
Presumption of innocence in Australia: A threatened species

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Legislation in Australia is increasingly departing from the presumption of innocence for those accused of a crime. After documenting specific instances in the current statute book, this article considers the High Court's response to date to legislative abrogation of the presumption. Though the presumption is of ancient vintage and is supported by strong rationale and links with other fundamental fair trial principles, the High Court has often validated laws departing from the presumption on the basis that parliaments have power to enact rules of evidence. However, in recent jurisprudence on Ch III of the Constitution, the High Court has found that it is an essential characteristic of the criminal trial in Australia that proceedings be accusatorial and adversarial in nature. Through this means, the High Court has created the constitutional potential for reverse onus provisions to be challenged, particularly where they practically permit the possibility of a person being convicted despite the existence of reasonable doubt as to their guilt.

INTRODUCTION

Most people would agree that the presumption of innocence is one of the most fundamental legal principles in the Australian system of criminal justice. It is recognised as such, either in its own right or as part of a fair trial¹ or due process,² in comparable international jurisdictions.³ However, Australia lacks an express national bill of rights which might have expressly enshrined and protected such a right from legislative interference. Increasingly, as the Australian Law Reform Commission recently noted, the presumption of innocence is being eroded by Australian statute law.⁴

This article will document instances in which Australian statute law abrogates the presumption of innocence. It discusses the fundamental nature of the presumption before considering through comparative jurisprudence what can be learned from elsewhere. It is possible for the High Court of Australia to protect the presumption of innocence through a robust application of its still nascent Ch III jurisprudence, which requires that laws which require courts to depart from traditional judicial process, such that their institutional integrity is threatened, be struck down as unconstitutional.

How Australian statute law is undermining the presumption of innocence

The following examples do not purport to be an exhaustive account of every provision which abrogates the presumption of innocence. There are different kinds of laws which interfere with the presumption of innocence.

First, there are occasions where particular elements of an offence, which the prosecution would normally be required to prove at the beyond reasonable doubt standard, are the subject of

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¹ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 3 November 1950 (effective 3 September 1953) Art 6(2) expressly enshrines the presumption of innocence with respect to someone charged with an offence, as part of the right to a fair trial.

² The *Fifth Amendment* to the United States *Constitution* expressly enshrines the right to due process. It has been held that the presumption of innocence is an integral part of due process: *Coffin v United States*, 156 US 432 (1895), 453.

³ *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); *Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/810 (1948) Art 11; *Canada Act 1982* (UK) c 11, Sch B Pt I (“*Canadian Charter of Rights and Freedoms*”) s 11(d); *New Zealand Bill of Rights Act 1990* (NZ) s 25(c).

⁴ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC, 2015) 271.



presumptions. These presume that the element is satisfied in particular cases, unless the accused can prove otherwise. In other words, they are reverse onus provisions.

Second, there are occasions where, although there is no presumption operating against the accused with respect to an element of an offence, an onus is still cast on the accused in relation to a defence. And where the onus of proof is cast upon the accused one way or another the standard of proof by which they must prove the required thing is relevant. Specifically, occasions where a mere evidentiary standard is required (show some evidence sufficient to create reasonable doubt), or whether a legal or persuasive onus is required (show on the balance of probabilities).

Finally, there are occasions where offences are cast not in terms of actual proven wrongdoing, but based on “reasonable suspicion”. This raises the question of the way in which the presumption of innocence is or should be protected by the law.

Examples at State level

Examples abound, particularly with respect to drug offences, where the “standard approach” to criminal prosecution (where the prosecutor must prove beyond doubt the existence of all elements of the offence charged) is varied.

For example, s 32(5) of the *Controlled Substances Act 1984* (SA) states that, in relation to a trafficking offence, where a person has in their possession a trafficable quantity of a controlled drug, it is presumed that they had the relevant intention or were acting for the relevant purpose, in the absence of evidence to the contrary. In other words, in relation to some types of trafficking offence, s 32(5) relieves the prosecutor of the burden of proving aspects of the offence of trafficking, and imposes a reverse onus on the defence with respect to that aspect. Similar provision is made with respect to other drug offences in South Australia.⁵

Similar arrangements appear in the *Misuse of Drugs Act 1981* (WA). Section 11 contains a (rebuttable) presumption of the required intent if the accused has more than a stated quantity of a prohibited drug or plant in their possession.

It is not clear from either Act, or the evidence legislation in those states,⁶ whether this onus cast upon the accused is a merely evidentiary onus, or whether it is a legal onus.

Another example is found in the *Misuse of Drugs Act 2001* (Tas). Offences are created involving manufacturing,⁷ cultivating⁸ and trafficking⁹ dangerous drugs. Section 6 proscribes the manufacture of a prohibited drug either (a) with the intention of selling it, or (b) believing that another person intends to sell it. The required intention or belief is presumed if the accused has a certain quantity of drug in their possession, unless they prove otherwise. Specifically, this proof is required on the balance of probabilities. Section 7 is virtually identical, but it applies to the offence of cultivating. Again, either intention or belief is required to commit the offence, but the onus of proof (at the legal standard) is on the accused to disprove the relevant one. Section 12 outlaws drug trafficking. The definition of the word “traffic” appears in s 3, with six examples given. Five of them refer specifically to the concept of “intent”. Section 12 states that the required intention will be presumed if the accused has the required quantity of drug in their possession, unless they can prove on the balance of probabilities they lacked the required intent.¹⁰

Examples at Commonwealth level

Commonwealth drug offences adopt a similar structure to their State counterparts. For example, s 302.4 of the *Criminal Code 1995* (Cth) creates the offence of trafficking in a controlled drug,

⁵ See, eg, the offence of manufacturing a controlled substance with intent to sell or believing that another intends to do so, aided by a presumption that the accused had the required intention or belief (s 33(5)), similarly for the offence of cultivation (s 33B) (aided by the presumption in s 33B(5)), and sale of controlled plants (s 33C) (aided by the presumption in s 33C(5)).

⁶ See *Evidence Act 1929* (SA); *Evidence Act 1906* (WA).

⁷ *Misuse of Drugs Act 2001* (Tas) s 6.

⁸ *Misuse of Drugs Act 2001* (Tas) s 7.

⁹ *Misuse of Drugs Act 2001* (Tas) s 12.

¹⁰ *Misuse of Drugs Act 2001* (Tas) s 12(2).

punishment by up to 10 years' imprisonment. The definition of traffic appears in s 302.1 in terms of five examples. Apart from one example (actual sale), the other four examples include a requirement that the accused have an intention to sell the drug. Section 302.5 creates a (rebuttable) presumption that, where a person possesses more than a certain quantity of a controlled drug, they are taken to have the necessary intention to traffic in it. Note 1 to this section makes clear that this onus is a legal onus on the accused.

While the default in the *Criminal Code* is that burdens of proof upon the accused must be satisfied on the evidentiary onus only, this is subject to displacement by clear contrary intention.¹¹ Note 1 makes it abundantly clear that it is intended that the accused bear a legal, rather than evidentiary, onus. A similar pattern appears regarding the offences of cultivating a controlled plant, again requiring intention or belief as an element of the offence.¹² Proof of either is aided by the presumption of intention or belief if the accused possesses a certain quantity.¹³ This pattern appears also with respect to the offence of manufacturing a substance for a commercial purpose, again requiring intention or belief as an element of the offence. Proof of either is aided by the presumption of intention or belief if the accused possesses a certain quantity.¹⁴ In both cases, notes to the relevant section confirm they are legal, rather than merely evidentiary, burdens. These offences can carry substantial penalties.¹⁵

Other examples appear in the *Criminal Code* where elements of an offence are presumed against the accused. For instance, s 376.3 states that, where the prosecution proves that the accused used false information to obtain an air passenger ticket, it is presumed (unless the accused proves otherwise) that a carriage service was used.¹⁶ This is a legal burden.

The drug offences contained in s 307.9 and 307.10 both contain, as an element of the offence, that the substance in the possession of the accused be reasonably suspected of having been unlawfully imported. If the prosecution can prove its elements beyond reasonable doubt, the accused is guilty unless they can make out a defence. One defence, that the substance in the accused's possession was not in fact unlawfully imported, must be proven by the accused at the legal standard.¹⁷ Similarly, s 400.9 creates an offence of dealing with property reasonably suspected of being proceeds of crime. An element of the offence is that "it is reasonable to suspect that the money or property is proceeds of crime". Section 400.9(5) creates a defence if the accused can prove they did not have reasonable grounds for suspecting the money or property was crime-derived. Again, this is a legal onus.¹⁸

¹¹ *Criminal Code 1995* (Cth) s 13.4.

¹² *Criminal Code 1995* (Cth) ss 303.1, 303.3.

¹³ *Criminal Code 1995* (Cth) ss 303.1, 303.7.

¹⁴ *Criminal Code 1995* (Cth) ss 305.2, 305.4, 305.6. See also *Criminal Code 1995* (Cth) ss 306.5–306.8, 308.2, 308.4, 309.5, 309.12 and 309.15 for other offences following a similar pattern.

¹⁵ In the case of drug trafficking, a maximum jail term of 25 years and/or 5000 penalty units (*Criminal Code 1995* (Cth) s 302.3) or 10 years and/or 2000 penalty units depending on the quantity of drug involved (s 302.4), for plant cultivation life imprisonment and/or 7500 penalty units (s 303.4) or 25 years and/or 5000 penalty units depending on quantity, and for manufacturing a substance for a commercial purpose, a maximum of life imprisonment and/or 7500 penalty units (s 305.3) or 25 or 28 years in prison and/or 5000 penalty units depending on quantity and the presence or absence of aggravating factors (s 305.4).

¹⁶ An element of the offence (presumably for constitutional reasons) is that the accused used a carriage service to obtain the ticket.

¹⁷ *Criminal Code 1995* (Cth) ss 307.9(5), 307.10(4). The maximum penalty for a breach of s 307(9) is 25 years' imprisonment and/or 5000 penalty units; the maximum penalty for a breach of s 307.10 is 2 years' imprisonment and/or 400 penalty units.

¹⁸ An offence under *Criminal Code 1995* (Cth) s 400.9 attracts a maximum imprisonment of three years and/or a fine of 180 penalty units.

