

# **Saved by the Bill?**

**The effect of the ACT *Human Rights Act 2004* on  
legislative provisions that reverse the onus of proof**

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A Research Paper submitted to the  
Faculty of Law, the Australian National University

6 June 2005

Word count: 10,949

## **Acknowledgements**

I would like to sincerely thank my supervisor, Professor Hilary Charlesworth for her guidance and encouragement in researching and writing this thesis. Thanks also go to Renuka Thilagaratnam from the ACT Department of Justice and Community Safety and Victoria Coakley from the ACT Human Rights Office for their advice and feedback. A special thank you to my family, Alison Hurst, and Kirsten Leitch, who have been so generous with their time – giving me feedback and editing drafts. Finally, thank you Jim. You have been a constant source of support and inspiration for me over the course of this thesis.

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### Introduction

The right to be presumed innocent until proven guilty is a fundamental principle of common law and is considered an essential element of a fair trial. This principle was famously described by Viscount Sankey in *Woolmington v DPP*<sup>1</sup> as the ‘golden thread’ running through the common law. ‘No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.’<sup>2</sup> It is a right recognised widely in international law,<sup>3</sup> and in many domestic rights instruments.<sup>4</sup>

However, in Australia this right is not entrenched. The presumption of innocence can be displaced by legislative provisions that place the onus on the accused to prove, on the balance of probabilities, that they are innocent of the charge. Such ‘reverse onus’ offences are justified on administrative efficiency grounds; that is, to improve the ease with which the prosecution can secure a conviction.<sup>5</sup> They are an uncontroversial

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<sup>1</sup> [1935] AC 462.

<sup>2</sup> *Ibid* 482.

<sup>3</sup> See, eg, *Universal Declaration of Human Rights*, opened for signature 19 December 1966, GA Res 217A, art 11(1); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 85, art 14(2) (entered into force 23 March 1976); *African Charter of Human and Peoples’ Rights*, opened for signature 27 June 1981, 21 ILM. 58, art 7(1) (entered into force 21 October 1986); *American Convention on Human Rights*, opened for signature 22 November 1969 OASTS 36 art 8(2) (entered into force 18 July 1978); *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)*, opened for signature 4 November 1950, 2889 UNTS 213, art 6(2) (entered into force 21 September 1970).

<sup>4</sup> See, eg, *Bill of Rights Act 1990* (NZ) s 25(c); *Bill of Rights Ordinance 1991* (HK) art 11(1); *Charter of Rights and Fundamental Freedoms 1982* (Can) s 11(d); *Human Rights Act 2004* (ACT) s 22(1); *Human Rights Act 1998* (UK) art 6(2); *South African Constitution 1994* s 25(3)(c); *United States Constitution* amend V.

<sup>5</sup> See, eg, Model Criminal Code Officers Committee, *Model Criminal Code, Chapter 6: Serious Drug Offences* (1998) 80; National Crime Authority, *Submission to the Senate Legal & Constitutional Legislation Committee for the Committee’s Inquiry into The Provisions of the Proceeds of Crime Bill 2001* (2002) 16; Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *The Burden of Proof in Criminal Proceedings* (1982); Senator Lyn Allison ‘The Financial Sector Legislation Amendment Bill (No. 1) 2000: Second Reading’ (Speech to the Australian Senate, 31 October 2000).

aspect of many minor regulatory offences; for example, speeding fines.<sup>6</sup> However, use of reverse onus provisions has become an increasingly common feature of legislation aimed at fighting the ‘war on drugs’ and the more recent ‘war on terrorism’, as part of a ‘tough on crime’ approach to law enforcement.<sup>7</sup> It is in relation to more serious offences – that carry the threat of significant sanctions – that reverse onus offences become highly problematic on human rights grounds. If an accused fails to prove their innocence they can be convicted despite reasonable doubt as to their guilt.

On 1 July 2004 the *Human Rights Act 2004* (ACT) (‘HRA’) was enacted, Australia’s first Bill of Rights. Based on the rights in the International Covenant on Civil and Political Rights, the HRA introduces international standards by which to measure ACT laws. Section 22(1) of the HRA states that ‘[e]veryone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law’. The HRA acknowledges that this right may be limited, but only in a manner ‘demonstrably justifiable in a free and democratic society’.<sup>8</sup> After almost a year of operation, no reverse onus offences have come before ACT courts. However, the significant rights issues raised by legislation reversing the onus of proof, and the high volume of international jurisprudence in this area indicate that this issue will be raised in court in the near future.

This thesis examines the potential impact of the HRA on legislative provisions that reverse the onus of proof. Chapter 2 examines how the common law fails to adequately protect a defendant’s right to be presumed innocent, because of the enactment of reverse onus legislative provisions. This common law standard applied in the ACT prior to the introduction of the HRA, thus Chapter 2 provides a reference point by which to analyse the potential impact of the HRA. This Chapter concludes by noting that without a federal Bill of Rights the only possible protection for the

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<sup>6</sup> See, eg, Parliament of Victoria Road Safety Committee, *Inquiry into the Demerit Point Scheme* (1994) Parliament of Victoria <<http://www.parliament.vic.gov.au/rsc/DEMERIT/demerit3.htm#9>> at 27 May 2005.

<sup>7</sup> See, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 832; Simon Bronitt, ‘Australia’s Legal Response to Terrorism: Neither Novel nor Extraordinary?’ (Paper presented at the Castan Centre For Human Rights Law Conference ‘Human Rights 2003: The Year in Review’, Melbourne, 4 December 2003) 1; Hilary Charlesworth, ‘Human Rights in the Wake of Terrorism’ (2003) 82 *Reform* 26, 28.

<sup>8</sup> *Human Rights Act 2004* (ACT) s 28.

presumption of innocence is the unlikely prospect at present that it be implied in Chapter III of the Constitution.<sup>9</sup>

Chapter 3 considers the right to be presumed innocent in international law through analysis of jurisprudence from the European Court of Human Rights, and from courts in common law countries with Bills of Rights. International jurisprudence will be highly relevant to the interpretation of the HRA. Section 22(1) of the HRA essentially reflects presumption of innocence provisions in key international and domestic rights instruments, and s 31 of the HRA allows courts to have recourse to international law and jurisprudence when interpreting rights. Some general principles can be gleaned from consideration of international case law. However, analysis reveals that outcomes of cases are highly dependent on the context of the offence and the statutory interpretation techniques adopted by courts.

Chapter 4 examines how the HRA could affect reverse onus offences in ACT legislation. The methods of statutory interpretation open to the ACT courts are examined with reference to international jurisprudence. By way of practical example, s 604 of the *Criminal Code 2002* (ACT) is examined. This is a reverse onus provision requiring a person found in possession of a certain quantity of drugs to prove they did not intend to traffic drugs. Analysis reveals that compliance of this provision with s 22(1) of the HRA depends on statutory interpretation techniques adopted by ACT courts. If complying with Parliament's intent proves a high priority for the judiciary, the HRA may afford no additional protection to the presumption of innocence than the common law does. However, should ACT courts take an expansive approach to interpretation, many reverse onus provisions in ACT legislation could be read in a more rights-consistent manner.

This thesis argues in favour of an expansive approach, as it would make the HRA a dynamic rights protection instrument. However, regardless of the interpretative approach taken by courts, the HRA will have an ongoing legacy, through its impact

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<sup>9</sup> See, eg, Justice Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?' (2001) 21 *Australian Bar Review* 235; Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, 272; George Williams, *Human Rights under the Australian Constitution* (1999) 214.

on scrutiny of Bills, and rights consideration processes being adopted by ACT government departments. The conclusions in this chapter were influenced by discussions and workshops with officers at the ACT Human Rights Office and the ACT Department of Justice and Community Safety.<sup>10</sup>

The analysis in this thesis of reverse onus offences in the context of the presumption of innocence has a relatively narrow focus. There are related themes, such as rights issues raised by strict liability offences,<sup>11</sup> how the criminal/regulatory offence dichotomy relates to reverse onus offences,<sup>12</sup> and the federal Bill of Rights debate<sup>13</sup> that while relevant to a wider discussion of these issues, will not be explored here.

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<sup>10</sup> See, eg, Interview with Victoria Coakley, Human Rights Officer, ACT Human Rights Office, and Thilagaratnam, Renuka, Human Rights Section, ACT Department of Justice and Community Safety (ACT Human Rights Office, 15 April 2005); Australian Capital Territory Human Rights Office, 'Human Rights Act for People with Legal Backgrounds' (Workshop, ACT Department of Justice and Community Safety, 31 March 2005); Email from Renuka Thilagaratnam to Rebecca Minty, 31 May 2005.

<sup>11</sup> See especially, *He Kaw Teh v The Queen* (1985) 157 CLR 523; *R v City of Sault St Marie* [1978] 2 SCR 1299. See also, Australian Capital Territory Department of Justice and Community Safety, *The Human Rights Act 2004, Guidelines for ACT Departments: Developing Legislation and Policy* (2004) [76] <<http://www.jcs.act.gov.au/humanrightsact/indexbor.html>> at 13 April 2005; Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, Report No 95 (2002) [4.4]; Peter Bayne, 'The Human Rights Act 2004 (ACT) – Developments in 2004' (forthcoming) *Canberra Law Review*; Bronitt and McSherry, above n 7, 850; Model Criminal Code Officers Committee, *Model Criminal Code, Chapter 6: Serious Drug Offences*, above n 5, 69; Victor Tadros and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) 67 *Modern Law Review* 402, 408.

<sup>12</sup> See especially, Australian Law Reform Commission, above n 11. See also, Australian Capital Territory Department of Justice and Community Safety, *The Human Rights Act 2004, Guidelines for ACT Departments: developing legislation and policy* (2004) [74] <<http://www.jcs.act.gov.au/humanrightsact/indexbor.html>> at 13 April 2005; New Zealand Ministry of Justice, *The Guidelines on the New Zealand Bill of Rights Act 1990: a guide to the rights and freedoms in the Bill of Rights Act for the public sector* (2004) <<http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html>> at 12 April 2005.

<sup>13</sup> See generally, ABC Radio, 'The ACT's Bill of Rights', *The Law Report*, 9 December 2003, <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1005349.htm>> at 1 May 2005; Bronitt, 'Australia's Legal Response to Terrorism: Neither Novel nor Extraordinary?', above n 7; Hilary Charlesworth, 'Writing in Rights: Australia and the Protection of Human Rights' (2002); Tom Davis (ed), *Human Rights 2003: The Year in Review* (2004); Nick O'Neill, Simon Rice and Roger Douglas, *Retreat From Injustice: Human Rights Law in Australia* (2<sup>nd</sup> ed, 2004); Peter Prince, 'The High Court and Indefinite Detention: Towards a National Bill of Rights?' (Parliamentary Library Current Issues Brief 7, Parliamentary Library, 2004); George Williams, *The Case for an Australian Bill of Rights* (2004).

# Reverse Onus Offences: Eroding the Common Law Presumption of Innocence

## The presumption of innocence

The right of a person accused of a criminal offence to be presumed innocent until the prosecution has proven guilt beyond reasonable doubt is a fundamental common law principle. Bronitt and McSherry describe the presumption as ‘reflect[ing] the adversarial nature of the legal process, that the party who “avers” must prove the case, and that a fair “balance” is maintained between the State and the individuals who are accused of a criminal offence’.<sup>1</sup> The presumption of innocence and standard of proof in criminal cases reflect a balance struck by society between the need to punish the guilty without convicting the innocent. The high standard that the prosecution must meet for a defendant to be convicted reflects society’s belief that convicting the innocent is worse than acquitting the guilty.<sup>2</sup> Nozick writes that ‘[a]n unreliable punisher violates no right of the guilty person; but still he may not punish him’.<sup>3</sup> The presumption of innocence serves ‘not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system’.<sup>4</sup>

The presumption of innocence has been recognised by the High Court,<sup>5</sup> and in the Model Criminal Code<sup>6</sup> which has been adopted in the ACT.<sup>7</sup> The importance of this

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<sup>1</sup> See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 115; Rinat Kitai, ‘Protecting the Guilty’ (2003) 6 *Buffalo Criminal Law Review* 1163.

