

## 8. Fair Trial

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## Summary

8.1 The right to a fair trial has been described as ‘a central pillar of our criminal justice system’,<sup>1</sup> ‘fundamental and absolute’,<sup>2</sup> and a ‘cardinal requirement of the rule of law’.<sup>3</sup>

8.2 A fair trial is designed to prevent innocent people from being convicted of crimes. It protects life, liberty, property, reputation and other fundamental rights and interests. Being wrongly convicted of a crime has been called a ‘deep injustice and a substantial moral harm’.<sup>4</sup> Fairness also gives a trial integrity and moral legitimacy or authority,<sup>5</sup> and maintains public confidence in the judicial system.

8.3 This chapter discusses the source and rationale of the right to a fair trial; how the right is protected from statutory encroachment; and when Commonwealth laws that limit accepted principles of a fair trial may be justified. It focuses on some widely recognised components of a fair trial that have been subject to some statutory limits, for example:

- a trial should be held in public;
- a defendant has a right to a lawyer; and
- a defendant has the right to confront the prosecution’s witnesses and test their evidence, and to obtain and adduce their own evidence.

8.4 Other components of a fair trial are discussed elsewhere in this Report.<sup>6</sup>

8.5 The common law and statute both feature some limits on fair trial rights, for example to protect vulnerable witnesses and to protect national security interests. This chapter provides a survey of some of the Commonwealth laws that may be said to affect fair trial rights. Some of these laws are uncontentious, but others may need to be reviewed to ensure they are justified.

8.6 Commonwealth laws that alter fair trial procedures for national security reasons were criticised in a number of submissions to this Inquiry. Some of these laws may be justified, provided that overall the trial remains fair, but they nevertheless warrant ongoing and careful scrutiny.

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1 *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

2 *Brown v Stott* [2003] 1 AC 681, 719.

3 Tom Bingham, *The Rule of Law* (Penguin UK, 2011) ch 9.

4 Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 *International Journal of Evidence and Proof* 241, 247. Ashworth goes on to say: ‘It is avoidance of this harm that underlies the universal insistence on respect for the right to a fair trial, and with it the presumption of innocence’: *Ibid.*

5 See Ian Dennis, *The Law of Evidence* (Sweet & Maxwell, 5th ed, 2013) 51–62.

6 The burden of proof and the right to be presumed innocent are discussed in Ch 9. The right not to incriminate oneself is discussed in Ch 11. Legal professional privilege, which among other things helps protect a person’s right to communicate in confidence with a lawyer, is discussed in Ch 12. Other chapters that relate to the fairness of the justice system more broadly include Ch 13 (Retrospective Laws), Ch 14 (Procedural Fairness), and Ch 15 (Judicial Review).

8.7 A range of other laws that affect fair trial rights are also identified, but relatively few attracted wide criticism. Client legal privilege and the privilege for religious confessions were singled out in one submission. These privileges in the Uniform Evidence Acts protect communications between lawyer and client and between priest (or other religious confessor) and penitent. Evidence of these communications may sometimes assist a defendant in a criminal trial. Although these privileges are themselves important rights, arguably there should be additional or clearer exceptions to give defendants greater scope to adduce third-party privileged evidence in criminal proceedings.

8.8 Courts have an inherent power to ensure that the overall process of a criminal trial remains fair. This provides considerable protection to fair trial rights in Australia.

8.9 The right to a fair trial ‘extends to the whole course of the criminal process’.<sup>7</sup> Given the practical scope of this Inquiry, this Report does not seek to identify all Commonwealth laws that might affect the fairness of a trial.<sup>8</sup> Rather, this chapter highlights examples of laws that interfere with accepted principles of a fair trial and some of the concerns that have been raised about them.

8.10 Further, because some state and territory courts exercise federal jurisdiction and apply their own state procedures,<sup>9</sup> a comprehensive review of fair trial laws would need to consider all these state laws.