Reverse onus provisions also appear in a range of other Commonwealth legislation, including forfeiture laws.¹⁹ They are generally not considered as egregious as the provisions discussed above, because they do not presume that an element of an offence has been satisfied.²⁰

Importance, history and rationale of the presumption of innocence

The presumption of innocence is enshrined in numerous international human rights instruments, reflecting its position in the criminal justice system as part of a fair trial and due process. In 1935, the House of Lords referred to the presumption of innocence as the “golden thread” running through criminal law.²¹

The presumption is of ancient vintage. It is cited in the *Code of Hammurabi* (1792–1750 BCE):

It is a fundamental principle of the code of Hammurabi that the presumption is always in favour of the innocence of the accused: the burden of proof is thrown upon the accuser ... not merely is the burden of proof upon the accuser, but in all primitive society the entire burden of accusation or indictment falls upon him. In this respect the legal procedure of Babylonia seems to have been that of all early nations.²²

There is reference to the presumption in Roman law.²³ English law did not have a strong need for the presumption when questions of guilt or innocence were answered by divine intervention, including trial by ordeal and trial by combat. Their demise in the early 13th century precipitated application of the presumption in some of the specialist courts, and eventually the common law more generally. There is a recorded reference to a 1293 Court of Common Pleas decision in which something akin to the presumption is uttered,²⁴ and it appears in a parliamentary speech in 1624.²⁵ It is further evidenced in English case law of the early to mid-18th century,²⁶ and appears in treatises of the time.²⁷

Different rationales have been suggested for the existence of the doctrine. Some take a highly historical perspective, pointing out longstanding fear and anxiety associated with erring in finding a person guilty, encapsulated in the pithy phrase from *Matthew 7:1*: “judge not, lest ye be judged”. This fear and anxiety was worst when the death penalty applied to hundreds of offences. There was real

¹⁹ See, eg, in the civil context, *Proceeds of Crime Act 2002* (Cth) s 179E(3) (unexplained wealth).

²⁰ See, eg, *Criminal Code 1995* (Cth) s 102.6(3) regarding membership of a terrorist organisation, s 72.35 regarding plastic explosives, and s 272.9(5) in relation to child sex offences: see also *Taxation Administration Act 1953* (Cth) ss 8K, 8Y. Other examples are contained in the Australian Law Reform Commission, n 4, 272–284.

²¹ *Woolmington v DPP* [1935] AC 462, 482 (Viscount Sankey for the Court) (noting the defence of insanity and any statutory exceptions). The existence of statutory exceptions today in the United Kingdom would need to be understood in relation to that jurisdiction’s adoption of the *European Convention on Human Rights*, introduced into United Kingdom law via the *Human Rights Act 1998* (UK). At the time of writing, although the United Kingdom had voted for “Brexit” (voting affirmative on a United Kingdom withdrawal from the European Union), it remains unclear as to the extent, if any, this will impact on the *Human Rights Act 1998* (UK).

²² Allen Godbey, “The Place of the Code of Hammurabi” (1905) 15 *The Monist* 199, 210; see also Robert Harper, *The Code of Hammurabi, King of Babylon* (1904) 11, s 1.

²³ *Codex Justinianus* 2.1.4: “Those who want to sue (accusare) should have proof”. See Timothy Kearley (ed), *Justice Fred H Blume’s Annotated Justinian Code* (University of Wyoming, 2nd ed, 2009).

²⁴ “Felony is never fastened on any person before he is by judgment convicted as guilty of the deed”: *Yearbooks of the Reign of King Edward the First: Years XXI and XXII 56–57* (Alfred Horwood ed, 1873) (citing a 1293 Common Pleas decision), similar to Magna Carta’s admonition that no free person shall be taken or imprisoned or dispossessed of their land or liberties in the absence of lawful judgment of their peers or the law of the land.

²⁵ Sir Edwyn Sandys spoke to fellow parliamentarians of the “ancient rule, every man is presumed to be innocent, till he be proved otherwise”: (1802) *House of Commons Journal*, Vol 1 1547–1629.

²⁶ *R v Best* (1705) 87 ER 941 (QB), 942: “every man is presumed innocent until the contrary appears” (Holt CJ); *Bird v Bird* (1753) 161 ER 78, 79: “the law presumes, on the contrary, every body to be innocent, till they are proved guilty” (Sir George Lee).

²⁷ “A man ... shall be suppose’d innocent till found otherwise by his Peers, (on lawful testimony) who pass judgment on his Trial”: *A New Year’s Gift for Mr Pope Being a Concise Treatment of all the Laws, Statutes and Ordinances, Made for the Benefit and Protection of the Subjects of England* (1736) 84; “in some cases, the man (who is always supposed to be innocent till there is sufficient proof of his guilt) is allowed a copy of his indictment, in order to help him to make his defence”: *An Account of the Constitution and Present State of Great Britain* (1759) 104.

concern that a person who participated in an incorrect decision that an accused was guilty would be subject to retribution, one way or the other. In this case, a starting position that a person accused of crime was considered innocent, and the related doctrine that, in the case of doubt, the “safer path” was to do nothing (ie find the person not guilty),²⁸ is understandable. The presumption of innocence is closely tied with the standard of proof, and the need in criminal cases for the prosecution to prove their allegations beyond reasonable doubt.²⁹ If they cannot, the safer path is taken and the accused is acquitted.

Others focus on notions of respect – that society must respect the individuals comprising it, and it is appropriately respectful to assume that a member of that society is good and law-abiding, unless the contrary is proved.³⁰ Others focus on the fact that many punishments for criminal behaviour involve severe restrictions on liberty, and in a liberal democracy, where freedom of action is prized, it is appropriate to require that an accuser who seeks, in effect, to curb the other’s freedom via punishment must prove their allegations against a starting presumption.³¹ Further, the state has significant resources at their disposal, significant investigatory powers and is a repeat player in the courtroom, all of which can advantage them in terms of a prosecution against an individual.³² Some consider it appropriate that the law balance this advantage with a presumption of innocence.

Others point to the fact that it is essential to retain public confidence in the system of criminal justice. One sure way of undermining such confidence would be to permit the conviction of individuals where there is real doubt as to whether they committed the crime with which they have been charged.³³ It is thus appropriate to commence with a presumption of innocence. This is related to the oft-used maxim that it is “better” for many guilty to go free than for an innocent person to be wrongly punished.³⁴ We know that sometimes our criminal justice system makes mistakes. We judge that mistaken convictions are the most egregious of these.³⁵

High Court jurisprudence on presumption of innocence

Generally, the High Court has validated legislation containing reverse onus provisions. An early case considered customs legislation which entitled the collector of customs to require securities to enforce compliance with the Act. The Act stated that if the collector put securities “in suit”, they were entitled to judgment unless the defendants could prove compliance with the conditions under which the security was entered, or some other stated facts.³⁶

The Court dismissed an argument concerning the reverse onus provision. The joint reasons stated that a law does not “usurp judicial power because it regulates the method or burden of proving

²⁸ James Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press, 2008) 117.

²⁹ “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; [2011] HCA 34, 51 (French CJ).

³⁰ Victor Tadros, “The Ideal of the Presumption of Innocence” (2014) 8 *Criminal Law and Philosophy* 449, 458; Andrew Ashworth and Lucia Zedner, “Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions” (2008) 2 *Criminal Law and Philosophy* 21, 22.

³¹ Andrew Ashworth, “Four Threats to the Presumption of Innocence” (2006) 10 *International Journal of Evidence and Proof* 241, 247; Paul Roberts, “Taking the Burden of Proof Seriously” [1995] *Criminal Law Review* 783, 785.

³² Andrew Ashworth, “Four Threats to the Presumption of Innocence” (2006) 10 *International Journal of Evidence and Proof* 241, 249–250. Hayne J referred to the accusatorial process of criminal justice as reflecting the balance struck between the power of the state and the individual’s place: *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; 235 A Crim R 326; [2013] HCA 39, [84].

³³ In *Re Winship*, 397 US 358 (1970), 364 (Brennan J, for the Court).

³⁴ *Traianus*, Dig 48, 19, 5; Matthew Hale, *Pleas of the Crown* (1678) 289; Fortescue *De Laudibus Legum Angliae* c 27 (1545); William Blackstone, *Commentaries on the Laws of England* 1765-1769 c 27, margin page 358.

³⁵ Liz Campbell, “Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence” (2013) 76 *Modern Law Review* 681, 683.

³⁶ *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1.

facts”.³⁷ Isaacs J pointed to English and American statutes which contained reverse onus provisions.³⁸ Isaacs J seemed to justify such provisions on the basis that the defendant’s “knowledge of the true facts is necessarily greater than that of anyone else”³⁹ and that, otherwise, justice might be defeated.

The High Court subsequently validated a reverse onus provision in criminal legislation.⁴⁰ Commonwealth legislation cast upon a person charged with being a prohibited immigrant an onus of proving they were not an immigrant and that they had not evaded a customs officer. Although again the Court validated the provisions, the first expression of limits appeared on the parliament’s ability to legislate with respect to reverse onus provisions. Isaacs J seemed to eschew any notion of presumption of innocence, claiming that the “burden of proof at common law rests where justice will best be served”, and the burden was placed “variously and according to the circumstances”.⁴¹ However, he agreed that presumptions which were “arbitrary and fanciful, so flagrantly destructive of any real and reasonable chance to place the real facts before the court for determination” could be challenged.⁴²

Clearly, presumption of innocence is related to the right to silence (and the closely related privilege against self-incrimination), in that a presumption of guilt would, in effect, abrogate the individual’s right to silence.⁴³ The High Court reflected on the presumption of innocence at some length in *Environmental Protection Authority v Caltex Refining Co Pty Ltd*, a case involving the privilege against self-incrimination.⁴⁴ There Mason CJ and Toohey J stated that it was a “fundamental principle” that the onus of proof beyond reasonable doubt rests on the Crown.⁴⁵ Their Honours relied on the concept of what were “essential elements in the accusatorial system of justice”.⁴⁶ Deane, Dawson and Gaudron JJ agreed that the principle was “fundamental” to Australian criminal law.⁴⁷

³⁷ *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 12 (Knox CJ Gavan Duffy and Starke JJ).