<sup>2</sup> See Ronald Dworkin, *Taking Rights Seriously* (1977) 199-200; John Rawls, *A Theory of Justice* (1971) 86.

<sup>3</sup> Robert Nozick, *Anarchy, State and Utopia* (1974) 107.

<sup>4</sup> *State v Coetzee* [1997] 2 LRC 593, 677 (Sachs J).

<sup>5</sup> See, eg, *Burns v R* (1975) 132 CLR 258; *Howe v R* (1980) 32 ALR 478; *Robinson v R (No 2)* (1991) 180 CLR 531; *Shepherd v The Queen* (1990) 170 CLR 573; *Thompson v The Queen* (1989) 169 CLR 1. See generally, Paul Fairall, ‘Unraveling the Golden Thread: *Woolmington* in the High Court of Australia’ (1993) 5 *Bond Law Review* 229.

principle is widely recognised, yet it is subject to statutory override through the enactment of reverse onus offences. This chapter discusses erosion of the common law presumption of innocence by reverse onus offences, in order to gauge the potential impact of the ACT *Human Rights Act 2004* ('HRA').

## Exception to the presumption

In *Woolmington v DPP* ('*Woolmington*'),<sup>8</sup> Viscount Sankey acknowledged two instances where departure from the presumption of innocence is permissible: when the accused relies on a defence of insanity, and when Parliament legislates to the contrary.<sup>9</sup> This thesis will focus on the latter. The doctrine of parliamentary sovereignty dictates that if legislation clearly expresses Parliament's intent to reverse the onus of proof, the courts have no leeway to interpret provisions differently. This has been reflected in High Court decisions upholding reverse onus provisions.<sup>10</sup>

Reverse onus provisions can alter the burden of proof by:

- imposing a legal (or persuasive) burden on the defendant, requiring them to prove, on the balance of probabilities, a fact which is essential to the determination of guilt or innocence;<sup>11</sup> or
- imposing an evidential burden on the defendant, requiring them to adduce sufficient evidence to raise an issue, at which point the prosecution bears the legal burden of disproving the issue beyond reasonable doubt.<sup>12</sup> Evidential burdens are less onerous for defendants to discharge. However, if the accused

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<sup>6</sup> Model Criminal Code Officers Committee, *Model Criminal Code, Chapter 1 & 2: General Principles of Criminal Responsibility* (1992) 26.

<sup>7</sup> *Criminal Code 2002* (ACT) s 56(1).

<sup>8</sup> [1935] AC 462.

<sup>9</sup> *Ibid*, 481.

<sup>10</sup> See, eg, *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 12; *R v Ludeke*; *Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636, 651. See also *Milicevic v Campbell* (1975) 132 CLR 307; *R v Hush*, *Ex parte Devanny* (1932) 48 CLR 487; *Williamson v Ah On* (1926) 39 CLR 95.

<sup>11</sup> See *R v DPP, Ex parte Kebilene* [2000] 2 AC 326, 378 (Hope LJ).

<sup>12</sup> *Ibid* 379.

is unable to adduce sufficient evidence of their innocence to discharge the burden they can still be convicted despite reasonable doubt as to their guilt.

Reverse onus offences can be problematic on human rights grounds for a number of reasons. Most importantly, there is a risk that a defendant can be convicted despite reasonable doubt of his or her guilt.<sup>13</sup> Reverse onus offences also make defendants presumptive criminals, resulting in social stigmatisation before the trial and after acquittal.<sup>14</sup> Further, requiring a defendant to prove their innocence better enables the prosecution to dictate the structure of the case, giving it greater powers than the defence at pre-trial and trial stages.<sup>15</sup> By modifying the burden of proof, Parliament can legitimately encroach on what might be regarded as elements of normal judicial process,<sup>16</sup> and in this way, the common law does not adequately protect the right to be presumed innocent.<sup>17</sup>

If a statute does not clearly express who bears the burden of proof or the type of burden imposed, courts will draw on common law principles of statutory interpretation that protect individual rights.<sup>18</sup> This supports the rebuttable presumption that when legislating, Parliament intends to conform to international human rights obligations.<sup>19</sup> This may entail interpreting a burden on the defendant as an evidential rather than legal burden, or requiring the prosecution to bear the onus of proof in all respects.<sup>20</sup> However, where legislative intent is clear, courts must interpret the offence the way Parliament intended.

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<sup>13</sup> Ben Emmerson and Andrew Ashworth, *Human Rights and Criminal Justice* (2001) 256.

<sup>14</sup> See, eg, Kitai, above n 1, 1170.

<sup>15</sup> See Peter Lewis, 'The Human Rights Act 1998: Shifting the Burden' (2000) *Criminal Law Review* 667, 667; Paul Roberts, 'Taking the Burden of Proof Seriously' (1995) *Criminal Law Reports* 783; Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *The Burden of Proof in Criminal Proceedings* (1982) [5.23].

<sup>16</sup> *Fardon v A-G (Qld)* (2004) 210 ALR 50, 64 (McHugh).

<sup>17</sup> John Doyle and Belinda Wells, 'How Far Can the Common Law go Towards Protecting Human Rights?' in Philip Aston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (1999) 17.

<sup>18</sup> Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia*, (4<sup>th</sup> ed, 1996) 145-6. See, eg, *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Tassell v Hayes Mason* (1987) 163 CLR 50 (Deane J).

<sup>19</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 306 (Mason CJ, McHugh J), 348-349 (Dawson J).

<sup>20</sup> See, eg, *Criminal Code 2002 (ACT)* s 58. See also, *He Kaw Teh v The Queen* (1985) 157 CLR 523, 529; Model Criminal Code Officers Committee, *Model Criminal Code, Chapter 1 & 2: General Principles of Criminal Responsibility*, above n 6, pt 2.6.

## A justified reversal?

Reverse onus offences are often justified on public interest or administrative efficiency grounds. Such arguments include: that it is too difficult or expensive for the prosecution if the onus of proof is not reversed; or that evidence necessary for a conviction is peculiarly within the knowledge of the accused.<sup>21</sup> Derrington J of the Queensland Court of Appeal in *Brauer v DPP* drew upon the efficiency argument in stating that reverse onus offences were an essential part of legislation to track proceeds of crime. In these cases, the lawful owner of property ‘should best be in the position to be able to demonstrate its origin and ... should usually have little difficulty in doing so’.<sup>22</sup> Clearly there are some instances where the need for administrative efficiency is an overriding concern. This theme of efficiency versus due process recurs throughout this thesis.

The High Court has accepted that it is reasonable to require a defendant to prove their innocence in regards to an aspect of an offence that is *peculiarly* within their knowledge.<sup>23</sup> Isaacs J in *Williamson v Ah On* expressed this rationale as follows:

The broad primary principle ... is that he who substantially affirms an issue must prove it. But, unless exceptional cases were recognised, justice would be sometimes frustrated and the very rules intended for the maintenance of the law of the community would defeat their own object ... One of the leading secondary rules ... is that the primary rule should be relaxed when ‘the subject matter of the allegation *lies peculiarly within the knowledge of one of the parties*’ ... [P]ossession of peculiar means of knowledge by a party is a reasonable ground for casting to some extent and according to the circumstances a special responsibility with regard to proof.<sup>24</sup>

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<sup>21</sup> See, eg, *Brauer v DPP* (1989) 91 ALR 491; *New South Wales Crime Commission v Crotty* [1999] NSWSC 147; *R v Fagher* (1989) 16 NSWLR 67. See also, Senator Lyn Allison ‘The Financial Sector Legislation Amendment Bill (No. 1) 2000: Second Reading’ (Speech to the Australian Senate, Parliament House, Canberra, 31 October 2000); Model Criminal Code Officers Committee, *Model Criminal Code, Chapter 6: Serious Drug Offences* (1998) 80; National Crime Authority, *Submission to the Senate Legal & Constitutional Legislation Committee for the Committee’s Inquiry Into the Provisions of the Proceeds of Crime Bill 2001* (2002) 16; Senate Standing Committee on Constitutional and Legal Affairs, above n 15.

<sup>22</sup> *Brauer v DPP* (1989) 91 ALR 491, 501.

<sup>23</sup> See *George v FCT* (1952) 86 CLR 183, 201 (Dixon CJ, McTiernan, Williams, Web, Fullagar JJ); *Williamson v Ah On* (1926) 39 CLR 95, 113.

<sup>24</sup> *Williamson v Ah On* (1926) 39 CLR 95, 113-114.

However, the Senate Standing Committee on Constitutional and Legal Affairs in a 1982 report considered that:

No policy considerations have been advanced which warrant an erosion of what must surely be one of the most fundamental rights of a citizen: the right not to be convicted of a crime until he has been proved guilty beyond reasonable doubt. While society has the role by means of its laws to protect itself, its institutions and the individual, the Committee is not convinced that placing a persuasive burden of proof on defendants plays an essential or irreplaceable part in that role.<sup>25</sup>

The Committee particularly noted proving a matter peculiarly within a defendant's knowledge did not justify reversing the onus of proof.<sup>26</sup>

## Trends in reverse onus offences

Empirical research by Ashworth and Blake suggests reverse onus provisions have become increasingly common in the United Kingdom ('UK') since Viscount Sankey's famous 1935 *Woolmington* statement.<sup>27</sup> Forty per cent of the 540 indictable offences Ashworth and Blake considered violated the presumption of innocence in that the prosecution did not bear the legal burden of proof in all respects.<sup>28</sup> These provisions covered a wide range of offences, from relatively minor matters to drug and terrorism offences. In attempting to explain this large-scale derogation from the presumption of innocence, the study's authors allude to an unprincipled legislative response to perceptions of an increased threat posed by serious offences such as terrorism, drugs and high-level fraud. Ashworth and Blake criticise this approach as neglecting 'the seriousness for defendants of being convicted of such offences'.<sup>29</sup>

Although no comparable studies have been done, Bronitt and McSherry see the situation in Australia as likely to be very similar.<sup>30</sup> Reverse onus provisions have been a significant inclusion in recent federal and state legislative responses to the perceived

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<sup>25</sup> Senate Standing Committee on Constitutional and Legal Affairs, above n 15, [5.34].

<sup>26</sup> Ibid [5.6]. See also, Glanville Williams, 'The Logic to Exceptions' (1998) *Cambridge Law Journal* 261, 268.

<sup>27</sup> Andrew Ashworth and Meredith Blake, 'The Presumption of Innocence in English Criminal Law' (1996) *Criminal Law Review* 306. See also, *R v Lambert* [2001] 3 WLR 206, 235 (Steyn LJ).

<sup>28</sup> Ashworth and Blake, above n 27, 314.

<sup>29</sup> Ibid.

