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# *"Changes to the Burden of Proof, Presumptions and the Need for Deeming Provisions – can lawyers assist?"*

*by*

***John Birch and Michael Fox***

*(Crown Prosecutors, Office of the Director of Public Prosecutions (NT), Alice Springs)*

# INTRODUCTION

The presumption has been described as "the slipperiest member of the family of legal terms, except for its first cousin, burden of proof": McCormick on Evidence. Edmund Morgan claimed that "Every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness, and has left it with a feeling of despair".

# PRESUMPTIONS

Presumptions are modes of proof. Professor Cross states succinctly that a presumption "denotes a conclusion that a fact (conveniently called the 'presumed fact') exists which may, or must be drawn if some other fact (conveniently called the 'basic fact') is proved or admitted." The law attached artificial weight to the basic fact in using it as the foundation of the presumed fact. This artificial weight may stem from an understanding based on general experience of probabilities, or it may rest on the need to promote a particular social policy. In either case, it is the fact that artificial weight is being added to the basic fact, so that the presumed fact must be found to exist unless the presumption is rebutted, which is significant.

Consider for example the presumption of death. It is well established that where there is no evidence that a person was alive during a period of at least seven years, then if it can be proved that there are other persons who would have been likely to have heard from him during that period, that they have not heard from him, and that due inquiries have been made, then that person will be presumed to be dead for the purposed of subsequent litigation. Artificial weight is attached to the figure of seven years. If the person in question were missing for only six years and eleven months, the presumption of death would not arise, and the trier of fact would decide the issue on the weight of the evidence as a whole. A finding of death might or might not be recorded. Where the presumption arises a finding of death must be recorded (unless the presumption is

rebutted) even if the trier of fact is not satisfied that the probabilities are that the person missing for seven years is dead.

There are rules of law that are often loosely described as presumptions, though in fact they do not operate in the same way as real presumptions. So-called irrebuttable or conclusive presumptions are a clear example. In New South Wales and Victoria it is conclusively presumed that no child under the age of eight years can be guilty of a criminal offence, as a result of legislation to this effect. To all intents and purposes this is not a presumption but simply a rule of law that someone under the relevant age cannot be convicted of an offence. Likewise in the Northern Territory the Criminal Code provides a person under the age of 10 years an excuse from criminal responsibility which again is not a presumption but a rule of law.

The so-called presumption of innocence is another example of a rule of law incorrectly described as a presumption. This doctrine simply reflects the incidence of the burden of proof in a criminal prosecution. The phrase is often used in the judge's charge to the jury, and this may not be a bad thing in that it amplifies the requirement that the jury be satisfied "beyond reasonable doubt". But conceptually it is not sound.

These presumed facts must be accepted by courts either absolutely, [for example - that no child under a stipulated age can commit an offence; ***Qld Criminal Code*** see 29 (age 10); ***Tas Criminal Code*** see 181(1) (age 7); ***WA Criminal Code*** see 29 (age 7)], that is, the presumption is irrebuttable or conclusive, or until the court is persuaded otherwise (persuasive presumptions) or until credible evidence to the contrary is adduced (evidential presumptions). Presumptions are therefore a technique for allocating burdens of proof on particular issues of fact. Such presumptions merely represent another way of expressing the general rules of allocating burdens of proof to be found in ***Woolmington v DPP [1935] AC 462***. In ***Axon v Axon [1937] 59 CLR 395*** Dixon J considered the use of presumptions to determine the incidence of a burden of proof and the approach a court should take in such a determination:

(1) *The plaintiff as claimant bears the persuasive burden of proving the validity of A's marriage to B.*

(2) *On proof of the ceremony between A and B the presumption of essential validity requires the defendant to carry the evidential and persuasive burdens of proving that the marriage is invalid.*

(3) *The defendant can establish this invalidity by showing first that A was previously validly married to C and second that C was still alive when A married B.*

(4) *Evidence of the ceremony between A and C establishes the first issue (casting evidential and persuasive burdens upon the plaintiff to show invalidity) so that the major issue upon which the defendant bears the evidential and persuasive burden is that C was alive when A married B.*

(5) *If C had not been heard of for seven years prior to A's marriage to B it is arguable that C is persuasively presumed dead at this time, but this is of no assistance to the defendant who already carries the persuasive burden of showing C alive at this time. As a means for determining the incidence of the persuasive burden on the issue of the life of C the presumption of death in these circumstances is a separate issue.*

(6) *The question is thus whether on the facts it can be inferred (on the balance of probabilities) that C was still alive at the relevant time. The trier of fact must decide whether to draw an inference that C's life continued to this time, based upon factors such as the health and age of C and the circumstances of C's disappearance, or to rather infer death from the nature of the absence. These are questions of fact. The inference that A acted innocently in marrying B on the assumption that C was dead does not as a matter of evidence appear to take the matter much further. No presumption of innocence in the sense of determining the incidence of the burden of proof applies in a civil case such as this.*

Analysed in this way presumptions assist in determining the incidence of the burden or proof upon the vital issue in the case, but once so isolated and the burden is determined, the decision becomes one of fact, not presumption.

