THE ONUS OF PROOF ON A DEFENDANT - A LEGISLATIVE SCRUTINY VIEW

*Peter Crawford**

Devotees of Rumpole of the Bailey will be aware of his much loved plea to the jury in which he emphasises the 'golden thread' of British justice that the accused is presumed innocent until proven guilty beyond reasonable doubt. The golden thread appears sometimes to be in danger of being severed when provisions in proposed legislation reverse the onus of proof in criminal prosecutions.

At common law, it is ordinarily incumbent on the prosecution to prove to the court all the elements of an offence beyond reasonable doubt and the accused is not required to prove anything. Provisions in some legislation, however, reverse this onus of proof and require the person charged with an offence to prove some matter to establish innocence.

The Senate Standing Committee for the Scrutiny of Bills generally considers the reversal of the onus of proof in criminal matters as breaching the first principle in its terms of reference because such a provision 'may trespass unduly on personal rights and liberties'[1].

The Committee over the years has developed its ideas with respect to the reversal of the onus of proof. Initially, the Committee endorsed the view expressed in *The burden of proof in criminal proceedings*, a report of the Senate Standing Committee on Constitutional and Legal Affairs published in 1982:

> The [Constitutional and Legal Affairs] Committee is of the opinion 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 [or she] 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 the role.[2]

In its *Annual Report 1986-87*, the Committee stated that it would regard as acceptable the imposition of a persuasive onus of proof on a defendant if:

- the matters to be raised by way of defence by the accused [are] peculiarly within the knowledge of the accused; and
- it would be extremely difficult and costly for the prosecution to be required to negative the defence.[3]

In the report, the Committee indicated that, while it was adopting a new policy in relation to reversals of the onus of proof, it would be no less vigilant in relation to clauses which imposed the persuasive onus of proof on the defendant in criminal proceedings. It indicated that it would continue to examine such provisions carefully to ensure that the onus was only reversed in the circumstances it had outlined and that it would continue to draw the attention of the Senate to any examples falling outside those guidelines.[4]

* *Peter Crawford is the Secretary to the Senate Standing Committee for the Scrutiny of Bills. Any views expressed in the paper are those of the author and not those of the Committee.*

Toward the end of 1992, the Committee became concerned about what it perceived to be an increasing tendency in Commonwealth legislation to reverse the onus of proof. In its *Nineteenth Report of 1992*, in the context of discussing certain provisions of the Tobacco Advertising Prohibition Bill 1992 which involved a reversal of the onus of proof, the Committee stated that it was concerned that:

> there is an increasing tendency to reverse the onus in relation to such provisions. While the justification given, in most cases, appears reasonable, the Committee notes that the same justification is equally applicable in relation to murder and other serious offences. The expanding use of the reversal of onus in legislation is, therefore, a matter of great concern to the Committee.[5]

At the First Australasian and Pacific Conference on the Scrutiny of Bills, in July 1993, Senator Amanda Vanstone, acting Chairman of the Scrutiny of Bills Committee, delivered a paper, titled *Innocent until proven guilty*.[6] She began by contrasting the theory of the presumption of innocence with the all too frequent practice in our society of prejudging people as guilty of crimes on the basis of newspaper or other stories or prejudices.

She commented on the increased use of reversal of the onus of proof provisions over the period since 1982[7]. She suggested, however, that there is some difficulty with accepting as a justification that the facts as to a particular matter are peculiarly within the knowledge of the defendant, as 'that is often true of murder or bank robbery'.

Instead she suggested that it is really a question of proportionality - a question of balancing the cost and difficulty of making the Crown take the burden of proof, the wrong that the law seeks to prevent and the penalty involved.

Since May 1993, the beginning of the 37th Parliament, the Scrutiny of Bills Committee has commented on 17 clauses containing a reversal of the onus of proof.

One in particular merits closer examination - the proposed changes[8] to the *Student Assistance Act 1973*. As the proposed offence was one of strict liability, the issue was not whether the facts were peculiarly within the knowledge of the accused. The Committee's reasoning can be seen as applying the principle of proportionality. This comparatively recent example shows the Committee's approach. The Committee examined the circumstances surrounding the provision to see whether the advantage to be gained by the provision outweighed the injury to personal rights. It was then able to form an opinion whether the harm to personal rights by reversing the onus of proof could be considered unduly to trespass on them.

In its *Alert Digest No. 6 of 1994* the Committee noted that the proposed amendments would have introduced a significant change in the system of criminal and civil sanctions which related to the payment of student assistance. The Committee was concerned that the new arrangement would be a retrograde step, imposing a more onerous level of obligation on recipients under the threat of what, in the circumstances appeared to be an inappropriate penalty - one year's imprisonment.

By way of background, the Committee pointed out that :

- Section 48 of the *Student Assistance Act 1973* imposes an obligation on a recipient of a student assistance payment to notify the Department of the happening of any event which has been prescribed by regulation. The student is not required to know the law in detail but is given a list of events to notify. Upon notification, the

Department adjusts or cancels payments.

- Section 49 provides for a series of five offences with a penalty of imprisonment for a year. Four of the offences require the person to act knowingly or recklessly in connection with obtaining a payment or deceiving an officer. Currently the fifth (which the Bill proposed to omit) forbids a person, without reasonable excuse, to fail to notify an event prescribed under section 48.

