

# Principles of good legislation: OQPC guide to FLPs



Reversal of onus of proof

Office of the Queensland Parliamentary Counsel



## Reversal of onus of proof

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## Summary

***Consider whether legislation reverses the onus of proof in criminal proceedings without adequate justification. Legislation that requires an accused person to prove innocence by, for example, disproving a fact the prosecution would normally be obliged to prove, or that otherwise affects the onus of proof, may adversely impact the rights and liberties of individuals under section 4(3)(d) of the Legislative Standards Act 1992 and should be justified.***

### General principles

Generally, in criminal proceedings:

- the legal onus of proof lies with the prosecution to prove the elements of the relevant offence beyond reasonable doubt (see paragraphs [3]-[4]); and
- the accused person must satisfy the evidential onus of proof for any defence or excuse he or she raises and, if the accused person does satisfy the evidential onus, the prosecution then bears the onus of negating the excuse or defence beyond reasonable doubt (see paragraphs [5]-[7]).

A statute can expressly reverse this general principle (see paragraphs [15]-[17]).

If a provision (known as a ‘statutory exception’) states grounds for liability and also states that a person may be exempted from liability on a particular ground, the person seeking to rely on the statutory exception bears the onus of proof on the balance of probabilities (see paragraphs [8]-[14]).

The evidential onus and legal onus of proving the defence of insanity lies with the defendant (see paragraph [6]).

### Statutory guidance

The [Legislative Standards Act 1992](#), section 4(3)(d) states that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, among other things, the legislation reverses the onus of proof in criminal proceedings without adequate justification.

### Issues considered by parliamentary committees

Parliamentary committees closely scrutinise any proposed provision that affects the onus of proof in criminal proceedings (see paragraphs [18]-[22]). Specific issues relating to statutory reversals of the onus of proof in criminal proceedings considered by parliamentary committees include:



- provisions expressly placing the legal onus of proof on an accused person (see paragraphs [23]-[27]); and
- the drafting of provisions as defences for which an accused person bears the onus of proof, rather than as excuses (see paragraphs [28]-[33]); and
- the exclusion of section 23 or 24 of the Criminal Code (see paragraphs [34]-[36]); and
- evidentiary provisions such as provisions deeming particular circumstances to exist or providing that particular kinds of evidence will be persuasive or conclusive (see paragraphs [38]-[53]); and
- derivative liability provisions, which impose criminal liability on a person as a consequence of criminal conduct by another, related person (see paragraphs [54]-[60]); and
- strict or absolute liability defences (see paragraphs [61]-[64]); and
- statutory exceptions (see paragraphs [65]-[75]); and
- the distinction between reversals of the onus of proof in civil, as opposed to criminal, proceedings (see paragraphs [76]-[80]).

The information contained in this chapter is current as at 19 June 2013.



## Introduction

- [1] Section 4(3)(d) of the [Legislative Standards Act 1992](#) provides that legislation should not reverse the onus of proof in criminal proceedings without adequate justification.

## General principles

- [2] The procedural rules relating to the conduct of criminal trials are concerned with the protection of innocent persons. For this reason, the prosecution is generally required to prove the guilt of an accused person beyond reasonable doubt. Legislation that requires an accused person to prove innocence by, for example, disproving a fact the prosecution would normally be obliged to prove, or that otherwise affects the onus of proof, may adversely affect the rights and liberties of individuals and should be justified.

### *Prosecution usually bears legal onus of proof*

- [3] It should be noted that bearing the *legal or persuasive* onus of proof is separate from, but related to, bearing the *evidential* onus in relation to a matter. A person who bears the legal or persuasive onus of proof must persuade the relevant arbiter of fact (ordinarily the jury in a criminal trial or a magistrate in a summary proceeding) that the offence has been committed, or that an excuse is negated. In contrast, a person who bears the evidential onus is merely required to show a *prima facie* case, namely that there is sufficient evidence of a matter (usually, an excuse or defence) to enable the matter to be put before the arbiter of fact. The person does not have to prove the matter itself.<sup>1</sup> The question of whether the evidential onus has been discharged is a question of law, while the discharge of the legal onus of proof to the relevant standard is a matter for the arbiter of fact.
- [4] The general principle is that the prosecution bears both the evidential onus and legal onus of proving each element of an offence, although this general principle may be expressly reversed by legislation. (Reversals of this kind, known as ‘statutory reversals’, are discussed further in paragraphs [15]-[17]). However, where a statutory provision states grounds for liability but also includes a distinct exception to liability, the prosecution does not bear the onus of proving that the exception applies. (Legislative provisions of this kind, known as ‘statutory exceptions’, are discussed further in paragraphs [8]-[14]).<sup>2</sup>

<sup>1</sup> The amount of evidence required to discharge the evidential onus varies, depending on the standard of proof required of the party under the obligation to discharge the onus. For a discussion of issues concerning evidential onus see JD Heydon *Cross on Evidence* (LexisNexis; 2010) at [7015] (‘*Cross on Evidence* (2010)’).

<sup>2</sup> *Woolmington v DPP* [1935] AC 462; [1935] UKHL 1 (‘*Woolmington*’)





*Accused person usually bears evidential onus for defences or excuses*

- [5] With the exception of insanity, if an accused person wishes to rely on a defence or excuse such as independence of will, accident, mistake of fact, intoxication, extraordinary emergency, compulsion, provocation for an assault or self-defence,<sup>3</sup> the accused person bears the evidential onus of raising the defence or excuse.<sup>4</sup> However, unless the onus has been expressly reversed by statute, the legal onus of negating the excuse or defence beyond reasonable doubt remains with the prosecution once it has been properly raised.<sup>5</sup> Excuses and defences for which the legal onus of negating the excuse or defence remains with the prosecution are referred to in this chapter as 'excuses'.
- [6] For the defence of insanity, both the evidential burden of raising the defence and the legal onus of proving insanity (or, in other words, rebutting the presumption of sanity), lie with the accused.<sup>6</sup>
- [7] The [Criminal Code](#) expressly reverses the onus of proof in relation to particular defences, so that the defendant must satisfy both the evidential onus and the legal onus on the balance of probabilities.<sup>7</sup> However, in the absence of an express reversal the legal onus to negative an excuse remains with the prosecution.

*Statutory exceptions to the general principle that the prosecution bears the legal onus of proof*

- [8] It is an established rule of statutory construction that where a legislative provision states grounds for liability and also provides for a distinct exception or proviso to liability, the onus of proving the exception on the balance of probabilities lies with the person seeking to rely on it.<sup>8</sup>
- [9] This rule of statutory construction has been legislatively established for summary offences by section 76 of the [Justices Act 1886](#). The section places the legal onus of

<sup>3</sup> The excuses of independence of will, accident, mistake of fact, intoxication, extraordinary emergency and compulsion are provided for in the [Criminal Code](#), chapter 5. The defences of provocation for an assault or self-defence are provided for in part 5, chapter 26.

<sup>4</sup> If this were not the case, the prosecution would be forced to negative all possible matters of excuse and justification, whether they were raised by the evidence or not: *Lobell* [1957] 1 QB 547, as cited by RG Kenny *An Introduction to Criminal Law in Queensland and Western Australia* (6<sup>th</sup> ed, 2004) at [6.11].

<sup>5</sup> See generally, *Woolmington*

<sup>6</sup> *M'Naghten* (1843) 10 Cl & Fin 200; 8 ER 718. Note that in Queensland, the [Criminal Code](#), s 26, establishes a statutory presumption of sanity.

<sup>7</sup> See, for example, the [Criminal Code](#), ss 208(4) and 360(2)

<sup>8</sup> *Dowling v Bowie* [1952] HCA 63; (1952) 86 CLR 136 ('*Dowling*')



proof on an accused person to prove an exception applies in relation to an alleged ‘simple offences or breach of duty’.<sup>9</sup> It states:

## 76 Proof of negative etc.

If the complaint in any case of a simple offence or breach of duty negatives any exemption, exception, proviso, or condition, contained in the Act on which the same is framed, it shall not be necessary for the complainant to prove such negative, but the defendant shall be called upon to prove the affirmative thereof in the defendant’s defence.

