the presumption of innocence, and [2] to create a default rule to the effect that where D must prove some fact then D carries only an evidential burden. This still leaves as a rights issue the question or whether the imposition of an evidential burden on D is justifiable in the circumstances of the particular offence.

3. By the use of appropriate words, the particular offence may of course make it clear that in respect of some matter of defence D carries a *legal* burden of proof. One advantage of requiring express provision (in contrast to the more obscure device of using words such as in the present section 59(1)) is that the rights issue should thus be more obvious.

4. In suggesting this reform, I have in mind what has emerged from the UK courts in their application of the presumption of innocence to ‘reverse onus’ clauses.

As a matter of reducing the derogation of the presumption of innocence, the preferable policy where some matter of defence is provided for in the offence provision (and one that may in some, perhaps many cases, be required by HRA section 22(1)) is that the defendant should carry only an evidential burden.

Indeed, if UK decisions are followed, the effect of HRA section 22(1) may be that

- a provision which in whatever way imposes on a defendant a “reverse onus” - that is, a burden of whatever kind to prove the existence of some fact in order to avoid a finding of guilt - is inconsistent with the presumption of innocence;

but

- such a derogation may be justifiable under HRA section 28 – that is, very generally, that the provision is a reasonable limit, set by a Territory law, which limit has been demonstrated to be justifiable in a free and democratic society.

A key consideration in the section 28 calculus is whether the provision imposes only an *evidential* burden on the defendant – which points strongly in favour of compatibility, or whether on the other hand it imposes a *legal* burden - which points strongly in favour of incompatibility - although not decisively.

The basis of the concern with the imposition of a *legal* burden on the defendant, even to the standard of balance of probabilities, is that “if an accused is required to prove a fact on the balance of probability to avoid conviction, this permits a conviction in spite of the fact-finding tribunal having a reasonable doubt as to the guilt of the accused: see Dickson CJ in *R v Whyte* (1988) 51 DLR (4th) 481, 493”: *R v Johnstone* [2003] 1 WLR 1736 at 1750, per Lord Nicholls.

On the other hand, it must be noted that some English judges have quite forcefully stated that there will be circumstances where the legitimate object of a scheme of regulation justifies the imposition of a *legal* burden on a defendant: see *Attorney General Reference No. 1 of 2004* [2004] EWCA Crim 1025 at paras 31, 34 and 38.)

(The justifiability calculus is more complex than merely addressing the nature of the burden of poof placed on the defendant. I return to this below.)

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An alternative reform …

The government may oppose amendment of section 59 on the basis that it wishes to keep the Act Code in the same terms as the Code enacted in other Australian jurisdictions.

If the government is adamant on this score, and sections 58 and 59 of the Code must be retained, then I suggest another way to achieve the result intended by first suggestion.

This is that

- as matter of drafting practice, which should be stated publicly by government, there will be provision for a matter of defence in an offence provision only by the use of words of the kind found in paras 59(a), (b) or (c); and

- where it is desired that D carry only an evidential burden of proof in respect of those matters of defence, that there be included in the offence provision a clause that negates the effect of section 59.

For example, section 10 of the XYZ Act (see the Example given in existing section 59) might contain an additional subsection in the form:

> (3) Notwithstanding section 59 of the *Criminal Code 2002*, a defendant has an evidential burden of proof in relation to proof of the matters stated in subsection (2).

(Of course, section 59 would not be displaced if the intention were that a defendant would carry a legal burden of proof in relation to some issue of defence, in which case the question of incompatibility with HRA section 22(1) would be starkly exposed.)

The least satisfactory reform is that each particular offence provision is drafted by the use of words that

- avoid the application of section 59 of the Code,

- yet makes it clear that D carries an onus of proof in respect of the existence of some fact (in which case D will carry only an evidential burden of proof, as per section 58 of the Code).

This is not really a reform at all, because this merely states the existing position. This is unsatisfactory because there still remains uncertainty in respect of many statutory offences.

The second area for reform of the law – a statement of a framework for assessing the justifiability of a reverse onus clause

We are faced here with two kinds of reverse onus clause, being

- those that impose an evidential burden on D; and
- those that impose a legal burden on D.