8.11 This chapter and the burden of proof chapter focus on criminal laws, although many of the principles will also be relevant to civil trials. Civil trials must of course also be fair, particularly considering the very serious consequences—including substantial legal costs and penalties—that may follow.<sup>10</sup>

## A common law right

8.12 The right to a fair trial is ‘manifested in rules of law and of practice designed to regulate the course of the trial’.<sup>11</sup> Strictly speaking, it is ‘a right not to be tried unfairly’ or ‘an immunity against conviction otherwise than after a fair trial’, because ‘no person has the right to insist upon being prosecuted or tried by the State’.<sup>12</sup>

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7 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [38] (French CJ and Crennan J) (citations omitted).

8 The laws of evidence, for example, affect the fairness of trials, and were the subject of substantial ALRC inquiries in 1985–87 and 2006: See Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985); Australian Law Reform Commission, *Evidence*, Report No 38 (1987); Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006).

9 *Judiciary Act 1903* (Cth) s 68.

10 The Terms of Reference refer to laws that ‘alter *criminal* law practices based on the principle of a fair trial’ (emphasis added). The principle of a fair trial ‘receives its most complete exposition’ in the context of the criminal law, but is ‘equally applicable to civil proceedings’: James Spigelman, ‘The Truth Can Cost Too Much: The Principle of a Fair Trial’ (2004) 78 *Australian Law Journal* 29, 3.

11 *Dietrich v The Queen* (1992) 177 CLR 292, 299–300.

12 *Jago v The District Court of NSW* (1989) 168 CLR 23, 56–7 (Deane J).

8.13 Although a fair trial may now be called a traditional and fundamental right, clearly recognised under the common law, what amounts to a fair trial has changed over time. Many criminal trials of history would now seem strikingly unfair.

8.14 In his book, *Criminal Discovery: From Truth to Proof and Back Again*, Dr Cosmas Moisisdis writes:

The earliest forms of English criminal trials involved no conception of truth seeking which would be regarded as rational or scientific by modern standards. The conviction of the guilty and the acquittal of the innocent were to be achieved by means which appealed to God to work a miracle and thereby demonstrate the guilt or innocence of the accused. No consideration was given as to whether an accused should be a testimonial resource or be able to enjoy a right to silence and put the prosecution to its proof. Instead, guilt and innocence were considered to be discoverable by methods such as trial by compurgation, trial by battle and trial by ordeal.<sup>13</sup>

8.15 Even when the importance of trial by jury for serious crimes was recognised, trials remained in many ways unfair. In his *Introduction to English Legal History*, Professor Sir John Baker wrote that, for some time, the accused remained ‘at a considerable disadvantage compared with the prosecution’. The defendant’s right to call witnesses was doubted, they had no right to compel witnesses to attend court, and they rarely had the assistance of counsel.<sup>14</sup>

8.16 There was also ‘little of the care and deliberation of a modern trial’ before the 19<sup>th</sup> century, Baker writes:

The same jurors might have to try several cases, and keep their conclusions in their heads, before giving in their verdicts; and it was commonplace for a number of capital cases to be disposed of in a single sitting. Hearsay evidence was often admitted; indeed, there were few if any rules of evidence before the eighteenth century.<sup>15</sup>

8.17 Baker describes the ‘unseemly hurry of Old Bailey trials’ in the early 19<sup>th</sup> century and calls it ‘disgraceful’. The average length of a trial was a few minutes, and many prisoners would return from their trials not even knowing that they had been tried. He states that it is ‘impossible to estimate how far these convictions led to wrong convictions, but the plight of the uneducated and unbefriended prisoner was a sad one.’<sup>16</sup>

8.18 Many of the most important reforms were made in the 19<sup>th</sup> century. Those on trial for a felony were given the right to have a lawyer represent them in court in 1836; to call their own witnesses in 1867; and to give their own sworn evidence in 1898.<sup>17</sup>

8.19 In *X7 v Australian Crime Commission*, Hayne and Bell JJ said that it was necessary to ‘exercise some care in identifying what lessons can be drawn from the