- [10] However, a distinction can be made in circumstances where an ‘exception’ is contained within, or is an essential ingredient of, the grounds for liability. In that situation, the exception effectively forms a ‘negative element’ of the offence and the onus of disproving the exception beyond reasonable doubt remains with the prosecution.
- [11] The leading Australian authority on ‘exceptions’ of this kind is the High Court’s decision in *Dowling v Bowie*.<sup>10</sup> The case concerned a Northern Territory Ordinance that prohibited to the sale of alcohol to members of a particular group. The question before the High Court was whether the prosecution was responsible for proving that the person to whom the relevant alcohol sale had been made was a member of the group or whether the defendant was obliged to prove that the purchaser was not a member. The High Court held that in order to answer this kind of question, it would be necessary in each case for a court to determine the elements of the offence, as specified by the Legislature using whichever form it chooses including negative elements. Once the court determined what those elements were, the High Court held, the burden of proving the elements would lie with the prosecution, and the defendant would have to provide any statutory exception to the offence.<sup>11</sup>
- [12] The High Court considered that in determining the elements of an offence it would be relevant whether the purported exception assumed the facts on which the rule of liability is based, and depended on ‘additional facts of a special kind’ to prove the exception. If that were the effect of the provision, considerations of substance might support the conclusion that the onus lay with the person relying on the exception, namely the defendant. The High Court held that whether the matter to be proved is within the knowledge of one party but not the other would also be relevant.<sup>12</sup>

<sup>9</sup> The *Justices Act 1886*, s 4 defines *simple offence* as ‘any offence (indictable or not) punishable, on summary conviction before a Magistrates Court, by fine, imprisonment, or otherwise’ and *breach of duty* as ‘any act or omission (not being a simple offence or a non-payment of a mere debt) on complaint of which a Magistrates Court may make an order on any person for the payment of money or for doing or refraining from doing any other act’.

<sup>10</sup> *Dowling* [1952] HCA 63; (1952) 86 CLR 136, as cited in *Cross on Evidence* (2010) at [7145]

<sup>11</sup> *Dowling* [1952] HCA 63; (1952) 86 CLR 136 at 144 per Williams and Taylor JJ at [5], citing *Ex parte Ferguson*; *Re Alexander* (1944) 45 SR (NSW) 64

<sup>12</sup> *Dowling* [1952] HCA 63 at [3] per Dixon CJ; (1952) 86 CLR 136 at 140; see also *Chugg v Pacific Dunlop Ltd* [1990] HCA 41; (1990) 170 CLR 249



- [13] It is clear from *Dowling* that whether an offence provision contains a statutory exception to be proved by the defendant, or whether the purported exception is in fact a ‘negative element’ of the offence or even an excuse that the prosecution must negative once properly raised, is a matter of construction of the particular legislative provision. It must therefore be determined in each case by reference to considerations of substance rather than form.<sup>13</sup> For this reason, the case law concerning statutory exceptions is complex and usually highly specific to the individual statute under consideration in the case. It may be said as a general rule that if an offence provision includes an exemption that takes a person outside the operation of a general rule (for example, by setting up new or different matter from the subject matter of the rule), the exemption is likely to be considered a statutory exception the proof of which lies with the defendant. This is particularly the case if the facts of the exception are likely to be better known to the defendant than anyone else.<sup>14</sup> However, this principle is merely a general guide and there is no single rule that can be applied in every case.
- [14] It is useful to note in this context that in Queensland, offences providing for an exemption from liability where a reasonable excuse exists (referred to in this chapter as ‘reasonable excuse provisions’) tend to be drafted on the basis that the [Justices Act 1886](#), section 76 would apply, placing the onus on the defendant to prove the existence of a reasonable excuse. It would seem likely that the facts giving rise to a reasonable excuse would be within the particular knowledge of the defendant.<sup>15</sup> Reasonable excuse provisions are discussed in further detail later in this chapter in the context of potential breaches of fundamental legislative principle.

### *Express statutory reversals of the onus of proof*

- [15] A provision may expressly place the onus of proving a matter on the defendant. For example, the [Criminal Code](#), section 515 provides:

Any person who, without lawful authority or excuse, *the proof of which lies on the person*, makes, in the name of any other person, before any court or person

<sup>13</sup> See, for example, *Director of Public Prosecutions v United Telecasters Sydney Ltd* [1990] HCA 5 per Brennan, Dawson and Gaudron JJ at [12]; (1990) 168 CLR 594 at 600-601. The relevant exemption can even be placed in a separate part of the Act. In *Stevenson v Yasso* [2006] QCA 40; [2006] 2 Qd R 150 the court found that the onus of proving an exemption from an offence about using or possessing fishing apparatus fell on the defendant, even where the exemption provision was general in nature and appeared in a separate part of the Act.

<sup>14</sup> *Chugg v Pacific Dunlop Ltd* [1990] HCA 41; (1990) 170 CLR 249, as cited by Fryberg J in *Stevenson v Yasso* [2006] QCA 40 at [148]; see also JRS Forbes *Evidence Law in Queensland* (Law Book Company, 2010) at [Q.33] (‘Forbes 2010’)

<sup>15</sup> However, this seems unlikely to be the case if the reasonable excuse consists of a common law defence, or an excuse such as those contained in the [Criminal Code](#), part 1, chapter 5. In those circumstances, it seems likely the legal burden of negating the defence or excuse would remain with the prosecution in the absence of an express provision to the contrary.





lawfully authorised to take such an acknowledgement, an acknowledgement of liability of any kind ... is guilty of a crime ... [Emphasis added]

Similarly, section 215(5) provides that if an offence:

... is alleged to have been committed in respect of a child of or above the age of 12 years, *it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years.* [Emphasis added]

- [16] The onus of proving the matters stated in sections 515 or 215(5) lies with the accused.<sup>16</sup> This is also the case for other legislative provisions that state that it is ‘a defence to prove that’ particular facts or circumstances existed.<sup>17</sup>
- [17] If a provision states that something is conclusive evidence of a matter until the contrary is proved by the accused, the effect is to reverse the onus of proof.<sup>18</sup> This is because the usual position is that the prosecution is required to prove a fact by admissible evidence whereas this type of provision requires the defendant to *disprove* the fact.<sup>19</sup>

## Reversal of the onus of proof in criminal proceedings as an FLP

### *General approach of parliamentary committees*

- [18] The types of provisions the parliamentary committees have commented on when considering section 4(3)(d) of the [Legislative Standards Act 1992](#) are broadly categorised below, along with the justifications commonly offered for them.
- [19] Some categories mentioned below overlap with each other, as provisions often contain more than one type of ‘reversal’.
- [20] It should also be noted that, in addition to commenting on provisions that expressly reversed the onus of proof,<sup>20</sup> it was the practice of the former Scrutiny of Legislation Committee (the *Scrutiny Committee*) to comment on *any* proposed provision that might place any burden on a defendant to prove something. For example, the Scrutiny Committee usually commented on provisions that placed, or might place, the evidential onus on the defendant, even if the onus already lay with the defendant at common law

<sup>16</sup> See the [Criminal Code](#), ss 12(3A), 17, 216(4) and 222(4)

<sup>17</sup> See, for example, the [Dispute Resolution Centres Act 1990](#), s 27(4), and the [Liquor Act 1992](#), s 230(1). The latter provision was considered by the Queensland Court of Appeal in *Tate v Aarjets Pty Ltd* [2010] QCA 243.

<sup>18</sup> See for example the [Electrical Safety and Other Legislation Amendment Bill 2011](#), s 9, which inserted a new s 181A into the [Electrical Safety Act 2002](#). A provision containing a presumption of law has a similar effect—for example, the defence of insanity under the [Criminal Code](#), s 26.

<sup>19</sup> *Schiffmann v Whitton* [1916] HCA 60; (1916) 22 CLR 142, as cited in Forbes, 2010 at [Q.27]

<sup>20</sup> See for example [LA 2011 No 3 p 5 para 29](#) and [LA 2011 No 5 p 23 para 19](#)



or under the [Justices Act 1886](#), section 76.<sup>21</sup> The Scrutiny Committee also commented on provisions purporting to alter the burden of proof in other ways, that relieved the prosecution from an obligation to prove something that it might otherwise be required to prove. For consistency with the Scrutiny Committee's approach, provisions that potentially affect the burden of proof in any way are included in the following discussion.