Presumptions only arise where there are good reasons for placing the burden of proof on one party rather than another. They embody reasons for allocating the burden of proof one way rather than another. The reasons for placing burdens, particularly

persuasive burdens, upon an accused in a criminal case must be very convincing. In ***Dillon v R [1982] AC 484*** the Privy Council refused to allow the prosecution to rely upon a presumption that officials had acted lawfully, an issue central to the charge of escape from lawful custody. On the otherhand in ***Pertl v Kahl [1976] 13 SASR 433*** the presumption that ***all acts are presumed to have been done rightly and regularly*** was invoked to presume that the Commissioner for Taxation had validly delegated his authority to a Deputy Commissioner for the purposes of tax prosecution, in the absence of credible evidence to the contrary from the accused. And the evidential presumption that commonly used scientific instruments, such as speedometers, are accurate has been applied in criminal proceedings ***Thompson v Kovacs [1959] VR 229***; ***Redman v Kleen [1979] 20 SASR 343***.

**Deeming Provisions**

We frequently talk of rebuttable or irrebuttable presumptions, of presumptions of fact or of law, of legal, persuasive or evidential presumptions, or of strong or weak presumptions. It is best in the law of evidence, to regard the presumption as constituting a short cut to proof . When the short cut (presumption) does not allow its presumed fact to be contradicted by other evidence, it is better to call it an irrebuttable presumption. Irrebuttable presumptions should not be the concern of evidence lawyers as they stipulate the legal result in certain situations which result in the creation of a ***Deeming Provision***.

Deeming provisions are often interpreted as establishing irrebuttable presumptions: see for example ***Cooper & Dysart Pty Ltd v Sargan (1991) 5WAR 472***. Such provisions have been criticised by the Courts. In *MacCormick v Federal Commissioner* Murphy J observed:

> *"Ordinary presumptions, that is, rebuttable presumptions of fact, are useful, and almost indispensable for the operation of an efficient legal system. Conclusive presumptions are dangerous: they prevent any judicial investigation of the matter conclusively presumed, even where it is disputed."*

On the otherhand Deeming Provisions not being conclusive presumptions but rebuttable presumptions which require the indicated fact to be found upon proof of indicated basic facts, unless the opponent contradicts either the basic facts or the presumed facts. They are usually to be found in the substantive law to which they relate. Narcotics legislation, for example, often creates presumptions that a person possessing more than a small amount of prohibited substances intended to supply them to others. The New South Wales Drug Misuse and Trafficking Act provides:

***Section 29***

A person who has in his or her possession an amount of prohibited drug which is not less than the traffickable quantity of the prohibited drug shall, forthe purposes of this Division, be deemed to have the prohibited drug in his or her possessions for supply, unless-

(a) the person proves that he or she had the prohibited drug in his or her possession otherwise than for supply; or

(b) except where the prohibited drug is prepared opium, cannabis leaf, cannabis oil, cannabis resin, heroin or 6-monoacetylmorphine or any other acetylated derivatives of morphine, the person proves that he or she obtained possession of the prohibited drug on an in accordance with the prescription of a medical practitioner, dentist or veterinary surgeon.

Section 29 does not create an offence. It is an evidentiary provision designed to facilitate proof of the offence of supplying a prohibited drug under s 25. Under s 29 it is for the prosecution to prove beyond reasonable that the accused had in his possession a quantity in excess of the traffickable quantity of the drug in question. The accused is then liable to be convicted of supplying the drug contrary to s 25 unless he proves the circumstances in s 29. These circumstances must be proved by the accused on the balance of probabilities. ***R v Carey*** **(1990) NSWLR 292 at 294**. By reason of s 4 of the Act (dealing with admixtures) it is not necessary that the prosecution prove the

actual amount of the particular drug which the defendant had in his or her possession, but only the amount of substance which contained a prohibited drug: ***R v R* (No 2) (1990) 19 NSWLR 573.**

