

# SECTION 25(1)

## THE RIGHT TO BE PRESUMED INNOCENT

### Section 25

(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

#### **POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 25(1)?**

You will need to consider s. 25(1) in assessing legislation, a policy or a program where it:

- creates or amends an offence that requires the accused to prove or establish the absence of an element of an offence;
- creates or amends an offence that provides that an exception, qualification, proviso, exemption, excuse or other defence must be proved or established by an accused;
- creates or amends an offence that contains a presumption of fact or law and puts the legal (persuasive) burden on the accused to rebut the presumption;
- creates or amends an offence that contains a presumption of fact or law and puts the evidential burden on the accused to rebut the presumption;
- creates or amends an offence that contains a presumption of fact or law operating against an accused which cannot be displaced;
- creates or amends an offence that imposes criminal liability on an officer of a corporation solely by reference to his or her position in the corporation and requires the officer to make out a defence;

- deals with the admissibility of evidence;
- creates or amends a statutory defence relating to an element of the offence;
- alters the criteria or conditions under which a person may apply for or be released on bail;
- allows public officials to comment on the guilt of persons who have been charged.

These policy triggers are not comprehensive.

#### **DISCUSSION**

Sub-section (1) of s. 25 protects the presumption of innocence in criminal proceedings. The presumption of innocence is a well-recognised civil and political right and a fundamental principle of common law.

More generally, s. 25 is concerned with rights in criminal proceedings. This provision is modelled on articles 14(2), 14(3), 14(4) and 14(5) of the ICCPR.

Note that by virtue of s. 49(2) of the Charter (transitional provisions), the rights in s. 25 will not affect any proceedings concluded or commenced before 1 January 2007. (Thus, if a person has been convicted of a reverse onus offence before 1 January 2007, his or her conviction will not be affected by s. 25.)

### When does section 25(1) apply?

Section 25(1) covers persons charged with an offence, whether it is an indictable or a summary offence.

In Victoria, typically a person is charged with an offence when the charge is filed in the Magistrates' Court on a charge sheet that alleges the person has committed an indictable or summary offence. A person will either be arrested and charged or a summons to answer the charge will be issued. The infringement notice system (discussed on page 164) provides an alternative means of dealing with allegations.

### What does it mean?

The right to be presumed innocent until proven guilty is a fundamental common law principle. It requires that the prosecution has the burden of proving that the accused committed the charged offence. The prosecution must prove the guilt of the accused beyond reasonable doubt.<sup>224</sup> This means that the prosecution must prove all elements of a criminal offence.

A law that shifts the burden of proof to the accused or applies a presumption of fact or law operating against an accused may breach this provision. Both are commonly called reverse onus provisions.

### Reverse onus offences

Reverse onus offences are offences that impose a legal (persuasive) burden on the accused by requiring the accused to prove, on the balance of probabilities, a fact that is essential to the determination of guilt or innocence.

Some offences impose an evidential burden on the accused by requiring the accused to present or point to evidence to raise an issue. In such offences, the prosecution bears the legal burden of disproving the issue beyond reasonable doubt.

These offences may also limit the presumption of innocence.

Reverse onus offences may undermine the presumption of innocence because there is a risk that an accused can be convicted despite reasonable doubt of his or her guilt. However, in international human rights law, reverse onus provisions do not necessarily violate the presumption of innocence as long as they are 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.<sup>225</sup>

Reverse onus offences should be examined carefully to determine if they breach s. 25(1).<sup>226</sup> If so, the provision may still be compatible with the Charter if it can be justified under s. 7. It must be a reasonable limitation that can be demonstrably justified in a free and democratic society. For more information, refer to the discussion in these Charter Guidelines on s. 7.

<sup>224</sup> *UN Human Rights Committee, General Comment 13, Article 14* (Twenty-first session, 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [7].

<sup>225</sup> *Salabiaku v. France* (1988) 141 Eur Court HR (ser A); (1991) 13 EHRR 379.

<sup>226</sup> See for example *R v. Lambert* [2002] 2 AC 545 and *R v. Oakes* [1986] 1 SCR 103.

The more serious the reverse onus offence, and the higher the penalty the courts can impose for the offence, the more likely it is that s. 25(1) has been breached. In assessing the seriousness of an offence (including the seriousness of the consequence for a convicted person), consider the purpose for which the offence was created and whether the offence has an element of moral fault. If the nature of the offence makes it very difficult for the prosecution to prove each element of the offence, a reverse onus provision may be acceptable. Similarly, if it is clearly easier and more practical for an accused to prove a fact than for the prosecution to disprove it, a reverse onus provision may be justifiable.