### *Provisions expressly placing the legal onus on the defendant to prove a matter*

- [21] A number of provisions in the statute book reverse the legal onus for proving a defence or other matter by expressly placing the onus on the defendant. These provisions sometimes state that it is a defence to prove a particular matter. Others provide that particular conduct constitutes an offence if committed without lawful justification or excuse, 'the proof of which lies on the accused'. In either type of provision, the standard is almost always on the balance of probabilities.
- [22] Generally, provisions of this kind can be justified if the matter to be proved by the defendant is peculiarly within the defendant's knowledge. The justification is even stronger if it would be difficult or expensive for the prosecution to disprove the matter. However the Scrutiny Committee expressly commented on several occasions that, although it appreciated the difficulties regarding proof of liability in certain circumstances, it did not generally endorse provisions reversing the onus in this way.<sup>22</sup>

### *Straightforward reversals of the onus of proof*

- [23] An example of a statutory reversal of the onus of proof is found in the [Drugs Misuse Act 1986](#). Section 129(1)(c) of that Act requires a defendant to prove that drugs found on the defendant's premises were there without the defendant's knowledge.<sup>23</sup>
- [24] The [Animal Management \(Cats and Dogs\) Bill 2008](#) proposed that it would be a defence to particular charges for dog owners to prove another person owned the dog at the time the alleged offence happened and had already been convicted of the offence and paid the penalty. The Explanatory Notes justified the reversal on the basis that the defendant was the most likely person to know about the ownership of the dog and would be well-

<sup>21</sup> However, the Scrutiny Committee did comment that a clause in the [Emblems of Queensland Bill 2004](#), which created an offence to use the State arms in connection with a relevant enterprise without lawful authority and expressly placed the onus on the defendant to prove lawful authority, may not constitute a breach of FLP if at common law the defendant would already bear the onus: [AD 2005 No 1 pp 13-14 paras 3-15](#). The department had, in its Explanatory Notes, suggested that the provision constituted a 'negative averment' under the common law. The common law principle is that a negative averment is generally permissible if the facts are likely to be better known to the defendant than anyone else: *R v Edwards* [1975] QB 27.

<sup>22</sup> See for example [AD 2007 No 10 pp 11-12 paras 14-24](#)

<sup>23</sup> The predecessor provision of section 129(1)(c) was considered by the Queensland Court of Criminal Appeal in *R v Brauer* [1990] 1 Qd R 332.



positioned to provide evidence of the defence.<sup>24</sup> The Scrutiny Committee referred the question whether or not the reversal of the onus was justified to Parliament.<sup>25</sup>

- [25] Clause 22 of the [Aboriginal and Torres Strait Islander Communities \(Justice, Land and Other Matters\) and Other Acts Amendment Bill 2008](#) proposed to amend section 168B(1) of the [Liquor Act 1992](#), which prohibited the possession of a prescribed quantity of liquor in a restricted area. Clause 22 of the Bill provided the offence in section 168(1) would not apply to a person travelling through an area in which alcohol was prohibited if the person in possession of the alcohol met stated criteria. The proposed amendment placed the burden of proving section 168(1) did not apply on the defendant, on the balance of probabilities. The Explanatory Notes stated that the reversal was justified because the person would be afforded special status and should therefore be responsible for proving he or she satisfied the exemption criteria.<sup>26</sup> The Scrutiny Committee referred the clause to Parliament for consideration.<sup>27</sup>
- [26] In contrast, the Scrutiny Committee expressed concern about a provision of the [Police Powers and Responsibilities and Another Act Amendment Bill 2002](#) that provided, in relation to a proceeding for an impounding order or forfeiture order for an impounded vehicle, that it was a defence for an owner to prove the ‘prescribed offence’ happened without the knowledge and consent of the owner. The Scrutiny Committee noted the owner could suffer very significant consequences if he or she was unable to establish the defence.<sup>28</sup>

### *Excuses vs defences*

- [27] On a number of occasions, the Scrutiny Committee queried the proposed insertion into the [Criminal Code](#) of defences expressly reversing the onus and suggested it might have been more appropriate for the legislation to create an ‘excuse’ for which the legal onus remained with the prosecution.
- [28] An example of Scrutiny Committee’s views on excuses versus defences is provided by its consideration of the [Criminal Code \(Drink Spiking\) and Other Acts Amendment Bill 2006](#). Clause 4 of the Bill proposed to create an offence of administering a substance to another person without the other person’s knowledge and with intent to cause the other person to be stupefied and overpowered. The proposed offence provision reversed the onus, providing it would be a defence to prove the substance was not a dangerous drug, and had been administered as a ‘prank’.
- [29] The Scrutiny Committee considered it difficult to envisage circumstances in which the defendant would be able to prove the drug had been administered as prank, after the

<sup>24</sup> [Animal Management \(Cats and Dogs\) Bill 2008 Explanatory Notes p 14](#)

<sup>25</sup> [AD 2008 No 13 p 13 para 46](#)

<sup>26</sup> [Aboriginal and Torres Strait Islander Communities \(Justice, Land and Other Matters\) and Other Acts Amendment Bill 2008 Explanatory Notes p 7](#)— it is possible this could have been a provision to which the [Justices Act 1886](#), s 76 would have applied in any event.

<sup>27</sup> [AD 2008 No 6 p 4 para 22](#)

<sup>28</sup> [AD 2002 No 5 pp 17-18, paras 36-42](#)



Crown had proved the drug was administered with intent to stupefy and overpower.<sup>29</sup> The Scrutiny Committee also queried why a ‘prank’ should be a defence rather than an excuse, assuming it was fair to distinguish between persons who administered a substance with the same intent and outcome on the basis that some of the persons were motivated by ‘playfulness’ and others by malice. That is, the Scrutiny Committee could not see a reason why, once the issue of a prank had been properly raised by the accused person, the Crown should not be required to negative the circumstances beyond reasonable doubt as the Crown would have to do in relation to other excuses under the Code.<sup>30</sup> The Committee sought information from the Attorney-General about why the ‘prank defence’ was a defence rather than an excuse under the Code.<sup>31</sup> The ‘prank defence’ was removed before the Bill was passed.<sup>32</sup>

- [30] The Scrutiny Committee made similar comments in relation to the proposed insertion of section 228E into the [Criminal Code](#) by the [Criminal Code \(Child Pornography and Abuse\) Amendment Bill 2004](#). That provision set out defences to the offences of making and distributing child exploitation material and required the accused to prove those defences. The defences included a defence that the conduct was consistent with an exemption given under a classification Act, and another defence that the material had a particular classification under specified Acts.
- [31] The Scrutiny Committee queried why these exceptions needed to be cast in the form of defences. It considered the defence of consistent conduct to be the subject of easily accessible records within a Government department. In relation to the classification defence, the Scrutiny Committee noted that no offence would be committed if it could be proved the material had the necessary classification. The Committee questioned whether it was appropriate that such a fundamentally exculpatory matter should not have to be negated by the prosecution beyond reasonable doubt.<sup>33</sup>

#### *Overriding the Criminal Code, sections 23 and 24*

- [32] The Scrutiny Committee classified provisions overriding sections 23 or 24 of the [Criminal Code](#) as provisions reversing the onus of proof. Sections 23 and 24 enable a person to escape liability if the relevant act happened independently of the person’s will or was accidental or if the person held an honest and reasonable, but mistaken, belief in a state of things relating to the act. The excuses in sections 23 and 24 must be disproved by the prosecution once the defendant has properly raised them and for this reason, the Scrutiny Committee considered that provisions overriding them assisted the prosecution.<sup>34</sup>

<sup>29</sup> [AD 2006 No 9 p 10 para 28](#)

<sup>30</sup> [AD 2006 No 9 p 11 para 33](#)

<sup>31</sup> [AD 2006 No 9 p 11 para 36](#)

<sup>32</sup> See the Attorney’s response to the Scrutiny Committee, quoted in [AD 2007 No 1 p 29 para 9](#)

<sup>33</sup> [AD 2005 No 1 pp 11-12 paras 70-78](#)

<sup>34</sup> Moreover, provisions overriding sections 23 and 24 are usually replaced with alternative defences that the accused person is required to prove.