In relation to analogous ACT legislation, it has been held that the Crown was not required to elect whether to rely upon the statutory presumption of possession for the purpose of supply or upon evidence tendered to positively establish the purpose. A party bearing the onus of proof may rely upon a presumption and upon actual evidence tending to establish the fact to be proved: ***R v Hughes & Curtis* (1983) 10 A Crim R 125.** Where the prosecution is relying upon deemed supply, evidence may be given of actual supplies by the accused, although the jury should be given a strong warning as to the relevance of the evidence: ***R v Agic* (CCA(NSW), 18 May 1992, (unreported)** where the evidence of actual supplies by the accused was held to be relevant to whether the accused had the drug for his own use.

From the perspective of evidence law, the easiest way of thinking of presumptions is to ask how strong each of them is. Some are very easy to displace. Some legislative presumptions, for example, state that the presumed fact shall be inferred from proof of the basic fact, "unless evidence sufficient to raise doubt about the presumption is adduced. If they are very strong, then their net effect is to place a legal burden of proof upon the party opposed to the presumed fact": **McCormack V Federal Commissioner of Taxation (1979) 143 CLR 284 at 314.** It is worth noting here that a presumption which has the effect of reversing the legal burden operates with regard to specific facts, no matter which party is seeking to rely on it. So a plaintiff who raises a strong presumption has effectively cast upon the defendant the legal burden of disproving the presumed fact. In all other respects, the normal rules as to the incidence of the burden of proof will apply.

# BURDEN OF PROOF

## INTRODUCTION

The term Burden of Proof has two separate meanings. In the first meaning burden of proof is used to indicate which party bears the onus of raising factual hypotheses or issues for consideration of the Court. In Australia this is usually referred to as the evidential burden.

The term burden of proof is also used when ascertaining which party bears the onus of persuasion. In other words which party has to persuade the trier of fact to the requisite standard. In a criminal case it is usually the prosecution who bears the burden of persuading the trier of fact beyond reasonable doubt.
The term burden of proof used in this context is usually a reference to the legal burden or persuasive burden.

The burden of proving guilt beyond reasonable doubt generally rests upon the prosecution from first to last. In criminal cases when the prosecution establishes a prima facie case the burden of proof does not in the absence of some statutory provision on the subject shift to the accused. A finding that a prima facie case has been made out is a finding of law that on the evidence as it stands the accused could be convicted of the offence charged. Whether he ought to be convicted depends upon the tribunal of fact being satisfied beyond reasonable doubt the accused is guilty

See *May & O'Sullivan (1955) 92 CLR 654*

## EXCEPTIONS TO ASSIGNING THE CRIMINAL BURDEN

A fundamental requirement of any judicial system is that the person who desires the Court to take action must prove the case to the satisfaction of the Court. The legal

burden of proving all elements essential to an allegation normally rests upon the prosecutor in criminal proceedings.

In ***Woolmington v. DPP [1935] AC 462*** Lord Sankey LC stated;

> *Throughout the web of the English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.*

see also: ***Dowling v. Bowie 1952 86 clr 136***

***Chugg v. Pacific Dunlop Ltd 1990 170 CLR 249 at 257***

## THE INSANITY EXCEPTION

By S.6 of the NT Criminal Code every accused person is presumed to be of normal mind and to have been of normal mind at any time that comes in question until the contrary is proved.

The accused bears the legal burden under S.37 NT Code which provides for the defence of diminished responsibility. The accused must persuade the jury on the balance of probabilities that he was not of normal mind at the relevant times. This is in line with the general principle that where the accused does bear a legal burden it is to be discharged by evidence meeting the civil standard.

This is specifically provided for by S. 440 NT Code.

Difficulties arise where the legal burden is divided between the prosecution and the defence. As was stated by Mason CJ, Brennan, Dean Dawson and Gaudron JJ in ***Hawkins v. R (1994) 122 ALR 27***;

> *"Where there are two available avenues of complete excuse for an incriminated act, one placing the onus of proof on the prosecution, the other placing the onus on the defence, it is not surprising that great difficulties in theory and practice have arisen (as Sir Owen*

> *Dixon foresaw in his paper, 'A Legacy of Hadfield, McNaghten and Maclean (1957) 31 ALJ 255) One basis for distinguishing between the two avenues of excuse is to confine the relevance of mental disease to the defence of insanity, denying it's relevance to the issue of voluntariness. This has been the solution adopted in most if not all jurisdictions. The solution requires of course, the determination by the Court of the character of any mental abnormality the existence of which is proved or raised by the evidence."*

The defence of automatism is viewed differently from that of insanity. If the automatism is said to relate to a "disease of the mind" then this effectively amounts to an insanity defence and the legal burden rests upon the accused.