³⁸ *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 17–18 (Isaacs J) citing 1818 and 1877 American decisions which apparently accepted the validity of reverse onus provisions. For some reason, his Honour did not cite the 1895 United States Supreme Court decision in *Coffin v United States*, 156 US 432 (1895), 453 where White J, for the Court, referred to the presumption of innocence as “axiomatic and elementary ... (laying) at the foundation of the administration of our criminal law”, tracing the doctrine to Biblical times.

³⁹ *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 17–18. The other judge, Higgins J, did not consider the matter.

⁴⁰ *Williamson v Ah On* (1926) 39 CLR 95.

⁴¹ *Williamson v Ah On* (1926) 39 CLR 95, 113.

⁴² *Williamson v Ah On* (1926) 39 CLR 95, 117 (Powers J agreeing at 127). In validating the provisions, Powers J noted (at 127) that the onus on the defendant related to matters peculiarly within their knowledge. Rich and Starke JJ referred (at 128) to the parliament’s ability to legislate with respect to rules of evidence, as did Higgins J on the basis it was a mere matter of procedure (at 122); Knox CJ and Gavan Duffy J (dissenting) decided that the Commonwealth could not deem a fact that enlivened the Commonwealth’s constitutional power over a particular subject matter.

⁴³ See *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 501 (Mason CJ and Toohey J): “The fundamental principle of the common law that the onus rests on the Crown of proving guilt beyond reasonable doubt is complemented by the elementary principle that no accused person can be compelled by process of law to admit the offence with which he or she is charged.” In the same case, Deane Dawson and Gaudron JJ (at 528) noted that the presumption of innocence and the right to silence had similar roots, sharing an aversion to the inquisitorial methods used by the Star Chamber and High Commission in the past. In *X7 v Australian Crime Commission* (2013) 248 CLR 92; 232 A Crim R 410; [2013] HCA 29, Kiefel J (at [159] (CLR)) referred to them as companion rules.

⁴⁴ *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

⁴⁵ *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503.

⁴⁶ *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503; their Honours also suggested (at 508) that some denials of fundamental principles could “undermine the foundation of our accusatorial system of criminal justice”. See also McHugh J who referred (at 550–551) to the fact that the integrity of the adversarial system of justice could be “seriously undermined” by departures from the presumption of innocence and the privilege against self-incrimination.

⁴⁷ *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 527.

The High Court also reflected generally on the power of parliaments to prescribe rules of evidence in *Nicholas v The Queen*.⁴⁸ Brennan CJ referred to the parliament's broad power in this area, including a reverse onus provision, which could not be constitutionally challenged "provided it prescribes a reasonable approach to the assessment of the kind of evidence to which it relates".⁴⁹ Toohey J also noted the parliament's broad ability to prescribe rules of evidence, provided they did not compromise the right of an accused to a fair trial.⁵⁰ Gaudron J made similar remarks, emphasising the need for a fair trial, that proceedings must not "bring the administration of justice into disrepute", and that rules and procedures must permit the facts to be properly ascertained.⁵¹ McHugh J agreed that the parliament could legislate with respect to evidence in criminal matters, as did Kirby J.⁵² However, it did prevent a court from finding that there had been an abuse of process or a tendency for public confidence in the judicial system to be undermined.⁵³

While Gummow J validated the provisions at issue there, he drew strong boundaries around the parliament's ability to legislate with respect to evidence. He stated that a law which deemed to exist any fact that was an element of the offence with which the accused was charged, although procedural, "might well usurp the constitutionally mandated exercise of the judicial power for the determination of criminal guilt".⁵⁴ He indicated that laws which changed the "amount or degree of proof" essential to convict might be constitutionally objectionable.⁵⁵

Hayne J validated the legislation pursuant to the parliament's ability to legislate with respect to the rules of evidence, but suggested a distinction between rules that merely regarded whether evidence could be received, and legislation dealing directly with ultimate issues of guilt or innocence. Laws of the former kind were valid; laws of the latter kind may not be.⁵⁶ The distinction between the two types of law is one of substance.⁵⁷

Legislation which contained a reverse onus provision in relation to property forfeiture was struck down as unconstitutional by the High Court in *International Finance Trust Co Ltd v New South Wales Crime Commission*.⁵⁸ However, there were several aspects of the regime that were objectionable, and the reasoning of the majority is expressed in compendious terms, making it less than clear how pivotal to the decision-making it was that the legislation reversed the onus.⁵⁹ It was certainly one factor leading some members of the Court to decide the legislation was unconstitutional.

⁴⁸ *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57; [1998] HCA 9: the context there was legislation which instructed the court, in assessing the weight (if any) to be given to evidence, to disregard the fact that the evidence was obtained through unlawful activity. A majority of the Court validated the legislation.

⁴⁹ *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57; [1998] HCA 9, [24].

⁵⁰ *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57; [1998] HCA 9, [54].

⁵¹ *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57; [1998] HCA 9, [74].

⁵² *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57; [1998] HCA 9, [201].

⁵³ *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57; [1998] HCA 9, [126].

⁵⁴ *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57; [1998] HCA 9, [156].

⁵⁵ *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57; [1998] HCA 9, [162].

⁵⁶ *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57; [1998] HCA 9, [249].

⁵⁷ *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57; [1998] HCA 9, [250].

⁵⁸ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; 212 A Crim R 480; [2009] HCA 49.

⁵⁹ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; 212 A Crim R 480; [2009] HCA 49, [97] (Gummow and Bell JJ): "The Supreme Court is conscripted for a process which requires in substance the mandatory ex parte sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on ex parte applications. In addition the possibility of release from that sequestration is conditioned upon proof of a negative proposition of considerable legal and factual complexity. Section 10 engages the Supreme Court in activity which is repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia." Of the other majority justices, French CJ referred (at [48]) to the reverse onus provision only briefly and Heydon J agreed (at [161]) with the reasoning of Gummow and Bell JJ.

Further relevant comments appear in the High Court decision *X7 v Australian Crime Commission*.⁶⁰ The case again involved questions concerning the privilege against self-incrimination. Hayne and Bell JJ repeatedly referred to the “accusatorial” and “adversarial” nature of the Australian criminal justice process. They identified as one aspect of this accusatorial nature that the prosecution bears the onus of proof of all elements of the charge laid.⁶¹ They conceded some statutory modification of the traditional process of criminal justice, but expressly left it open as to whether there was a constitutional dimension that limited such alteration.⁶² Kiefel J adopted a similar position, holding that the Crown’s onus of proof was fundamental to the adversarial and accusatorial nature of the Australian criminal justice system.⁶³ She indicated that the accusatorial nature of the trial had a constitutional dimension.⁶⁴

In dissent in the result, French CJ and Crennan J noted the parliament’s power to regulate the standard and burden of proof. However they appeared to accept the distinction that Hayne J had made in *Nicholas* between laws merely regulating evidence, and laws going to questions of guilt or innocence, indicating the former might be valid, but the latter not.⁶⁵

More recently, in *Lee v New South Wales Crime Commission*, involving the privilege against self-incrimination, members again referred to the accusatorial and adversarial nature of criminal process in Australia, including that the prosecution bore the onus of proof and that a presumption of innocence applied.⁶⁶ Hayne J referred to the

burden and the standard of proof that must be applied in adjudging guilt. If the prosecution cannot prove guilt beyond reasonable doubt, the accused must be found not guilty. Guilt must be determined at trial, not assumed.⁶⁷

However, despite the supposedly fundamental nature of the accusatorial and adversarial trial, including the presumption of innocence, judges have indicated that the presumption of innocence does not withstand legislative removal or interference with it, if the parliament’s will is clear enough. This is exemplified in the judgment of French CJ in *Momcilovic v The Queen*.⁶⁸ After acknowledging that the presumption of innocence was an “important incident of the liberty of the subject”, his Honour acknowledged that the parliament may have attempted to abrogate or remove the presumption. While the principle of legality may be utilised to resolve any ambiguity in parliamentary language, French CJ concluded that if the parliament’s will to abrogate or remove the presumption was clear enough, the principle of legality would be of no avail.⁶⁹ He did not indicate that the presumption of innocence had constitutional protection. This contrasts with the positions of Hayne and Bell JJ in *X7*, who expressly left open whether fundamental aspects of the criminal justice system, including the presumption of innocence, had a constitutional dimension,⁷⁰ and Kiefel J, who said that it did, at least in relation to the jury aspect,⁷¹ and possibly more.

⁶⁰ *X7 v Australian Crime Commission* (2013) 248 CLR 92; 232 A Crim R 410; [2013] HCA 29.

⁶¹ *X7 v Australian Crime Commission* (2013) 248 CLR 92; 232 A Crim R 410; [2013] HCA 29, [99].

⁶² *X7 v Australian Crime Commission* (2013) 248 CLR 92; 232 A Crim R 410; [2013] HCA 29, [119].

⁶³ *X7 v Australian Crime Commission* (2013) 248 CLR 92; 232 A Crim R 410; [2013] HCA 29, [160].

⁶⁴ *X7 v Australian Crime Commission* (2013) 248 CLR 92; 232 A Crim R 410; [2013] HCA 29, [160] (referencing *Constitutions* 80).

⁶⁵ *X7 v Australian Crime Commission* (2013) 248 CLR 92; 232 A Crim R 410; [2013] HCA 29, [48]; only five judges heard the case.

⁶⁶ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; 235 A Crim R 326; [2013] HCA 39, [2] (French CJ); [74] (Hayne J); [125] (Crennan J); [176] (Kiefel J); [264] (Bell J); [318] (Gageler and Keane JJ).

⁶⁷ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; 235 A Crim R 326; [2013] HCA 39, [77].

⁶⁸ *Momcilovic v The Queen* (2011) 245 CLR 1; 209 A Crim R 1; [2011] HCA 34.

⁶⁹ *Momcilovic v The Queen* (2011) 245 CLR 1; 209 A Crim R 1; [2011] HCA 34, [45].

⁷⁰ *X7 v Australian Crime Commission* (2013) 248 CLR 92; 232 A Crim R 410; [2013] HCA 29, [119].

⁷¹ *X7 v Australian Crime Commission* (2013) 248 CLR 92; 232 A Crim R 410; [2013] HCA 29, [153].

