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SUPPLEMENTARY LEGAL CONSULTATION ISSUE
SECTION 67(8) SUMMARY PROCEEDINGS ACT 1957 AND
THE PRESUMPTION OF INNOCENCE

INTRODUCTION

1. In the Criminal Procedure (Simplification) Project paper dated 21 December 2009 (at paragraph 222) we indicated that we would consult on possible reform of section 67(8) of the Summary Proceedings Act ("SPA").

2. Section 67(8) imposes on the defence the legal burden of proving the applicability of any exception, exemption, proviso, excuse or qualification, in any case tried summarily.

3. This paper considers whether or not section 67(8) remains a desirable feature of the New Zealand justice system, in light of the presumption of innocence in section 25(c) of the New Zealand Bill of Rights Act 1990 (NZBORA).

4. Our preferred option is to:

    4.1. remove the reverse onus currently applicable to summary cases; and

    4.2. apply the evidential rules currently applicable to indictable cases to all cases.

5. With the removal of the reverse burden in section 67(8), there will be a need to determine whether there are any specific offences that warrant a reverse onus specific to that offence. Agencies will need to consider the statutes for which they are responsible and determine whether any case for a reverse onus can be made in the light of the decision of the Supreme Court in *R v Hansen*.[1]

BACKGROUND

6. Section 67(8) of the SPA provides that:

> Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the enactment creating the offence, may be proved by the defendant, but, subject to the provisions of section 17 of this Act, need not be negatived in the information, and, whether or not it is so negatived, no proof in relation to the matter shall be required on the part of the informant.

[1] *R v Hansen* [2007] 3 NZLR 1

7. The wording of the provision was modelled on the then section 81 of the United Kingdom Magistrates' Courts Act 1952,[2] which set out to codify the common law position.[3]

8. As Butler and Butler have noted, "[g]enerally speaking, section 67(8) has been understood as placing an onus on an accused to prove the relevant exception, exemption, etc, on the balance of probabilities."[4] This can be contrasted with an evidential burden, which would only require an accused to point to sufficient evidence to satisfy a judge that the exception clause is a triable issue, after which the prosecution would need to discharge a legal or persuasive onus of negating the exception beyond reasonable doubt.

9. In determining whether a particular element of an offence is a form of exception or a core component of the offence itself, it is necessary to look at both the form and the intrinsic character of the provision and its real effect.[5] The key issue is not the particular language that is employed (for example, whether the word "excuse" is used) but rather whether the relevant component of the offence provision creates an exception or excuse in relation to an act that is otherwise regarded as culpable and completely prohibited. As it was put in *R (Sheahan) v the Justices of County Cork* [1907] 2 IR 5:

> Does the statute make the act described an offence subject to particular exceptions, qualifications etc, which, where applicable, make the prima facie offence an innocent act? Or does the statute make an act, prima facie innocent, an offence when done under certain conditions? In the former case the exception need not be negatived [by the prosecution]; in the latter, words of exception may constitute the gist of the offence [and therefore need to be proved beyond reasonable doubt by the prosecution].

10. In ambiguous cases, the determination of the party upon whom Parliament intended to place the burden of proof can be informed by "practical considerations":[6]

> …if the linguistic construction of the statute did not clearly indicate upon whom the burden should lie the court should look to other considerations to determine the intention of Parliament such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden.

THE DISTINCTION BETWEEN SUMMARY AND INDICTABLE CASES

11. Section 67(8) confines the reverse onus to summary trials. In cases that proceed by way of indictment (either because the charge is laid on indictment by the prosecution or because the defence elects jury trial), the legal burden of proving the exception etc remains with the prosecution; the defence bears only an evidential burden.

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[2] Section 81 provided that "[w]here the defendant to an information relies for his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him; and this notwithstanding that the information or complaint contains an allegation negativing the exception, exemption, proviso, excuse or qualification."

[3] The common law position was more recently stated in *R v Edwards* [1975] QB 27. Section 81 was subsequently replaced in identical language by section 101 of the Magistrates' Courts Act 1980.

[4] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (Wellington: LexisNexis NZ Limited, 2005), at 23.4.28.

[5] *McFarlane Laboratories Limited v Department of Health* [1978] 1 NZLR 861.

[6] *R v Hunt* [1987] 1 All ER 1, at 11.

12. As part of the Criminal Procedure (Simplification) Project, it is currently proposed that the terminology "summary" and "indictable" be removed. Whatever changes are made, some cases will continue to be tried in what is currently the summary jurisdiction and other cases in what is currently the indictable jurisdiction. It is still necessary to determine, therefore, whether the onus of proof should differ according to jurisdiction or mode of trial.