Where both sane and insane automatism is raised on the evidence the jury must be directed to determine whether the prosecution has disproved sane automatism beyond reasonable doubt. If not then the accused is entitled to an acquittal. However if the jury are satisfied there is no such reasonable doubt then they have to consider whether the defence has proved insanity on the balance of probabilities.

In ***R v. Falconer (1990) 171 CLR 30*** the Court was concerned with characterising the condition that affected the voluntariness of the accused discharging a firearm that caused the death of the deceased. The issue arose because the evidence of the accused's mental state at the relevant time was insufficient to raise non-insane automatism under S.23 of the WA Code. It was clear that the same abnormality could not give rise to issues of voluntariness and insanity at the same time. The court held that the evidence was capable of giving rise to an issue of voluntariness.

It is not open for the Crown to lead evidence of insanity where the issue of insanity has not been raised by the accused. The proper time for the prosecution
to call evidence as to the accused's sanity is in rebuttal. The prosecution can be permitted to call evidence at the close of the Crown case to prove sanity where it appears from the cross examination or otherwise that a defence of insanity will be relied upon and that the defence does not intend to call evidence.

In the Northern Territory whether or not the evidence discloses a state of abnormality of mind is a question for the jury. Generally the issues involved are highly complex with

evidence called by both defence and prosecution from a variety of psychiatrists, psychologists and other medical experts. This plethora of expert testimony often leads to juries being confused on issues of insanity with the resultant effects upon justice for both the accused and the community.

In Queensland, under Part 4 of the Mental Health Act, an alternative procedure for the resolution of whether a person was, at the time an indictable offence was committed, suffering from unsoundness of mind or, in the case of murder, suffering from diminished responsibility or whether the person is fit to stand trial.
The legislation establishes a Mental Health Tribunal constituted by a Supreme Court Judge assisted by two psychiatrists, which is empowered to enquire and determine such issues.

The Mental Health Tribunal can order psychiatric, medical or other examinations of persons referred to it. The Tribunal can also order that all reports obtained including reports other than those it has ordered, be supplied to all parties.
Evidence compulsorily obtained is admissible in any subsequent trial

The standard of proof of unsoundness of mind required in any proceedings before the Mental Health Tribunal is proof on the balance of probabilities but such a finding should be made only in reliance on clear and convincing evidence and a firm satisfaction consistent with the gravity of the proceeding.
(See ***R v. Schaferius [1987] 1 Qd R 381***)

The option of having the issues determined by a jury still remain. The alternate Queensland procedure appears to be a sensible and efficient manner of resolving issues of insanity and diminished responsibility.

## THE STATUTORY EXCEPTIONS

Numerous statutory exceptions to the prosecution bearing the burden of proof appear in the statutes of the NT. Many of these provisions relate to regulatory offences in the Traffic Act etc.

The most significant provisions appear in the Criminal Code, the Evidence Act and the Justices Act.

Courts have tended to view with suspicion attempts by the legislature to water down the basic requirement that the burden of proof rests upon the prosecution. Where issue is taken with a statutory exception the contest will largely focus upon the structure of the words utilised in the statutory provision and whether or not the provision actually reverses the onus of proof away from the prosecution to the defendant. The intention of the legislature is also important as this will determine the provision's construction by taking account of the public policy behind it.

Apart from the situations where the legislature has expressly reversed the burden of proof, it is often difficult to predict when a court will decide that the parliamentary intent was to assign the burden of proof on the defence. Whether this is achieved by the legislation is a matter of statutory interpretation from case to case. The High Court and the House of Lords have emphasised that whether any burden is placed upon the accused depends upon the intention of the legislature obtained from the words and policies of the legislation under consideration See ***Dowling v. Bowie (1952) 86 CLR 136 & R.v. Hunt [1986]WLR 1115 (HL)***

### Interpreting Legislative Intent

The Courts have developed various guidelines for determining legislative intent in respect to the incidence of the burden of proof particularly in criminal cases.

Of some significance is the rule in ***Jarvis 1756 102 ER 249;***

> *It is a known distinction that what comes by way of proviso in statute must be insisted upon by way of defence by the party accused; but where exceptions are in the enacting part of the law it must appear in the charge that the defendant does not fall within any of them.*

Originally only a rule of averment in criminal cases, because of the close connection between burdens of pleading and burdens of proof, it was subsequently extended to include the latter.