<sup>30</sup> Simon Bronitt and Bernadette McSherry, above n 1, 117.

threat of drugs and terrorism.<sup>31</sup> Peter Bayne, legal adviser to the ACT Legislative Assembly Scrutiny of Bills Committee, notes reverse onus provisions in ACT legislation are ‘very common’.<sup>32</sup> The frequency with which reverse onus provisions appear in legislation has led academics to question whether it can still be considered a ‘fundamental principle’ of the common law.<sup>33</sup>

## Constitutional protection of the presumption of innocence?

Notwithstanding the decline in common law protection of the presumption of innocence, some legal commentators entertain the prospect that certain fair trial rights (including the presumption of innocence) could be implied in Chapter III of the Constitution (‘Chapter III’).<sup>34</sup> Chapter III relates to the judicial arm of government, and under the Chief Justiceship of Mason, the High Court has interpreted Chapter III expansively, finding that it safeguards procedural rights necessary for the effective functioning of judicial power.<sup>35</sup> However, the extension of Chapter III to protecting substantive rights (such as the right to be presumed innocent) is yet to be accepted by a majority of the High Court.<sup>36</sup>

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<sup>31</sup> See, eg, *Criminal Code 1995* (Cth) s 103.3; *Major Crime (Seizure of Assets) Act 2004* (Vic) ss 20, 53; *Police Powers (Drug Premises) Act 2001* (NSW) ss 12, 14; *Terrorism (Police Powers) Act 2002* (NSW) s 33. See also, Simon Bronitt, ‘Australia’s Legal Response to Terrorism: Neither Novel nor extraordinary?’ (Paper presented at the Castan Centre for Human Rights Law Conference ‘Human Rights 2003: The Year in Review’, Melbourne, 4 December 2003); Hilary Charlesworth, ‘Human Rights in the Wake of Terrorism’ (2003) 82 *Reform* 26, 28; Christopher Reynolds, *Public Health Law in Australia* (1995) 207; Kirsty Simpson, ‘Police Push to Change Onus of Guilt on Suppliers’, *The Age* (Melbourne), 14 March 2004.

<sup>32</sup> See Peter Bayne, ‘The Human Rights Act 2004 (ACT) – Developments in 2004’ (forthcoming) *Canberra Law Review*. See, eg, *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) ss 13(4), 23(4), 62(2); *Criminal Code (Serious Drug Offences) Act 2001* (ACT) s 634; *Parentage Act 2004* (ACT) s 12.

<sup>33</sup> See, Ashworth and Blake, above n 27; Nicola Lacey and Celia Wells, *Reconstructing Criminal Law* (2<sup>nd</sup> ed, 1998) 23.

<sup>34</sup> Justice Michael McHugh, ‘Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?’ (2001) 21 *Australian Bar Review* 235, 237. See also, *R v Kirby, Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

<sup>35</sup> See, eg, *Leeth v Commonwealth* (1992) 174 CLR 455; *Ngoc Tri Chau v DPP* (1995) 37 NSWLR 639, 645 (Gleeson CJ). See also, *Frugniet v Victoria* (1997) 325 VR 86.

<sup>36</sup> See, eg, *Leeth v Commonwealth* (1992) 174 CLR 455 (Deane and Toohey JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (Deane and Gaudron JJ).

A practical result of this Constitutional interpretation could be that laws that reversed the onus of proof in criminal matters heard in Chapter III courts could be unconstitutional.<sup>37</sup> Wheeler supports this interpretation, noting that:

... where Parliament has placed upon the defendant the persuasive burden of proof in relation to an element of a federal offence, this is (prima facie) to ask a court exercising federal jurisdiction to conduct an unfair criminal trial because of the risk that ... a defendant will be convicted despite the existence of a reasonable doubt as to her or his guilt.<sup>38</sup>

However, recent High Court judgments indicate a retreat from an expansive interpretation of Chapter III to a more legalist approach that does not greatly emphasize individual rights protection.<sup>39</sup> Consequently, present prospects of constitutional protection for the presumption of innocence appear dim. This has renewed debate about the need for a federal Bill of Rights to address deficiencies in the common law in protecting many basic rights.<sup>40</sup>

## Conclusion

The presumption of innocence has been recognised by the High Court as a fundamental common law principle. However, while courts should endeavour to place the burden of proof on the prosecution, 'Parliament may do what it pleases'.<sup>41</sup> As a result, the presumption of innocence has been eroded by the inclusion of reverse onus offences in statutes. Legislative provisions requiring defendants to prove their innocence have become an increasingly popular legislative weapon in highly politicised wars on drugs and terror. Although constitutional law experts have noted the possibility that the presumption of innocence could be implied in Chapter III, the current bench of the High Court has not supported this implication.

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<sup>37</sup> See, eg, George Williams, *Human Rights under the Australian Constitution* (1999) 217.

<sup>38</sup> Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, 272.

<sup>39</sup> See, eg, *Al-Kateb v Godwin* (2004) 208 ALR 124; *Fardon v A-G for Queensland* [2004] 210 ALR 50; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 208 ALR 201.

<sup>40</sup> Peter Prince, 'The High Court and Indefinite Detention: Towards a National Bill of Rights?' (Parliamentary Library Current Issues Brief 7, Parliamentary Library, 2004).

<sup>41</sup> Ashworth and Blake, above n 27, 314.

Without any entrenched rights protection, Australia lags behind many other countries in the protection of fair trial rights. The following chapter establishes international standards for the presumption of innocence by considering jurisprudence on reverse onus offences under international and domestic rights instruments.

### Reverse Onus Offences in International Law

The presumption of innocence is well established in international law and represented in major human rights conventions. Under the International Covenant on Civil and Political Rights and European Convention on Human Rights ('ECHR'), the presumption applies to criminal proceedings only.<sup>1</sup> However, 'criminal' has an autonomous meaning and 'may encompass offences which are viewed as regulatory in domestic law'.<sup>2</sup> The United Nations Human Rights Committee has provided few detailed insights into how the presumption should be interpreted. The European Court of Human Rights ('European Court') frequently considers reverse onus offences but generally approach the matter on a case-by-case basis. There is diverse and at times conflicting jurisprudence from other common law countries with domestic rights protection instruments, including the United Kingdom ('UK'),<sup>3</sup> New Zealand ('NZ')<sup>4</sup> and Canada.<sup>5</sup> This chapter establishes that there is no single 'international standard' right to be presumed innocent. Beyond the few general principles, there are conflicting authorities and differing statutory interpretation methods, both between and within jurisdictions.

#### The European Court of Human Rights

Article 6(2) of the ECHR states that '[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law'. The European Court has interpreted this as requiring the prosecution to prove all elements of an offence in

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<sup>1</sup> *Engel v The Netherlands* (1979) 1 Eur Court HR (ser A) 647; *Yves Morael v France*, UNHR Comm 207, UN Doc A/44/40 (1989).

<sup>2</sup> See *Albert and Le Compte v Belgium* (1983) 5 EHRR 533; *Ezeh and Connors v The United Kingdom* (2003) VII Eur Court HR 485. See also, Richard Gordon and Tim Ward, *Judicial Review and the Human Rights Act* (2000) 189.

<sup>3</sup> See *Human Rights Act 1998* (UK).

<sup>4</sup> See *Bill of Rights Act 1990* (NZ).

<sup>5</sup> See *Charter of Rights and Fundamental Freedom*, C 1982.

criminal proceedings, and any doubt about guilt should benefit the accused.<sup>6</sup> Article 6(2) does not prohibit statutory provisions requiring the accused to establish a defence or an exception to an offence, as long as the overall burden of establishing guilt remains with the prosecution.<sup>7</sup>

The major case on the presumption of innocence in the European Court is *Salabiaku v France* ('*Salabiaku*').<sup>8</sup> Here, it was held that reverse onus provisions did not necessarily violate the presumption of innocence, as long as they were within 'reasonable limits which taken into account the importance of what is at stake and maintain the rights of defence'.<sup>9</sup> This test has been applied in subsequent European Court decisions<sup>10</sup> and has influenced the development of UK jurisprudence, since the introduction of the *Human Rights Act 1998* (UK) ('UKHRA').<sup>11</sup> However, beyond general statements of principle, the Court has not provided specific guidance on interpretation of reverse onus provisions. Emmerson and Ashworth consider this 'vague and general formulae' on the presumption of innocence raises more questions than it answers.<sup>12</sup> The lack of clear ratio decidendi in European Court decisions is not surprising, considering the civil law tradition of most European Court judges, for whom precedent is not the usual basis for decision making.<sup>13</sup> Yet even in the UK, where precedent guides judicial decision making, it can be difficult to ascertain clear principles.

## The United Kingdom

The UKHRA commenced in 2000, and Article 6(2) of the UKHRA incorporated the right to be presumed innocent into UK law. Judicial consideration of this section has

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<sup>6</sup> *Barbera, Messegue and Jabardo v Spain* (1989) 11 EHRR 360.

<sup>7</sup> *Lingens and Leitgens v Austria* (1981) 4 EHRR 373, 390-391.

<sup>8</sup> (1991) 13 EHRR 379.

<sup>9</sup> *Ibid*, 388.

<sup>10</sup> See, eg, *Minelli v Switzerland* (1983) 5 EHRR 554; *Moody v United Kingdom* (1995) 19 EHRR 90; *Pham Hoang v France* (1993) 16 EHRR 53.

<sup>11</sup> See, eg, *Attorney-General's Reference (No. 1 of 2004)* [2005] TASSC 10; *Barnfather v Islington Education Authority* [2003] 1 WLR 2318; *R v DPP, Ex parte Kebilene* [2000] 2 AC 326; *R v Lambert* [2001] 3 WLR 206.

<sup>12</sup> Ben Emmerson and Andrew Ashworth, *Human Rights and Criminal Justice* (2001) 258.

<sup>13</sup> David Parsons, *The Human Rights Act 1998 Part I - Constitutional Context and Effect of the Substantive Criminal Law of the United Kingdom* (2000) 2 Bedford Row: the Chambers of William Clegg QC <<http://www.2bedfordrow.co.uk/articles.asp>> at March 18 2005.

draw out a number of important, and occasionally competing, principles. UK jurisprudence in this area represents an ‘increasingly confident and interventionist judicial reaction to the task of human rights-consistent interpretation’.<sup>14</sup>

In *R v DPP, Ex parte Kebilene*<sup>15</sup> the House of Lords held that reverse onus provisions were more likely to be consistent with the UKHRA if they require the defendant to prove an exception, proviso or excuse rather than an essential element of the offence.<sup>16</sup> In *R v Lambert* (‘*Lambert*’)<sup>17</sup> the House of Lords read down a reverse onus provision to impose an evidential burden rather than a legal burden in order to achieve compliance with the UKHRA. Lords Steyn and Hope noted the burden was on the state ‘to show that the legislative means adopted were not greater than necessary’.<sup>18</sup> From a practical standpoint Roberts and Zuckerman argue that post-*Lambert*, the ‘effect of every single reverse onus provision clause in English criminal law must be determined on an individual, case-by-case basis’ to determine if the legal burden should be read down.<sup>19</sup>

Differing interpretative methods are illustrated by the House of Lords decision in *R v Johnstone* (‘*Johnstone*’),<sup>20</sup> where it was held that a reverse onus provision imposing a legal burden on the defendant *was* consistent with human rights. The reverse burden required the defendant, accused of breaching a trademark, to demonstrate a reasonable belief he had not breached a trademark. This provision was considered justifiable on public policy grounds (as it would encourage traders in branded products to be attentive for counterfeit goods), and because of the difficulties prosecutors face in tracing suppliers of counterfeits. The House of Lords emphasised the need for judicial deference, noting that ‘Parliament, not the court, is charged with the primary responsibility for deciding, as a matter of policy, what should be the constituent

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<sup>14</sup> Hilary Charlesworth, ‘Human Rights and Statutory Interpretation’, in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (forthcoming).