13. In *R v Rangi,*[7] the Court of Appeal attempted to provide a justification for this distinction, in the context of a prosecution on indictment for possession of a knife or offensive weapon or disabling substance in a public place "without lawful authority or reasonable excuse" under section 202(A)(4)(a) of the Crimes Act 1961, in the following terms:

> …if the onus is found to lie on the Crown under s 202A [in indictable cases] there would be one rule for prosecutions laid indictably, and another for those laid summarily; and for those brought under s 13A of the Summary Offences Act the onus would also lie on the accused in the summary jurisdiction. However, this inconsistency may not be a problem in practical terms. We understand that for less serious cases of simple possession a charge is likely to be laid under the last mentioned section, the Crimes Act (with its higher maximum penalty) being used for indictable charges in what are considered to be more serious situations.

14. However, we find this justification unconvincing. While, in practice, charges under section 202A of the Crimes Act may usually relate to more serious cases than those laid under section 13A of the Summary Offences Act, they will not always do so. Moreover, even charges under the Crimes Act will still generally be laid by the prosecutor in summary form, with the defence then having the right of election of jury trial. It seems wrong in principle that the onus of proof should depend upon the exercise of police discretion as to the form in which the charge is laid or alternatively upon a defence election as to jury trial, neither of which need to have anything to do with the seriousness of the case.

15. The House of Lords, in considering the equivalent provision in the United Kingdom in *R v Hunt,*[8] expressed similar concerns. In particular, Lord Ackner, addressing a submission from counsel that defendants should bear the legal burden to prove exceptions etc in cases tried summarily, but only the evidential burden in cases tried indictably, stated:

> Counsel for the appellant frankly concedes that, if his submission is right, the weight of the burden would vary according to whether an accused is tried summarily or on indictment. This anomaly becomes even more remarkable when one bears in mind the extent of hybrid offences, that is offences that can be tried either summarily or on indictment. If counsel for the appellant is correct in his submissions it would follow that a Crown Court judge, sitting with justices and hearing an appeal from convictions in a magistrate's court where an exception etc was relied on by the appellant (defendant), would have to advise them that the legal burden of establishing the offence was on the defendant. In the next case, which might be a trial on indictment for the selfsame offence, he would have to give the jury an entirely different direction with regard to the weight of the burden of proof, it being only the evidential burden. Such a remarkable situation cannot, in my judgment, be attributed to the presumed intention of Parliament.

[7] [1992] 1 NZLR 385
[8] [1987] 1 All ER 1

16. While the current distinction between summary and indictable cases in section 67(8) has been held to represent parliamentary intent in New Zealand, we think that it is an untenable distinction. We therefore propose that the applicable burdens of proof should be the same in all cases regardless of the Court in which they are tried or the mode of trial.

OPTIONS FOR REFORM

17. We turn to consider how this might be achieved. We have identified three options:

- apply a reverse onus to all exceptions etc (as currently defined) in all cases;
- confine the reverse onus to a narrower range of categories of exceptions etc but apply it irrespective of jurisdiction or mode of trial;
- remove the reverse onus altogether.

New Zealand Bill of Rights Act 1990

18. The starting point for the assessment of these options is section 25(c) of NZBORA, which provides that everyone who is charged with an offence has "the right to be presumed innocent until proved guilty according to law."

19. Since the enactment of this provision, any reverse burden provision imposing a legal burden of proof on an accused (including section 67(8)[9]) has been considered a prima facie breach of the presumption of innocence. This is because, "[i]f an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."[10]

20. Accordingly, the question becomes whether the intrusion on the presumption of innocence in section 67(8) constitutes a justified limitation under section 5 of the NZBORA,[11] which prescribes that:

> …the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

21. Some have taken the view that no limitation on the presumption of innocence can ever be justified (as with other rights that have been identified as non-derogable, such as the rights not to be tortured or tried unfairly). For example, Elias CJ in *R v*

[9] Andrew Butler and Petra Butler, above n 4, 23.4.28.
[10] *R v Whyte* (1988) 51 DLR (4th) 481 (SCC). This reasoning was quoted and adopted in *R v Lambert* [2001] 3 All ER 577, at 591 (per Lord Steyn).
[11] The test used in New Zealand to ascertain whether or not a limitation on a right or freedom in the NZBORA is justified is borrowed from the Canadian Supreme Court case of *R v Oakes* [1986] 1 SCR 103. The *Oakes* test requires that for any proposed limitation to be justified in a free and democratic society, it must serve an objective that is sufficiently important to justify overriding a protected right or freedom and use means that are reasonable and demonstrably justified. The latter inquiry, in practice, involves three components: the measures used must be rationally connected with the objectives served; the measures should impair the right as little as possible; and the limiting measures must be in proportion to the objective served. This approach was endorsed by all five judgments in *R v Hansen* (above n 1), although Anderson J (at [272]) would have preferred to "recast" the test "without diminution of its core elements."

Hansen recorded her "doubt whether the presumption of innocence can be limited under section 5", arguing that any limitation on the presumption of innocence effectively denies the right altogether.