This rule is embodied in S.56 of the NT Justices Act which relates to proceedings before Magistrates. Despite S.56, if a matter accompanies the description of an offence, then it will ordinarily be construed as an element of the offence which the prosecution must prove, unless there is something in the form of the language used or in the nature of the subject matter to suggest that it is an exception upon which the defendant bears the onus of proof.

**(i) Where an offence is expressed as subject to exception, excuses or provisos this may indicate an intention to impose an evidential or persuasive burden on the accused.**

The difficulty arises when determining what is a proviso. In both summary and indictable matters the courts do not rely simply on formal wording in the legislation in deterring what is a proviso. Where a statute having defined the grounds of some liability it imposes, proceeds to introduce by some distinct provision, a matter of exception or excuse, it lies upon the party seeking to avail himself of the exception or excuse to prove the facts which bring his case within it. See ***Dowling v. Bowie (1952) 86 CLR 136***

***Vines v Djordjevitch (1955) 91 CLR 512*** made some distinction between provisos and exceptions:

> *"'There is a technical distinction between a proviso and an exception which is well understood. All the cases say, that if there be an exception in the enacting clause, it must be negatived: but if there be a separate proviso, it need not" per Abbott J. in Steel and Smith*

> *(1). The distinction has perhaps come to be applied in a less technical manner, and now depends not so much upon form as upon substantial considerations. In the end, of course, it is a matter of the intention that ought, in the case of a particular enactment, to be ascribed to the legislature and therefore the manner in which the legislature has expressed its will must remain of importance. But whether the form is that of a proviso or of an exception, the intrinsic character of the provision that the proviso makes and its real effect cannot be put out of consideration in determining where the burden of proof lies."*

Form of expression will be taken into account ***[see Ex parte Ferguson;Re Alexander (1944)SR (NSW) 64 at 66-7*** however Courts will go behind the express words and determine as a matter of substance and policy whether an issue is a distinct issue by way of defence upon which parliament may have presumed the accused to bear the burden.

**(ii) Where an offence comprises negative averments of matters peculiarly within the knowledge of the accused this may be indicative of an intention to place some burden on the accused**

Another guideline for interpreting legislative allocation of the burden of proof is provided by the case of ***R. v. Turner 105 ER 1026 at 1028*** which established the proposition that the defence should be put to proof on matters within the "peculiar knowledge" of the accused. This is not a definitive rule as expressed by Scholl J in ***Everard v. Opperman [1958] VR 389 at 394***. Nevertheless the knowledge of the parties is a significant factor in determining whether parliament intended the accused to bear a persuasive burden.

In ***Chugg v. Pacific Dunlop Ltd 170 CLR 249 at 258-259*** the High Court held that if the matter is a matter peculiarly within the knowledge of the defendant then that may provide a strong indication that it is a matter of exception upon which the defendant bears the onus of proof.

An example of where the prosecution has been relieved of the necessity to prove a particular within the knowledge of the defendant is the NT case of ***Marshall v. Rennie***

*& Anor 25 ALR 116*. This case concerned a charge of unlawful use of a motor vehicle. The Court held that the essential elements of the offence are a using of the motor vehicle without the consent of the owner. and that reasonable excuse may provide an exception within S.56 Justices Act. It was held that the onus was on the prosecution to prove the lack of consent however the exception of reasonable excuse was for the defendant to prove .

A difficulty with the "peculiar knowledge" criterion for implying the reversal of the legal burden is that it assumes that the accused does actually have such knowledge yet there is no evidence taken to establish there is indeed "peculiar knowledge". And if such evidence were taken, this could create greater confusion as the legal burden would be allocated on the basis of the facts of the case.

The rule is not definitive and in some cases the Courts have adopted a fairness approach to the "peculiar knowledge" argument. For example in DOWLING v. BOWIE the High Court considered it easier and fairer for the prosecution to establish that an Aborigine had not been declared exempt for the purpose of the sale of liquor despite the fact that this was a matter within his knowledge.

**(iii) Use of the term "proof to the contrary" in legislation is generally indicative of a persuasive burden upon the accused.**

Terms often used in the statutory exceptions have been determined by the Courts. The use of the term" proof to the contrary" in legislation is generally indicative of a persuasive burden upon the accused.