- The Bill proposed, in place of the failure-to-notify offence, to substitute an offence of strict liability of receiving a payment that is not payable (whether in whole or part) subject to certain statutory defences which, of course, reversed the onus of proof.

The Committee indicated that there were two elements in the proposed offence: the offence would have been 'committed' where, first, there had been an amount received in a person's bank account and, secondly, the amount had not been payable (whether in whole or part).

Whether or not an amount is payable under the student assistance scheme requires a detailed knowledge of the law and the regulations. In some cases, this question has taxed the finest legal minds in the land. The current scheme requires that the student be given a list of events with the relatively simple obligation to notify if any of those events occurred. The Committee was concerned that, under the proposed amendment, the student would not know if he or she had committed a crime unless he or she had a detailed knowledge of the law and the many regulations made under the law.

In respect of the defences, the Committee was equally concerned at the imposition of a new and onerous level of obligation.
The Committee noted that it would not be unusual for the decision to prosecute to be made many months after the discovery of an overpayment. The discovery itself may not occur for some months after the payment is received. At such a distance in time, it may be impossible for the student to prove any of the defences which the statute would offer.

The proposed defences were:

- the event was notified in accordance with section 48;

- a reasonable and timely effort was made to notify the Department of the receipt of the payment and of the fact that the payment was not payable or may not have been payable;

- because of circumstances beyond the person's control he or she has been unable to make a reasonable and timely effort to notify the Department as mentioned in the second defence.

The Committee made several points. It would not be prudent for a student to notify an event by telephone. The student would have no record of such a conversation and it is not unknown that either no record is made by the Department or that such a record is later not able to be found. It would be prudent to keep a certified copy of any notification sent to the Department and to send it by certified mail.

The second defence itself (by suggesting that recipients should notify the Department where there is doubt about a payment or the amount) underlined the inappropriateness of the scheme: perhaps the logical corollary would be that the prudent student ought to notify the Department of the receipt of every payment in case it may not have been payable in whole or in part - whether a payment is payable and what the correct rate is where an income test applies may require a knowledge of the system well beyond the competence of many students.

The Committee reiterated its view that the defences put too onerous a burden of proof on the recipient and that the proposal to make the bare receipt of an overpayment a criminal offence, and one of strict liability, was both unprecedented and unwarranted. Accordingly, the Committee sought the Minister's reconsideration of the scheme.

Following its usual practice, the Committee drew senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

In the event, the offending provisions were debated and deleted by the Senate[9] (with the Government's concurrence) but for other reasons the Bill was laid aside.

By way of conclusion, three points can be made. One is illustrated by Senator Robert Bell when he said during debate in the Senate on this Bill[10]:

> I think this a drastic case of overkill because the offences are likely to be in the order of a few dollars here and there, perhaps a couple of hundred in extreme cases; they are certainly not likely to be great crimes against humanity or things which will affect hundreds of other people. It is a particularly heavy sledgehammer which has been brought to bear on this walnut.

Clauses which breach the Committee's terms of reference often arise from convenient solutions to administrative problems. There is, however, often a healthy tension between the attractiveness of a convenient solution to a problem and the experience that resulted in the establishment of the Committee: the experience that attractive solutions sometimes have a downside of trespassing unduly on personal rights.

The second point has to do with the value of precedent. It was important that the Senate debated and rejected the provisions, even though the Bill was laid aside for other reasons. The Committee, on asking ministers why a clause trespassing on personal rights should not be considered to do so unduly, is frequently told that what is proposed is already in other legislation. It is not an argument that finds favour with the Committee, not least because the 'precedent' legislation frequently pre-dates the formation of the Committee in 1981 or arises through last minute government amendments too late to be examined by the Committee.

Thirdly, although in this instance the Committee's views were accepted by the Senate, it must be remembered that the Committee sees its role as one of alerting senators to possible breaches of its terms of reference: while the reversal of an onus of proof may be a trespass on personal rights and liberties, whether in a particular case it unduly trespasses is ultimately a political decision that is properly resolved by debate in the chamber.

Endnotes

1 The Committee's terms of reference are contained in the Senate's Standing Order 24. By that order, the Committee is required to report to the Senate on whether clauses of bills trespass unduly on personal rights and liberties; make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; make rights liberties or obligations unduly dependent on non-reviewable decisions; inappropriately delegate legislative powers; or insufficiently subject the exercise of legislative power to parliamentary scrutiny.

2 Parliamentary Paper No. 319/1982, p 47.

3 Parliamentary Paper No. 443/1987, p 22.

4 ibid, p 22.

5 Senate Standing Committee for the Scrutiny of Bills, *First to Twentieth Reports of 1992* (Parliamentary Paper no. 546/1992), p 603.

6 Published in the *Proceedings of Fourth Australasian and Pacific Conference on Delegated Legislation and First Australasian and Pacific Conference on the Scrutiny of Bills.*

7 Scrutiny of Bills function commenced in the Senate in November 1981.

8 Items 48, 49, 50 and 53 of the Schedule to the Student Assistance Amendment Bill 1994.

9 Senate Hansard 11 May 1994 pp 586-591 and 673-674.

10 ibid, p 673.