22. However, the majority of the Supreme Court in *Hansen* (and most other commentators on the Bill of Rights Act) accept that the right in section 25(c) is capable of some justified limitation.[12] Nevertheless the Supreme Court in *Hansen* makes clear that justified limitations on the presumption of innocence will at best be uncommon. Moreover, any limitation must have a rational connection to its intended purpose and be no greater than is necessary to achieve that purpose.

23. The reverse onus under consideration in *Hansen* was that contained in section 6(6) of the Misuse of Drugs Act 1975, which imposes the legal burden of proof on the defendant, on a charge of possession for supply, to prove on the balance of probabilities that drugs over a specified quantity were not possessed for the purposes of supply. The majority of the Court held the reverse onus to be in contravention of section 25(c) of the Bill of Rights Act, at least partly on the basis that it was triggered by a arbitrary numerical threshold that had not been reviewed for a considerable time and did not justify the presumption of supply, so that there was no rational connection between the intended purpose of the reverse onus and the threshold that triggered its operation.

24. Each of the options for reform need to be considered in this light.

Option 1: Retention of the reverse onus in all cases.

25. There are two related arguments in favour of retaining a reverse onus.

26. The first is that the courts have interpreted "exception, exemption, proviso, excuse or qualification" to mean that they apply only in relation to conduct that is generally prohibited and prima facie culpable. In other words, they provide an exception or excuse for a normally prohibited and culpable act because it was committed by a particular type of person or in particular circumstances. It is therefore reasonable to require the defendant to show that he or she should be excluded from the liability that would normally attach to that conduct.

27. We do not think that this argument is sufficient to justify a limitation on section 25(c) of the Bill of Rights Act. Even though the conduct would normally be regarded as culpable and giving rise to criminal liability, the fact remains that the defendant is innocent if the particular exemption etc applies to him or her or to the circumstances in which he or she committed the act. The fact that the matter that absolves the defendant from criminal liability is one of particular, rather than general, applicability does not in itself seem a good enough reason to reverse the onus.

[12] They often cite the following passage from the European Court of Human Rights judgment in *Salabiaku v France* (1988) 13 EHRR 397, at 288 (para 28) (discussing article 6(2) of the European Convention on Human Rights, the equivalent to our section 25(c) of NZBORA) as a starting point: "Presumptions of fact or law operate in every legal system. Clearly the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law… Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

28. The second and related argument is that, because the exception etc is peculiar to the particular defendant or the particular circumstances in which the conduct occurred, it would be unreasonable to require the prosecution to exclude its possible application beyond reasonable doubt and would lead to unjustified acquittals. For example, whether the defendant has a "reasonable excuse" for conduct that is otherwise criminally culpable may be peculiarly within the knowledge of the defendant and difficult for the prosecution to exclude.

29. Notwithstanding the force of this argument, we again do not find it a sufficient reason to impose a limit on the presumption of innocence in section 25(c). The difficulties of proof for the prosecution in relation to exemptions etc are frequently overstated. While in particular cases it may be difficult for the prosecution to disprove beyond a reasonable doubt the application of an exemption or an excuse that is made a triable issue by the defence, that will not always be so. There will often be surrounding circumstances, or indeed tangible direct evidence, from which the culpability of the defendant can be readily inferred. Indeed, in relation to some exemptions (such as where the defendant has a licence), it may be very easy for the prosecution to show that the exemption does not apply.

30. The overstated nature of the claim as to difficulties of proof is demonstrated by the fact that there is no real evidence of problems in cases that proceed by way of indictment when the reverse onus would have applied if they had proceeded summarily.

31. This points to the fundamental problem with section 67(8). Because of its general application, it does not involve any analysis of the need for the reverse onus in relation to the particular offences to which it applies. It is therefore difficult to see how there can be a rational connection between the reverse onus and its intended purpose – a fundamental requirement of any justified limitation on section 25(c).

32. The argument is sometimes made that, if the reverse onus is removed, it would simply prompt the legislature in the future to remove exceptions etc altogether. This would be a perverse result: a legislative change designed to ensure the protection of a fundamental right of defendants in criminal cases would actually make their position worse and remove the possibility of exculpation in circumstances where it would be justified. However, we do not think that this is a legitimate reason to retain a provision that is in breach of section 25(c). Legislative reform should not be constrained by a speculative fear that the legislature will respond by passing poor legislation in the future.

Option 2: Confine the reverse onus to a narrower range of categories

33. The second option is to retain the reverse onus only for particular types of exceptions etc in which it can more easily be justified as having a rational connection to its intended purpose.