As argued above, either kind derogates from the presumption of innocence, and the question is then whether that derogation is justifiable under HRA section 28. A framework for the application of section 28 is set out in *Scrutiny Report No 25 of the Sixth Assembly*, in relation to the Terrorism (Extraordinary Temporary Powers) Bill 2006. Speaking very generally, and not very helpfully, the basic inquiry is whether the reverse onus provision is a proportionate means of achieving a legitimate aim.

In the context I am addressing here, it is fair to say that judges and commentators have found it very difficult to state a framework for assessing the justifiability of a reverse onus clause.

Some UK judges have attempted to give general guidance. In *R v Johnstone* [2003] 1 WLR 1736 at 1750, Lord Nicholls referred to the consequence of imposing a *legal* burden on a defendant, and continued:

> This consequence of a reverse burden of proof should colour one's approach when evaluating the reasons why it is said that, in the absence of a persuasive [that is, legal – PB] burden on the accused, the public interest will be prejudiced to an extent which justifies placing a persuasive burden on the accused. The more serious the punishment which may flow from conviction, the more compelling must be the reasons. The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access.

It is to be noted that Lord Nicholls did not suggest that regard be had to whether the matter to be proved by the defendant was 'an essential element of the offence' as against a matter of exception. In *R v Lambert* [2001] UKHL 37, para 35, Lord Steyn rejected this supposed distinction as having little value as a guide to resolving the compatibility issue. He said:

> The 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.

Lord Nicholls did find to be relevant the "extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution". In *Lambert*, Lord Steyn said that what concerned him was a case "where the defence is so closely linked with mens rea and moral blameworthiness that it would derogate

from the presumption [of innocence] to transfer the legal burden to the accused": ibid. (Strict and absolute liability offences illustrate this situation and that is why onus reversal in those cases is so problematic; see below.)

It is to be noted that Attorney-General's Department, *A Guide To Framing Commonwealth Offences,* ... (full cite is below), does give some guidance as to when reversal of onus is appropriate. It states:

> **Appropriate use of defences**
>
> Only use defences where reversal of the onus of proof is appropriate
>
> Principle: In general, the prosecution should be required to prove all aspects of a criminal offence beyond reasonable doubt. A matter should be included in a defence, thereby placing the onus on the defendant, only where the matter is peculiarly within the knowledge of the defendant; and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.
> …
> The mere fact that it is difficult for the prosecution to prove an element of an offence has not traditionally been considered in itself, a sound justification for reversing the onus of proof. If an element of the offence is also difficult for the defendant to prove, reversing the onus of proof places the defendant in a position in which he or she will find it very difficult to produce the information needed to avert conviction. This would generally be unjust.
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> However, where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it is legitimate to cast the matter as a defence. Placing of an evidential burden on the defendant (or the further step of casting a matter as a legal burden) is more readily justified if:
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> - the matter in question is not 'central' to the question of culpability for the offence,
> - the offence carries a relatively low penalty, or
> - the conduct proscribed by the offence poses a grave danger to public health or safety.

The Guide did note that the Senate Scrutiny Committee may take a narrower view of when reversal is justified, and it also noted that "[In] Alert Digest 6/2001 pages 27-28, the Scrutiny of Bills Committee indicated that explanatory memoranda to a Bill should explain, whenever the onus of proof is reversed, why the defendant should bear that onus of proof instead of the prosecution".

Here, I propose that JACS should publish a statement similar to that found in *A Guide To Framing Commonwealth Offences, …*and place this policy in the context of the *Human Rights Act 2004.*

A reverse onus clause may take the form of a statutory presumption that certain facts exist upon proof of other facts, and where P is permitted to aver that certain facts exist. Such provisions also derogate from the presumption of innocence.

In these cases too, I suggest that JACS should publish a statement similar to that found in *A Guide To Framing Commonwealth Offences, …*and place this policy in the context of the Human Rights Act 2004.

I also propose that the Standing Committee on Legal Affairs endorse the view of the Senate Scrutiny of Bills Committee that the Explanatory Statement to a Bill should

explain, whenever the onus of proof is reversed, why the defendant should bear that onus of proof instead of the prosecution.