- [33] The Scrutiny Committee's attitude to provisions of this kind is illustrated by its treatment of the [Transport \(Rail Safety\) Bill 2008](#). Clause 31 of the Bill excluded sections 23 and 24 of the [Criminal Code](#) and clauses 36 and 37 of the Bill provided for alternative defences, the proof of which lay with the defendant. The Explanatory Notes to the Bill stated that the approach was consistent with the approach taken for similar obligations in the *Workplace Health and Safety Act 1995* and other Queensland safety-related Acts.<sup>35</sup> The Scrutiny Committee referred the provision to Parliament.<sup>36</sup>
- [34] Another example of the Scrutiny Committee's attitude to provisions overriding sections 23 and 24 of the [Criminal Code](#) is provided by its discussion of the [Transport Legislation Amendment Bill 2002](#). The Bill proposed to insert new sections 47, 48 and 50 into the *Transport Operations (Marine Pollution) Act 1995* to make certain conduct by 'culpable persons' an offence. A 'culpable person' was defined as a ship's owner, ship's master, or another member of a ship's crew who allowed sewage to be discharged from the ship in marine waters. The Bill also proposed to insert a defence to the new offence provisions and, although the proposed defence did not expressly state that the defendant would bear the burden of proving it, the Scrutiny Committee considered the net effect of the provisions was to reverse the onus of proof. The reason for the Committee's view was that under the proposed provisions, each culpable person would be held strictly liable for an offence unless he or she could establish a relevant ground of defence. The Scrutiny Committee referred the matter to Parliament, commenting that, as a general rule, it did not endorse provisions of this kind.<sup>37</sup>

### *Provisions expressly placing the evidential onus on the accused person*

- [35] An example of a provision expressly placing the evidential onus on the accused is provided by clause 38(3) of the [Safety in Recreational Water Activities Bill 2011](#).<sup>38</sup> The clause proposed to create an offence of producing, in order to comply with a requirement under the Bill, a document a person knew to be false or misleading without indicating that the document contained false or misleading information. The provision placed the evidential onus on the accused person to show he or she did, in fact, indicate the extent of the false or misleading information. The Scrutiny Committee invited the Minister to comment on the clause. In the Minister's response,<sup>39</sup> the Minister advised that the 'reversal' was justified on the basis that the accused person would be in a better position than the prosecution to know whether he or she had appropriately indicated that the information was false or misleading and it would be difficult for the prosecution to prove the offence if the evidential onus were not placed on the accused. The Minister

<sup>35</sup> [Transport \(Rail Safety\) Bill 2008 Explanatory Notes p 8](#)

<sup>36</sup> [AD 2008 No 2 p 19 paras 24-27](#)

<sup>37</sup> [AD 2002 No 4 p 27 paras 10-11](#)

<sup>38</sup> [LA 2011 No 6 p 13 para 19](#)

<sup>39</sup> The Minister's letter was extracted in [LA 2011 No 7 pp 16-19](#)



emphasised, however, that the legal burden of proof remained with the prosecution. The Scrutiny Committee made no further comment.<sup>40</sup>

- [36] If it is assumed that a court would have interpreted clauses as merely stating the elements of the offence, and not as an offence to which there was a statutory exception, it seems likely that the purpose of placing the evidential onus on the defendant was to ensure the prosecution was not required to disprove in every case the fact that the accused had failed to indicate how the information was false or misleading. In other words, it appears that the provision was intended to require the accused to discharge the evidential onus for the excuse before the prosecution would be required to negative it.<sup>41</sup>
- [37] The Transport, Housing and Local Government Committee (the *THLGC*) commented on clause 639 of the [Heavy Vehicle National Law Bill 2012](#).<sup>42</sup> The clause provided that if an employee alleged that his or her employer had unfairly dismissed the employee in retaliation for giving information about the employer to law enforcement agencies, the employer had the onus of proving the employee was not dismissed in retaliation. The Explanatory Notes sought to justify this reversal of the onus of proof on the basis that the employer was best placed to explain its reasons for dismissing the employee.<sup>43</sup> The Explanatory Notes added the reversal was necessary to:

... deter employers from taking adverse action, and to encourage employees and prospective employees to help enforce [the Heavy Vehicle National Law] without fear of adverse action being taken against them.<sup>44</sup>

The THLGC did not consider that the justification offered in the Explanatory Notes was adequate and sought clarification from the Minister as to the need to reverse the onus rather than relying on existing legislative provisions governing relations between employers and employees.<sup>45</sup>

*Evidentiary provisions—matters taken to be proved, or matters deemed to exist, unless evidence proves otherwise*

- [38] The Scrutiny Committee expressed reservations about provisions stating a thing to be sufficient evidence of a matter, or presuming a state of affairs to exist, unless a party required proof of the thing or state of affairs or the evidence proved that the state of affairs was not as presumed or that the thing was not sufficient evidence. The Scrutiny

<sup>40</sup> [LA 2011 No 7 p 15](#)

<sup>41</sup> It would also be open, although perhaps unlikely, to a court to interpret the provision as containing an exception to which the [Justices Act 1886](#), section 76 applied.

<sup>42</sup> [THLGC Report No 4 \(August 2012\)](#)

<sup>43</sup> [Heavy Vehicle National Law Bill 2012 Explanatory Notes p 15](#)

<sup>44</sup> [Heavy Vehicle National Law Bill 2012 Explanatory Notes p 15](#)

<sup>45</sup> [THLGC Report No 4 \(August 2012\) p 31 para 3.1.9](#); see the subsequent comments by the THLGC in its report on the [Heavy Vehicle National Law Amendment Bill 2012](#) in [THLGC Report No 16 \(February 2013\) p 36](#)



Committee commented that evidentiary provisions affect the right of individuals to a fair trial and just legal process by assisting the prosecution in the discharge of its legal or persuasive onus.<sup>46</sup>

### *Certificate or other documentary evidence*

- [39] It is not uncommon for Queensland legislation to provide that a certificate signed by a person administering a law is evidence of a fact stated in the certificate. These provisions enable an administering authority to put evidence before courts about a range of basic matters relating to its activities records without the need to call witnesses. The Scrutiny Committee noted the purpose of the provisions is usually to improve administrative efficiency and reduce the workload of officials administering the legislation.<sup>47</sup> The Scrutiny Committee generally considered provisions about evidentiary certificates as being unexceptional, provided the matters to which the certificates related were non-contentious and the certificates were treated merely as evidence and not as being conclusive proof of the fact stated or determinative of the ultimate issue in question.<sup>48</sup>
- [40] An example of the Scrutiny Committee's attitude can be found in its comments on the [Transport and Other Legislation Amendment Bill 2010](#). Clause 38 of the Bill sought to amend section 120 of the [Transport Operations \(Road Use Management\) Act 1995](#), to provide that a certificate purporting to be signed by the commissioner about a stated photographic detection device would be evidence of the matters stated in it. Under the clause, if defendant wished to challenge the certificate, he or she would have to give the prosecution written notice of his or her intention to challenge. The Explanatory Notes for the Bill justified the reversal on the basis that the certificate was not conclusive evidence because it was open to the defendant to challenge the matters stated in it.<sup>49</sup> The certificates are, according to the Explanatory Notes, merely 'evidentiary aids' and intended to be a convenient and cost-effective way to inform a court of particular matters.<sup>50</sup> The Scrutiny Committee did not specifically express concern about the provision.
- [41] In contrast, the Scrutiny Committee did express concern about the proposed insertion of new section 443AA into the [Police Powers and Responsibilities Act 2000](#) by the [Police Powers and Responsibilities and Other Acts Amendment Bill 2006](#).<sup>51</sup> The proposed section 443AA provided that a certificate signed by the commissioner and attaching a document identified as a 'running statement' would be evidence of the matters stated in the certificate and in the running statement. A 'running statement' was defined as a

<sup>46</sup> See, for example, [AD 2008 No 13 p 47 para 36](#) in relation to the [Summary Offences and Other Acts Amendment Bill 2008](#)

<sup>47</sup> See, for example, [AD 2002 No 3 p 7 para 30](#)

<sup>48</sup> See, for example, [AD 2008 No 13 p 5 paras 20-24](#); [AD 2008 No 2 p 20 paras 32-34](#); [AD 2005 No 13 p 6 paras 28-34](#)

<sup>49</sup> [Transport and Other Legislation Amendment Bill 2010 Explanatory Notes pp 27-28](#)

<sup>50</sup> [LA 2010 No 4 pp 37-38 paras 67-73](#); see also [LA 2011 No 1 p 11 para 34](#) and [LA 2011 No 2 pp 8-9 paras 19-25](#)

<sup>51</sup> [AD 2006 No 5 pp 23-34 paras 34-42](#)



document that contained factual information about a thing relevant to the commission of an offence that was in the possession of the police service. The running statement contained details such as where and when the thing was found, who found it, to whom it was given after being found, whether it was kept free from tampering, and to whom, how and when it had been transported.