13 Cosmas Moisisdis, *Criminal Discovery. From Truth to Proof and Back Again* (Institute of Criminology Press, 2008) 5.

14 JH Baker, *An Introduction to English Legal History* (Butterworths, 1971) 417.

15 Ibid.

16 Ibid.

17 Ibid 418. These reforms were made by Acts of Parliament.

history of the development of criminal law and procedure'.<sup>18</sup> Even some fundamental features of the criminal trial process 'are of relatively recent origin'.<sup>19</sup> For example, now 'axiomatic principles about the burden and standard of proof in criminal trials' were not fully established until 1935, and it was 'not until the last years of the nineteenth century that an accused person became a competent witness at his or her trial'.<sup>20</sup>

## Attributes of a fair trial

8.20 Widely accepted general attributes of a fair trial—some traceable to the common law, others to parliamentary reforms—may now be found set out in international treaties, conventions, human rights statutes and bills of rights. As found in art 14 of the *International Covenant on Civil and Political Rights* (ICCPR), these include the following:

- **independent court:** the court must be 'competent, independent and impartial';
- **public trial:** the trial should be held in public and judgment given in public;
- **presumption of innocence:** the defendant should be presumed innocent until proved guilty—the prosecution therefore bears the onus of proof and must prove guilt beyond reasonable doubt;<sup>21</sup>
- **defendant told of charge:** the defendant should be informed of the nature and cause of the charge against him—promptly, in detail, and in a language which they understand;
- **time and facilities to prepare:** the defendant must have adequate time and facilities to prepare a defence and to communicate with counsel of their own choosing;
- **trial without undue delay:** the defendant must be tried without undue delay;<sup>22</sup>
- **right to a lawyer:** the defendant must be 'tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it';

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18 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [100].

19 *Ibid.*

20 *Ibid.*

21 See Ch 9.

22 That is, undue delay between arrest and the trial, perhaps having regard to such things as the length of the delay, the reasons for the delay, and whether there was any prejudice to the accused. See *R v Morin* (1992) 1 SCR 771.

- **right to examine witnesses:** the defendant must have the opportunity to ‘examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’;
- **right to an interpreter:** the defendant is entitled to the ‘free assistance of an interpreter if he cannot understand or speak the language used in court’;
- **right not to testify against oneself:** the defendant has a right ‘not to be compelled to testify against himself or to confess guilt’;<sup>23</sup>
- **no double jeopardy:** no one shall be ‘liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country’.<sup>24</sup>

8.21 The elements of a fair trial appear to be related to the defining or essential characteristics of a court, which have been said to include: the reality and appearance of the court’s independence and its impartiality; the application of procedural fairness; adherence, as a general rule, to the open court principle; and that a court generally gives reasons for its decisions.<sup>25</sup>

### Practical justice

8.22 The attributes of a fair trial cannot, however, be conclusively and exhaustively defined.<sup>26</sup> In *Jago v District Court (NSW)*, Deane J said:

The general notion of fairness which has inspired much of the traditional criminal law of this country defies analytical definition. Nor is it possible to catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one. Putting to one side cases of actual or ostensible bias, the identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience.<sup>27</sup>

23 See Ch 11.

24 This list and the quotes are drawn from the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14. See also Bingham, above n 3, ch 9.

25 *Wainohu v New South Wales* (2011) 243 CLR 181, [44] (French CJ and Kiefel J) (citations omitted).

26 ‘There has been no judicial attempt to list exhaustively the attributes of a fair trial. That is because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to determine, as here, whether something that was done or said in the course of the trial, or less usually before trial, resulted in the accused being deprived of a fair trial and led to a miscarriage of justice’: *Dietrich v The Queen* (1992) 177 CLR 292, 300 (Mason CJ and McHugh J). James Spigelman has written that it is ‘not feasible to attempt to list exhaustively the attributes of a fair trial ... The issue has arisen in a seemingly infinite variety of actual situations in the course of determining whether something that was done or said either before or at the time of the trial deprived the trial of the quality of fairness to a degree where a miscarriage of justice has occurred’: James Spigelman, ‘The Common Law Bill of Rights’ (2008) 3 *Statutory Interpretation and Human Rights: McPherson Lecture Series* 25.