The third area for reform of the law – a statement of a framework for assessing the justifiability for creation of offences of strict or absolute liability

A particular (and quite problematic) instance of the "reverse onus" issue is raised where the statutory provision creates an offence of strict or absolute liability, or where it creates an offence or an offence which includes an element of strict or absolute liability. Such provisions derogate from the presumption of innocence stated in HRA s 22(1), and perhaps might be seen to derogate from other HRA rights. In *Report No 38 of the Fifth Assembly*, the Scrutiny Committee quoted the words of Lamer J in *Re B.C. Motor Vehicle Act*:

> It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin *actus non facit reum nisi mens sit rea* [an act does not make the doer guilty, unless the mind be guilty].[1]

Thus, a court might see the rights issue as being whether an offence of strict or absolute liability, or an offence which includes an element of strict or absolute liability, is compatible with a person's "right to liberty and security of the person": s 24(1). Perhaps *HRA* s 24(1) is most obviously implicated where imprisonment is a possible punishment for breach of the offence. Moreover, where the punishment is severe, there may well be a derogation from HRA right not to be "treated or punished in a cruel, inhuman or degrading way": HRA s 10(1)(b).

There may well, however, be a 'right to liberty' or 'cruel punishment' objection even in cases where imprisonment is not a possible penalty. In the words of Lamer CJ in *R v Wholesale Travel Group Inc.*,[2] the question in every case will be whether "the penalty imposed on an accused and the stigma which attaches to that penalty and/or to the conviction itself, necessitate a level of fault which reflects the particular nature of the crime". If the fault element in the statutory offence is not one the court thinks sufficient to meet the standards of fundamental justice, the provision will be in breach of the bill of rights. Whether this approach translates to the *HRA* is debatable. It might be seen to be an aspect of asking whether the punishment is proportionate to the offence.[3]

In any event, provision for strict or absolute liability will always constitute a derogation from the presumption of innocence, and the rights issue is thus whether this derogation is justifiable under HRA s 28. A brief statement concerning the fundamentals of criminal liability will make this clear.

The statement by a law of what will constitute an offence has two elements: (1) *the physical element* – which states what physical actions of a person are prescribed; and (2) *the fault element* - which states what state of mind (if any) of the person must accompany the commission of the physical elements in order by her or him to be guilty of the offence. (The fault element is sometimes spoken of as the *mens rea* element, and the physical element as the

[1] [1985] 2 SCR 486 [69].
[2] [1991] 3 S.C.R. 154 at 183.
[3] In *Report No 55 (5th Assembly)*, concerning the Crimes (Restorative Justice) Bill 2004 (GR *Report No 56*), the Committee drew attention to *HRA* s 10 and noted a comment that "[i]n various jurisdictions around the world it is a constitutional principle that no person should be subjected to a grossly disproportionate sentence": D van Zyl Smit and A Ashworth, "Disproportionate Sentences as Human Rights Violations" (2004) 67 *Modern Law review* 541 at 541.

actus reus). Following Australian common law, the *Criminal Code Act 2002* (ACT) makes provision for three categories of statutory criminal offence so far as concerns the nature of the fault element.

1. First, there are offences in respect of which there is an obligation on the prosecution to prove that the accused *intended* to perform the physical elements of the relevant offence. Thus, the intention is the fault element. By s 22 of the *Code*, this is the position in relation to all offences, *unless* the offence is stipulated to be one of either strict or, alternatively, absolute liability.[4]

2. Secondly, if the law creating the offence provides that it is one of strict liability, "there are no fault elements for any of the physical elements of the offence": *Code,* s 23(a). Nevertheless, the defendant may adduce evidence that he or she, when carrying out the conduct making up the physical elements, considered whether or not facts existed, (in relation to which see s 36(2)), and was under a mistaken but reasonable belief about the facts. If, had the facts existed, the conduct would not have been an offence, the defendant is not criminally responsible: *Code,* s 36(1). The defendant need only present or point to evidence that suggests a reasonable possibility that he or she acted in this way: *Code*, s 58. If this "evidential burden" is discharged, then the prosecution "is required to persuade the jury that there was no mistake or that the mistake was unreasonable".[5]

It should however be noted that:

- in terms of Code s 36, a defendant cannot be mistaken about the facts unless he or she has considered whether or not facts existed. There is then, in effect, a duty of inquiry in circumstances where the defendant's conduct might result in the commission of the offence; and
- s 36 does not permit a defence
  1. of reasonable ignorance of the facts;
  2. of reasonable ignorance of the law; or
  3. that reasonable steps were taken by the defendant to obey the law (a 'due diligence' defence).[6]

On the other hand, "this rigour is softened to some extent by the provision of a defence which excuses accidental breach of provisions which impose strict or absolute liability".[7] This is a reference to *Code* s 39, which deals with "Intervening conduct or event". This defence is, however, much narrower than a due diligence defence. Some further protection is afforded by s 40 (duress); s 41, ("Sudden or extraordinary emergency"); s 42 (self-defence); and s 43 (lawful authority).