While early Australian cases established the general position that the parliaments are free to legislate with respect to evidence, including onuses and standards, there has been a recognition in more recent times that there may be some restrictions on the parliament's ability to do so. Chapter III of the *Constitution*, and the kind of judicial process it assumes and protects, seems to be the most likely candidate through which departures from the presumption of innocence might be constitutionally challenged, on the basis that such departures undermine the accusatorial and adversarial nature of the criminal trial. This will be elaborated on later.

The international dimension

For the purposes of discussion, this article will focus on two jurisdictions: Canada and the United Kingdom. The shared common law traditions between these jurisdictions and Australia makes such comparison at least potentially apposite. Of course, differences in relevant law must always be borne in mind. In the case of Canada, the *Charter of Rights and Freedoms* expressly protects the presumption of innocence,⁷² although this right is not absolute, and is subject to legislative override if the government can justify its legislation under proportionality analysis.⁷³ In the case of the United Kingdom, that jurisdiction has acceded to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as reflected in the *Human Rights Act 1998* (UK). At the time of writing, despite "Brexit" it is not known whether the United Kingdom Parliament will repeal or amend the *Human Rights Act 1998*. Article 6(2) of the *Convention* reflects the presumption of innocence for a person charged with an offence, as part of the broader notion of a fair trial which is itself enshrined in Art 6(1).

Canada

In the leading case of *R v Oakes*,⁷⁴ the Canadian Supreme Court considered legislation very similar to the type of drug offence referred to earlier in the context of the Commonwealth and Australian states, namely legislation that presumes a person in possession of drugs has them for a commercial purpose. If the accused could not show otherwise, they would be convicted of the serious offence of drug trafficking.⁷⁵

The court noted that the presumption of innocence was a hallowed principle lying at the very heart of criminal law.⁷⁶ It referred to a presentation by leading evidence scholar Sir Rupert Cross. Cross had countered an argument that it was acceptable to transfer the onus of proof onto the defendant because the standard was lower. He pointed out that even if the standard of proof the accused had to meet was on the balance of probabilities, it still could mean that the accused could be convicted despite the existence of reasonable doubt.

This was the test the Court applied to determine the constitutionality of the challenged provision. The Court indicated that the provision required the accused to disprove, on the balance of probabilities, an element of the offence (namely that the person in possession of the drugs had them for a commercial purpose). It could not accept that the accused had a legal burden to disprove what was an acknowledged element of the offence. This was because the Court made it possible that an accused could be convicted of a crime, although there was reasonable doubt that they committed it. This would occur if the accused could not prove on the balance of probabilities that they did not have the requisite commercial purpose. There may well be reasonable doubt about that fact, but given the

⁷² *Canadian Charter of Rights and Freedoms* s 11(d).

⁷³ *Canadian Charter of Rights and Freedoms* s 1.

⁷⁴ *R v Oakes* [1986] 1 SCR 103.

⁷⁵ *Narcotic Control Act*, RSC 1970, c N-1, s 4(2) stated no-one should have in their possession a drug for trafficking purposes. Section 8 stated that if the court found the person was in possession of a drug, if the person failed to show they were not in possession for the purposes of trafficking, they shall be convicted of the offence. The offence was punishable by a maximum term of life imprisonment.

⁷⁶ *R v Oakes* [1986] 1 SCR 103, 119 (Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ).

presumption, the prosecution did not need to prove it, let alone prove it beyond reasonable doubt, in order to obtain a conviction for a serious offence.⁷⁷ The Court also found the provision could not be justified under s 1 of the *Charter*.

The Canadian Supreme Court has continued to apply this approach to challenges to legislation departing from the presumption of innocence, asking whether their practical effect is that an accused may be convicted despite the existence of reasonable doubt as to whether they are guilty of the offence charged.⁷⁸ Although the Court in *Oakes* rejected the United States approach whereby statutory presumptions might be valid if the thing presumed is “rationally connected” to the proven fact, subsequent cases have accepted and applied the “rationally connected” test. Sometimes, this has meant that reverse onus provisions have been found valid, for example a provision presuming that an accused had committed the offence of living on the proceeds of prostitution from the fact they were often in the company of prostitutes, unless the person could prove otherwise.⁷⁹

As indicated, where the provision prima facie contravenes the guarantee of presumption of innocence in s 11(d), it may be saved under s 1 of the *Charter*. Relevant factors here will include whether the legislation relates to a legitimate government objective, whether the challenged measure was rationally connected to achieving that objective, the relative difficulty for the prosecution to prove the thing presumed, how easy it would be for the defendant to prove it, and whether the statute minimally impaired the presumption of innocence.⁸⁰

United Kingdom

As indicated above, there is a long history of recognition of the presumption of innocence in English common law. The presumption is now reflected in Art 6(2) of the *European Convention on Human Rights*, which remains part of United Kingdom law as it currently stands in the *Human Rights Act 1998*. At the time of writing, although the United Kingdom has voted in favour of “Brexit”, the future of the *Human Rights Act 1998* is not clear. Section 4(1) of the *Human Rights Act 1998* requires United Kingdom courts to interpret legislation so as to be consistent with *Convention* rights where possible. The general approach of the European Court of Human Rights has been to consider legislative presumptions, including reverse onus provisions, on a case-by-case basis, though they must be kept within “reasonable” limits.⁸¹ The presumption of innocence has been found not to be an absolute requirement, although the requirement of a fair trial (of which the presumption is an integral part) is an absolute requirement.⁸²

R v DPP; Ex parte Kebilene considered the interplay of the presumption of innocence with anti-terrorism measures.⁸³ The Court found that the human rights legislation was not to be applied retrospectively and thus did not apply to the particular situation before the Court. However, members of the Court in obiter dicta considered at some length the possible application of the human rights legislation to anti-terrorism legislation, in an early test case establishing appropriate boundaries. Essentially, the legislation contained an offence for a person to have an article in their possession, giving rise to a reasonable suspicion that they have it for a purpose connected with terrorism.⁸⁴ It could include a situation where the article was found on premises where the person was present. A defence was available if the accused could show that the article was not in fact in their possession for

⁷⁷ *R v Oakes* [1986] 1 SCR 103, 132–133 (Dickson CJ, Chouinard Lamer Wilson and Le Dain JJ).

⁷⁸ *Whyte v The Queen* [1988] 2 SCR 3; *Downey v The Queen* [1992] 2 SCR 10; *R v Lamoureux* [2012] 3 SCR 187.

⁷⁹ *Downey v The Queen* [1992] 2 SCR 10.

⁸⁰ *R v Lamoureux* [2012] 3 SCR 187, 210, 231 (Deschamps J, for McLachlin CJ, Le Bel, Fish and Abella JJ).

⁸¹ *Salabiaku v France* (1988) EHRR 279, [27]–[28].

⁸² *Brown v Scott* [2003] 1 AC 681; [2001] 2 WLR 817, 693 (Lord Bingham), 719 (Lord Hope), 727 (Lord Clyde) and 730 (Rt Hon Kirkwood) (AC) (five Lords heard the case).

⁸³ *R v DPP; Ex parte Kebilene* [2000] 2 AC 326.

⁸⁴ *Prevention of Terrorism (Temporary Provisions) Act 1989* (UK) s 16A.

such a purpose. One was also available, with respect to items found on premises occupied by the accused, if the accused could show they did not know the item was there, or that they did not control it.

Similarly, s 16B criminalised the possession or collection of information for the purpose of terrorism. Again, a defence was available if the accused could show lawful authority or reasonable excuse for possession of the information. Both offences attracted a maximum jail term of 10 years' imprisonment and/or a fine at the court's discretion.

The Court made interesting obiter dicta observations about the compatibility of ss 16A and 16B with the *Convention*. At divisional level, Lord Bingham (who would later be appointed to the House of Lords) stated that the two offences undermined the presumption of innocence "in a blatant and obvious way".⁸⁵ He used the concept of "gravamen", stating that the offences involved possession of articles or information, themselves innocent, for terrorism purposes. However, in neither case was the prosecution required to prove *mens rea* in relation to the offence; in fact, the onus was on the accused to prove they did not have the required *mens rea*.⁸⁶

Lord Bingham cited the Canadian approach⁸⁷ with approval, that it was relevant to consider whether the result of the reverse onus provision was that an accused could be convicted despite the existence of reasonable doubt. Here, the accused could be convicted under s 16A and/or s 16B if there was reasonable doubt as to whether the accused had the required terrorism purpose. This violated the presumption of innocence.⁸⁸

In the House of Lords, Lord Hope distinguished between laws imposing a mere evidentiary burden on the accused, requiring them to lead some evidence (a reasonable doubt) as to a particular issue, and laws imposing a legal (or evidentiary) burden on the accused, requiring them to prove something on the balance of probabilities. Statutory presumptions merely placing an evidentiary burden on the accused were not incompatible with the *Convention*. Lord Hope stated statutory presumptions which placed the legal burden on the accused required further examination, and involved three types. First, if such a presumption was mandatory, it was absolutely incompatible with the *Convention*, regardless of facts. Second, if the presumption was discretionary, the particular facts of the case would need to be considered.

The third type was the kind of provision considered here – a reverse onus provision whereby the accused must prove something to avoid conviction. These also required further investigation and no definitive answer could be given.

Even if a provision is inconsistent with the presumption of innocence protected by Art 6(2), it may be saved by the "margin of appreciation" and proportionality analysis contemplated by the *Convention*. Various factors, similar to those articulated above in relation to the Canadian provisions, have been considered, including:

- (1) whether the legislation is designed to achieve a legitimate objective;⁸⁹
- (2) whether the legislation is rationally connected with that objective;⁹⁰
- (3) the extent to which the prosecution retains a burden of proof in relation to other aspects of the offence;⁹¹

⁸⁵ *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 344.

⁸⁶ *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 344.

⁸⁷ *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 344–345, citing *R v Whyte* [1988] 2 SCR 3.

⁸⁸ *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 345.

⁸⁹ *R v DPP* [2000] 2 AC 326; [1999] 3 WLR 972, 387 (Lord Hope) (AC); *McIntosh v Lord Advocate* [2003] 1 AC 1078; [2001] 2 WLR 817, 1094 (Lord Bingham, with whom all other Lords agreed) (AC).