- [42] The Scrutiny Committee noted the provision would allow a court to take the contents of the running statement as evidence of the stated matters, without the need to call witnesses with first-hand knowledge of those matters. The Scrutiny Committee stated that it did not object to ‘certificate evidence’ where the matters in question were non-controversial but noted at least some of the matters in a running statement were likely to be contentious. The Scrutiny Committee noted, however, that its concerns were mitigated to some extent by proposed sections 443AA(4) to (6), which permitted a defendant to give notice of his or her intention to challenge any matter stated in the certificate and provided that, if the defendant gave notice, the certificate would cease to be evidence of the matter challenged.<sup>52</sup>
- [43] The legislative context of a provision reversing the evidential onus of proof may be relevant to whether the reversal is considered objectionable. This point is illustrated by the Scrutiny Committee’s comments about proposed amendments to the *Drug Rehabilitation (Court Diversion) Act 2000* (now the [Drug Court Act 2000](#)) included in the [Drug Legislation Amendment Bill 2005](#). The proposed provisions would have allowed magistrates to accept assessment reports by the Department of Health as evidence of the reports’ contents. The Scrutiny Committee did not consider the effect of the proposed provision to be particularly objectionable, because it would apply only in cases where a person had pleaded, or intended to plead, guilty of a drug-related charge. Further, the effect of the provision would be to give the defendant access to rehabilitation assistance as an alternative to a fine or term of imprisonment.<sup>53</sup>
- [44] The Scrutiny Committee considered it important that evidentiary provisions be clearly drafted. For example, clause 19 of the [Prostitution and Other Acts Amendment Bill 2009](#) sought to insert a new section into the [Criminal Code](#), providing that the fact that:

... a business of prostitution is being carried on may be inferred from employment records, business records, telephone records, advertisements and other relevant factors and circumstances.

The Scrutiny Committee commented that unless an evidentiary provision was drawn with precision and clarity, it would have no evidentiary effect.<sup>54</sup> The Committee also noted that inclusion of the general words ‘and other relevant factors and circumstances’ may reduce the evidentiary effect of the provision.<sup>55</sup>

<sup>52</sup> [AD 2006 No 5 p 24 paras 38-39](#)

<sup>53</sup> [LA 2006 No 1 pp 15-16 paras 3-11](#)

<sup>54</sup> [LA 2009 No 7 p 10 para 29](#), citing *Cross on Evidence* at [7105] in relation to ‘averment provisions’

<sup>55</sup> [LA 2009 No 7 p 10 para 29](#)





- [45] The Scrutiny Committee also considered it appropriate that the evidentiary provisions be capable of being rebutted or displaced. For example, clause 180 of the [Health and Other Legislation Amendment Bill 2008](#) proposed to insert section 26VE into the [Tobacco and Other Smoking Products Act 1998](#).<sup>56</sup> The proposed section provided that a statement in a charge that a person was under 16 or that a thing was a smoking product would be evidence of the matter stated. The Explanatory Notes stated that without the evidentiary provision, the prosecution would need to obtain a birth certificate to prove a child's age, and potentially a laboratory analysis to prove a cigarette was a smoking product, for each offence.<sup>57</sup> The Explanatory Notes noted a court could accept the evidence as proof only if it considered the belief to be reasonable, and there was no evidence to the contrary. The Scrutiny Committee noted the competing right of the individual to have the prosecution satisfy the elements of an offence beyond reasonable doubt and the policy intention to protect the community and children from harmful tobacco smoke. It referred the clause to parliament.<sup>58</sup>
- [46] Parliamentary committees are likely to express concern if an evidentiary provision limits the ability of a person to challenge the evidence. The Scrutiny Committee discussed this issue in relation to clause 3 of the [Transport Operations \(Road Use Management\) Amendment Bill \(No. 2\) 2002](#).<sup>59</sup> The clause proposed to insert provisions into the [Transport Operations \(Road Use Management\) Act 1995](#) to the effect that a defendant would only be able to call a relevant witness to challenge 'certificate evidence' if the court granted leave. Under the proposed provision, the court could only grant leave if satisfied about certain matters. The Explanatory Notes sought to justify the restriction on the accused person's ability to contest the certificate evidence on the basis that it was necessary for the efficient operation of the provision. The intention of the provision was, according to the Explanatory Notes, to ensure that only substantiated and legitimate challenges to the evidence were allowed, thereby minimising the impact on the finite testing resources available in hospitals and laboratories.<sup>60</sup>
- [47] A provision with a similarly limited effect was proposed to be inserted into the [Evidence Act 1977](#) by clause 48 of the [Criminal Law Amendment Bill 2002](#). The Bill provided that a party wishing to challenge an evidentiary certificate, by leading evidence about the processes relevant to obtaining, dealing with and storing DNA profiles, would have to obtain the leave of the court. Again, the court could only give leave if satisfied about particular matters. The Scrutiny Committee commented that the evidence pertained to criminal proceedings in which the rights and liberties of defendants are of considerable

<sup>56</sup> [AD 2008 No 13 p 22 para 18](#)

<sup>57</sup> [Health and Other Legislation Amendment Bill 2008 Explanatory Notes p 42](#)

<sup>58</sup> [AD 2008 No 13 pp 22-23 paras 19 and 21](#)

<sup>59</sup> [AD 2002 No 6 pp 42-43 paras 16-24](#); see also a discussion by the Scrutiny Committee in [AD 2002 No 4 pp 25-25 paras 13-21](#) about other limitations placed on a defendant to have an analyst attend court to give evidence about relevant matters under the [Transport \(Compulsory BAC Testing\) Amendment Bill 2002](#)

<sup>60</sup> [Transport Operations \(Road Use Management\) Amendment Bill \(No. 2\) 2002 Explanatory Notes pp 2-3](#)



importance, and the evidence given by certificate was potentially contentious.<sup>61</sup> In referring the matter to Parliament, however, the Scrutiny Committee did note the fact that the provision incorporated some safeguards.<sup>62</sup>

#### *Matters presumed or circumstances taken to exist*

- [48] Provisions creating a presumption or providing that circumstances are taken to exist are often sought to be justified on the basis that the accused is likely to be better placed than the prosecution to rebut the presumption or prove the circumstances did not exist.
- [49] An example of this kind of justification can be found in the Explanatory Notes for the [Criminal Code and Other Legislation Amendment Bill 2010](#). Clause 8 of the Bill sought to insert a subsection into section 469 of the [Criminal Code](#) to the effect that damage to cemeteries would be presumed to have been done without the owner's consent unless the contrary were proven. The Explanatory Notes observed that it might be difficult to identify the owner of the damaged property and therefore in many cases the defendant would be best positioned to place evidence as to consent before the court.<sup>63</sup> The Scrutiny Committee expressed reservations about the evidential burdens the provisions would impose on the defendant and referred the 'large number of clauses' in the Bill reversing the onus of proof to parliament.<sup>64</sup>
- [50] The Explanatory Notes for the [Work Health and Safety Bill 2011](#) offer another example of justification on the grounds of a defendant's particular knowledge. Clause 110 of the Bill sought to create a presumption that an alleged prohibited reason for discriminatory conduct was the dominant reason for that conduct unless the defendant could prove, on the balance of probabilities, that it was not the dominant reason. The provision expressly stated that the defendant bore the legal onus in this regard. The Explanatory Notes for the Bill sought to justify the reversal on the basis that it would be difficult, if not impossible, for the prosecution to establish whether a reason was the dominant reason for conduct as this would likely be a matter known only to the defendant.<sup>65</sup> The Scrutiny Committee referred the matter to parliament for its consideration.<sup>66</sup>

#### *Conclusive evidence*

- [51] The Scrutiny Committee took a cautious approach to draft legislation providing that a matter or thing was conclusive evidence of a particular fact. The Scrutiny Committee considered provisions of this kind needed considerable justification because, in

<sup>61</sup> [AD 2002 No 3 pp 7-8 paras 30-41](#)

<sup>62</sup> [AD 2002 No 3 p 8 para 40](#)

<sup>63</sup> [Criminal Code and Other Legislation Amendment Bill 2010 Explanatory Notes pp 3-4](#)

<sup>64</sup> [LA 2011 No 1 p 31 para 1](#)

<sup>65</sup> [Work Health and Safety Bill 2011 Explanatory Notes pp 12-13](#)

<sup>66</sup> [LA 2011 No 6 pp 31 and 39 paras 1 and 33](#)



addition to affecting the normal rules of evidence, they denied judges the right to exercise their discretion.<sup>67</sup>