In *(Crawford Earthmovers v. Fitzsimmons 4 SASR 1972 116 at 149* it was stated:

> *"When the section makes the allegation in the complaint proof of the fact alleged 'in the absence of proof to the contrary', I think that this requires something more than evidence which raises a reasonable doubt in the mind of the Court. Once the allegation is made in the complaint, then in relation to the fact alleged the onus is cast upon a*

*defendant to prove on the balance of probabilities, that the truth is different from the facts alleged"*

Also the High Court decision of ***Gabriel v. Ah Mook [1924] 34 CLR 591 at 594*** discussed the significance of the term "proof to the contrary".

When the legislation requires a party to "prove" an issue, this is interpreted to involve the persuasive burden and where this burden falls upon the accused the standard of proof is the civil standard.

**(iv) Where an allegation itself constitutes prima facie evidence of the commission of an offence, the accused must satisfy an evidential burden to put the allegation in issue.**

The High Court has held that such a provision does not place upon the accused the onus of disproving the facts upon which his guilt depended, but while leaving the prosecutor the onus of establishing the ingredients of the offence beyond reasonable doubt, it provided in effect that the allegations of the prosecutor were sufficient to discharge that onus.

See ***R v. Hush; ex parte Devaney [1932] 48 CLR 487.***

**(v) Where an exception sets up a new or different subject matter from the subject matter of the rule, it is more likely that a burden is placed on the defence.**

Such is ordinarily the case where there is a prohibition on the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with a licence or permission of specified authorities.

In the High Court case of ***Darling Island Stevedoring & Lighterage Co. Ltd and Jacobsen [1945] 70 CLR 675*** the issue in question was the liability of the company under the Workers Compensation Act for the death of an employee on his way to work. That act provides that the dependents of a worker who had died of an injury "without

his own default or wilful act" on his journey to work would receive compensation. The Court held the employer bore the onus of proof of this qualification of "without his own default or wilful act" because this involved a new factor which would otherwise be irrelevant, that is, the causation by conduct on behalf of the deceased. The primary grounds of liability for compensation remained but their consequence was avoided by the addition of a new and special fact. Thus the employer (respondent) bore the onus of proof.

(vi) **Where the legislative provision would entail the additional burden of anticipating several different possibilities then it is not likely that the burden of proof will fall on the accused.**

By way of illustrating this proposition the case of ***Chugg v. Pacific Dunlop Ltd [1990] 170 CLR 249*** is useful. This case concerned statutory provisions on work safety standards. The legislation in question concerned statutory provisions that the employer contravened the particular section if the employer failed to provide and maintain equipment and work systems that were as far as practicable safe and without risks to health.

The High Court held that it would be impossible to read into this legislation an intention to place the onus of proof on the issue of practicability on a defendant when that onus would entail the additional burden of anticipating and negating every possible means of avoiding or mitigating a risk or accident that might be raised in cross examination. The onus of proof lay with the prosecution.

**The NT Criminal Code and the Burden of Proof**

S.440 Criminal Code provides a statutory basis for the standard of proof.
The section states;

(1) Any matter that has to be proved by the defence in a trial must be proved on the balance of probabilities; otherwise the standard of proof is proof beyond reasonable doubt.

(2) Subsection (1) does not apply in relation to the proof of facts necessary for determining whether evidence should be admitted or excluded.

This section is predicated upon proof by the accused of a defence.

**Excuse Provisions under the NT Code**

The NT Criminal Code contains a number of excuse provisions in Sections 30-43. These provisions which include the excuses of provocation, accident, mistake of fact etc are defences that excuse the offender from liability. When dealing with excuse provisions the onus remains with the prosecution to negative the existence of such matters should any of these be relied upon by the accused. Although the persuasive onus rests on the prosecution, the evidential onus rests on the accused. This means that the defence are required to provide evidence of these excuses either through evidence in chief or cross examination of the prosecution witnesses or by evidence called on his behalf or by a combination of all these methods. Whether or not the defence have sufficiently raised the excuse defences is a question of law for the judge or magistrate to determine.

In relation to insanity the defence bear both the evidential onus and the persuasive onus. The relative standard of proof for establishing insanity is on the balance of probabilities. (See NT case of ***"P" [1991] 57 A CRIM R 211***)
It should be noted that this decision determined that pursuant to S.357 of the Code, where the Crown is aware of credible evidence raising a doubt as to an
accused's ability to understand the trial proceedings, it is incumbent on the Crown to notify the Court before the accused is asked to enter a plea. The Court held that the onus of proof is on the party raising the issue. For the Crown the standard is beyond reasonable doubt and for the defence on the balance of probabilities.