27 *Jago v The District Court of NSW* (1989) 168 CLR 23, [5].

8.23 In *Dietrich v The Queen*, Gaudron J said that what is fair ‘very often depends on the circumstances of the particular case’ and ‘notions of fairness are inevitably bound up with prevailing social values’.<sup>28</sup> Except ‘where clear categories have emerged, the inquiry as to what is fair must be particular and individual’.<sup>29</sup>

8.24 Testing a given law against an accepted attribute of a fair trial may therefore be contrasted with an approach that focuses on whether, in a particular case, justice was done in practice. In a case concerning administrative law, but in terms said to have more general application, Gleeson CJ said:

Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.<sup>30</sup>

8.25 In *Assistant Commissioner Michael James Condon v Pompano*, the court said that the ‘rules of procedural fairness do not have immutably fixed content’.<sup>31</sup> Gageler J said that exceptions to procedural fairness in the common practices of Australian courts were ‘more apparent than real’.<sup>32</sup>

All are examples of modifications or adjustments to ordinary procedures, invariably within an overall process that, viewed in its entirety, entails procedural fairness.<sup>33</sup>

8.26 Evidently, considerable care must be taken in identifying laws that interfere with the right to a fair trial and, as discussed in Chapter 14, with procedural fairness in administrative decision making. Such laws must be understood in their broader context, and with a view to their practical application. It is unlikely that such laws can be subject to simple tests which will effortlessly reveal whether the law is justified or not.

8.27 Much might depend on whether the court retains its discretion to ensure the trial is run fairly. Judges play the central role in ensuring the fairness of trials, and have inherent powers to ensure a trial is run fairly. In *Dietrich v The Queen*, Gaudron J said that the ‘requirement of fairness is not only independent, it is intrinsic and inherent’:

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28 *Dietrich v The Queen* (1992) 177 CLR 292, 364.

29 *Ibid.* In *Wainohu*, French CJ and Kiefel J said: ‘Historically evolved as they are and requiring application in the real world, the defining characteristics of courts are not and cannot be absolutes. Decisional independence operates within the framework of the rule of law and not outside it. Procedural fairness, manifested in the requirements that the court be and appear to be impartial and that parties be heard by the court, is defined by practical judgments about its content and application which may vary according to the circumstances. Both the open court principle and the hearing rule may be qualified by public interest considerations such as the protection of sensitive information and the identities of vulnerable witnesses, including informants in criminal matters’: *Wainohu v New South Wales* (2011) 243 CLR 181, [44] (citations omitted).

30 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [37]. Cited with approval, and said to have more general application, in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [156] (Hayne, Crennan, Kiefel and Bell JJ). Professors Dixon and Williams write that in this case, the Court endorsed ‘a largely practical concept of procedural fairness, rather than one informed by abstract notions of human rights’: Rosalind Dixon and George Williams, *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 294.

31 *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [177] (Hayne, Crennan, Kiefel and Bell JJ).

32 *Ibid* [192] (Gageler J).

33 *Ibid.*

Every judge in every criminal trial has all powers necessary or expedient to prevent unfairness in the trial. Of course, particular powers serving the same end may be conferred by statute or confirmed by rules of court.<sup>34</sup>

8.28 In *X7 v Australian Crime Commission*, French CJ and Crennan J said:

The courts have long had inherent powers to ensure that court processes are not abused. Such powers exist to enable courts to ensure that their processes are not used in a manner giving rise to injustice, thereby safeguarding the administration of justice. The power to prevent an abuse of process is an incident of the general power to ensure fairness. A court's equally ancient institutional power to punish for contempt, an attribute of judicial power provided for in Ch III of the *Constitution*, also enables it to control and supervise proceedings to prevent injustice, and includes a power to take appropriate action in respect of a contempt, or a threatened contempt, in relation to a fair trial.<sup>35</sup>

8.29 For the purpose of this Inquiry, the ALRC has identified statutes that appear to depart from accepted attributes of a fair trial, even if such statutes—understood in their broader context and having regard to a court's power to prevent unfairness—may not, in practice, cause unfairness.