- [52] An example of the Scrutiny Committee's cautious approach to 'conclusive evidence' provisions can be found in its discussion of the [Transport Legislation and Another Act Amendment Bill 2006](#). The Bill proposed to insert a new subsection 80(16FA) into the [Transport Operations \(Road Use Management\) Act 1995](#), which provided that a statement in a certificate that a particular drug was present in the blood or saliva of a defendant would be 'conclusive evidence' of the drug's presence. Although the defendant could negative the evidence, the effect of the provision would be that the court would have to accept the certificate as proof of the matters stated unless the defendant led clear evidence to the contrary. The provision was similar to other provisions in the Act but the Scrutiny Committee observed that this did not automatically justify it. The Scrutiny Committee concluded that if the Bill had sought to establish a new regime, rather than merely to amend an existing one, it might have sought a comprehensive explanation from the Minister as to why it the certificate evidence provision was necessary.<sup>68</sup>
- [53] Another example of the Scrutiny Committee's attitude toward 'conclusive evidence' provisions is provided by its discussion of the [Natural Resources and Other Legislation Amendment Bill 2010](#). The Bill proposed to insert a new section 61SG into the [Forestry Act 1959](#), which would provide that the particulars of a registered document recorded in the register were conclusive evidence of the document's registration, its contents, and when it was lodged and registered. Paragraph (c) provided registration was also conclusive evidence of all things stated or implied in the document by any Act. The Explanatory Notes did not address the issue.<sup>69</sup> The Scrutiny Committee was unconcerned about the conclusiveness of the evidence for non-contentious matters such as the registration of the document. However to the extent that matters stated or implied in the document under paragraph (c) could potentially be conclusive evidence of a contentious matter in a criminal proceeding, the Scrutiny Committee considered the clause could be objectionable because a party affected should be given an opportunity to challenge a fact sought to be proved.<sup>70</sup>

<sup>67</sup> See, for example, [AD 2001 No 7 pp 51-52 paras 35-38](#) in relation to a provision in the [Transport Legislation Amendment Bill 2001](#) that expressly provided that the 'court must accept' particular matters as proved, provided the court considers the matters were the subject of an authorised person's reasonable belief and there is no evidence to the contrary.

<sup>68</sup> [AD 2007 No 1 p 25 para 14](#); for similar comments see also [AD 2005 No 4 p 19 paras 62-67](#)

<sup>69</sup> However in subsequent correspondence, the Minister stated that the provision was '... intended to allow a person to – for example – rely on the absence of a document in the register, where the document is valid only on registration, as establishing that no interest of the relevant kind exists': [LA 2010 No 5](#)

<sup>70</sup> [LA 2010 No 4 pp 9-10 paras 33-37](#)



### *Derivative liability provisions*

- [54] A provision making a person guilty of an offence committed by another person to whom the first person is linked (such as an agent or a corporation) must be justified. Provisions of this type create a presumption of guilt or responsibility, and effectively relieve the prosecution of the obligation to prove the elements of the offence for the person taken to have committed it. This could include elements such as intent, which is generally required in order to find a person guilty of an offence. A provision of this type is usually accompanied by a defence that requires the accused person to prove that he or she took reasonable steps to ensure compliance or prevent the offending act or omission, or that the accused person was not in a position to influence the conduct of the other person.
- [55] A common type of derivative liability provision is one providing that executive officers of a corporation are taken to be guilty of offences committed by the corporation. The Scrutiny Committee held the view that individuals should not usually be made criminally liable for misconduct by a corporation except where it could be shown they had personally helped in or been privy to the relevant misconduct.<sup>71</sup> The Scrutiny Committee noted that such inherent reversal of the onus of proof embedded in these derivative liability provisions was contrary to the general presumption of innocence in criminal law. It also stated that, in effect, derivative liability provisions imposed a form of strict liability on corporate officers.
- [56] The [Directors' Liability Reform Amendment Bill 2012](#) has to some extent rendered the Scrutiny Committee's comments on various derivative liability provisions of historical interest only.<sup>72</sup> The Bill proposes to introduce standard (or 'model') derivative liability provisions for corporate executive officers across the Queensland statute book. The model provisions themselves implement the Directors' Liability Principles formulated by the Council of Australian Governments. An early indication of the approach parliamentary committees may take to one of the model provisions can be found in the report of the State Development, Infrastructure and Industry Committee (the *SDIIC*) on clause 164 of the [Economic Development Bill 2012](#), which was based on the model provisions.<sup>73</sup> The clause provided that, if a corporation committed an offence, each executive officer of the corporation would also commit an offence unless he or she took all reasonable steps to ensure the corporation did not engage in the offending conduct. The SDIIC noted that, unlike previous derivative liability provisions for corporate officers, clause 164:

... does not directly reverse the onus of proof (ie. it is not expressly couched as putting the onus on the accused officer to prove they took reasonable steps, as occurs in some pieces of legislation) and it appears to still be for the prosecution

<sup>71</sup> [AD 2008 No 6 p 44 para 29](#), quoting from the Australian Government's Corporations and Market Advisory Committee Report, *Personal Liability for Corporate Fault* (2006).

<sup>72</sup> See, for example, [AD 2006 No 8 pp 6-7 para 31-37](#); [AD 2006 No 1 p 4 paras 24-30](#) and [pp 22-23 paras 22-30](#); [AD 2005 No 13 p 5 paras 21-27](#); [AD 2004 No 5 pp 12-13 paras 40-51](#); [AD 2002 No 3 pp 19-20 paras 9-16](#)

<sup>73</sup> [SCIIC Report No 15 \(November 2012\)](#)





to establish to the criminal standard of proof (beyond reasonable doubt) that reasonable steps were not taken by the officer. The committee is satisfied that this fundamental legislative principle is upheld in the legislation.<sup>74</sup>

- [57] Regardless of developments relating to the derivative liability of corporate officers, however, the Scrutiny Committee's comments on other types of derivative liability provisions remain relevant.
- [58] Clause 8 of the [Cloning of Humans \(Prohibition\) Bill 2001](#) provided that persons would be criminally liable for acts done by their representatives (including employees and agents) unless the person proved they could not have prevented the act by the exercise of reasonable diligence. The Explanatory Notes sought to justify the reversals on a number of grounds, including the seriousness of the offence and the principle that persons should be required to oversee the conduct of their representatives and make reasonable efforts to ensure their employees and agents complied with the Act.<sup>75</sup> The Scrutiny Committee considered this provision effectively converted strict liability offences into offences of negligently permitting non-compliance with the Act.<sup>76</sup> It criticised the justifications offered in the Explanatory Notes, observing that the more serious an offence, the more scrupulous the law should be in relation to proving it and stating that the 'supervisory principle' was not a ground on which to reverse the onus of proof.<sup>77</sup> The Scrutiny Committee referred the matter to Parliament but the Bill was later withdrawn.
- [59] An example of a slightly different type of derivative liability provision is provided by clause 52 of the [Transport Legislation Amendment Bill 2008](#). The clause proposed to insert a new section 57AB into the [Transport Operations \(Road Use Management\) Act 1995](#), expanding the definition of 'influencing person'. Under that Act, if a driver of a heavy vehicle were proved to have committed an offence, then under section 57B, an influencing person would be taken to have also committed the offence. An influencing person could rely on defences but was required to prove them. The Explanatory Notes stated that providing for liability of influencing persons was crucial to ensure accountability.<sup>78</sup> The persons identified as influencing persons had, according to the Explanatory Notes, an integral role in influencing the potential breach of a fatigue management requirement by a driver and the provision was justified because it would help address root causes of driver fatigue, such as unrealistic scheduling and unfair pressure.<sup>79</sup> The Scrutiny Committee quoted the explanation in the Explanatory Notes and questioned whether the reversal was justified.<sup>80</sup>

<sup>74</sup> [SCIIC Report No 15 \(November 2012\) p 47](#)

<sup>75</sup> [Cloning of Humans \(Prohibition\) Bill 2001 Explanatory Notes p 4](#)

<sup>76</sup> [AD 2002 No 1 p 8 paras 31-33](#) (The Bill also contained derivative liability provisions for executive officers of corporations.)