### REASONABLE LIMITS ON THE RIGHT TO BE PRESUMED INNOCENT

As with all of the human rights protected in the Charter, the right to be presumed innocent in s. 25(1) may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

However, in this context you should note that in the UK, courts have held that reverse onus provisions are more likely to be consistent with human rights if they require the accused to prove an exception, proviso or excuse rather than disprove an element of the offence.<sup>227</sup> However, for offences heard summarily in Victoria, section 130 of the *Magistrates' Court Act 1989* provides that a defendant who wishes to rely on an exception, exemption, proviso, excuse or qualification has an evidential burden only in relation to that exception, proviso, excuse or qualification. Similarly, provisions that place the evidential burden on the accused will be easier to justify than provisions that place the legal burden on the accused by requiring him or her to prove a fact.<sup>228</sup>

### KEY POINTS TO REMEMBER

- The presumption of innocence is a well-recognised civil and political right and a fundamental common law principle.
- Section 25(1) applies to persons who have been charged with a criminal offence.
- A charged person is entitled to be presumed innocent until proven guilty of committing the offence with which he or she has been charged.
- The prosecution has the burden of proof and must prove the guilt of the accused beyond reasonable doubt. This usually means the prosecution must prove both the physical and fault elements of an offence and disprove any exceptions or defences that are raised by the accused.
- Reverse onus provisions, being laws that shift the burden of proof to the accused or apply a presumption of fact or law operating against an accused, may breach s. 25(1).
- Whether a reverse onus provision breaches s. 25(1) involves consideration of all the facts and circumstances.

<sup>227</sup> *R v. DPP, ex parte Kebilene* [2000] 2 AC 326.

<sup>228</sup> *R v. Lambert* [2002] 2 AC 545.

## MEASURES TO IMPROVE COMPLIANCE

To improve compliance with s. 25(1):

- If you are developing a policy or legislation that creates or amends a criminal offence or criminal procedure, ensure so far as possible that it is consistent with the presumption of innocence.

If you are developing a policy or legislation that creates or amends a criminal offence which does not require the prosecution to prove all the elements of the offence, but places a burden on the accused, then consider the following criteria in deciding if the offence breaches s. 25(1):

- the nature and context of the conduct you are attempting to regulate;
  - the nature and purpose of the offence;
  - the reason you want the accused to provide evidence or prove that they were not at fault. Is it very difficult for the prosecution to provide that evidence?
  - the ability of the accused to exonerate himself or herself. Is it difficult and impractical for the accused to establish a defence?
  - the severity of the penalty to be imposed;
  - the nature of the burden placed on the accused. Is it a legal or evidential burden? Does the accused have to prove a qualification, proviso or excuse (in which case the provision may be inconsistent with section 130 of the Magistrates' Court Act) or is he or she required to prove an essential element of the offence?
- If the offence cannot be justified on the above criteria, the provision may still be permissible if it is a reasonable limit on the right to the presumption of innocence, which can be demonstrably justified in a free and democratic society (under s. 7).

## RELATED RIGHTS AND FREEDOMS

When considering whether a policy or legislation might give rise to an issue under s. 25(1), you should also consider the following additional rights and freedoms:

- the right not to be arbitrarily arrested or detained (s. 21);
- the right to humane treatment when deprived of liberty (s. 22);
- the right to a fair hearing (s. 24).

## HISTORY OF THE SECTION

Section 25(1) is modelled on article 14(2) of the ICCPR.

Similar rights exist in comparative law. Refer to Appendix H for further information.

## BIBLIOGRAPHY

### Case Law

1. *R v. DPP, ex parte Kebilene* [2000] 2 AC 326.
2. *Hansen v R* [2007] NZSC 7.
3. *R v. Lambert* [2002] 2 AC 545.
4. *R v. Oakes* [1986] 1 SCR 103.
5. *Sheldrake v. Director of Public Prosecutions Attorney-General's Reference (no 4 of 2002)* [2005] 1 AC 264.
6. *Salabiaku v. France* (1988) 141 Eur Court HR (ser A).
7. *Van der Tang v. Spain* (1995) 321 Eur Court HR (ser A).

### United Nations Human Rights Committee Jurisprudence

7. *Rameka v. New Zealand* Human Rights Committee, Communication No. 1090/2002, UN Doc. CCPR/C/79/D/1090/2002 (15 December 2003).

### Other Sources

8. *UN Human Rights Committee, General Comment 13*, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003).