## Protections from statutory encroachment

### Australian Constitution

8.30 The *Australian Constitution* does not expressly provide that criminal trials must be 'fair', nor does it set out the elements of a fair trial, but it does protect many attributes of a fair trial and may by implication be found to protect other attributes.

8.31 Chapter III of the *Constitution* and its judicial interpretations provide a range of assurances that a person charged with a criminal offence under federal law is tried by a competent, independent and impartial tribunal. Section 71 vests the judicial power of the Commonwealth exclusively in the High Court, other federal courts created by Parliament and state courts in which Parliament invests federal jurisdiction. Section 72 protects judicial tenure, including the remuneration of federal judges during their tenure.

8.32 The High Court has determined that courts exercising federal judicial power must be courts in the strict sense of the term.<sup>36</sup> Judicial power in Ch III of the *Constitution* is not power to resolve a controversy in any manner, but rather to determine it by the curial mode of decision making. In *Polyukhovich v Commonwealth*, Deane J said that the provisions of Ch III were based 'on the assumption of traditional judicial procedures, remedies and methodology' and that the *Constitution's* 'intent and meaning were that judicial power would be exercised by those courts acting as courts with all that notion essentially requires'.<sup>37</sup>

34 *Dietrich v The Queen* (1992) 177 CLR 292, 363–4 (Gaudron J).

35 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [38] (French CJ and Crennan J) (citations omitted).

36 Eg, *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

37 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607.



8.33 Moreover, under the *Kable* doctrine, state courts cannot be vested with powers that are incompatible with their role as courts exercising federal judicial power.<sup>38</sup> Trials of people charged for crimes under federal law falls within federal judicial power by the classic definition of that power.<sup>39</sup> According to the rule in the *Boilermakers' Case*, Parliament cannot vest this federal judicial power in non-judicial bodies. The independence of the federal judicature is further assured by prohibiting non-judicial powers from being vested in federal courts.

8.34 The text and structure of Ch III of the *Constitution* has been found to imply that Parliament cannot make a law which 'requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the *essential character of a court or with the nature of judicial power*'.<sup>40</sup> In *Nicholas v The Queen*, Gaudron J quoted this passage and then said:

In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.<sup>41</sup>

8.35 However, the regulation by Parliament of judicial processes (for example, the power to exclude evidence) is considered permissible, and is not an incursion on the judicial power of the Commonwealth.<sup>42</sup>

8.36 The High Court may have moved towards—but stopped short of—entrenching procedural fairness as a constitutional right.<sup>43</sup> If procedural fairness were considered an

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38 *Kable v DPP (NSW)* (1996) 189 CLR 51.

39 "There has never been any doubt that "convictions for offences and the imposition of penalties and punishments are matters appertaining exclusively to [judicial power]". There has equally never been any doubt that the separation of the judicial power of the Commonwealth by Ch III of the *Constitution* renders those matters capable of resolution only by a court': *Magaming v The Queen* (2013) 252 CLR 381, [61] (Gageler J).

40 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) (emphasis added).

41 *Nicholas v The Queen* (1998) 193 CLR 173, 208–9.

42 *Nicholas v The Queen* (1998) 193 CLR 173. For example, in *Hogan v Hinch*, French CJ stated that an 'essential characteristic of courts is that they sit in public', but nevertheless 'it lies within the power of parliaments, by statute, to authorise courts to exclude the public from some part of a hearing or to make orders preventing or restricting publication of parts of the proceeding or of the evidence adduced': *Hogan v Hinch* (2011) 243 CLR 506, [20], [27]. See also Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175.