<sup>15</sup> *R v DPP, Ex parte Kebilene* [2000] 2 AC 326.

<sup>16</sup> See also, *Attorney-General (HK) v Lee Kwong-kut* (1993) HKPLR 72; *R v Sin Yau-ming* (1991) 1 HKPLR 88.

<sup>17</sup> 3 WLR 206.

<sup>18</sup> *R v Lambert* [2001] 3 WLR 206, 206.

<sup>19</sup> Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2004) 383.

<sup>20</sup> [2003] 3 All ER 884.

elements of a criminal offence'.<sup>21</sup> This is prima facie contrary to the *Lambert* decision where the Court departed from legislative intent by reading down a reverse onus provision.

In the recent case of *Sheldrake v Director of Public Prosecutions Attorney-General's Reference (No. 4 of 2002)*,<sup>22</sup> Latham LJ expressly rejected the assumption made in *Johnstone* that Parliament would not depart from the presumption of innocence in statutes without good reason. He claimed this afforded too little weight to the presumption, and to a court's obligation under the UKHRA to interpret legislation consistently as far as possible with ECHR rights. Although it appears that *Johnstone* and *Lambert* are conflicting authorities, Latham LJ stated that both cases were valid approaches, and the different emphasis in each case was the result of differing statutory contexts.<sup>23</sup>

The House of Lords defined the scope of the presumption of innocence as follows:

1. the presumption of innocence is a fundamental right directed at ensuring a fair trial;
2. any presumptions of fact must be kept within reasonable limits and not be arbitrary; and
3. security concerns do not absolve member states from a duty to observe basic standards of fairness. Whether a reverse burden can be justified involves consideration of all the facts and circumstances and there is no rule of thumb for this process.<sup>24</sup>

These principles are reminiscent of the European Court's decision in *Salabiaku*. The House of Lords are acknowledging that there can be no authoritative detailed guidelines on interpretation of Article 6(2). The scope of the presumption of innocence is determined largely by the provision in question and the facts of each case.

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<sup>21</sup> *R v Johnstone* [2003] 1 WLR 1736, 1759 (Nicholls LJ).

<sup>22</sup> [2005] 1 AC 264.

<sup>23</sup> *Sheldrake v Director of Public Prosecutions Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264, 287.

<sup>24</sup> *Ibid*, 297 (Bingham LJ).

## Canada and New Zealand

Section 11(d) of the Canadian *Charter of Rights and Fundamental Freedoms* (1982) enshrines the presumption of innocence. The Canadian Supreme Court held in *R v Oakes* ('*Oakes*') that this section requires the state to prove the guilt of the accused beyond reasonable doubt, and the prosecution must bear the ultimate burden of proving every aspect of an offence for the defendant to be convicted.<sup>25</sup> In *Oakes* the Court formulated a 'proportionality test' to examine whether departure from human rights can be justified. The test has been adopted by NZ courts and has influenced the drafting of s 28 of the HRA.<sup>26</sup>

Subsequent cases in the Canadian Supreme Court have held that statutory provisions that place the burden on the accused to prove an exception, proviso or excuse (that is, something that is not an essential element of the offence) may not be consistent with the presumption of innocence. In *R v Whyte* the Court explained: 'the real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence'.<sup>27</sup> The Canadian Supreme Court has also held that statutory provisions imposing legal burdens can be saved from invalidity by reading them as evidential burdens.<sup>28</sup>

The presumption of innocence is also enshrined in s 25(c) of the *Bill of Rights Act* (NZ) 1990 ('NZBOR'). Section 6 of the NZBOR states that where a rights-consistent interpretation of legislation is possible, it is to be preferred over other meanings. However, this has been interpreted to mean that a statute must be ambiguous in order for NZ courts to adopt a rights-consistent interpretative approach.<sup>29</sup> *R v Phillips* provides an example of this restrictive reading: the NZ Court of Appeal held that a statutory provision requiring the defendant to *prove* intent not to traffic drugs could

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<sup>25</sup> *R v Oakes* [1986] 1 SCR 103, 126.

<sup>26</sup> Australian Capital Territory Human Rights Office, *Human Rights Act for People with Legal Backgrounds* (2005), Workshop Handout Notes.

<sup>27</sup> [1988] 2 SCR 3, 18.

<sup>28</sup> *Knodel v British Columbia (Medical Services Commission)* (1991) 58 BCLR (2<sup>d</sup>) 356; *R v Downey* [1992] 2 SCR 10; *R v Laba* [1994] 3 SCR 965.

<sup>29</sup> *Noort v MOT*; *Curran v Police* [1992] 3 NZLR 260; *Quilter v Attorney-General* [1998] NZLR 523.

not be interpreted as imposing merely an evidential burden.<sup>30</sup> According to Emmerson and Ashworth, this has inhibited the development of NZ case law in this area.<sup>31</sup>

## Common themes in the interpretation of reverse onus offences

The wide range of legislative provisions utilising reverse onus offences make it difficult to elucidate general principles from international case law. Courts have, for example, interpreted reverse onus provisions in such varying areas as tax law,<sup>32</sup> copyright law,<sup>33</sup> bail legislation,<sup>34</sup> drug trafficking offences<sup>35</sup> and the offence of ‘living off immoral earnings’ under sexual offences legislation.<sup>36</sup> Nevertheless, certain principles can be deduced from cases decided by international courts:

1. the presumption of innocence applies to criminal offences only;<sup>37</sup>
2. some derogation from the presumption is permitted, within ‘reasonable limits’ or ‘proportionate’ to the offence in question;<sup>38</sup>
3. if it is unclear what type of burden the provision imposes on the defendant it should be interpreted as an evidential burden;<sup>39</sup>
4. an offence that places a legal burden on the defendant to disprove an essential element of the offence is likely to violate the presumption of innocence.

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<sup>30</sup> *R v Phillips* [1991] 3 NZLR 175 (CA). See also, *R v Rangī* [1992] 1 NZLR 385; New Zealand Ministry of Justice, *New Zealand Bill of Rights Act 1990: Summary of Case Annotations* (1997) <<http://www.justice.govt.nz/pubs/reports/1997/bill-of-rights/section25.html>> at 18 April 2005.

<sup>31</sup> Emmerson and Ashworth, above n 12, 266.

<sup>32</sup> *King v United Kingdom* (2003) 37 EHRR CD1.

<sup>33</sup> *R v Johnstone* [2003] 1 WLR 1736.

<sup>34</sup> *Capeau v Belgium* [2005] Comm No 42918/98; *Cesky v The Czech Republic* (2001) 33 EHRR 8.

<sup>35</sup> *Salabiaku v France* (1991) 13 EHRR 379.

<sup>36</sup> *X v United Kingdom* (1972) 42 CD 135.

<sup>37</sup> See *Engel v The Netherlands* (1979) 1 Eur Court HR (ser A) 647; *Ezeh and Connors v the United Kingdom* [2003] Eur Court HR 485; *Yves Moraël v France*, UNHR Comm 207, UN Doc A/44/40 (1989).

<sup>38</sup> See *R v DPP, Ex parte Kebilene* [2000] 2 AC 326; *R v Oakes* [1986] 1 SCR 103; *R v Phillips* [1991] 3 NZLR 175 (CA); *Salabiaku v France* (1991) 13 EHRR 379.

<sup>39</sup> See *R v DPP, Ex parte Kebilene* [2000] 2 AC 326; *R v Lambert* [2001] 3 WLR 206; *R v Oakes* [1986] 1 SCR 103; *R v Phillips* [1991] 3 NZLR 175 (CA); *R v Rangī* [1992] 1 NZLR 385. See also, New Zealand Ministry of Justice, *The Guidelines on the New Zealand Bill of Rights Act 1990: a Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (2004) [2] <<http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html>> at 12 April 2005; Standing Committee on Legal Affairs, ACT Legislative Assembly (Scrutiny of Bills and Subordinate Legislation Committee), *Report Number 4 of 2001* (2001) [2].

However, if the burden relates to an exception, proviso, excuse or qualification to the main offence, it is more likely to comply with human rights standards;<sup>40</sup>

5. it is generally permissible to read down a legal burden to impose an evidential burden to ensure consistency with the presumption of innocence;<sup>41</sup> and
6. the context of an offence and nature of the provision in question are important in determining if a reverse onus provision is justified, and analysis should proceed on a case-by-case basis.<sup>42</sup>

## Two contentious issues in the interpretation of reverse onus offences

A major factor contributing to divergent approaches in interpretation of reverse onus provisions is different judicial approaches to statutory interpretation. The UK courts, for example, have demonstrated a willingness to depart from the legislative intent where necessary to achieve rights-consistent interpretation. This can be contrasted with the approach taken by NZ courts, where judges have adopted a purposive approach. Statutory interpretation techniques adopted by courts are therefore a major factor in determining the efficacy of Bills of Rights in protecting individual rights. However, even within domestic systems there is not always uniformity. Lord Nicholls in *Johnstone* strongly emphasised the importance of deferring to Parliament on policy matters such as how best to construct criminal offences.<sup>43</sup> Yet the House of Lords has also expressly rejected the proposition that Parliament would not have departed from the presumption of innocence without good reason.<sup>44</sup>

A second area of uncertainty is whether reverse onus offences can be justified on grounds that it is appropriate for defendants to prove matters peculiarly within their

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<sup>40</sup> See *R v DPP, Ex parte Kebilene* [2000] 2 AC 326; *R v Oakes* [1986] 1 SCR 103; *R v Phillips* [1991] 3 NZLR 175 (CA); *R v Rangi* [1992] 1 NZLR 385; *R v Whyte* [1988] 2 SCR 3.

<sup>41</sup> See *R v DPP, Ex parte Kebilene* [2000] 2 AC 326; *R v Lambert* [2001] 3 WLR 206; *R v Oakes* [1986] 1 SCR 103; *R v Phillips* [1991] 3 NZLR 175 (CA); *R v Rangi* [1992] 1 NZLR 385. See also, New Zealand Ministry of Justice, above n 39, [2]; Standing Committee on Legal Affairs, above n 39, [2].

<sup>42</sup> See *R v DPP, Ex parte Kebilene* [2000] 2 AC 326; *Salabiaku v France* (1991) 13 EHRR 379; *Sheldrake v Director of Public Prosecutions Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264.

<sup>43</sup> *R v Johnstone* [2003] 1 WLR 1736, 1759 (Nicholls LJ).

<sup>44</sup> *Sheldrake v Director of Public Prosecutions Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264, 287.

own knowledge. As outlined in chapter 2, this is a justification accepted by the Australian High Court, and has also been accepted on a number of occasions by the European Court<sup>45</sup> and UK Courts.<sup>46</sup> However, reliance on this justification is in Ashworth's view 'alarming in view of the manifest weakness of the argument',<sup>47</sup> as it can be used to justify any offence.<sup>48</sup> Many crimes turn on the intent of the defendant, a key example being murder. Yet the defendant is not required to disprove intent in murder cases. Justifying reverse onus provisions on grounds that it relates to matters peculiarly within the defendants own knowledge is highly problematic as it could lead to 'imposing burdens on the defendants to disprove intention and knowledge more widely in the criminal law'.<sup>49</sup>

## Conclusion

The diverse range of offences that utilise reverse onus provisions, and differing judicial approaches to statutory interpretation are two key reasons for the lack of precise international standards for determining whether reverse onus provisions violate the presumption of innocence. However, it is still possible to ascertain more general principles, as set out in this chapter. These principles can provide some guidance for the ACT courts in interpreting reverse onus provisions under the HRA, as they establish a range of possible approaches and interpretative methods.