## S.129 (3) Criminal Code

This section provides a statutory defence that the accused believed the female complainant in a case involving sexual intercourse or gross indecency of a female under 16 years, was at least that age.

Subsection (3) states;

> *It is a defence to a charge of a crime defined by this section to prove that the accused person believed, on reasonable grounds, that the female was of or above the age of 16 years.*

This provision was central to the case of ***DPP v. Cole and another (1994) 100 NTR 1 (Nt Ct of Cr App)***. It was held that both the language of S.129(3) and the authorities relating to similar provisions elsewhere support the view that the burden of proof of the accused's belief that the female was at least 16 is on the accused. If all the elements of an offence under S.129(1) or (2) are proved by the prosecution beyond reasonable doubt and the accused fails to discharge the burden of proof under S.129(3) then the accused should be found guilty. The standard of proof resting on the accused is that upon the balance of probabilities. The onus is not upon the Crown to establish beyond reasonable doubt the absence of the particular exculpatory matter, but upon the accused to show that the matter is, on all the material in evidence, established on the probabilities

In construing the allocation of the burden under S.129(3) the Court relied upon the High Court decision of ***Dowling v. Bowie (1952) 86 CLR 136 at 139-140*** to interpret the statutory provision.

> *"that where a statute, having defined the grounds of some liability it imposes, proceeds to introduce by some distinct provision a matter of exception or excuse, it lies upon the party seeking to avail himself of the exception or excuse to prove the facts which bring his case within it.....The question, however, where in such cases the burden of proof lies may be determined in accordance with common law principles upon considerations of substance and not*

> *of form. A qualification or exception to a general principle of liability may express an exculpation excuse or justification or ground of defeasance which assumes the existence of the facts upon which the general rule of liability is based and depends on additional facts of a special kind. If that is the effect of statutory provisions, considerations of substance may warrant the conclusion that the party relying on the qualification or exception must show that he comes within it."*

**S. 9 Evidence Act and *Weissensteiner's case.***

Strictly speaking S. 9 of the Evidence Act does not impose any burden of proof upon the accused however it does relate to the accused's right to silence. S.9(3) provides that the failure of an accused person to give evidence shall not be made the subject of any comment by the Judge or by counsel for the Crown. As discussed in ***Weissensteiner 117 ALR 545***, this restriction may no longer be appropriate.

The right of a jury to take into account the silence of the accused does not stem from the right of the trial Judge to comment upon it. Even in jurisdictions where comment is prohibited such as in the Northern Territory, the jury may consider the accused's silence. The prohibition merely forbids the trial judge from reminding the jury that they may do so and informing them of the proper way in which they may do so.

The intent of the legislature in forbidding such comment is that it is in the accused's interests to prohibit comment upon his choice to remain silent than to allow it. However in a modern context where at least some of the members of the jury will know and be conscious of the fact that an accused can give evidence, this approach prohibiting comment may be mistaken. The jury may read more into the silence of an accused than they are entitled to and as a result the accused may be at a greater disadvantage than if comment by the trial judge were allowed.

In the words of Windeyer J. in ***Bridge v. R (1964) 118 CLR 615***

> *"An accused person is never required to prove his innocence: his silence can never displace the onus that is on the prosecution to prove his guilt beyond reasonable doubt. A failure to offer an explanation does not of itself prove anything. Nor does it, in any strict sense, corroborate other evidence. But the failure of an*

> *accused person to contradict on oath evidence that to his knowledge must be true or untrue can logically be regarded as increasing the probability that it is true. That is to say a failure to deny or explain may make evidence more convincing, but it does not supply its deficiencies. A direction by the judge on such matters...might no doubt be helpful to the accused in some cases"*

In the appeal case of ***Kops v. R;Ex parte Kops [1894] AC 650 at 653*** the Privy Council made the following observation;

> *"There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact that the prisoner has not tendered himself as a witness, it being open to him either to tender himself, or not, as he pleases. But on the other hand there are cases in which it appears to their Lordships that such comments may be both legitimate and necessary."*

It is not every case that calls for explanation or contradiction by evidence from the accused. It may be the situation that there are no matters peculiarly within the accused's knowledge.

It may be the situation that the prosecution case is deficient and the accused can simply remain silent and rely upon the onus of proof cast upon the prosecution.