<sup>77</sup> [AD 2002 No 1 p 9 paras 36-40](#)

<sup>78</sup> [Transport Legislation Amendment Bill 2008 Explanatory Notes p 20](#)

<sup>79</sup> [Transport Legislation Amendment Bill 2008 Explanatory Notes p 20](#)

<sup>80</sup> [AD 2008 No 4 p 34 paras 6 to 8](#)



- [60] The SDIIC considered a slightly different type of derivative liability provision in its report on the [Surat Basin Rail \(Infrastructure Development and Management\) Bill 2012](#). Clause 63 of the Bill provided that in a proceeding for an offence for which a person's state of mind was relevant, it would be enough to prove an act or omission was done or made by the person's representative within the scope of the representative's actual or apparent authority and the representative had the requisite state of mind. The clause further provided that an act or omission would be taken to have been done or made within the scope of the representative's authority unless the person proved he, she or it took reasonable precautions to avoid the conduct. The SDIIC noted that this clause potentially contravened the fundamental legislative principle concerning the reversal of the onus of proof. It noted the Explanatory Notes for the Bill did not offer any justification for the reversal,<sup>81</sup> and referred the issue to the Minister for consideration and response.<sup>82</sup>

### *Strict or absolute liability offences*

- [61] At common law, an absolute liability offence is one that does not require any proof of *mens rea*, provided that the act of the accused is voluntary.<sup>83</sup> Similarly, at common law, a strict liability offence is one which also does not require any proof of *mens rea* but to which the common law defence of honest and reasonable mistake of fact applies.<sup>84</sup> In Queensland, however, intention is immaterial unless it is an element of an offence, and motive is immaterial in determining criminal responsibility.<sup>85</sup>
- [62] The Scrutiny Committee considered strict liability offence provisions as potentially reversing the onus of proof because they relieved the prosecution from the obligation of proving an element or disproving an excuse that it might otherwise have been required to prove or disprove. Also, in some cases, strict liability is imposed on a person subject to the person proving particular defences, which places the onus on the defendant to prove the exculpatory matters.
- [63] An example of the Scrutiny Committee regarding a strict liability offence provision as reversing the onus of proof is provided by its treatment of clause 17 of the [Crime and Misconduct and Summary Offences Amendment Bill 2009](#). The clause proposed to insert a new section 26 into the [Summary Offences Act 2005](#), creating the offence of endangering the safe use of a vehicle by throwing an object, placing an object in the path of a vehicle or directing a laser beam at a travelling vehicle. The proposed section provided, among other things, that the intention with which the act was done did not

<sup>81</sup> [SDIIC Report No \(October 2012\) p 16, para 3.3](#)

<sup>82</sup> See also the comments of the Health and Disabilities Committee on the [One Funding System for Better Services Bill 2011: Health and Disabilities Committee Report No 6 \(December 2011\) p 22](#)

<sup>83</sup> *Encyclopaedic Australian Legal Dictionary* (LexisNexis, 2011) definition *absolute liability offence*

<sup>84</sup> *Encyclopaedic Australian Legal Dictionary* (LexisNexis, 2011) definition *strict liability offence*

<sup>85</sup> [Criminal Code](#), section 23



matter. The offence could be committed regardless of intention or knowledge the conduct would constitute a breach.

- [64] The Scrutiny Committee considered this provision reversed the onus of proof.<sup>86</sup> Although the Explanatory Notes did not address the issue, in a subsequent letter to the Scrutiny Committee, the Minister disagreed with the Scrutiny Committee's characterisation. The Minister noted that criminal responsibility in Queensland law was governed by chapter 5 of the [Criminal Code](#), which contained the relevant excuse provisions. The Minister observed the chapter 5 excuses would all apply to the proposed offence and therefore, in order to convict a person under the proposed provision, the prosecution would have to prove each element of the offence and, if section 23 of the Code applied, the accused person would not be convicted.<sup>87</sup>

### *Exceptions and excuses*

#### *General*

- [65] Some legislative provisions make a particular act or omission an offence unless particular circumstances exist. The circumstances exempting the person from the offence may be stated in the same, or a separate subsection (i.e. 'subsection (1) does not apply if...'), or occasionally in a separate section or part of the Act. The Scrutiny Committee took the view provisions drafted in this form reversed the onus of proof because they created either:
- a 'statutory exception' to the offence, which placed both the evidential and legal onus on the defendant under the common law rules of construction and/or by virtue of the [Justices Act 1886](#), section 76; or
  - an excuse, which placed the evidential onus on the defendant but left the legal onus of negating the excuse with the prosecution.<sup>88</sup>
- [66] Examples of the Scrutiny Committee's observations about these types of provisions are set out below under subheadings 'statutory exceptions' and 'reasonable excuse provisions'. The examples illustrate the confusion that can arise around the question of whether particular provisions contain statutory exceptions or excuses, and whether the

<sup>86</sup> [LA 2009 No 2 p 38 paras 6-9](#)

<sup>87</sup> [LA 2009 No 3 p 54](#)

<sup>88</sup> It should be noted that, in the absence of an express statement that a provision of this kind has the effect identified by the Scrutiny Committee, a court might not categorise the provisions in the same way. It is possible that a court could construe the exempting circumstances as constituting a negative element of the offence which must be negated by the prosecution in all cases. (See, for example, *Dowling v Bowie* [1952] HCA 63; (1952) 86 CLR 136.) If the provision were to operate in this way, there would be no reversal or other effect on the prosecution's obligation to discharge the onus of proof in relation to the offence.



provisions affect the onus of proof in a way contemplated by the [Legislative Standards Act 1992](#), section 4(3)(d).

### *Statutory exceptions*

- [67] Clause 44 of the [Coroners and Other Acts Amendment Bill 2009](#) is an example of a statutory exception that reversed the onus of proof. The clause sought to insert a new provision into the [Coroners Act 2003](#) that would create an offence of disclosing information in a document given to a person under that section. The proposed provision stated that a person would not commit the offence if the disclosure were made under the [Transplantation and Anatomy Act 1979](#), or were permitted or required under the [Coroners Act 2003](#) or another Act. The Explanatory Notes indicated this provision created a statutory exception that placed both the evidential and legal onus on the accused person to prove that the disclosure was made, permitted or required. The Explanatory Notes maintained the reversal was justified because the accused would have ‘peculiar knowledge of these facts and would be best positioned to disprove guilt’.<sup>89</sup> The Scrutiny Committee appeared to accept the justification.<sup>90</sup>
- [68] Another example of the Scrutiny Committee classifying a statutory exception provision as a reversal of the onus of proof is provided by the Committee’s comments on the [Health Legislation \(Restriction on Use of Cosmetic Surgery for Children and Another Measure\) Amendment Bill 2008](#). Clause 5 of the Bill proposed to insert new section 213B into the [Public Health Act 2005](#), which provided:

- (1) A person must not perform, or offer to perform, a cosmetic procedure on a child.
- ...
- (2) A person does not commit an offence against subsection (1) if the person believes, on grounds that are reasonable in the circumstances, that performance of the procedure is in the best interests of the child.
- (3) Proof that the person did not have sufficient regard to any of the following matter is sufficient proof that the person did not have the belief mentioned in subsection (2)
- ...

Examples of the matters stated in section 213B(3) included whether the person had had sufficient regard to the child’s views or the child’s physical and psychological health.

- [69] The Explanatory Notes stated the provision contained only elements of the offence, and would place the onus of proving the accused person did not have the belief mentioned

<sup>89</sup> [Coroners and Other Acts Amendment Bill 2009 Explanatory Notes p 5](#)  
<sup>90</sup> [LA 2009 No 2 p 26 paras 23-28](#)





in section 213B(2) on the prosecution.<sup>91</sup> However, the Scrutiny Committee was of the view that a person would be criminally responsible if he or she did not, as required by section 213B(2), adduce evidence of a belief ‘on reasonable grounds’. The Scrutiny Committee considered section 213B(2) effectively to be a statutory exception that would result in the defendant bearing both the evidential and legal onus of proving the exception.<sup>92</sup> It referred the provision to Parliament for consideration.<sup>93</sup>