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<sup>45</sup> See *Elton v UK* [1997] Eur Court HR App No 32344/96; *M v Italy* [1991] Eur Court HR App No 1286/8; *Phillips v UK* [2001] Eur Court HR App No 41087/98; *Welch v UK* (1995) 20 EHRR 247, 263.

<sup>46</sup> See *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 (Simon Brown LJ); *L v DPP* [2002] 2 All ER 854; *McIntosh v Lord Advocate* [2001] 3 WLR 107; *R v Benjafield* [2003] 1 AC 1099, 1119; *R v Daniels* [2003] 1 Cr App R 6 (Auld LJ); *R v Matthews* [2003] EWCA Crim 813; *Sheldrake v Director of Public Prosecutions Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264, 281 (Latham LJ). See also, *R v Lambert* [2001] 3 WLR 206, 243 (Hutton LJ).

<sup>47</sup> Andrew Ashworth, 'Criminal Proceedings after the Human Rights Act: The First Year' (2001) *Criminal Law Review* 855, 858. See also, Andrew Ashworth and Michelle Strange, 'Criminal Law and Human Rights' (2004) 2 *European Human Rights Law Review* 121, 138; Tom Rees and Andrew Ashworth 'Case Comment: Burden of proof' (2004) *Criminal Law Review* 832, 836.

<sup>48</sup> Don Stuart, 'Supporting General Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration: A Canadian Perspective' (2000) 4 *Buffalo Criminal Law Review* 13, 40.

<sup>49</sup> Dilys Tausz and Andrew Ashworth, 'Case Comment: Reverse Burden' (2005) *Criminal Law Review* 215, 220.

### **Reverse Onus Offences under the *ACT Human Rights Act 2004***

Under s 22(1) of the *Human Rights Act 2004* (ACT) ('HRA'), 'everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law'. This chapter will consider the potential effect of this provision on reverse onus offences in ACT legislation. As no reverse onus provisions have yet been challenged in courts, this chapter speculates on possible interpretative approaches, drawing on the international case law discussed in chapter 3. This analysis uses the example of a reverse onus provision in the *Criminal Code 2002* (ACT) ('*Criminal Code*') to illustrate different outcomes possible.

If ACT courts take an expansive approach to interpretation, many legislative provisions imposing legal burdens on the defendant could be read down as evidential burdens. This thesis argues that this is the ideal approach as it best enables courts to use the HRA as a dynamic rights protection instrument. In contrast, if courts take a restrictive interpretive approach, more legislation with reverse onus legal burdens may be declared incompatible with the HRA. However, this is no guarantee that the Legislative Assembly will subsequently amend the legislation to correct the rights violation. This approach is therefore unlikely to improve rights protection in the way an expansive approach would.

This chapter then considers the potential impact of s 22(1) of the HRA on law-making processes in the ACT as well as the common law, illustrating that regardless of the outcome of litigation, the HRA has already provided a new lens through which to view the right to be presumed innocent.

## Key features of the ACT *Human Rights Act 2004*

The HRA was enacted on 1 July 2004 after an extensive consultation process.<sup>1</sup> It is an ordinary piece of legislation (that is, it is not entrenched) and incorporates most of the rights in the International Covenant on Civil and Political Rights. The HRA was modelled largely on the *Human Rights Act 1998* (UK) ('UKHRA') and the *Bill of Rights Act 1990* (NZ) ('NZBOR'), and is described as a 'dialogue model' because of the emphasis on encouraging all arms of government to engage in rights discussion and interpretation.<sup>2</sup>

Section 30 of the HRA introduces a new rule of statutory construction in the ACT,<sup>3</sup> requiring that when 'working out the meaning of a Territory Law, an interpretation that is consistent with human rights is as far as possible to be preferred'. Under s 30(2), this rule applies unless the Legislative Assembly clearly intended a law to be inconsistent with human rights. International law should be of great relevance in the interpretation of HRA rights: under s 31 of the HRA a court may take account of international law and judgments of foreign courts in interpreting rights under the HRA.

Section 28 of the HRA limits deviation from rights, stating that they 'may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society'. Should the ACT Supreme Court be satisfied that a law is inconsistent with a HRA right, it may issue a declaration of incompatibility,<sup>4</sup> requiring the Attorney-General to respond to the Legislative Assembly within six months.<sup>5</sup> A declaration of incompatibility does not affect the validity of the law.<sup>6</sup> Instead, it is a statement 'designed to draw political attention to the breach of human right'.<sup>7</sup>

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<sup>1</sup> See Australian Capital Territory Bill of Rights Consultative Committee, *Towards a Human Rights Act*, Report (2003).

<sup>2</sup> Helen Watchirs, 'The ACT Human Rights Act 2004: Its Impact and Potential' (Speech delivered at the Australian National University Toyota Public Lecture Series, the Australian National University, 22<sup>nd</sup> February 2005) 2.

<sup>3</sup> See Explanatory Statement, Human Rights Bill 2004 (ACT) 5; Watchirs, above n 2, 2.

<sup>4</sup> *Human Rights Act 2004* (ACT) s 32.

<sup>5</sup> *Human Rights Act 2004* (ACT) s 33.

<sup>6</sup> *Human Rights Act 2004* (ACT) s 33(3).

<sup>7</sup> Hilary Charlesworth, 'Human Rights and Statutory Interpretation', in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (forthcoming).

All government Bills must be accompanied by a compatibility statement from the Attorney-General,<sup>8</sup> and the development of these statements prior to a Bill's introduction is carried out by the ACT Department of Justice and Community Safety ('DJACS').<sup>9</sup> All government and Private Member's Bills must be scrutinised by the Legal Scrutiny Committee for compliance with the HRA.<sup>10</sup> None of the 80 Bills introduced in the first six months of the HRA were found to be incompatible with human rights.<sup>11</sup> This is perhaps unsurprising, since the process of preparing compatibility statements involves negotiation and dialogue through the policy development and drafting stages of a Bill. By the time the Bill is introduced into the Legislative Assembly, ideally, any HRA inconsistencies have been fixed.<sup>12</sup>

## **The right to be presumed innocent: saved by the Bill?**

In determining if a reverse onus provision complies with s 22(1) of the HRA, ACT courts are required to use the framework established by s 28 and s 30 of the HRA noted above. The Explanatory Statement to the Human Rights Bill notes that 'it is the clear intention ... that the interpretation of human rights is to be as coherent with internationally accepted standards as possible'.<sup>13</sup> As chapter 3 noted, clear 'internationally accepted standards' in regard to the presumption of innocence are difficult to deduce because judicial interpretation generally turns on the context and content of the provision in question. However, issues raised by international courts will greatly assist ACT courts with interpretation.

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<sup>8</sup> *Human Rights Act 2004* (ACT) s 37.

<sup>9</sup> Email from Renuka Thilagaratnam to Rebecca Minty, 31 May 2005; ACT Human Rights Office, *Human Rights Act for People with Legal Backgrounds* (2005), Workshop Handout Notes.

<sup>10</sup> *Human Rights Act 2004* (ACT) s 38.

<sup>11</sup> ACT Human Rights Office, above n 9.

<sup>12</sup> Email from Renuka Thilagaratnam (Human Rights Officer, ACT Department of Justice and Community Safety) to Rebecca Minty, 31 May 2005.

<sup>13</sup> Explanatory Statement, Human Rights Bill 2004 (ACT) 6.

A useful approach to interpretation could be one based on that taken by the New Zealand ('NZ') Court of Appeal in *Moonen v Film and Literature Board of Review* ('*Moonen*').<sup>14</sup> In *Moonen* the court undertook a four-step process:

1. determine the *scope* of the right to be presumed innocent;
2. examine the *possible interpretations* for the provision in question;
3. determine whether the meaning of the provision in question *limits* the right to be presumed innocent as defined in Step 1; and
4. determine whether the limitation from Step 3 can be *justified* under s 28 of the HRA.

This interpretative process can be illustrated with reference to s 604(1) (d) of the *Criminal Code*; a reverse onus clause relating to the offence of drug trafficking. Section 604 (1) (d) states:

**604 Trafficking offence—presumption if trafficable quantity possessed etc**

(1) If, in a prosecution for an offence against section 603, it is proved that the defendant—...

... (d) possessed a trafficable quantity of a controlled drug;

it is presumed, unless the contrary is proved, that the defendant had the intention or belief about the sale of the drug required for the offence.

*Note:* A defendant bears a legal burden of proving that the defendant did not have the intention or belief mentioned in this subsection.

Step 1: What is the scope of the right to be presumed innocent?

The internationally established principles governing the presumption of innocence arrived at in chapter 3 can be applied to s 604 of the *Criminal Code*.

1. The presumption of innocence only applies to criminal offences;<sup>15</sup> it therefore applies to s 604.

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<sup>14</sup> [2000] 2 NZLR 9.

<sup>15</sup> See *Engel v The Netherlands* (1979) 1 Eur Court HR (ser A) 647; *Ezeh and Connors v the United Kingdom* [2003] Eur Court HR 485; *Yves Mornet v France*, UNHR Comm 207, UN Doc A/44/40 (1989).

2. Some derogation from the presumption of innocence is permitted within certain limits;<sup>16</sup> s 604 derogates from the presumption of innocence by imposing a burden on the defendant to prove they did not intend to traffic. This is a reverse onus offence and may potentially breach the presumption of innocence if the justification provided for the offence proves inadequate.
3. If it is unclear what type of burden the provision imposes on the defendant, it should be interpreted as an evidential burden;<sup>17</sup> s 604 clearly states that a legal burden on the defendant is intended.
4. An offence that places a legal or evidential burden on the defendant to disprove an essential element of the offence is likely to violate the presumption of innocence;<sup>18</sup> the legal burden imposed on a defendant by s 604 relates to disproving intent to traffic drugs. Intent is an essential element of the offence. It is therefore likely that this offence violates the presumption of innocence in the HRA.
5. It is generally permissible to read down a legal burden to impose an evidential burden to ensure consistency with the presumption of innocence;<sup>19</sup> the option of reading down s 604 to impose an evidential burden is open to the court and (using the *Moonen* analysis) is discussed later.
6. The context of the offence and the nature of the provision in question are important in determining if a reverse onus provision is justified, and analysis should proceed on a case-by-case basis;<sup>20</sup> s 604 is a serious drug offence, and the reverse onus is arguably necessary because of the difficulty for the prosecution to prove the defendant's intent. However, the associated penalty of imprisonment arguably necessitates a convincing and logical justification for the provision.<sup>21</sup> This is further discussed later.

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<sup>16</sup> See *R v DPP, Ex parte Kebilene* [2000] 2 AC 326; *R v Oakes* [1986] 1 SCR 103; *R v Phillips* [1991] 3 NZLR 175 (CA); *Salabiaku v France* (1991) 13 EHRR 379.

<sup>17</sup> See *R v DPP, Ex parte Kebilene* [2000] 2 AC 326; *R v Lambert* [2001] 3 WLR 206; *R v Oakes* [1986] 1 SCR 103; *R v Phillips* [1991] 3 NZLR 175 (CA); *R v Rangitiki* [1992] 1 NZLR 385. See also, New Zealand Ministry of Justice, *The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (2004) [2] <<http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html>> at 12 April 2005; Standing Committee on Legal Affairs, ACT Legislative Assembly (Scrutiny of Bills and Subordinate Legislation Committee), *Report Number 4 of 2001* (2001) [2]. See also *Criminal Code 2002* (ACT) s 58.