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[4] Section 22 is more complicated. Where the physical element consists only of conduct, intention is the fault element (s 22(1)); where the physical element consists of a circumstance or a result, recklessness is the fault element (s 22(2)).

[5] *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) at 177.

[6] Australian courts have not recognised that as a matter of common law interpretation of a statutory offence, they should find that an accused can raise a due diligence explanation; see *AIS Pty Ltd v Environment Protection Authority* (1992) 29 NSWLR 487. (The court did not foreclose the development of such a defence, and one has been developed by the Canadian courts; see *R v The Corporation of The City of Sault Ste. Marie* [1978] 2 SCR 1299.) The foundation for adoption of a due diligence explanation is the principle that "the defendant lacked a guilty mind because he had done all that could be done to avoid the happening of the offence": *AIS Pty Ltd v Environment Protection Authority* (1992) 29 NSWLR 487 at 499, per Carruthers J. (If it was described as true defence, the accused would at least bear an evidential burden of proof to make it out; alternatively, it might be described in way which placed on the accused only a tactical onus to adduce evidence from which the inference might be drawn that he or she had acted with diligence.)

[7] *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) at 177.

3. Thirdly, if the law creating the offence provides that it is one of absolute liability, there are no fault elements for any of the physical elements; and the defence of mistake of fact under s 36 is not available: *Code* s 24(1). Sections 39 to 43 are, however, also available in relation to offences of absolute liability.

The *Code* provides no guidance as to how the legislature should choose in which category to place a particular offence, or as to how a breach should be punished. Thus, a term of imprisonment might be prescribed as an available penalty in respect of an offence of strict or absolute liability. Nor does the *Code*, (nor could it of course), preclude the legislature from providing for a discrete defence, such as that the accused acted with due diligence, or had a reasonable excuse.

This issue of justification has often engaged the attention of the Scrutiny Committee, and it has at various times attempted to state its standpoint. In *Report No 38 of the Fifth Assembly*, the Committee concluded a general discussion in these terms.

> First, it is clear that from a rights perspective, the issue of the nature of the fault elements in relation to an offence is one to be taken seriously. …
>
> The Assembly needs to be conscious of this issue as it deals with each proposed statutory offence and, more generally, as it deals with the issues that will be thrown up by the proposed Territory Human Rights Bill.
>
> Secondly, the Committee adheres to its position, stated in earlier Reports, that in relation to a proposed statutory offence of strict or absolute liability, the Explanatory Statement should [1] offer a justification of the reasons for the amelioration of principle that an accused must be shown to have committed the physical elements of the offence with a guilty mind, and [2] should indicate why an alternative (and in particular the option of providing a due diligence defence) was not adopted.
>
> Thirdly, there is room for debate as just what is an appropriate framework for sorting out the issue of when there should be such an amelioration. The approach of the Canadian courts, and of the Senate Committee, are suggestive of a range of factors. This is a matter that needs to be addressed on a case-by-case basis until a general position can be stated. With respect to the Chief Minister, the Committee feels that it is appropriate for the Attorney to indicate at least some minimum general standards.

The government response firmly rejected the second suggestion in the third paragraph of the quoted material; (see letter of the Attorney-General of 18 August 2003 attached to *Report No 38*). So far as concerns the suggestion that the government should indicate a general approach, it is the case that from time to time, (and increasingly so), that a particular Explanatory Statement will state a justification for the creation of the strict or absolute liability offences proposed in the Bill.

Although the Committee had not in *Report No 38* suggested that consideration be given to a "reasonable excise" defence, it had done so on earlier occasions and the Attorney's letter rejected adoption of a defence framed in these terms given its inherent vagueness. The Committee has accepted this approach, although some Territory bills continue to make provision for a defence cast in these terms.