34. For example, it is often argued that, where an act is prohibited unless done pursuant to a stipulated licence or authority, the defendant should have to prove that he or she possessed the necessary licence or authority, because the burden can be easily discharged. Indeed, in *R v Hunt*[13], Lord Griffiths considered that this was virtually the

[13] Above n 6

only type of situation in which a reverse onus could be justified and that "the occasions on which a statute will be construed as imposing a burden of proof on a defendant which do not fall within this formulation are likely to be exceedingly rare".

35. The difficulty with this option is simply that it is very difficult to identify any general category of case that can be defined with precision, is *sui generis*, and is always a justified limitation on section 25(c). Indeed, the example of an exemption by way of a stipulated licence or authority provides a case in point. On the one hand, while the existence of such a licence or authority will often be easy for the defendant to prove, it will often also be equally easy for the prosecution to disprove the existence of such a licence, particularly where a public register exists. On the other hand, there may be other licences or authorities that do not need to be recorded or registered, so that their existence may be difficult or impossible for the prosecution to exclude. This requires consideration on an offence-by-offence basis; a general category relating to licences or authorities would simply be too broad.

36. In essence, therefore, this option suffers from the same deficiencies as the first option. It overreaches the application of the reverse onus and therefore severs the rational connection between it and its intended purpose.

Option 3: Removal of the reverse onus

37. That leaves the final option: the removal of the reverse onus in all cases. This is our preferred option. Four points should be made about it.

38. First, our proposal that the general provision be repealed does not carry with it any implication that we think a reverse onus is never justified. As we have made clear above, we take the view that the justification for a reverse onus needs to be considered on an offence-by-offence basis. Those proposing new offences that include within them an exception etc will need to consider whether a reverse onus is justified and make out the case. In relation to existing offences, agencies that believe that a reverse onus should be retained will similarly need to make out a case for that, so that the particular offence provision can be consequentially amended as part of the criminal procedure reforms. We note that any agency doing so in relation to cases that can currently proceed by way of indictment will need to demonstrate why the reverse onus is necessary, given that it has not applied to date when they do proceed in that way.

39. Secondly, the removal of the reverse onus will not require the prosecution to exclude the application of an exception etc in every case. In accordance with general evidential principles, the defendant will bear the evidential onus of making the exception etc a triable issue. That requires him or her to point to some evidence (by way of either cross-examination of prosecution witnesses or direct evidence) that makes it a reasonable possibility. The mere assertion that the prosecution has not proved beyond reasonable doubt that an exception etc does not apply will not suffice.

40. Thirdly, any concerns that the removal of the reverse onus will lead to "ambush defences" which the prosecution do not have the opportunity to investigate and rebut are likely to be substantially mitigated, if not removed altogether, by the proposed requirement in the criminal procedure reforms that the defence identify the issues of

dispute in advance of trial. This will ensure that the prosecution has prior notice that the defence intends to rely upon the existence of an exception etc as a defence.

41. Finally, in relation to defences that will no longer have the reverse burden as a result of our proposed change, we do not think that this will necessarily make the task of the prosecution more difficult or increase the number of acquittals. The evidential burden will not be discharged unless there is some evidence that points to the reasonable possibility that an exception etc applies. Once that occurs, its existence or otherwise will, in most cases, be readily proved or disproved, regardless of where the burden of proof lies. That is perhaps demonstrated by the fact that, as we have noted above, there is no real evidence that cases of this sort have substantially different outcomes depending upon whether they proceed summarily or by way of indictment.

EXPLICIT EVIDENTIAL BURDEN?

42. If the general reverse onus is repealed, the remaining question is whether the resulting evidential onus on the defence should be codified.

43. We do not think that there is any need to do so. As we have noted above, it is clear that, while the prosecution bears both the legal and evidential burden in relation to the core elements of the *actus reus* and *mens rea*, the defendant has an evidential onus in relation to anything that is a defence. This includes anything that is properly construed as an exception, exemption, proviso, excuse or qualification. Although there are a large number of statutory provisions that do impose an evidential burden (usually by the use of the words "in the absence of evidence to the contrary"), it is not general practice. It is in our view confusing to give explicit statutory recognition to the existence of an evidential burden in relation to one class of defences, while remaining silent in relation to others such as compulsion or self-defence.

44. We note, too, that the codification of the evidential burden is unlikely to do much to improve the accessibility or transparency of the law, whatever form of words is used to express it. The nature and significance of the burden may be understood by lawyers, and its application in this context is beyond doubt, but its inclusion in statute is unlikely to improve lay comprehension of the offence.

CONCLUSION

45. We therefore propose that:

- section 67(8) be repealed;
- the consequent evidential burden that will be placed on the defendant in relation to exceptions, exemptions, provisions, excuses and qualifications by the operation of ordinary evidential principles should not be codified;
- agencies should be invited to make a case for the inclusion of a reverse onus in any offence provision that will be affected by the removal of section 67(8).

COMMENTS

Please provide written comments on this paper by 31 March 2010 to either:

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