<sup>18</sup> See *R v DPP, Ex parte Kebilene* [2000] 2 AC 326; *R v Oakes* [1986] 1 SCR 103; *R v Phillips* [1991] 3 NZLR 175 (CA); *R v Rangitiki* [1992] 1 NZLR 385; *R v Whyte* [1988] 2 SCR 3.

<sup>19</sup> See *R v DPP, Ex parte Kebilene* [2000] 2 AC 326; *R v Lambert* [2001] 3 WLR 206; *R v Oakes* [1986] 1 SCR 103; *R v Phillips* [1991] 3 NZLR 175 (CA); *R v Rangitiki* [1992] 1 NZLR 385. See also, Standing Committee on Legal Affairs, above n 17, [2]; New Zealand Ministry of Justice, above n 17, [2].

<sup>20</sup> See *R v DPP, Ex parte Kebilene* [2000] 2 AC 326; *Salabiaku v France* (1991) 13 EHRR 379; *Sheldrake v Director of Public Prosecutions Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264.

<sup>21</sup> See Ben Emmerson and Andrew Ashworth, *Human Rights and Criminal Justice* (2001) 271.

Based on settled international principles, s 604 appears to violate the presumption of innocence under s 22(1) of the HRA because it imposes a legal burden on the defendant to disprove an essential element of the offence.

Step 2: What are the possible interpretations for the provision in question?

In addition to the settled factors above, chapter 3 notes debate about the extent to which a court can or should engage in expansive statutory interpretation. This is relevant to s 30 of the HRA.

Section 30 requires courts to interpret laws to be consistent with human rights unless the Legislative Assembly clearly intended another interpretation.<sup>22</sup> This section is based on the language of the interpretative sections of NZBOR (s 6) and the UKHRA (s 3(1)).<sup>23</sup> After almost a year of the HRA being in force there is no clear indication about how the court will interpret legislation using s 30 of the HRA. Most cases to date have referred to a right in the HRA to support an existing common law or statutory right.<sup>24</sup> The only use to date of s 30 is in the case of *R v YL*<sup>25</sup> where Crispin J used s 30 to justify not using the discretion he was afforded under the *Supreme Court Act 1933* (ACT) to coerce a child to give evidence against the child's stepmother. He noted that this was the only option open to him under s 30 of the HRA to achieve consistency with international norms on the rights of the child.<sup>26</sup>

Two possible approaches to statutory interpretation under s 30 of the HRA are open to the court, best illustrated by the UK and NZ experiences. First, ACT courts could adopt a restrictive approach like the NZ courts, which is typified by a judicial

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<sup>22</sup> *Human Rights Act 2004* (ACT) s 30.

<sup>23</sup> Charlesworth, above n 7.

<sup>24</sup> See *Buzzacott v The Queen* [2005] ACTCA 7 (Unreported, Gray J, 1 March 2005); *Firestone v The Australian National University* (2004) 184 FLR 53; *Fletcher v Harris* [2005] ACTSC 27 (Unreported, Higgins CJ, 18 April 2005); *Merritt and Commissioner for Housing* [2004] ACTAAT 37 (29 September 2004); *Robertson v Australian Capital Territory* [2005] ACTSC 35 (Unreported, Crispin J, 29 April 2005); *R v Martiniello* [2005] ACTSC 9 (Unreported, Connolly J, 31 January 2005); *R v O'Neill* ACTSC 64 (Unreported, Connolly J, 1 July 2004); *R v YL* [2004] ACTSC 115 (Unreported, Crispin J, 27 October 2004); *Szuty v Smyth* [2004] ACTSC 77 (Unreported, Higgins CJ, 1 September 2004).

<sup>25</sup> [2004] ACTSC 115 (Unreported, Crispin J, 27 October 2004).

<sup>26</sup> *Ibid* [30].

reluctance to depart from Parliament's intent. The NZ Court of Appeal has construed the interpretative section of the NZBOR (s 6) to mean:

[If] a particular statutory provision, properly interpreted, is inconsistent with the full enjoyment of such a right or freedom, the statutory provision must be given effect and the right or freedom will remain only to the extent that it too can be given effect to.<sup>27</sup>

The UK courts have taken a more flexible approach to statutory interpretation. The leading case on statutory interpretation under the UKHRA is *Ghaidan v Godin-Mendoza* ('*Ghaidan*').<sup>28</sup> Here, the House of Lords read a legislative provision referring to 'wife or husband' as legitimately including a 'partner' in a same sex couple. Lord Nicholls noted that:

Parliament is charged with the primary responsibility for deciding the best way of dealing with social problems. The court's role is one of review. The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to the person's Convention rights.<sup>29</sup>

The House of Lords characterised the interaction between the judiciary and Parliament on rights issues in terms of allowing for a margin of appreciation: 'the discretionary area of judgment the court accords Parliament when reviewing legislation pursuant to its obligations under the UKHRA'.<sup>30</sup> The court considered that distinguishing between homosexual and heterosexual couples was outside the discretionary area, requiring the use of statutory interpretation techniques to achieve a rights-consistent outcome. This expansive interpretation was considered permissible in this case because, in the majority's opinion, it met the test of not interfering with the fundamental provisions or policy of the legislation.<sup>31</sup> Lord Steyn noted that should Parliament disagree with the court's interpretation, it may override it through statutory amendment.<sup>32</sup> If the ACT courts were to adopt such a robust approach, this 'test' would provide an excellent guide to the judicial limits of statutory interpretation under

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<sup>27</sup> *Noort v MOT; Curran v Police* [1992] 3 NZLR 260, 284.

<sup>28</sup> [2004] 3 WLR 113. See also *R v Lambert* [2001] 3 WLR 206.

<sup>29</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 568.

<sup>30</sup> *Ibid* 570 (Nicholls LJ).

<sup>31</sup> *Ibid* 572.

<sup>32</sup> *Ibid* 574.

the HRA. It would help allay fears that the HRA could enable courts to usurp the law-making powers of Parliament.

It is difficult to determine if the difference between the NZ and UK approaches derives from stronger interpretative wording in the UKHRA. The UK section has been described as conveying ‘a rather more powerful message’ than the NZ section.<sup>33</sup> However, it is argued elsewhere that ‘there is no convincing difference’ between the provisions.<sup>34</sup> Regardless of the reason for differing interpretations, it is useful to consider these approaches to illustrate options open to the ACT courts in using s 30 to interpret a HRA right. Charlesworth cites the requirement under s 30 (2) of the HRA (that a purposive approach be given primacy) as increasing the likelihood that courts will defer to Parliament.<sup>35</sup> However, Charlesworth also notes Corcoran’s comment that Australian courts ‘tend to pay lip service to the purposive rule while in reality employ ... more flexible methods of interpretation’.<sup>36</sup> A deferential approach could be adopted because of requirements under the HRA that all Bills be scrutinised for rights compatibility,<sup>37</sup> as the courts may defer to the legislature’s rights evaluation process. It would be disappointing if the courts merely acted as a ‘rubber stamp’ to the Legislative Assembly’s rights evaluation process as this could make the HRA a ‘Claytons Bill of Rights’.<sup>38</sup>

This thesis prefers an expansive reading of the HRA’s interpretative clauses as it would enable the HRA to play a more robust role in protecting rights. This approach

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<sup>33</sup> *R v DPP, Ex parte Kebilene* [2000] 2 AC 326, 330 (Cooke LJ) (former President of the New Zealand Court of Appeal). See also, *R v A* [2000] 2 AC 326, 44 (Steyn LJ); Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights* (2000) 38; The Honourable Justice Spigelman, ‘Blackstone, Burke, Bentham and the Human Rights Act 2004’ (2005) 26 *Australian Bar Review* 1, 3.

<sup>34</sup> Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (2003) 147, cited in Charlesworth, above n 7.

<sup>35</sup> Charlesworth, above n 7. See also, Carolyn Evans, ‘Responsibility for Rights: The ACT Human Rights Act’ (2004) 32 *Federal Law Review* 291, 309.

<sup>36</sup> Suzanne Corcoran, ‘The Architecture of Interpretation: Dynamic Practice and Constitutional Principles’ in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (forthcoming).

<sup>37</sup> See especially, Explanatory Statement, Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004 (ACT) 4. See also, Explanatory Statement, Criminal Code (Serious Drug Offences) Amendment Bill 2004 (ACT) 3.

<sup>38</sup> See, eg, Simon Bronitt, ‘The *Human Rights Act 2004* (ACT) – A “Claytons Bill of Rights” or New Magna Carta?’ (2004) 28 *Criminal Law Journal* 325. See also, Julie Debeljak, ‘The Human Rights Act 2004 (ACT): A Significant, Yet Incomplete, Step Toward the Domestic Protection and Promotion of Human Rights’ (2004) 15 *Public Law Review* 169; George Winterton, ‘The ACT Bill of Rights’ (2004) 7 *Constitutional Law and Policy Review* 47.

would, for example, see the legal burden imposed on the defendant by s 604 of the *Criminal Code* read down to impose an evidential burden. As in *Ghaidan*, the courts are likely to give the Legislative Assembly a wide margin of appreciation in formulating drugs policy. However, the imposition of a legal burden on the defendant is still likely to be outside this discretionary area. Section 604 could therefore be read down to an evidential burden as this would not interfere with any of the fundamental provisions or fundamental policy of the *Criminal Code*. However, if the NZ restrictive interpretative approach was preferred, the courts would be unlikely to interpret s 604 in any other way than imposing a legal burden, as this is clearly the intended construction of this section.

Step 3: Does the meaning of the provision in question limit the right to be presumed innocent as defined in Step 1?

This step involves analysing the preferred construction of s 604 of the *Criminal Code* (as determined by Step 2) in light of the scope of the presumption of innocence as established in Step 1. Generally, a provision that imposes a legal burden on the accused to prove their innocence violates s 22(1). Thus s 604 prima facie violates s 22(1) of the HRA. However, if ACT courts read down s 604 at Step 2 to impose an evidential burden, it would not violate the presumption of innocence.

Step 4: Can this limitation from Step 3 be justified under s28, HRA?

Under s 28 of the HRA, human rights may be subject only to reasonable limits that can be ‘demonstrably justified in a free and democratic society’.<sup>39</sup> This section ‘provides one standard against which to measure justifications for limits on human rights’.<sup>40</sup> The Explanatory Statement to the ACT Human Rights Bill notes s 28 requires limits on rights be proportionate, in terms of:

1. being necessary and rationally connected to the objective;
2. being the least restrictive to accomplish the objective; and

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<sup>39</sup> *Human Rights Act 2004* (ACT) s 28.

<sup>40</sup> Explanatory Statement, Human Rights Bill 2004 (ACT) 4.

3. not having a disproportionately severe effect on the person to whom it applies.<sup>41</sup>

This formulation is consistent with the approach of the Canadian Supreme Court in *R v Oakes* ('*Oakes*').<sup>42</sup> The NZ Court of Appeal in *Moonen* described proportionality as a rational relationship between the means employed by the statutory provision and the objective of the offence, or ensuring that 'a sledgehammer [is not] used to crack a nut'.<sup>43</sup> The UK approach to proportionality is based on the European Court's approach in *Salabiaku*, that a departure from the presumption of innocence be 'within reasonable limits'.<sup>44</sup> It is not clear whether the *Oakes* test for proportionality is more restrictive than the UK approach.<sup>45</sup>

Would s 604 pass the three-step proportionality test under s 28 of the HRA? In examining this section of the *Criminal Code*, the ACT Standing Committee on Legal Affairs left the issue of compatibility with the HRA as 'an open question'.<sup>46</sup>

Part one of the proportionality test requires the court to ask if the limit on the presumption of innocence is necessary, and rationally connected to the objective of the offence. The Legislative Assembly's aim in enacting s 604 was to deal with what they considered to be a substantial and pressing need to curb drug trafficking by facilitating the conviction of drug traffickers.<sup>47</sup> A court is likely to accept this as a goal of sufficient importance to override the presumption of innocence in certain cases.<sup>48</sup> The *Criminal Code* Explanatory Statement claims there is a 'rational connection' between s 604 and the objective of curbing drug trafficking because of the requirement that the prosecution prove possession of a 'trafficable quantity' of drugs. The Statement explains that 'trafficable quantities ... represent quantities that so far exceed the likely requirements of personal use as to provide a rational basis for

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<sup>41</sup> Ibid.