The prosecution case in ***Weissensteiner v. R*** was entirely circumstantial. There was abundant evidence from which the jury might have concluded that the victim's were in fact dead. All contact with their respective families had ceased, their bank accounts had not been operated on and no trace of them was ever found. Upon the assumption that the victims were dead there was abundant evidence from which the jury may have concluded the accused had been involved in their deaths. The accused gave no evidence at his trial nor did he call any evidence. He was subsequently convicted of the murder of both victims.

In Queensland, where the trial took place, a trial judge is not precluded from commenting on the failure of an accused to give evidence as judges are in the Northern

Territory by the provisions of ***S.9 Evidence Act***. The appeal to the High Court was on the basis that the trial judge erred in directing the jury that they might more safely drawn an inference of guilt from the evidence because the appellant did not give evidence of relevant facts which could be perceived to be within his knowledge. In dismissing the appeal the High Court stated at ***p.552***

> *"...the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it. In particular, in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, it is exists at all, must be within the knowledge of the accused.*
>
> *Of Course, an accused may have reasons not to give evidence other than that the evidence would not assist his or her case. The jury must bear this in mind in determining whether the prosecution case is strengthened by the failure of the accused to give evidence. Ordinarily it is appropriate for the trial judge to warn the jury accordingly."*

Their Honours Brennan and Toohey JJ made the following observation ***at p.557***

> *"It is questionable whether, now that juries generally know that an accused has a right to testify, it is still conducive to the administration of criminal justice to prevent the judge from directing the jury about the limits of the use which they can make of an accused's failure to testify. However that may be, the Queensland legislation leaves a judge free in an appropriate case to comment on an accused's failure to give evidence."*

Perhaps there is some basis for suggesting that ***S.9 Evidence Act*** needs reviewing such that in appropriate cases comment can be made on the accused's failure to give evidence.

If comment was permitted, the judge could tell the jury that where the facts which they find to be proved by the evidence can support an inference that the accused committed the offence charged and where it is reasonable to expect that, if the truth were consistent with innocence, a denial, explanation or answer would be forthcoming, the jury may take the accused's failure to give evidence into account in determining whether the inference should be drawn. The jury should

also be told that the onus remains on the prosecution and that the accused is under no obligation to give evidence, but that it is legitimate to have regard to the
fact that the accused has given no evidence or satisfactory explanation of the Crown case when considering the safety or otherwise of making the inference of guilt on the prosecution evidence.

There is the opposing argument that any legislative interference with the right to silence is unwarranted. However for the reasons stated above there does appear to be good argument to permit some flexibility in permitting the trial judge to make the appropriate comments in those cases where the circumstances warrant it.

## THE ONUS AND STANDARD OF PROOF ON DISPUTED FACTS IN SENTENCING MATTERS

Generally speaking the prosecution bears the onus of proof in relation to circumstances of aggravation of an offence on the criminal standard and the defence bears the onus of proof in relation to circumstances of mitigation on the civil standard.

In recent times the law in relation to whom carries the onus of proof and to what standard in relation to disputed facts in sentencing hearings has become unclear. In ***R v. Ali [1996] 2 VR 49*** Callaway JA and Crockett AJA, held that the critical distinction, in relation to the burden and standard of proof of sentencing issues, is not between circumstances of aggravation and circumstances of mitigation but between the circumstances of the offender and circumstances of the offence. This approach has now been criticised by a full court comprising five judges of the Victorian Court of Appeal in the case of
***The Queen v. Storey (Unrep 109/96 6-12-96)***

Briefly the Court of Appeal held that the question which party bears an onus of proof may be one that arises only where there is some joinder of issue between parties to a suit and that there is no general joinder of issue, analogous to the joinder of issue on trial, in relation to sentence. The Court held it is not for the Crown to prove what is a proper sentence for the offender or to prove the facts that should be taken into account

in reaching such a sentence any more that it is for the offender to prove either of those matters. It is for the judge to find the facts which he or she considers affect the exercise of the sentencing discretion and then determine an appropriate sentence.

***Storey*** overruled the previously accepted decision of ***R v. Chamberlain [1983]2 VR 511.***

The High Court decision of ***Anderson v. The Queen (1993) 177 CLR 520*** is still applicable. In that case Deane, Toohey and Gaudron JJ said;

> *"If, on a sentencing hearing after a plea of guilty, the Crown wishes to rely on some alleged, but disputed, factual circumstance as aggravating the offence, the ordinary rule is that the onus lies upon the Crown to establish the existence of that circumstance. It is common ground, and rightly so, that the standard of proof rests upon the Crown in such a case in South Australia is the ordinary criminal standard, namely beyond reasonable doubt."*

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