⁹⁰ *Brown v Scott* [2003] 1 AC 681; [2001] 2 WLR 817, 720 (Lord Hope) (AC).

⁹¹ *McIntosh v Lord Advocate* [2003] 1 AC 1078; [2001] 2 WLR 817, 1094 (Lord Bingham, with whom all other Lords agreed) (AC).

- (4) whether it would be practically difficult for the prosecution to prove the matters the subject of the reverse onus provision;⁹²
- (5) whether the presumption can be rebutted or not;⁹³
- (6) the seriousness of the charge and the likely penalty;⁹⁴
- (7) whether the accused can easily lead evidence of the relevant matters (or is the only person with knowledge of such matters);⁹⁵
- (8) reasonableness;⁹⁶ and
- (9) whether measures less invasive of the human right could have been enacted to achieve the legitimate objective.

The “read-down” power was used in *R v Lambert*.⁹⁷ The accused was charged with possession of an unlawful drug with intent to supply, contrary to s 5(3) of the *Misuse of Drugs Act 1971* (UK). It was a defence for the accused to prove that they did not know, suspect or have reason to suspect that the substance was an unlawful drug, or prove that they did not believe they would be committing an offence by having such possession.⁹⁸ Conviction for an offence against s 5 was punishable by life imprisonment.

The House of Lords interpreted the s 5 offence such that it was not necessary for the prosecution to prove beyond reasonable doubt that the accused knew, suspected or ought have reason to suspect the thing in their possession was a prohibited drug.⁹⁹ However, they were concerned that the s 28 defence could be interpreted to impose a legal burden on the accused. If it were so interpreted, an accused could be convicted despite the existence of a reasonable doubt about whether they were aware, suspected or ought to have suspected that what they had in their possession was an unlawful drug.¹⁰⁰ As indicated, this has been a concern raised in the context of reverse onus provisions in Canada and an earlier United Kingdom decision.

Their practical solution to these concerns was to read down the s 28 provision so as to require the accused merely to raise some evidence of their lack of knowledge, suspicion or reason to suspect.¹⁰¹

Some members of the House of Lords also dealt with the issue that sometimes, the legislature might cast upon the accused the onus of proof in relation to a defence where, ordinarily, that was a matter that the prosecution had to prove beyond reasonable doubt. The question has arisen of the extent to which legislatures may avoid difficulties in proving particular things by simply re-assigning them to the accused and claiming that they are defences, even if in substance they have traditionally been considered to be part of the offence. Lord Steyn indicated his awareness of the issue:

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

⁹² *McIntosh v Lord Advocate* [2003] 1 AC 1078; [2001] 3 WLR 107, 1098 (Lord Bingham, with whom all other Lords agreed) (AC).

⁹³ *R v Lambert* [2002] 2 AC 545; [2001] 3 WLR 206, 620 (Lord Hutton) (AC).

⁹⁴ *R v DPP* [2000] 2 AC 326; [1999] 3 WLR 972, 346 (Lord Bingham) (AC); *R v Lambert* [2002] 2 AC 545; [2001] 3 WLR 206, 609 (Lord Clyde) (AC).

⁹⁵ *McIntosh v Lord Advocate* [2003] 1 AC 1078; [2001] 3 WLR 107, 1094 (Lord Bingham, with whom all other Lords agreed) (AC); *R v DPP* [2000] 2 AC 326; [1999] 3 WLR 972, 387 (Lord Hope) (AC); *R v Johnstone* [2003] 1 WLR 1736 (Lord Nicholls, with whom all other Lords agreed).

⁹⁶ *McIntosh v Lord Advocate* [2003] 1 AC 1078; [2001] 3 WLR 107, 1096 (Lord Bingham, with whom all other Lords agreed) (AC).

⁹⁷ *R v Lambert* [2002] 2 AC 545; [2001] 3 WLR 206.

⁹⁸ *Misuse of Drugs Act 1971* (UK) s 28

⁹⁹ *R v Lambert* [2002] 2 AC 545; [2001] 3 WLR 206, 563 (Lord Slynn), 580 (Lord Hope), 601 (Lord Clyde) (AC) (five Lords heard the case).

¹⁰⁰ *R v Lambert* [2002] 2 AC 545; [2001] 3 WLR 206, 571–572 (Lord Steyn), 587 (Lord Hope), 609 (Lord Clyde) (AC).

¹⁰¹ *R v Lambert* [2002] 2 AC 545; [2001] 3 WLR 206, 563 (Lord Slynn), 575 (Lord Steyn), 589 (Lord Hope), 610 (Lord Clyde) (AC). Lord Hutton (at 622–625) said the onus was a legal one, but this did not contravene Art 6(2) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* in the circumstances.

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 ... there are other cases where the defence is so closely linked with mens rea and moral blameworthiness that it would derogate from the presumption to transfer the legal burden to the accused.¹⁰²

The read down mechanism was also utilised in the conjoined appeals case of *Sheldrake v DPP*.¹⁰³ One of the cases involved s 11(1) of the *Terrorism Act 2000* (UK) making it an offence to belong to, or profess to belong to, a proscribed terrorist organisation. Section 11(2) created a defence if the accused could show that the organisation had not been proscribed at the time they joined it, and that they did not actively participate in the organisation's affairs. Again, neither the fact that the organisation was proscribed at the time the accused joined it or the fact they participated in the organisation's affairs were necessary in order that the elements of the offence under s 11(1) were proven. An offence under s 11(1) carried a possible 10 year term of imprisonment.

However, again members of the Court expressed serious concern with the provision, reflecting a substantive rather than formalistic approach to criminal liability. Lord Bingham, with whom Lords Steyn and Phillip agreed,¹⁰⁴ noted the offence would cover a person who joined an organisation when it was not terrorist in nature, or if it was, the accused did not know so. This meant that, on its face, the section could lead to the conviction and punishment of a person who was "guilt of no conduct which could reasonably be regarded as blameworthy, or such as should attract criminal sanctions".¹⁰⁵ It could not be saved either under the margin of appreciation, given matters such as the possible difficulties in the accused being able to prove what the legislation apparently required of them. As a result, the defence was read down to a merely evidentiary, rather than legal, onus, in order that it be compatible with Art 6(2).¹⁰⁶

Chapter III and protecting the presumption of innocence

There is a potential conflict between different strands of reasoning employed by the High Court when considering the extent to which Ch III might be argued to constitutionally protect the presumption of innocence.

The first strand, discussed above, suggests that parliaments have broad power to enact evidence legislation, and it is a matter for them to prescribe the elements of offences and defences, to clarify or amend the standard and onus of proof in relation to particular matters. On this theory, the legislature could quite legitimately provide for a reverse onus in relation to a particular offence or defence, including a legal onus on the accused to prove or disprove something on the balance of probabilities. If the accused could not do so, they could be convicted if the prosecutor had proven beyond reasonable doubt all of the elements of the crime, as defined by the legislature. These sentiments are reflected in earlier High Court decisions such as *Commonwealth v Melbourne Harbour Trust Commissioners* and *Williamson v Ah On*.¹⁰⁷

On the other hand, is the High Court's Ch III jurisprudence. Traditionally most of the separation of powers cases involved questions of whether a particular body was or was not judicial in nature, and questions of the nature of the power that it exercised. The fundamental principle was that only Ch III courts could exercise federal judicial power, and that non-judicial bodies could only exercise non-judicial powers, with very limited exceptions. As a result, it became critical to clarify the criteria

¹⁰² *R v Lambert* [2002] 2 AC 545; [2001] 3 WLR 206, 571 (AC); to like effect Lord Clyde: "one must look not only at the form of the legislation but also at its substance and effect, and the Privy Council decision in *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951, 969-970, indicating that what is decisive is the 'substance and reality of the language creating the offence rather than its form'".

¹⁰³ *Sheldrake v DPP* [2005] 1 AC 264; [2004] 3 WLR 976.

¹⁰⁴ *Sheldrake v DPP* [2005] 1 AC 264; [2004] 3 WLR 976, 314 (AC).

¹⁰⁵ *Sheldrake v DPP* [2005] 1 AC 264; [2004] 3 WLR 976, 311 (AC).

¹⁰⁶ *Sheldrake v DPP* [2005] 1 AC 264; [2004] 3 WLR 976, 314 (Lord Bingham; Lords Steyn and Phillips agreeing) (AC).

¹⁰⁷ See *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1; *Williamson v Ah On* (1926) 39 CLR 95.

by which a Ch III court was ascertained, and the nature of judicial power. This was the fundamental principle established in 1956 in the classic *Boilermakers' Case*.¹⁰⁸

More than 30 years later, members of the High Court began to articulate the potential of the separation of powers doctrine to preserve fundamental rights of due process. In 1989, Deane J referred to Ch III as the *Constitution's* “only general guarantee of due process”.¹⁰⁹ Soon after, in *Polyukhovich v Commonwealth*, Deane J stated that Ch III required that courts exercise judicial power “in accordance with the essential attributes of the curial process”,¹¹⁰ and that Ch III assumed traditional judicial procedures, remedies and methodology.¹¹¹ The Court has settled upon a definition of judicial power,¹¹² and refined the notion of “institutional integrity” as a prima concept in determining whether or not a challenged law is valid, in the sense that a law will be invalid if it undermines a court’s institutional integrity.¹¹³ Beyond this, the Court has taken a case-by-case approach, and in the course of the past quarter century has “fleshed out” the meaning of institutional integrity, and what are considered essential elements of a judicial process, legislated departure from which leads (or may lead) to unconstitutionality. This process continues.

Open and transparent courts are typically a feature of a judicial process. Thus, mandated departures from this requirement may trigger unconstitutionality in terms of Ch III.¹¹⁴ Natural justice is considered a key element. A law which required or authorised a court to determine a matter without hearing from both parties to the proceeding may be vulnerable to a Ch III challenge.¹¹⁵ Judicial process is characterised by fairness, which is either a very important,¹¹⁶ or immutable,¹¹⁷ characteristic. Specificity of allegation is a hallmark of judicial process.¹¹⁸ Courts must retain the ability to review a decision of a lower court for jurisdictional error.¹¹⁹ Courts must be, and be seen to be, independent of other arms of government. Laws which undermine this decisional independence are likely to be struck out.¹²⁰ Historical considerations will be important in identifying typical features of

¹⁰⁸ *R v Kirby* (1956) 94 CLR 254.