<sup>42</sup> [1986] 1 SCR 103.

<sup>43</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 18.

<sup>44</sup> *Salabiaku v France* (1991) 13 EHRR 379, 388.

<sup>45</sup> Charlesworth, above n 7.

<sup>46</sup> Standing Committee on Legal Affairs, ACT Legislative Assembly (Scrutiny of Bills and Subordinate Legislation Committee), *Report Number 53 of 2004* (2004) [9].

<sup>47</sup> Explanatory Statement, *Criminal Code (Serious Drug Offences) Amendment Bill 2004* (ACT) 12.

<sup>48</sup> See *R v Oakes* [1986] 1 SCR 103, 141. See generally, *R v Phillips* [1991] 3 NZLR 175 (CA); *R v Sin Yau-Ming* (1991) 1 HKPLR 88; *S v Bhulwana* (1995) 2 SACR 748.

the inference that a person in possession of such quantity is likely to be engaged in trafficking'.<sup>49</sup>

This 'trafficable quantity' threshold in s 604 distinguishes it from a similar drug trafficking provision considered by the Canadian Supreme Court in *Oakes*. In that case, the Supreme Court held that the reverse onus clause failed the proportionality test because the presumption of supply could be triggered by possession of a small or negligible quantity of narcotics. The provision was therefore not considered to be rationally related to the objective of curbing drug trafficking.<sup>50</sup> A consistent approach was taken by the NZ Court of Appeal in *R v Phillips*,<sup>51</sup> where a drug trafficking provision was considered proportionate because it included a 'quantity threshold'. Although s 604 of the *Criminal Code* does include a 'trafficable quantity' threshold, the thresholds set out in the *Criminal Code Regulations* still need to be examined to see if they have a rational connection to drug trafficking. The Regulations, for example, list possession of 500 milligrams of MDMA (ecstasy) as constituting a 'trafficable quantity' of this drug.<sup>52</sup> However, in 2000, the average purity of ecstasy in the ACT, as measured from samples taken from Australian Federal Police seizures was 132 milligrams per pill.<sup>53</sup> Research on the Canberra party drug scene indicates that more than two-thirds of ecstasy users take more than one pill per session.<sup>54</sup> In one survey, over two-thirds of regular users had used four or more pills per session in the preceding six months.<sup>55</sup> It is therefore not unlikely that a user, apprehended with just four pills for personal use, could be over the 'trafficable quantity' threshold. This example suggests that a court would need to closely examine the context of the offence to determine if the thresholds in the *Criminal Code Regulations* would meet this limb of the proportionality test.

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<sup>49</sup> Explanatory Statement, Criminal Code (Serious Drug Offences) Amendment Bill 2004 (ACT) 12.

<sup>50</sup> *R v Oakes* [1986] 1 SCR 103, 106.

<sup>51</sup> [1991] 3 NZLR 175 (CA).

<sup>52</sup> *Criminal Code Regulation 2005* (ACT), sch 1, pt 1.2, item 94.

<sup>53</sup> Phoebe Proudfoot and Jeff Ward, 'Australian Capital Territory Party Drug Trends 2003: Findings from the Party Drugs Initiative' (National Drug and Alcohol Research Centre Technical Report Number 188, 2003) 13.

<sup>54</sup> *Ibid* 11.

<sup>55</sup> *Ibid*.

At a conceptual level the distinction between drug possession for personal use and possession for commercial purposes is problematic. This dichotomy is widely used in drug offences to distinguish a higher degree of moral blameworthiness associated with drug trafficking.<sup>56</sup> Yet categorisation is arbitrary, as many users deal to fund their own habit, or they obtain drugs for friends.<sup>57</sup> Ordinary drug users are often inclined to buy ‘in bulk’ because of the risks associated with purchasing drugs, something noted by the Hong Kong Court of Appeal<sup>58</sup> and the South African Constitutional Court in drug trafficking cases.<sup>59</sup> An inference of intent to traffic from possession of a ‘trafficable quantity’ can vary according to the circumstances of the case, and patterns of use and possession will differ; for example, between cannabis and heroin.<sup>60</sup> In this regard, shifting the burden to the defendant will result in ‘the highest likelihood of error in the most dubiously marginal area of useful application [of reversing the onus of proof]’.<sup>61</sup> This problem is best dealt with by requiring the prosecution to prove all elements of the offence.

Part two of the s 28 proportionality test asks if s 604 of the *Criminal Code* employs the least restrictive means necessary to achieve the objective of the offence. Police and prosecutorial authorities are adamant that reverse onus provisions in drug trafficking offences are essential to curb drug trafficking. This has been accepted by the Model Criminal Code Officers Committee (MCCOC).<sup>62</sup> Police and prosecutors argue that without reverse onus provisions it is often too difficult for the prosecution to secure convictions, because there is generally little evidence of drug sale or other overtly commercial activity. They also note the difficulty in finding relevant witnesses, because drug purchasers are generally unwilling to complain or testify against traffickers.<sup>63</sup>

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<sup>56</sup> See, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 817; Christopher Reynolds, *Public Health Law in Australia* (1995) 207.

<sup>57</sup> Bronitt and McSherry, above n 56, 818; Reynolds, above n 56, 202.

<sup>58</sup> *R v Sin Yau-Ming* (1991) 1 HKPLR 88.

<sup>59</sup> *S v Bhulwana* (1995) 2 SACR 748.

<sup>60</sup> Model Criminal Code Officers Committee, *Model Criminal Code, Chapter 6: Serious Drug Offences* (1998) 87.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.* 85. See also, Kirsty Simpson, ‘Police Push to Change Onus of Guilt on Suppliers’, *The Age* (Melbourne), 14 March 2004.

<sup>63</sup> Bronitt and McSherry, *Principles of Criminal Law*, above n 56, 858.

However, if the assumption that reverse onus provisions result in more convictions is correct, there is an increased risk of convicting the innocent. From a human rights perspective, due process (and the presumption of innocence) is even more important when there is more at stake for the accused.<sup>64</sup> This is the case with drug trafficking offences that generally involve significant jail sentences. This argument has been eloquently stated by Sachs J of the South African Constitutional Court:

There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become ... The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption ... the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.<sup>65</sup>

Even if it is accepted that reversing the onus of proof is a necessary part of drug law enforcement, s 604 could still achieve its objective by imposing an evidential, rather than a legal burden on the defendant. This would require the defendant to adduce sufficient evidence that he or she did not have intent to traffic drugs. Having done this, the prosecution would still be required to prove intent to traffic beyond reasonable doubt. The argument in the *Criminal Code* Explanatory Statement, linking the quantity of drugs possessed with intent to traffic, fails to justify the imposition of a legal burden. If the offender's intent can be inferred from the quantity of drugs in their possession, a reversal of the legal burden of proof is unnecessary to support the prosecution's case.<sup>66</sup> This was a rationale behind the MCCOC recommendation that if the burden is to be reversed for serious drug offences, it should be an evidential burden and not a legal burden on the defendant.<sup>67</sup> The HRA may provide ACT courts with an opportunity for re-evaluation of assertions that reverse onus legal burdens are an appropriate way to deal with drug trafficking offences. By imposing a legal burden on defendants, s 604 does not satisfy part two of the proportionality test. However, if

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<sup>64</sup> See Emmerson and Ashworth, above n 21, 271; Simpson, above n 62.

<sup>65</sup> *State v Coetzee* [1997] 2 LRC 593, 677.

<sup>66</sup> *Model Criminal Code, Chapter 6: Serious Drug Offences*, above n 60, 87.

<sup>67</sup> *Ibid* 91.

under Step 3 the courts read s 604 as an evidential burden, it would satisfy the proportionality test.

Part three of the proportionality test under s 28 of the HRA requires the court to consider whether penalties associated with s 604 of the *Criminal Code* have a disproportionately severe effect on defendants charged under this provision. Penalties associated with s 604 are graded in severity, depending on the type and quantity of drug being trafficked. For a large commercial quantity, the maximum penalty is imprisonment for life.<sup>68</sup> The lowest penalty is imprisonment for three years for trafficking in cannabis.<sup>69</sup> Australian courts have recognised the severity of the crime of drug trafficking, noting it is a ‘grave social evil’ that poses a ‘serious threat to the wellbeing of the Australian community’.<sup>70</sup> However, in *R v Lambert*, the maximum penalty of life in prison imposed by a reverse onus drug trafficking offence was a factor in concluding the provision was not proportional to the offence (considering a defendant could be convicted without knowingly trafficking drugs).<sup>71</sup> Given the current concern in Australia about drug trafficking and the gradation of penalties in s 604, it is an open question as to whether the penalties in s 604 would be considered proportionate to the offence they concern.

On balance, it is the writer’s view that s 604, with the requirement that the defendant bear the *legal burden* of proving his or her innocence, cannot be considered a justifiable limitation on the presumption of innocence under s 28 of the HRA. This conclusion is supported by the MCCOC’s recommendations and UK case law. This violation of s 22(1) of the HRA could ideally be remedied by reading the legal burden in the provision down to an evidential burden. This would not constitute ‘democracy-erosion’ because it would not interfere with any of the fundamental provisions or policy of the *Criminal Code*. This interpretation of s 604 illustrates how the HRA can safeguard individual rights without encroaching significantly on parliamentary supremacy. If the Legislative Assembly disagreed with this interpretation and felt it fundamentally interfered with the legislation or with ACT drugs policy, they are ‘free

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<sup>68</sup> *Criminal Code 2002* (ACT) s 603(1).

<sup>69</sup> *Criminal Code 2002* (ACT) s 603(8).

<sup>70</sup> *He Kaw Teh v The Queen* (1985) 157 CLR 523, 529-530 (Gibbs CJ).

<sup>71</sup> *R v Lambert* [2001] 3 WLR 206.

to override it by amending the legislation and expressly reinstating the incompatibility'.<sup>72</sup>

## A declaration of incompatibility

Should legislation be found to violate a HRA right, the court may issue a declaration of incompatibility. However, the ACT Human Rights Commissioner considers it unlikely that many declarations of incompatibility will be issued.<sup>73</sup> UK courts issued only approximately 15 declarations in the first half decade of the UK HRA,<sup>74</sup> possibly because 'judicial interpretation of laws seems a less interventionist activity than that of invalidation'.<sup>75</sup> Lord Steyn described declarations as 'a measure of last resort'.<sup>76</sup> A similar reluctance on the part of ACT courts may suggest an increased willingness to read down s 604 of the *Criminal Code* to impose an evidential burden rather than finding it incompatible with the HRA. Authority from the UK would certainly support this option.<sup>77</sup>

Should the ACT Supreme Court choose to issue a declaration of incompatibility in regards to the legal burden imposed by s 604 of the *Criminal Code*, after the Attorney-General had issued a written response, it is ultimately up to the Legislative Assembly to determine whether to remedy the rights violation by amending the *Criminal Code*. This approach could slow down the rights protection process. The Attorney-General's report could take up to six months, with no guarantee laws will be amended at the end of the process.<sup>78</sup> In contrast, an expansive reading of s 31 provides flexibility in enabling courts to opt for the human rights-consistent interpretation, providing it does not conflict with the fundamental policy and purpose of legislation. In practical terms this could involve reading down many of the legal burdens in ACT legislation as evidential burdens, rather than sending many statutes back to Parliament by way of declarations of incompatibility. This way, declarations of incompatibility

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<sup>72</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 575 (Steyn LJ).