The Committee has a particular concern with offences of strict or absolute liability in respect of which imprisonment is a possible punishment, and has suggested that such clauses may be found to be incompatible with the *HRA*.

The Committee has not attempted to spell out a framework according to which it assesses whether it is appropriate to provide for an offence of strict or absolute liability, and, as noted, its invitation to the Executive to spell out a general framework has only been partially taken up.

While it is undesirable (if not fatuous) to attempt to devise an exhaustive list of factors, a non-exhaustive list of general considerations would be very useful as a guide to those who draft the Explanatory Statements. Some or all of these factors – and of course any others that are thought to justify imposition of strict and/or absolute liability – could then be stated in the Explanatory Statement and, if necessary spelt out in more detail, both in a prefatory statement and more particularly when justifying a particular offence provision.

A possible statement of policy may be found in Attorney-General's Department, *A Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers* (February 2004, and updates).
http://www.ag.gov.au/agd/www/Agdhome.nsf/Page/6F19B1D7FCBBF6C3CA256E5F00017937?OpenDocument

It states some particular policies (emphasis added):

> Application of strict or absolute liability to **all physical elements** of an offence has generally only been considered appropriate where each of the following considerations is applicable:
>
> - The offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate) in the case of strict liability or 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability. A higher maximum fine has been considered appropriate where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment.
> - The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences.
> - There are legitimate grounds for penalising persons lacking 'fault', for example because they will be placed on notice to guard against the possibility of any contravention. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made an honest and reasonable mistake of fact.
>
> …
>
> Application of strict or absolute liability to **a particular physical element** of an offence has generally only been considered appropriate where one of the following considerations is applicable:
>
> - There is demonstrated evidence that the requirement to prove fault of that particular element is undermining or will undermine the deterrent effect of the offence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made an honest and reasonable mistake of fact in respect of that element.
>
> Jurisdictional elements attract absolute liability

- The element is a jurisdictional element rather than one going to the essence of the offence. Absolute liability should apply to the jurisdictional element. For example, in the case of theft of Commonwealth property, the act of theft is the substantive element of the offence; while the circumstance that the property belongs to the Commonwealth is a jurisdictional element (see section 131.1 of the Criminal Code).

…

The document then refers to reports of the Scrutiny Committee and in particular to Report 6/2002 of the Scrutiny of Bills Committee: *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. The document endorsed as in accord with Commonwealth government policy several propositions stated in the Senate report:

- 'fault liability is one of the most fundamental protections of criminal law; to exclude this protection is a serious matter' (page 283),
- 'strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; it would not be proper to base strict liability on mere administrative convenience or on a rigid formula' (page 283),
- 'strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units ($6,600 for an individual and $33,000 for a body corporate) appears to be a reasonable maximum' (page 284),
- 'strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation' (page 284),
- 'strict liability may be appropriate where its application is necessary to protect the general revenue' (page 284),
- 'strict liability should not be justified on the sole ground of minimising resource requirements' (page 284),
- 'strict liability may be appropriate to overcome the 'knowledge of law' problem' (page 285), and
- 'absolute liability offences should be rare and limited to jurisdictional or similar elements of offences' (page 285).

(The 'knowledge of law' problem' has now been addressed by amendment of the Criminal Code 2002 to insert what is now section 12(2) of the Code.)

I propose that

- **JACS should publish a 'general framework' statement similar to that found in *A Guide To Framing Commonwealth Offences,* …and place this policy in the context of the *Human Rights Act 2004*, and**

- **the Standing Committee on Legal Affairs affirm that in relation to a proposed statutory offence of strict or absolute liability, the Explanatory Statement should justify the amelioration of principle that an accused must be shown to have committed the physical elements of the offence with a guilty mind.**

Other possible approaches

More problematic is the issue of whether the Explanatory Statement should also indicate why there was no provision made for a due diligence defence. My view is that the absence of provision for such a defence will have a critical bearing on whether derogation of the

presumption of innocence is justifiable under HRA section 28. Thus, one would normally expect the absence of such provision to be justified. (On the other hand, if there is provision for such a defence, that would be a matter also noted as tending to support justification under HRA section 28.)

A more ‘radical’ view is that the Criminal Code should be amended to make provision for a due diligence defence to be invoked as a defence to every offence of strict liability.