¹⁰⁹ *Re Tracey* (1989) 166 CLR 518, 580.

¹¹⁰ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607; to like effect, see 689 (Toohey J), 703 (Gaudron J).

¹¹¹ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 614.

¹¹² *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 where Griffith CJ defined judicial power as the power to decide controversies between subjects, or between itself and its subjects, by a tribunal with power to give an binding and authoritative decision.

¹¹³ *Grollo v Palmer* (1995) 184 CLR 348; 82 A Crim R 547, 365 (Brennan CJ Deane Dawson and Toohey JJ) (CLR).

¹¹⁴ *Russell v Russell* (1976) 134 CLR 495; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; 212 A Crim R 480; [2009] HCA 49.

¹¹⁵ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; [1999] HCA 9, [56] (Gleeson CJ Gaudron McHugh Gummow Hayne and Callinan JJ): “judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process. And that requires that parties be given an opportunity to present their evidence and to challenge the evidence led against them.” Having said that, it must be conceded that on occasion the High Court has validated “criminal intelligence” provisions, under which one party to the proceeding may not see or hear evidence being led against them: see *Kuczborski v Queensland* (2014) 254 CLR 51; [2014] HCA 46.

¹¹⁶ *Wainohu v New South Wales* (2011) 243 CLR 181; 210 A Crim R 45; [2011] HCA 24, [44] (French CJ and Kiefel J) (CLR); Gummow Hayne Crennan and Bell JJ (225), quoting with approval Gaudron J in *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1, 22 to the effect that confidence in courts required that fair procedures be utilised.

¹¹⁷ *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38; 228 A Crim R 237; [2013] HCA 7, [194].

¹¹⁸ *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1.

¹¹⁹ *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2.

¹²⁰ *South Australia v Totani* (2010) 242 CLR 1; 201 A Crim R 11; [2010] HCA 39, [62] (French CJ), [142] (Gummow J), [226]–[230] (Hayne J), [426] (Crennan and Bell JJ), [481] (Kiefel J); *Northern Australia Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; [2004] HCA 31, [27] (McHugh Gummow Kirby Hayne Callinan and Heydon JJ).

the judicial process, or judicial power.¹²¹ It is an essential feature of the judicial process that courts be able to give reasons for their decisions.¹²² Equal justice is, or may be, a characteristic of judicial process.¹²³ Recently, members of the Court have emphasised the accusatorial and adversarial nature of criminal trials in Australia.¹²⁴ At one point it was thought that laws that undermined public confidence in the judiciary were unconstitutional due to Ch III. Now, it is accepted that the touchstone of invalidity is the effect on institutional integrity. However, public confidence remains an important issue. The fact that legislation would undermine Ch III is now seen as an indicator of invalidity, rather than the test to be applied.¹²⁵

Several strands of reasoning are considered appropriate to the current context of laws departing from the presumption of innocence. First, authorities suggest that procedural fairness is an essential characteristic of the exercise of judicial power. It is generally considered, as reflected in the international human rights instruments referenced above, that an aspect of procedural fairness in criminal matters is that there is a presumption of innocence. The argument is that the legislation referred to above, which reverse the requirement of proof with respect to elements of the offence, offend the presumption of innocence and create a lack of procedural fairness which is a required feature of judicial process according to Ch III.

Case law has indicated that historical considerations assist in determining the nature and characteristics of judicial power. The presumption of innocence has characterised the exercise of judicial power since the *Code of Hammurabi*, and there are numerous references to Roman and English historical legal material indicating that this presumption is of longstanding significance in the law. This assists the argument that legislation providing for a reverse onus directs or authorises a court to act in a manner that is, historically, non-judicial. The High Court has said this is an indicator of Ch III invalidity.¹²⁶

More recent case law has emphasised the accusatorial and adversarial nature of the Australian criminal trial. The High Court has frequently connected this with the fact that the onus of proof of proving elements of the offence is on the prosecution at a “beyond reasonable doubt” standard.¹²⁷ Kiefel J, with whom Hayne and Bell JJ expressed agreement, succinctly made the point:

The golden thread of the system of English criminal law is that it is the duty of the prosecution to prove the prisoner’s guilt. This is consistent with the presumption of innocence. It finds expression as a fundamental principle of the common law of Australia.¹²⁸

Kiefel J, with whom Hayne and Bell JJ agreed, said this was an “essential aspect of the criminal trial in our system of criminal justice”.¹²⁹

These observations about the fundamental nature of our adversarial and accusatorial system are very difficult, if not impossible, to square with the statutory provisions discussed above, containing

¹²¹ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1, [98] (French CJ Gummow Hayne Crennan Kiefel and Bell JJ); *R v Davison* (1954) 90 CLR 353, 365 (Dixon CJ and McTiernan J), 376 (Fullagar J), 382 (Kitto J).

¹²² *Wainohu v New South Wales* (2011) 243 CLR 181; 210 A Crim R 45; [2011] HCA 24.

¹²³ *Leeth v Commonwealth* (1992) 174 CLR 455; 61 A Crim R 85, 487 (Deane and Toohey JJ), 502 (Gaudron J) (CLR); *Gypsy Jokers Inc v Commissioner of Police* (2008) 234 CLR 532; 180 A Crim R 455; [2008] HCA 4, [113] (Kirby J) (CLR); *Cameron v The Queen* (2002) 209 CLR 339; [2002] HCA 6, [44] (McHugh J).

¹²⁴ *X7 v Australian Crime Commission* (2013) 248 CLR 92; 232 A Crim R 410; [2013] HCA 29, [97] (Hayne and Bell JJ); [160] (Kiefel J) (only five justices heard the case); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; 235 A Crim R 326; [2013] HCA 39, [37] (French CJ), [79] (Hayne J), [125] (Crennan J), [176] (Kiefel J, with whom Bell J agreed), [318] (Gageler and Keane JJ).

¹²⁵ *South Australia v Totani* (2010) 242 CLR 1; 201 A Crim R 11; [2010] HCA 39, [206] (Hayne J), applying the position of Gummow J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46, [102].

¹²⁶ See *Kable v DPP (NSW)* (1996) 189 CLR 51.

¹²⁷ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; 235 A Crim R 326; [2013] HCA 39, [37] (French CJ), [74] (Hayne J), [125] (Crennan J), [174] (Kiefel J).

¹²⁸ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; 235 A Crim R 326; [2013] HCA 39, [174] (Hayne and Bell JJ agreeing at [58] and [255] respectively).

¹²⁹ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; 235 A Crim R 326; [2013] HCA 39, [176].

presumptions that elements of offences have been satisfied, unless the accused can prove on the balance of probabilities that they are not satisfied. Clearly, this is not an “accusatorial” system. As the High Court said in *Lee v New South Wales Crime Commission*, it is an *essential* aspect of the criminal trial in the Australian legal system that the prosecution is the one to discharge the onus of proof. Logic would therefore suggest that the High Court cannot validate provisions containing reverse onus provisions relating to elements of an offence. The current High Court clearly does not provide for what it has previously described as “essential”. The word “essential” is necessary and indispensable; it is not something that is negotiable or subject to legislative whim.

The High Court in *Lee v New South Wales Crime Commission* departed from fundamental ways in which criminal trials in Australia have traditionally operated. They are unfair. By three different mechanisms, such laws are invalid according to the High Court’s current interpretation of the requirements of Ch III of the *Constitution*:

- (1) their undermining of the accusatorial and adversarial system of criminal justice;
- (2) their departure from historic and traditional criminal justice processes, and
- (3) because it is recognised that a presumption of innocence is an integral part of a fair trial, and the High Court has said procedural fairness characterises judicial process in Australia.

Some of the older Ch III cases also provide support for a constitutional challenge to the statutory provisions outlined at the commencement of the article. For instance, in *Nicholas*, Gummow J specifically opined in dicta that legislation which deemed elements of offences to exist may be unconstitutional, as a usurpation of what is traditionally a function of a court – to determine whether a prosecutor has proven each of the defined elements of a crime beyond reasonable doubt.¹³⁰ The provisions of the *Criminal Code 1995* (Cth) and the State equivalents outlined above clearly do involve a deeming that elements of an offence have been met. Presumably, at least Gummow J would find this constitutionally objectionable. And Hayne J in the same case distinguished between mere rules of evidence, and issues directly implicating questions of guilt or innocence.¹³¹ While legislatures faced few restrictions with respect to the former kind of law, Hayne J certainly questioned the validity of the latter type. A provision deeming that an element of an offence has been satisfied is surely closer to a provision with respect to guilt and innocence than it is to a “mere” rule of evidence.

OTHER ARGUMENTS

Is conviction possible where there is reasonable doubt?

In both Canada and the United Kingdom, reverse onus provisions are not automatically invalid or unconstitutional. One criterion that courts in both jurisdictions have used to determine this is whether the practical effect of the legislation is to permit a person to be convicted despite the existence of reasonable doubt. If the answer to this is yes, in both jurisdictions this cannot stand. In Canada, such a provision will be struck out as being contrary to the *Charter*, and falling outside the exception under s 1. In the United Kingdom, the solution in *Kebilene*, *Lambert* and *Sheldrake* has been to read down the reverse onus provision so that only an evidentiary, rather than legal, standard is imposed on the accused.¹³² This obviates the risk that a person could be convicted despite there being reasonable doubt as to the person’s guilt, on the basis that if the accused can meet the evidentiary standard, reasonable doubt exists and they are entitled to be acquitted. Of course, the accused may not have been able to meet their onus if it were considered a legal onus to be satisfied on the balance of probabilities.

The provisions of Australian legislation discussed in this article are concerning because they do permit the possibility that a person may be convicted despite the existence of reasonable doubt as to their guilt. This is particularly the case with provisions of the Commonwealth legislation, and to some

¹³⁰ *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57, [156].

¹³¹ *Nicholas v The Queen* (1998) 193 CLR 173; 99 A Crim R 57, [250].