*Reasonable excuse—statutory exception or excuse?*

- [70] If legislation prohibits a person from doing something ‘without reasonable excuse’ it would seem in many cases appropriate for the accused person to provide the necessary evidence of the reasonable excuse. While there is no Queensland case law directly on point, the Northern Territory Supreme Court has held that the onus of proving the existence of a reasonable excuse rested with the defendant on the basis that the reasonable excuse was a statutory exception that existed as a separate matter to the general prohibition.<sup>94</sup> That approach is consistent with the principles used to determine whether a provision contains an exception to the offence or whether negating the existence of the reasonable excuse is a matter to be proved by the prosecution once the excuse has been properly raised (see paragraphs [11]-[13]).
- [71] As mentioned in paragraph [14], it is understood that in Queensland, ‘reasonable excuse provisions’ are drafted on the assumption that the [Justices Act 1886](#), section 76 will apply and place both the evidential and legal onus on the defendant to raise and prove the existence of a reasonable excuse. On the other hand, as shown in the examples below, departments have often taken the view in their Explanatory Notes that a provision containing an exemption where a reasonable excuse exists is an excuse for which only the evidential onus lies with the accused.
- [72] For example, several clauses of the [Work Health and Safety Bill 2011](#) proposed to make it an offence to engage in certain conduct ‘without reasonable excuse’. The clauses expressly placed the evidential burden on the defendant to show a reasonable excuse existed.<sup>95</sup> The Explanatory Notes for the Bill stated that the legal onus remained on the prosecution.<sup>96</sup> It could be surmised that the express statement about evidential onus being placed on the defendant implied the legal onus remained with the prosecution but this was not stated expressly. The Scrutiny Committee concluded the provisions would impose evidential burdens on accused persons defending charges of wilful damage to

<sup>91</sup> [Health Legislation \(Restriction on Use of Cosmetic Surgery for Children and Another Measure\) Amendment Bill 2008 Explanatory Notes p 12](#)

<sup>92</sup> [LA 2008 No 8 p 27 para 39](#)

<sup>93</sup> [LA 2008 No 8 p 27 paras 41-42](#)

<sup>94</sup> See *Marshall v Rennie & Anor* (1979) 25 ALR 116, although it should be noted that the case did not consider this issue in detail.

<sup>95</sup> See for example the [Work Health and Safety Bill 2011](#), cl 118, 144 and 165

<sup>96</sup> [Work Health and Safety Bill 2011 Explanatory Notes p 12](#)



cemeteries, and referred to parliament the ‘large number of clauses’ in the Bill that sought to reverse the onus of proof.<sup>97</sup>

- [73] An example of a department taking the view that the legal onus rests with the prosecution can be seen in the Explanatory Notes for the [Environmental Protection and Other Legislation Amendment Bill \(No. 2\) 2008](#). The Bill proposed to insert several ‘reasonable excuse provisions’ into the [Environmental Protection Act 1994](#). The Scrutiny Committee commented that provisions prohibiting certain conduct by a person ‘unless the person has a reasonable excuse’ reversed the onus of proof.<sup>98</sup> In response, the Minister expressed the view that a reasonable excuse provision did not constitute a reversal of the onus of proof. In the Minister’s view, the Bill would require the prosecution to prove each element of the offence including the fact the alleged offender did not have a reasonable excuse for engaging in the conduct.<sup>99</sup> The Minister advised that there were also numerous defences (excuses) available for which the defendant would be better-positioned than the prosecution to meet the evidential burden. However the Minister stated that under the proposed provisions the legal onus of proof was intended to remain at all times with the prosecution.<sup>100</sup>
- [74] Similarly, the [Guardianship and Administration and Other Acts Amendment Bill 2008](#) proposed to insert several offences into the [Guardianship and Administration Act 2000](#), [Powers of Attorney Act 1998](#) and [Jury Act 1995](#) that would impose liability on a person unless the person had a reasonable excuse for making the relevant act or omission. The Scrutiny Committee commented that the effect of the provisions would be to impose the evidential burden on the defendant and noted the Explanatory Notes did not address the issue. In response to the Scrutiny Committee’s comment, the Minister advised that although the evidential burden would be placed on the defendant, the legal onus to negative the existence of a reasonable excuse raised by the defendant would remain with the prosecution. The Minister stated that the ‘reasonable excuse’ defence was included to ensure liability would not be unjustly imposed, given the complexity and unpredictability of the situations likely to be involved.<sup>101</sup>
- [75] It seems likely that in most cases a reasonable excuse will constitute a statutory exception to be proved by the defendant. However, in the absence of an express statement as to the allocation of the onus, the question will ultimately need to be determined by a court having regard to the established rules of statutory interpretation.

<sup>97</sup> [LA 2011 No 6 p 31 para 1](#). The Scrutiny Committee also commented on the large number of clauses that reversed the onus of proof in the [Criminal Code and Other Legislation Amendment Bill 2010](#) – see [LA 2011 No 1 p 31 para 1](#) and also paragraph [52] above.

<sup>98</sup> [AD 2008 No 9 p 34 para 17](#)

<sup>99</sup> It seems unlikely that the existence of a reasonable excuse would ordinarily be considered an element of the offence, to be disproved in every case by the prosecution. It would be difficult for the prosecution to predict, and then negative, every reasonable excuse likely to apply to the defendant.

<sup>100</sup> See [AD 2008 No 10 p 36-37 para 12](#)

<sup>101</sup> [AD 2008 No 8 pp 48-49 paras 10-14](#)



### *Civil proceedings distinguished*

- [76] The principle that legislation should not reverse the onus of proof without adequate justification is directed towards criminal proceedings and safeguarding the presumption of innocence. The Scrutiny Committee therefore generally considered legislative reversals of the onus of proof in civil proceedings to be outside the scope of section 4(3)(d) of the [Legislative Standards Act 1992](#).
- [77] The Scrutiny Committee did, however, comment on some provisions that sought to shift the onus in civil proceedings. For example, clauses 37, 38 and 41 of the [Civil Forfeiture of the Proceeds of Crime Bill 2002 \(P\)](#)<sup>102</sup> sought to reverse the onus of proof by requiring a person to prove on the balance of probabilities that property should not be the subject of restraining or assets forfeiture orders. The Bill required a court to make a proceeds assessment order if it found, on the balance of probabilities, that a particular offence had been committed. A 'proceeds assessment order' would require a person to pay the Treasurer an amount assessed by the court as being the value of the proceeds derived from an illegal activity.
- [78] The Scrutiny Committee considered it reasonable for the Bill to shift the onus of proof once a reasonable suspicion of criminal activity had been established because civil proceedings are conducted on the balance of probabilities, which is a less onerous standard than the criminal standard of proof beyond reasonable doubt. The Scrutiny Committee noted that often a particular party in civil proceedings is likely to be in a unique position to be able to account for the source of proceeds. The Scrutiny Committee also noted that the proceedings under the Bill were based on equitable notions of restitution and reparation rather than the criminal justice concepts of criminal responsibility and punishment and made the general observation that reverse onus mechanisms are central to the ability of civil based forfeiture schemes to achieve their purpose. Further, the Scrutiny Committee (citing Derrington J in *Brauer v DPP*<sup>103</sup>) considered that a reverse onus aimed at the proceeds of crime would be legally acceptable if it were part of a controlled, legislative scheme that incorporated safeguards against unjustly depriving a suspected person of property. For example, allowing a court to take into account any difficulty associated with proving a negative or other forensic disadvantage such as the person's inability to lead material evidence would be relevant in deciding if the reversal were justified.<sup>104</sup>
- [79] Another example of the Scrutiny Committee commenting on a provision reversing the onus of proof in civil proceedings can be found in its report on the [Racing and Other Legislation Amendment Bill 2010](#). The Bill proposed to insert a section in the [Racing Act 2002](#) providing that if an accredited analyst or veterinary surgeon gave evidence that the method of taking and dealing with material for analysis substantially complied with the requirements of section 143(3) of the Act, the evidence would be conclusive unless

<sup>102</sup> (P) means that the Bill is a Private Member's Bill.

<sup>103</sup> (1989) 91 ALR 490 at 501-502

<sup>104</sup> [AD 2002 No 6 pp 20-22 paras 91-109](#); see also the Scrutiny Committee's discussion of the [Criminal Proceeds Confiscation Bill 2002: AD 2002 No 10 pp 9-10 paras 32-39](#)



contrary evidence were led. The Scrutiny Committee noted that the provision would alter requirements as to proof but also noted that the provision related to administrative, not criminal proceedings.<sup>105</sup>

- [80] Clause 13 of the [Industrial Relations and Other Acts Amendment Bill 2005](#) inserted new 122A into the [Industrial Relations Act 1999](#). That section sought to establish a rebuttable presumption in proceedings under Part 4 of the Act (entitled ‘Civil Remedies’) that an entity had engaged in ‘prohibited conduct’ with the necessary intent. Although the reversal related to civil proceedings, the Scrutiny Committee considered the provision reversed of the onus because, under the general law, it would have been the applicant’s and not the entity’s obligation to establish the necessary intent.<sup>106</sup>

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<sup>105</sup> [LA 2010 No 6 p 41 paras 32-35](#)  
<sup>106</sup> [AD 2005 No 3 pp 6-7 paras 7-18](#)