43 George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 375.

essential characteristic of a court, this might have the potential, among other things, to constitutionalise:

the presumption of innocence, the ‘beyond reasonable doubt’ standard of proof in criminal proceedings, the privilege against self-incrimination, limitations on the use of secret evidence, limitations on ex parte proceedings, limitations on any power to continue proceedings in the face of an unrepresented party, limitations on courts’ jurisdiction to make an adverse finding on law or fact that has not been put to the parties, and limitations on the power of a court or a judge to proceed where proceedings may be affected by actual or apprehended bias.<sup>44</sup>

8.37 In *Pompano*, Gageler J said that Ch III of the *Constitution* ‘mandates the observance of procedural fairness as an immutable characteristic of a Supreme Court and of every other court in Australia’. His Honour went on to say:

Procedural fairness has a variable content but admits of no exceptions. A court cannot be required by statute to adopt a procedure that is unfair. A procedure is unfair if it has the capacity to result in the court making an order that finally alters or determines a right or legally protected interest of a person without affording that person a fair opportunity to respond to evidence on which that order might be made.<sup>45</sup>

8.38 It remains to be seen whether this will become settled doctrine in the Court.

8.39 Trial by jury is commonly considered a feature of a fair trial,<sup>46</sup> and s 80 of the *Constitution* provides a limited guarantee: ‘the trial on indictment of any offence against any law of the Commonwealth shall be by jury’. However, the High Court has interpreted the words ‘trial on indictment’ to mean that Parliament may determine whether a trial is to be on indictment, and thus, whether the requirement for a trial by jury applies.<sup>47</sup> This has been said to mean that s 80 provides ‘no meaningful guarantee or restriction on Commonwealth power’.<sup>48</sup>

8.40 The right to appeal against a conviction is also a recognised fair trial right, and is protected by s 73 of the *Constitution*, which gives the High Court extensive jurisdiction to hear and determine appeals. Parties aggrieved by judgments or sentences have, by implication, a right of appeal to the High Court.<sup>49</sup>

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44 Ibid 376.

45 *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [177].

46 Although this is the subject of some debate. Some scholars argue that the jury system can in fact be harmful to fair trial. See Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006) ch 18.

47 *R v Archdall and Roskrige; Ex parte Carrigan and Brown* (1928) 41 CLR 128, 139–40; *R v Bernasconi* (1915) 19 CLR 629, 637; *Kingswell v The Queen* (1985) 159 CLR 264, 276–7; *Zarb v Kennedy* (1968) 121 CLR 283.

48 Williams and Hume, above n 43, 355. See also *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 58 CLR 556, 581–2 (Dixon and Evatt JJ).

49 This was affirmed by the High Court in *Cockle v Isaksen* (1957) 99 CLR 155.

### Principle of legality

8.41 The principle of legality may provide some protection to fair trials.<sup>50</sup> When interpreting a statute, courts will presume that Parliament did not intend to interfere with fundamental principles of a fair trial, unless this intention was made unambiguously clear.

8.42 Discussing the principle of legality in *Malika Holdings v Stretton*, McHugh J said it is a fundamental legal principle that ‘a civil or criminal trial is to be a fair trial’,<sup>51</sup> and that ‘clear and unambiguous language is needed before a court will find that the legislature has intended to repeal or amend’ this and other fundamental principles.<sup>52</sup>

8.43 The right to a fair trial is ‘perhaps the best established example of a presumption that is appropriately characterised as part of a common law bill of rights’.<sup>53</sup>

Australian law is virtually indistinguishable from the case law with respect to a right of fair trial in those jurisdictions which have adopted a human rights instrument all of which contain a provision to that effect.<sup>54</sup>

### International law

8.44 The right to a fair trial is recognised in international law. Article 14 of the ICCPR is a key provision and has been set out above. As discussed later in this chapter, fair trial is considered a ‘strong right’, but some limits on fair trial rights are also recognised in international law.

8.45 International instruments, such as the ICCPR, cannot be used to ‘override clear and valid provisions of Australian national law’.<sup>55</sup> However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.<sup>56</sup>

### Bills of rights

8.46 In other jurisdictions, bills of rights or human rights statutes provide some protection to fair trial rights. Principles of a fair trial are set out in the *Charter of*

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50 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 2. The application of the principle of legality to particular fair trial rights is discussed further below and in other chapters of this report dealing with fair trial rights.