¹³² *R v DPP; Ex parte Kebilene* [2000] 2 AC 326; *R v Lambert* [2002] 2 AC 545; [2001] 3 WLR 206; *Sheldrake v DPP* [2005] 1 AC 264; [2004] 3 WLR 976.

extent at State level, which make expressly clear that the reverse onus on the accused is a legal, rather than evidentiary, standard. It becomes very difficult to apply “soft” human rights interpretative techniques, like the principle of legality, when the legislation is clear on its face that the higher standard of proof is to be applied. To be specific, the Commonwealth drug offences described above all require, as an element of the offence, that the accused have a particular intention or belief. They are elements of the offence. However, this is lessened by the statute containing presumptions in favour of the prosecution, creating a presumption of that required intent or belief, unless the accused can prove to the contrary at the legal standard.

A regime crafted in this manner is egregious because it permits a person to be convicted although there is reasonable doubt as to their guilt. Assume, for instance, that the prosecution cannot prove beyond reasonable doubt that the accused had the required intention or belief. As a result, they rely on the statutory presumption that this element exists, based on quantity. Let’s say that the accused can raise some evidence that they did not have the required intention or belief, enough to raise reasonable doubt. However, they cannot prove this on the balance of probabilities. As a result, application of the legislation would result in a conviction on the balance of probabilities, exposing the accused to the possibility of a significant jail term, despite there being reasonable doubt as to their guilt.

The potential for this to occur ought not be underestimated. The precise potential will depend on the gulf that exists between “balance of probabilities” and “evidence such as to raise a reasonable doubt”. The High Court’s general position is not to quantify what reasonable doubt means; on the basis it is self-evident.¹³³ However, phrases such as “solicitude for certainty”,¹³⁴ “moral certainty”,¹³⁵ “so high that the contrary cannot reasonably be supposed”¹³⁶ have been used to describe it. These non-quantified phrases suggest a reasonable gulf between the existence of reasonable doubt and proof of something on the balance of probabilities, only reinforcing the risk that an accused can be convicted despite the existence of reasonable doubt if they are subject to satisfying a reverse legal onus provision with respect to an element of the offence, as appears in the Australian laws being discussed.

Others have been prepared to speak about “reasonable doubt” in a quantifiable way. Some criminal law scholars have suggested that a 1 per cent doubt that an accused is innocent is sufficient to create reasonable doubt.¹³⁷ In another case, the fact that there was a 20 per cent doubt as to whether an accused was guilty was sufficient for the person to be acquitted.¹³⁸ One study found significant disparity when judges and jury members were asked to quantify reasonable doubt. The judges surveyed on average quantified it as being between 87–93 per cent certain in relation to a range of serious offences. Jury estimations of the level of certainty required tended to be lower.¹³⁹

If the balance of probabilities can be approximated at 51 per cent certainty,¹⁴⁰ then regardless of how reasonable doubt is quantified, there remains a significant disparity between the raising of a reasonable doubt, and the proof of something on the balance of probabilities. For instance, there is a

¹³³ *Brown v The King* (1913) 17 CLR 570, 584 (Barton ACJ), 594 (Isaacs and Powers JJ), *Dawson v The Queen* (1961) 106 CLR 1, 18 (Dixon CJ); *Green v The Queen* (1971) 126 CLR 28, 33 (Barwick CJ, McTiernan and Owen JJ).

¹³⁴ *Green v The Queen* (1961) 126 CLR 28, 33 (Barwick CJ).

¹³⁵ *Brown v The King* (1913) 17 CLR 570, 585 (Barton ACJ), 595 (Isaacs and Powers JJ).

¹³⁶ *Martin v Osborne* (1936) 55 CLR 367, 375.

¹³⁷ Glanville Williams, “The Mathematics of Proof” (1979) *Criminal Law Review* 297, 306: “if a juror is able to calculate that he is 99% sure, then he already has a doubt, in legal theory, and ought not to convict”; Jonathan Cohen, “The Logic of Proof” (1980) *Criminal Law Review* 102 agreed that even at 99 per cent confidence level, reasonable doubt might exist; Charles Nesson, “Reasonable Doubt and Permissive Inferences: The Value of Complexity” (1979) 92 *Harvard Law Review* 1187, 1193 suggested 96 per cent confidence level might not be sufficient.

¹³⁸ *Samuels v Flavel* [1970] SASR 256 where the expert evidence suggested that given a particular blood alcohol level, 80 per cent of individuals would show the clinical impairment needed to make out the offence. The court found this was not sufficient to establish guilt beyond reasonable doubt.

¹³⁹ Rita James Simon and Linda Mahan, “Quantifying Burden of Proof” (1971) 5 *Law and Society Review* 319.

¹⁴⁰ *Davies v Taylor* [1974] AC 207, 219 (Lord Simon).

very significant difference between 1 per cent doubt and 51 per cent probability. Again, this only tends to reinforce the concern with reverse onus provisions which cast a legal onus on the accused to disprove an element of the offence.¹⁴¹

Regarding the above requirements of Ch III, the touchstones of invalidity in that case were laws that offended the institutional integrity of a court – there are many ways of demonstrating this. Initially the High Court used the notion of public confidence, in the sense that a law that was offensive to Ch III would be one that undermined public confidence in the judiciary. More recent cases suggest that the concept of public confidence remains useful, but that it is an indicia of laws that undermine the institutional integrity of a Ch III court rather than the touchstone.

The existing criminal provisions under discussion raise the unwelcome spectre of an innocent person being convicted, because they clearly permit the conviction of a person where there is a reasonable doubt as to their guilt, because they cannot satisfy the legal onus. It is difficult to think of a feature of a criminal justice system that would be more dangerous to public confidence in the judiciary than one which permitted the innocent to be convicted. However, if these provisions are not struck down as unconstitutional, demonstrably this is the result that will be achieved. As a result, the fact that the laws allow people to be convicted although there is reasonable doubt as to their guilt can be utilised in the context of Ch III, to find that legislation of this type is unconstitutional.

Substance and form

Having documented serious concerns with legislative provisions that effectively cast the onus of proof onto an accused to disprove the existence of what are clearly specific elements of a defined crime, this discussion must now move to a different type of provision. Even if it is accepted that such provisions are unconstitutional due to a breach of Ch III requirements, a legislature might respond by re-defining criminal provisions. Specifically, is there anything to stop a parliament from shearing off almost all of the elements of a crime, proof of which would lie on the prosecution, and defining them as “defences”, then casting an onus on the accused to prove their existence, at either the evidentiary or legal standard?

Another type of offence provision raises similar concerns, one which defines criminality in “peculiar” terms. Sections 307.9 and 307.10 of the *Criminal Code* requires that the accused has a substance that is “reasonably suspected of having been unlawfully imported”. Notice how the offence is framed, and how it is *not* framed. It is not framed to require that the prosecution prove the substance was in fact unlawfully imported. The prosecution need only prove a reasonable suspicion that it was, in order to make out that element of the offence. The United Kingdom anti-terrorism legislation considered in *Kebilene*, making it an element of the offence that there was “reasonable suspicion” that an accused had an article for terrorism purposes, not that they in fact did so. In the case of both the United Kingdom and Australian legislation, the curious crafting of the element in this way is explained by the fact that they are both accompanied by a reverse onus provision. Section 307.9(5) states that the offence is not committed if the person proves the particular thing was not unlawfully imported. This is a legal standard.¹⁴² Breach of s 307.9 is punishable by imprisonment for 25 years, a fine of 5000 penalty units, or both.

These types of provisions raise the question of whether a parliament has complete freedom to define offences in whatever manner they wish. Specifically, can they assign to defences, with implications for the onus of proof, matters that might have previously been seen as elements of offences? And can a parliament base criminality on notions of “reasonable suspicion” of wrongdoing, or is proof of actual wrongdoing required?

¹⁴¹ Given the evident disparity between the meaning of reasonable doubt, whether quantified or not, and balance of probabilities, I must respectfully differ from the conclusion of Lord Hope in *R v Lambert* [2002] 2 AC 545; [2001] 3 WLR 206, 589 that “the practical effect of reading (sections) as imposing an evidential burden only on the accused and not a persuasive burden ... is likely in almost every case that can be imagined to be minimal”.

¹⁴² Note *Criminal Code 1995* (Cth) s 307.9(5); s 307.10(4) makes similar provision with respect to lesser quantities of the drug, presuming unlawful importation, unless the accused can prove otherwise on the balance of probabilities: note *Criminal Code 1995* (Cth) s 307.10(4).

As has been indicated above, scholars and courts have been alive to the potential that legislatures might resort to such measures to overcome practical difficulties in proving that accused persons have committed particular crimes.

Regarding the possibility that legislatures might move what are typically elements of offences into the defence column, several commentators have written of this possibility. The general position¹⁴³ has been one advocating that a substantive, rather than formal, view be taken on this question. Glanville Williams tends to reject the distinction between offences and defences on the basis that an exception states the limits of an offence, and the prosecution is required to prove the defence is not applicable.¹⁴⁴ Andrew Ashworth rejects the distinction between offences and defences,¹⁴⁵ while a substantive view is also taken by other scholars.¹⁴⁶ If a substantive view is taken, the question then becomes what tests can be utilised in order to determine what, in substance, is an element of an offence proof of which must be on the prosecution, and what, in substance, is a defence, proof of which might be, at least to some extent, on the defence. The academic and judicial literature suggests significant support for the notion that the elements of an offence must be such that the parliament can “legitimately define it as culpable wrongdoing”;¹⁴⁷ in other words that the conduct is sufficiently blameworthy. In relation to matters that go to culpability, the prosecution ought to bear the onus of proof beyond reasonable doubt.¹⁴⁸

Other tests that have been suggested are also worthy of consideration. Kenneth Campbell states that an offence in substance deals with things against which the law says there is *prima facie* a reason, while a defence relates to exonerating conditions.¹⁴⁹ John Calvin Jeffries and Paul Stephan state that a given crime for which punishment may include imprisonment must be defined to include, at minimum, an *actus reus* and *mens rea*.¹⁵⁰ Strict liability offences are excluded on the basis that they are typically punished by fines. And finally, the judgment of Powell J in the United States Supreme Court decision in *Patterson v New York* suggested that a substantive approach should be taken.¹⁵¹ As part of it,

¹⁴³ The only author which research for this article has disclosed who has advocated a formalist, legal positivistic position that parliament can define elements of offences and defences any way it wishes is Paul Roberts, “The Presumption of Innocence Brought Home? *Kebilene* Deconstructed” (2002) 118 *Law Quarterly Review* 41; Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford University Press, 2nd ed, 2010) 286–288.

