



1 April 2010

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By email: malcolm.luey@justice.govt.nz

Dear Malcolm

Criminal Procedure (Simplification) Project

The Society's Criminal Law Committee is grateful for the opportunity to comment on the Ministry of Justice consultation papers relating to section 67(8) of the Summary Proceedings Act 1957 and the presumption of innocence, and adverse inferences that can be drawn from a defendant's silence at trial. Its response to the two consultation papers is set out below.

Section 67(8) Summary Proceedings Act 1957 and the presumption of innocence

The distinction between summary and indictable cases

The position needs to be the same for both summary and indictable prosecutions. We therefore support the proposal 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

We support the preferred option 3 (the removal of the reverse onus in all cases). This would require, in all cases, an accused to point to sufficient evidence to satisfy the court that any particular exception is a triable issue, at which point the prosecution would be required to negate the applicability of the exception relied upon beyond reasonable doubt. However, this is on the proviso that there will be specific provisions in statutes where the context requires a reverse onus to be applied.

We have reservations about the proposition in paragraph 41 that such a change will not "necessarily make the task of the prosecution more difficult or increase the number of appeals". This change will have cost and time implications for the prosecution. It would have been preferable to legislate the evidential burden on the defendant, especially given that there is a change in the approach being proposed. Contrary to the view expressed in the paper, we consider that such a codification of the evidential burden would make the law more understandable to lay people.

Adverse inference from defendant's failure to give evidence

We are strongly opposed to the proposition that a fact finder may draw an adverse inference from the failure of an accused person to give evidence. There may be many reasons why a person elects not to call evidence, to which the jury are not privy and for which no explanation can or should be given.

In our view a criminal prosecution is all about the Crown proving beyond a reasonable doubt that the accused is guilty of the crime. If the Crown has not done that then that is the end of the prosecution. If the evidence does not reach that level to the jury's satisfaction then a person is entitled to be acquitted and the fact that he or she has not given evidence should make no difference.

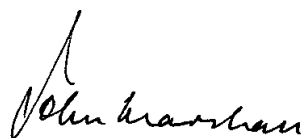
There is also a real danger in inviting juries to draw adverse inference from an accused's decision not to give evidence that the presumption of innocence will be relaxed. The strength of the present approach is that it steels the jury against reasoning wrongly from silence. It is not so much the privilege against self-incrimination or the Bill of Rights that is the problem, it is the practical weakening of the presumption of innocence that we see as the problem.

However, if it were thought desirable to legislate to allow an inference to be drawn from a defendant's silence at trial then it should relate only to the drawing of adverse inferences from a defendant's silence at trial. We do not consider that this should be extended to pre-trial silence. The principle should be approached in a comprehensive manner consistent with the scheme of the Evidence Act 2006, and we are of the view that s33 of the Evidence Act should remain.

We agree with the proposed repeal of s67(5) of the Summary Proceedings Act, given the fact that s 33 of the Evidence Act covers the same ground and, therefore, it is unnecessary to have s67(5) in the new Procedure Act.

The Society hopes that the above comments are of assistance to the Ministry of Justice. If you wish to discuss any matters raised in this letter please contact me, or the committee secretary, Rhyn Visser by phone (04) 472 7837 or email rhyn.visser@lawsociety.org.nz.

Yours sincerely



John Marshall QC
President