51 Other cases identifying the right to a fair trial as a fundamental right: *R v Macfarlane; Ex parte O’Flanagan and O’Kelly* (1923) 32 CLR 518, 541–2; *R v Lord Chancellor; Ex parte Witham* [1998] QB 575, 585.

52 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28] (McHugh J, in a passage discussing why ‘care needs to be taken in declaring a principle to be fundamental’).

53 Spigelman, above n 26, 25.

54 *Ibid.*

55 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

56 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 2.

*Human Rights and Responsibilities Act 2006 (Vic)* and the *Human Rights Act 2004 (ACT)*.<sup>57</sup>

8.47 Bills of rights and human rights statutes also protect the right to a fair trial in the United States,<sup>58</sup> the United Kingdom,<sup>59</sup> Canada<sup>60</sup> and New Zealand.<sup>61</sup> The Sixth Amendment to the *United States Constitution* provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### Justifications for limits on fair trial rights

8.48 Although it will never be justified to hold an unfair trial, particularly an unfair criminal trial, as this chapter shows, many of the general principles that characterise a fair trial are not absolute.<sup>62</sup>

8.49 Given the importance of practical justice, discussed above, one general question that might be asked of a law that appears to limit a fair trial right is: does this law limit the ability of a court to prevent an abuse of its processes and ensure a fair trial? Professor Jeremy Gans stressed the importance of the inherent jurisdiction of any superior court to stay a proceeding on the ground of abuse of process: ‘a key criterion for determining whether a Commonwealth law limits the right to a fair trial is whether or not a court’s power to prevent an abuse of process is effective’.<sup>63</sup> Another general question that might be asked is: does this law increase the risk of a wrongful conviction?<sup>64</sup>

8.50 The structured proportionality test discussed in Chapter 2 may also be a useful tool. The Parliamentary Joint Committee on Human Rights has suggested that proportionality reasoning can be used to evaluate limits of fair trial rights.<sup>65</sup>

57 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* ss 24–25; *Human Rights Act 2004 (ACT)* ss 21–22.

58 *United States Constitution* amend VI.

59 *Human Rights Act 1998 (UK)* c 42, sch 1 pt I, art 6.

60 *Canada Act 1982 (UK)* c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 11, 14.

61 *New Zealand Bill of Rights Act 1990 (NZ)* ss 24, 25.

62 This is evidently the position in Europe: ‘The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute’: *Brown v Stott* [2003] 1 AC 681, 704 (Lord Bingham). Professor Ian Dennis has said that all the individual fair trial rights in art 6 of the European Convention ‘are negotiable to some extent’. Although the right to a fair trial is a ‘strong right’, ‘it is clear that the specific and express implied rights in art 6, which constitute guarantees of particular features of a fair trial, can be subject to exceptions and qualifications’: Ian Dennis, ‘The Human Rights Act and the Law of Criminal Evidence: Ten Years On’ (2011) 33 *Sydney Law Review* 333, 345.

63 J Gans, *Submission 2*.

64 *Ibid* 2.

65 ‘Like most rights, many of the criminal process rights may be limited if it is reasonable and proportionate to do so’: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human*

Proportionality is also used in the fair trial context in international law. In *Brown v Stott*, Lord Bingham said that limited qualification of the fair trial rights in art 6 of the *European Convention on Human Rights* is acceptable, ‘if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for’. He went on to say that the European Court of Human Rights has:

recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention.<sup>66</sup>

8.51 This reflects a proportionality analysis.<sup>67</sup> Professor Ian Dennis writes that the European Court has not deployed the concept of proportionality with any consistency in the context of fair trial rights, but ‘the English courts have been more consistent in using proportionality to evaluate restrictions of art 6 rights, although the practice has not been uniform’.<sup>68</sup> Dennis cites examples of proportionality reasoning in English courts in relation to the privilege against self-incrimination,<sup>69</sup> the presumption of innocence,<sup>70</sup> and legal professional privilege.<sup>71</sup>

8.52 Proportionality reasoning is referred to in discussions of these features of a fair trial in this and other chapters of this Report. It is a useful method of testing whether laws that limit fair trial rights are justified.