¹⁴⁴ Glanville Williams, “Offences and Defences” (1982) 2 *Legal Studies* 233, 234.

¹⁴⁵ “There has never been a firm legislative convention about the division of crimes into offence elements and defence elements, and it should therefore not be regarded as a sound basis for allocating the burden of proof”: Andrew Ashworth, “Four Threats to the Presumption of Innocence” (2006) 10 *International Journal of Evidence and Proof* 241, 259.

¹⁴⁶ See, eg, Victor Tadros, “The Ideal of the Presumption of Innocence” (2014) 8 *Criminal Law and Philosophy* 449; Andrew Stumer, *The Presumption of Innocence: Evidence and Human Rights Perspectives* (Hart, 2010); Antony Duff, “Strict Liability, Legal Presumptions and the Presumption of Innocence” in AP Simester (ed), *Appraising Strict Liability* (Oxford University Press, 2005) 134; Victor Tadros and Stephen Tierney, “The Presumption of Innocence and the Human Rights Act” (2004) 67 *Modern Law Review* 402, 415; Scott E Sundby, “The Reasonable Doubt Rule and the Meaning of Innocence” (1989) 40 *Hastings Law Journal* 457, 488; John Calvin Jeffries and Paul Stephan, “Defences, Presumptions and Burden of Proof in the Criminal Law” (1979) 88 *Yale Law Journal* 1325, 1347.

¹⁴⁷ *Sheldrake v DPP* [2005] 1 AC 264; [2004] 3 WLR 976, 313 where Lord Bingham expressed strong concern with an offence provision that could catch a person “who is innocent of any blameworthy or properly criminal conduct” (with whom Lords Steyn and Phillips agreed); *R v Lambert* [2002] 2 AC 545; [2001] 3 WLR 206, 571 where Lord Steyn railed against transferring aspects of proving “mens rea and moral blameworthiness” onto the accused; Duff, n 146: “the presumption of innocence requires that defendants be convicted only on proof beyond reasonable doubt of what the law legitimately defines as culpable wrongdoing”; Richard L Lippke, *Taming the Presumption of Innocence* (Oxford University Press, 2016) 73 who, rejecting the formalistic approach, concluded “what we want to do is punish conduct that deserves censure and hard treatment because it is significantly blameworthy and harmful to others”; Barbara Underwood, “The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases” (1977) 86 *Yale Law Journal* 1299, 1346: “the wisdom of imposing criminal punishment for conduct that lacks any significant component of personal culpability is subject to serious question”.

¹⁴⁸ Glanville Williams, “Offences and Defences” (1982) 2 *Legal Studies* 233; Glanville Williams, “The Logic of Exceptions” (1988) 47 *Cambridge Law Journal* 261.

¹⁴⁹ Ian Dennis, *Criminal Law and Justice: Essays from the W G Hart Workshop* (Sweet & Maxwell, 1987) 73.

¹⁵⁰ Jeffries and Stephan, n 146, 1370–1376.

¹⁵¹ *Patterson v New York*, 432 US 197 (1977), 226–227 (Powell J (dissenting), for Brennan and Marshall JJ).

anything that made a substantive difference to the stigma and punishment surrounding an alleged crime would need to be proven by the prosecution at the beyond reasonable doubt level. History would be utilised in determining this.

Let us consider these principles in relation to the offences noted above, and the facts of the some of the case law. The first type of provision, which assumes against the accused matters such as intention and belief, involves matters that typically go to culpability. Where the prosecution has not shown beyond a reasonable doubt that an accused has the required intention or belief in relation to the offence, there is real doubt as to whether the accused is “morally blameworthy” enough to deserve criminal punishment, especially the lengthy jail terms that apply to such offences. Questions regarding intention or belief don’t relate to “exonerating conditions”, which is Campbell’s substantive description of what defences are. Powell J in *Patterson* referred to things that traditionally affect the stigma and punishment associated with crime; in his substantive view, those things must be proven by the prosecution beyond reasonable doubt. Here, there is a significant difference in stigma and punishment between, on the one hand, mere possession of an unlawful drug, and on the other, possession for purposes of business activity. The latter is typically punished more severely than the former. As a result, applying the view of Powell J, elements going to show such “business activity” purposes would need to be proven by the prosecution beyond reasonable doubt, not presumed against the accused unless they can prove otherwise on the balance of probabilities.

These substance tests also raise question marks over laws that criminalise mere membership of an association. The United States Supreme Court has declared unconstitutional those laws that criminalise mere status.¹⁵² Again, there are doubts whether mere membership of a proscribed organisation, in the absence of any evidence the person actively contributed to terrorism activity, for example, is “sufficiently blameworthy” so as to justify criminal sanction. Williams might have struggled to identify “culpability” here. Jefferies and Stephan require, at minimum, *actus reus* and *mens rea* in order that a criminal offence can be justified. It is hard to square this with simple membership of an organisation, which the accused may have joined prior to its being proscribed, who may not be aware of its alleged terrorist activity, and who may never have actively contributed to any terrorist conduct.

Finally, there are question marks over criminal offence provisions which include as an element of the offence that the prosecution has a “reasonable suspicion” about something, rather than that the prosecution can prove that thing. Again, there are concerns over whether this conduct is sufficiently morally blameworthy and culpable to warrant criminal sanction; it does not relate to exonerating conditions.

These arguments once again can be tied to Ch III in order to give them constitutional status. If a court is asked to apply a criminal law to convict and punish a person where, according to an objective analysis, the conduct complained of is not morally blameworthy, or where there is no actual culpability, this could undermine public confidence in the judiciary. Citizens would observe that people who really had not done anything seriously wrong were being jailed by courts. Citizens would rightly have concern with individuals being jailed because there is a “reasonable suspicion” that one or several elements of a crime had been committed – but suspicion well short of actual proof beyond reasonable doubt. They might also have concern where citizens were being jailed although their sole “crime” was innocent membership of an association, where they could not prove their innocuous association.

This means that parliaments are not free to define crimes with absolute freedom, and alter the onus and standard of proof at will.

Sometimes prosecutors will be frustrated, because they strongly suspect or know that a person has committed a crime, but cannot prove it. However, this is not a new concern. From time immemorial, we have refused to punish a person based on mere suspicion. Accusers must demonstrate the truth of their accusations. The default must be that the person retains their freedom and it is assumed they are a good, law abiding citizen, until proven otherwise. Laws that depart from these fundamental

¹⁵² *Robinson v California*, 370 US 660 (1962).

principles gravely risk the institutional integrity of a court, by requiring courts to participate in legal proceedings leading to conviction and punishment (sometimes very serious jail terms) where, objectively, there is little or no actual culpability or moral blameworthiness. Courts have a reputation for doing justice. If they are asked to consider convicting and punishing a person where there is very little substantive actual wrongdoing, their reputation risks being fatally undermined. The High Court must not permit this to occur.

CONCLUSION

This article has considered a range of Commonwealth and State offences which depart from the presumption of innocence, by presuming stated elements of the offence to have been proven, unless the accused can show otherwise, often on the balance of probabilities standard. While in the past the High Court has validated legislated departures from the presumption of innocence, in more recent years the possibility has developed that the separation of powers principle could be utilised to indirectly protect fundamental human rights like the presumption of innocence. The Court has found that laws that undermine or abrogate fundamental characteristics of traditional judicial process may be unconstitutional as breaching the requirements of Ch III. Current members of the Court have identified the accusatorial and adversarial nature of Australian criminal law as fundamental. It is not a large leap to find that laws that contain reverse onus provisions are unconstitutional, because they depart from the accusatorial and adversarial nature of Australian criminal process.

This article has also noted the potential of existing Australian statutory provisions to lead to outcomes where an accused is convicted of an offence although there is reasonable doubt as to their guilt. As has been demonstrated, this has been a red line in comparable jurisdictions; neither the Canadian nor the United Kingdom Supreme Court has permitted legislation where, because the accused is required to meet a legal onus, they may be convicted in such circumstances because, while they can raise reasonable doubt as to their guilt, they cannot disprove they committed an element of the offence at the level of balance of probabilities. There is quite a difference between reasonable doubt and balance of probabilities, meaning there will be quite a number of cases where an accused could meet a reasonable doubt standard, but not a balance of probabilities standard. The High Court should not permit such outcomes. One way for it to do so is to find that the notion of a person being convicted despite the existence of reasonable doubt is so offensive to traditional notions of what courts do that the possibility offends the institutional integrity of a court and undermines public confidence in the judiciary.

A substantive view must be taken as to the nature of what is truly an “offence” and what is a “defence”. Courts must not permit parliaments *carte blanche* in this area. The cost of doing so would be the effective surrender of due process rights, where the parliament could effectively circumvent the inconvenience of having to prove facts by presuming them to exist, and placing an onus on the accused to disprove them, on pain of punishment.

Various commentators have proposed tests to help clarify, as a matter of substance, what are truly offence elements, and what are truly defences or excuses. Concepts of moral blameworthiness, culpability, and exonerating conditions are worthwhile to consider here, as well as notions of *actus reus* and *mens rea* as being necessary aspects of valid criminal offence provisions, together with considerations of stigma and punishment, assisted by history.

By use of this substantive approach to criminal law, we can avoid the spectre of a parliament creating offences with no real moral opprobrium or culpability, and then asking courts to apply such laws, potentially jailing individuals for trivialities. We can ensure that the great weapons of the criminal law are reserved for the truly deserving. We can make sure that prosecutors are not permitted to get around the “inconvenience” of proving actual culpability, difficult though that sometimes may be, by prosecutor-friendly offence provisions requiring only that reasonable suspicion be shown.

The reputation of courts in dispensing justice is under grave threat if they are asked to treat as criminal behaviour what society would not regard as morally blameworthy. Citizens would not accept the jailing of fellow citizens based on “reasonable suspicion” that the accused has committed elements of the offence for which they are jailed. There is a constitutional solution for such grave interferences with a court’s institutional integrity, if the courts are prepared to choose it.