Review of Commonwealth Criminal Law

The Committee for Review of Commonwealth Criminal Law has published two discussion papers. The first of these deals with the onus of proof and averments and the second deals with Common Law Offences and the Commonwealth. The Association has presented submissions on both these papers to the Committee.

One of the matters raised in the first paper is the onus passing to the defendant to establish certain defences. The distinction is drawn between statutory provisions which require this and the traditional evidential onus. In the latter the prosecution must disprove the matter beyond reasonable doubt. Despite the criticism of the phrase "evidential onus" by the Privy Council in *Jaecina v The Queen (1970) A.C. 618* the phrase has established tradition. Although the using of the word "onus" is misleading it is still used as a standard phrase for the method for a defendant to raise a defence for the prosecution to disprove.

One of the problems which results from the statutory defence on the balance of probabilities is that there are two standards of proof used in criminal cases. If there were to be one onus only then, although the defence must raise the defence, it need only "prove it" to the extent of raising a reasonable doubt.

The Association is considering this approach. It seems acceptable in principle although there may always be room for exceptions given particular legislation.

The Review Committee attempts to find a formulation of the defence consistent with one standard of proof in criminal matters. The Committee refers to the formulation of the Senate Standing Committee in Constitutional and Legal Affairs as follows:

"There is sufficient evidence to raise an issue with respect to that matter."

That formulation has the benefit of not imposing any express onus on either party to lead such evidence. All that is needed is that the evidence be there. The use of the word "sufficient" could cause some difficulty. It has associations with sufficient evidence for a *prima facie* case. The Review Committee suggested possible alternative formulations.

It may be that the placing of the onus on the balance of probabilities on the defendant is based on an unjustified fear in the authorities that unpredictable judges will hold there is no case to answer or irrational juries will acquit. Such fears are unfounded — although it is always possible to have an irrational jury it must be very rare indeed. The use of 12 jurors in criminal cases is to avoid such situations.

The Review Committee draws attention to the different formulations of the reversal of the onus in different statutes and the very heavy burden which can be imposed in some; eg. where the defendant must prove they did not know and could not reasonably be expected to know — thus imposing both a subjective and objective test for the state of mind of the defendant. Such an approach is disapproved both by the High Court and by the House of Lords.

In discussing "Exceptions to the Rule in *Woolmington's* Case" the Committee refers to the distinction drawn between statutory provisions where the statute, having defined the ground of liability, introduces by some distinct provisions a matter of exception or excuse and, on the other hand, provisions where the definition of liability contains within it the statment of the exception or qualification. (*Dowling v Bowie* (1952) 86 C.L.R. 136 at p.139). In the first case, the onus lies on the defendant to prove the exception or excuse. In the second case, the onus lies on the prosecution.

The Committee refers to s.233B(1)(c) of the Customs Act 1901 and to the decision of the High Court in *R v He Kaw Teh* (1985) 157 C.L.R. 523. The Committee notes that this decision, in overruling earlier decisions, established that it must be proved the defendant knew of the existence of the goods in whatever receptacle he was carrying them or was wilfully blind to the possibility of their existence.

Averment provisions are discussed with the Committee noting that "In short, an averment provision in modern legislation authorises the prosecutor or plaintiff to aver in the information, or like document, matters of fact and such an averment is prima facie evidence of the matters so averred."

It is suggested by the Committee that averment provisions should be kept to a minimum and should only be used to prove formal matters not relating to the conduct of the defendant, or if the matter relates to the conduct of the defendant, it should be a matter peculiarly within the defendant's knowledge.

In the second paper the Committee discusses whether, an Act consolidating Commonwealth criminal law should abolish common law offences where such offences are already dealt with in that Act and in other Commonwealth laws.

The paper thereafter discusses the various Commonwealth common law offences, some of which the Committee notes are already subsumed in existing legislation, eg. cheating the public revenue — s29D of the *Crimes Act,* and some are archaic, eg. refusal to serve in a public office, and can be ignored for the purposes of a modern Commonwealth criminal law. The Committee also recommends that extended versions of some offences be included in the future Act, eg escape, as being an extended version of s47 of the *Crimes Act*.

In regard to the offence of bribery and corruption the Committee welcomes submissions on whether the future Act should include an extended version of sections 73 and 73A of the *Crimes Act* covering circumstances where the bribe proposal related to an exercise of duty, authority or influence either real or apparent. The Committee also deals with a modified version of the common law offence of extortion, namely, wrongful taking of money by an officer under colour of his office, knowing that the money was not due. Offences such as perverting the course of justice and conspiracy are reserved for further discussion.

Under the general description of official misconduct the Committee refers to the offences of wilful neglect of duty (nonfeasance); malicious exercise of official power (misfeasance); and wilful excess of official authority. As regards nonfeasance the Committee notes that *ex parte Kearney* (1917) 17 S.R. (N.S.W.) 578 was an unsuccessful attempt to invoke this common law offence in relation to an industrial dispute. "In present day circumstances,

creation of a statutory offence with the full width of the common law offence of nonfeasance would, the Review Committee believes, be publicly unacceptable. It would be interpreted as intruding into industrial relations and indeed the facts in *ex parte Kearney* would support such an interpretation." The Committee does however put forward the possible point of view that, if there were to be abolition of common law offences, new offences covering some of the ground of the common law offences should be created; for instance where a public official wilfully fails to carry out a duty of his office, knowing or having reason to believe that his failure might cause loss of life, personal injury or serious property damage.

The Committee raises an interesting point in regard to common law offences and the Commonwealth — "Is there a *separate* Common Law of the Commonwealth?" The Paper states that even if it is correct to say that there is a separate common law of the Commonwealth, it does not follow that, for Commonwealth purposes, the common law operates unaffected by State statutes although the question is perhaps arguable. The Review Committee is disposed to think that the matter would be governed by the relevant State statute in force in the State where the proceedings are brought subject, of course, to its consistency with the Constitution and any law of the Commonwealth. Where the locality is a Commonwealth place, the State law will generally be applied by the *Commonwealth Places (Application of Laws) Act 1970.* □

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New Equity Procedures

The following procedures are to be introduced in the Equity Division in 1988.

1. A short notice list is to be instituted. The notice given to the parties on the list is to be a minimum of three days.
2. Cases to go automatically on the list are those which are estimated to last one day or less. Other cases may be placed on the list by consent. That consent could be given at any time on or after entry in the General List.
3. Matters to be compulsorily placed in the list will be so placed by the Registrar when he is satisfied that the case is ready for trial or, if the matter of its category is in doubt, by a Master after reference to him by the Registrar.
4. For voluntarily submitted cases, application to be placed on the list should be made to a Master, who will give directions.
5. The list will be kept by the Registrar. Details kept should include the estimated length of trial.
6. When judges have notice of the settlement of a case fixed for hearing before them they will advise the Registrar who will then give the requisite notice to the parties in the case occupying the highest place in the list of cases in that category (i.e. short matters if only one day available, two day cases if two days available).
7. For those cases presently in the list which have had readiness hearings but have had no hearing date fixed, an opportunity to be listed will be given by advertising for the space of a week in the daily law list. Applications must be made to the Master as detailed in paragraph 4 above.
8. Other cases in the General List will be placed in a callover as at present, but the Registrar will fix only a provisional date for hearing, and will also fix a date for a directions hearing before the trial judge four weeks before the provisional date. If the case cannot be made ready by the provisional date, that fixture will be aborted and the place taken either by another matter in the General List or by a matter or matters in the Short Notice list.
9. Readiness hearings are to be abandoned.
10. There will be two judges dealing only with expedited matters. □