<sup>73</sup> Watchirs, above n 2, 6.

<sup>74</sup> *Ibid.*

<sup>75</sup> Charlesworth, above n 7.

<sup>76</sup> *R v A* [2000] 2 AC 326, 44 (Steyn LJ).

<sup>77</sup> See, eg, *R v Lambert* [2001] 3 WLR 206; *Sheldrake v DPP* [2004] QB 487.

<sup>78</sup> *Human Rights Act 2004* (ACT) s 33(3).

would be reserved for situations where the Supreme Court felt unable to read down legal burdens (that is, where to do so would conflict with the policy and purpose of the legislation).

## **Institutional changes resulting from s 22 (1), HRA**

An important objective of the HRA is to create a ‘human rights dialogue’ between the Legislative Assembly, the executive and the judiciary.<sup>79</sup> To this end, the HRA includes a range of measures designed to improve rights awareness and protection in the drafting and review of legislation, in government departments and in the wider community.

The HRA includes measures concerned with pre-enactment scrutiny of Bills; for example, the requirement that a compatibility statement accompany each government Bill.<sup>80</sup> This process is aimed at ‘mainstreaming human rights considerations in the policy development process’.<sup>81</sup> It is argued that ‘although this work will be invisible to practitioners and the public, in many respects it is where the biggest impact of the Act will be felt’.<sup>82</sup> The development of compatibility statements should be more straightforward where departments have followed the Department of Justice and Community Safety *Guidelines for Government Departments on Developing Legislation and Policy*.

As required by s 38 of the HRA, the Standing Committee on Legal Affairs has commented on human rights issues raised by a range of reverse onus clauses in Bills, including in regard to the *Criminal Code*.<sup>83</sup> The first comprehensive Legislative Assembly response to Standing Committee comments was in the Explanatory Statement to the *Classification (Publications, Films and Computer Games)*

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<sup>79</sup> Charlesworth, above n 7.

<sup>80</sup> *Human Rights Act 2004 (ACT)* s 37.

<sup>81</sup> Watchirs, above n 2, 3.

<sup>82</sup> Elizabeth Kelly, ‘Human Rights Act 2004: A New Dawn for Human Rights Protection?’ (2004) 41 *AIAL Forum* 30, 33.

<sup>83</sup> See, eg, Standing Committee on Legal Affairs, above n 17; Standing Committee on Legal Affairs (Scrutiny of Bills and Subordinate Legislation Committee), ACT Legislative Assembly, *Report Number 4 of 2001* (2001); Standing Committee on Legal Affairs (Scrutiny of Bills and Subordinate Legislation Committee), ACT Legislative Assembly, *Report Number 13 of 2000* (2000).

*(Enforcement) Amendment Bill 2004*. In noting that departure from the presumption of innocence was only appropriate in exceptional circumstances, the reverse onus provisions in the Bill were justified in the following general terms:

[A] judgment must be made by the Assembly about the value to society of the presumption of innocence as opposed to the protection of children [from explicit material]. The limitation on the presumption of innocence as a result of retaining a legal burden of proof in these provisions is justified by the greater protection from exposure to violent and sexually explicit material it affords to children.<sup>84</sup>

Although this response lacks the rigorous legal analysis a court would engage in, this exchange between the Scrutiny Committee and the Legislative Assembly is an early indication of some success of the HRA promoting a rights discourse in the ACT. A possible implication is that laws passed after 1 July 2004 may be less likely to be challenged on human rights grounds, because of pre-enactment rights scrutiny. This is not to say that the legislature will not pass laws inconsistent with human rights or that all compatibility statements will be adequate or appropriate, but it is reasonable to suggest that these HRA measures will improve the extent to which ACT laws comply with human rights.

A number of provisions in the HRA are designed to encourage rights discourse outside the legislative sphere. Section 41 establishes a Human Rights Commissioner to provide advice to the Attorney-General on rights issues, to educate the community on rights, and to review and report on rights compliance.<sup>85</sup> Part 2.1 of the Act requires that ACT government departments report on measures taken to respect, protect and promote human rights in their annual reports. In this way that HRA extends the realm of the presumption of innocence beyond law-making and litigation.

An outcome of the HRA could be the development of the common law presumption of innocence. The HRA only applies to ‘territory law’; defined as an Act or statutory instrument of the ACT (that is, not common law).<sup>86</sup> Yet the Explanatory Statement of

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<sup>84</sup> Explanatory Statement, Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004 (ACT) 5.

<sup>85</sup> Watchirs, above n 2, 4.

<sup>86</sup> *Human Rights Act 2004* (ACT) s 29. See also, Explanatory Statement, Human Rights Bill 2004 (ACT) 5.

the Human Rights Bill recognises that values enshrined in the HRA may development the common law.<sup>87</sup> Chief Justice Spigelman (of the NSW Supreme Court) also predicts that UK case law on the presumption of innocence will influence Australian common law.<sup>88</sup> Experience from the UK and NZ indicates that Bills of Rights develop the common law. In *Campbell v MGN Ltd*, the House of Lords found the right to privacy under the European Convention on Human Rights had been absorbed into UK common law.<sup>89</sup> As rights awareness improves amongst ACT lawyers HRA rights are likely to become increasingly integrated into pleadings, even if only to support common law propositions. In *Szuty v Smyth*,<sup>90</sup> for example, Higgins CJ of the ACT Supreme Court noted that the scope of the defence of ‘fair comment’ in defamation cases was set out in common law by *Carleton v ABC*<sup>91</sup> but is now further supported by s 16 of the HRA.<sup>92</sup>

## Conclusion

It is not until the first reverse onus provision is tested in court that the extent of the HRA on the right to be presumed innocent in the ACT can be gauged. Litigation will reveal whether the ACT courts adopt the expansive, rights-based approach to statutory interpretation taken by UK courts, or whether the NZ restrictive approach will prevail. This thesis argues that an expansive interpretation is necessary to enable the HRA to make a positive impact on the right to be presumed innocence in the ACT. Possible outcomes resulting from each approach were illustrated by s 604 of the *Criminal Code*, which places a legal burden on the accused to disprove intent to traffic drugs. It has been argued that the legal burden in this provision violates s 22(1) of the HRA, which cannot be considered ‘demonstrably justifiable’ under s 28 of the HRA. If the courts adopt this approach they may choose to issue a declaration of incompatibility.

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<sup>87</sup> Explanatory Statement, Human Rights Bill 2004 (ACT) 5.

<sup>88</sup> The Honourable Justice Spigelman, ‘The Truth Can Cost Too Much: The Principle of a Fair Trial’ (2004) 78 *Australian Law Journal* 29, 48.

<sup>89</sup> [2004] 2 AC 457, 465 (Nicholls LJ). See also, *Hosking v Runting* [2005] 1 NZLR 1; *Kerr v A-G* (1996) 4 HRNZ 270; *Upton v Green (No 2)* (1996) 3 HRNZ 179; United Kingdom Department for Constitutional Affairs, *The Human Rights Act 1998: Guidance for Departments* (2<sup>nd</sup> ed, 2000) <<http://www.humanrights.gov.uk/guidance.htm#intro>> at 15 May 2005.

<sup>90</sup> [2004] ACTSC 77 (Unreported, Higgins CJ, 1 September 2004).

<sup>91</sup> (2002) 172 FLR 398.

<sup>92</sup> [2004] ACTSC 77 (Unreported, Higgins CJ, 1 September 2004).

Alternatively, they may choose to ‘read down’ the legal burden to impose an evidential burden as it is likely that this would be considered compliant with s 22(1) of the HRA. Reading down this provision to an evidential burden would be the most efficient way the HRA could be used to protect the rights of a defendant charged under s 604 because it would be a faster and more certain means to HRA compliance than declarations of incompatibility.

Wider implications can be drawn from the analysis of the *Criminal Code*. By international standards, in most contexts, a statute that imposes a legal burden on the defendant to prove their innocence is likely to violate a defendant’s right to be presumed innocent. This indicates that many reverse onus provisions in ACT legislation imposing a legal burden on the defendant could be considered to violate s 22(1) of the HRA. This has far reaching policy implications, particularly in terms of the uncertainty it may create about the status of ACT legislation with reverse onus legal burdens. However, this has not proven catastrophic in the UK, and should largely be viewed as an inevitable part of re-aligning ACT laws with international human rights standards.

### Conclusion

The presumption of innocence in criminal trials is an internationally recognised human right. It requires that the prosecution bear the burden of proving the guilt of the accused beyond reasonable doubt. Australian common law does not adequately protect this right because it can be overridden by an Act of Parliament with reverse onus provisions. The ACT *Human Rights Act 2004* ('HRA'), as Australia's first Bill of Rights, has the potential to strengthen the presumption of innocence in the ACT. As a 'dialogue model' for rights protection, it aims to generate discussion across all arms of government about rights issues and protection. It enables defendants who have been charged under reverse onus provisions to challenge the legislation in court on the grounds that their right to be presumed innocent under s 22(1) of the HRA has been denied.

As s 22(1) of the HRA is yet to be challenged in court, this thesis has outlined the likely steps the courts will follow in interpreting this section. Analysis in this thesis, which has drawn heavily on jurisprudence from other common law jurisdictions with Bills of Rights, indicates that reverse onus provisions imposing a legal burden on the defendant to prove their innocence are likely to be considered a violation of the presumption of innocence. How ACT courts will deal with such a violation depends greatly on statutory interpretation techniques adopted under s 30 of the HRA. Courts could follow the expansive approach taken in the United Kingdom, enabling legal burdens to be read as evidential burdens even when it is clear that Parliament intended the former. Alternatively, courts could adopt the purposive approach of the NZ courts and defer to the legislature when it is clear that a legal burden was intended. A possible consequence of this restrictive approach could be that more declarations of incompatibility would be issued, requiring the Attorney-General to report to

Parliament on the breach. However, there are no guarantees that the Legislative Assembly would consequently amend statutes to achieve rights consistency.

This thesis argues that an expansive approach to statutory interpretation will best realise the potential of the HRA to protect the presumption of innocence in the ACT. This would result in reverse onus legal burdens in legislation being read down to impose evidential burdens to achieve rights-consistency. For example, s 604 of the *Criminal Code 2002* (ACT) would be read as requiring the accused to raise sufficient evidence to point to his or her innocence (at which point the prosecution would be required to prove guilt), instead of requiring the accused to prove their innocence on the balance of probabilities. In this way, human rights compliance could be achieved through the more flexible and efficient method of statutory interpretation. This would compliment the measures introduced by the HRA to improve rights scrutiny and awareness outside courts.

Reverse onus provisions are a relatively common feature of ACT legislation. Because these provisions deny those accused of criminal offences the right to be presumed innocent they raise significant human rights issues. Section 22(1) of the HRA has the potential to remedy the rights violations caused by reverse onus offences, both through litigation and by creating a culture of rights in the ACT. When the first reverse onus provision is tested in court it will prove an important litmus test on of the efficacy of the HRA as a rights protection instrument. By examining a single right under the HRA this thesis has illustrated the great potential for courts to seize the opportunity presented by the HRA and take bold steps in safeguarding human rights in the ACT.

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