## Open justice

8.53 Open justice is one of the fundamental attributes of a fair trial.<sup>72</sup> That the administration of justice must take place in open court is a ‘fundamental rule of the common law’.<sup>73</sup> The High Court has said that ‘the rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances’.<sup>74</sup>

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*Rights* (2014) 26. As noted in Ch 2, many stakeholders said that the proportionality principle should be used to test laws that limit important rights, although few discussed it specifically in the context of fair trial rights.

66 *Brown v Stott* [2003] 1 AC 681, 704 (Lord Bingham).

67 As discussed in Ch 2, the proportionality principle is reflected in the Siracusa Principles: United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [10], [11].

68 Dennis, above n 62, 346.

69 *Brown v Stott* [2003] 1 AC 681; *R v S and A* [2009] 1 All ER 716; *R v K* [2010] 2 WLR 905. See also Ch 11.

70 *R v Lambert* [2002] 2 AC 545; *Sheldrake v DPP* [2005] 1 AC 264.

71 *In Re McE* [2009] 2 Cr App R 1. See Ch 12 and Dennis, above n 62, 346.

72 Open justice is ‘a fundamental aspect of the common law and the administration of justice and is seen as concomitant with the right to a fair trial’: Jason Bosland and Ashleigh Bagnall, ‘An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12’ (2013) 35 *Sydney Law Review* 674.

73 *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]–[477] (McHugh JA, Glass JA agreeing).

74 *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

8.54 In *Russell v Russell*, Gibbs J said that it is the ‘ordinary rule’ of courts of Australia that their proceedings shall be conducted ‘publicly and in open view’—without public scrutiny, ‘abuses may flourish undetected’. Gibbs J went on to say:

Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for ‘publicity is the authentic hallmark of judicial as distinct from administrative procedure’. To require a court invariably to sit in closed court is to alter the nature of the court.<sup>75</sup>

8.55 The principle of open justice finds some protection in the principle of legality. French CJ has said that ‘a statute which affects the open-court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle’.<sup>76</sup>

8.56 Jason Bosland and Ashleigh Bagnall have written that this ‘longstanding common law principle manifests itself in three substantive ways’:

[F]irst, proceedings are conducted in ‘open court’; second, information and evidence presented in court is communicated publicly to those present in the court; and, third, nothing is to be done to discourage the making of fair and accurate reports of judicial proceedings conducted in open court, including by the media. This includes reporting the names of the parties as well as the evidence given during the course of proceedings.<sup>77</sup>

8.57 That the media is entitled to report on court proceedings is ‘a corollary of the right of access to the court by members of the public’, and therefore ‘[n]othing should be done to discourage fair and accurate reporting of proceedings’.<sup>78</sup>

### Limitations on open justice

8.58 The principle of open justice is not absolute, and limits on the open justice principle have long been recognised by the common law, particularly where it is ‘necessary to secure the proper administration of justice’ or where it is otherwise in the public interest.<sup>79</sup>

75 *Russell v Russell* (1976) 134 CLR 495, 520. French CJ has said that this principle ‘is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts. Under the *Constitution* courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The open-court principle serves to maintain that standard. However, it is not absolute.’: *Hogan v Hinch* (2011) 243 CLR 506, [20].

76 *Hogan v Hinch* (2011) 243 CLR 506, [27] (French CJ).

77 Bosland and Bagnall, above n 72, 674.

78 *John Fairfax Publications v District Court of NSW* (2004) 61 NSWLR 344, [20] (citations omitted).

79 ‘It has long been accepted at common law that the application of the open justice principle may be limited in the exercise of a superior court’s inherent jurisdiction or an inferior court’s implied powers. This may be done where it is necessary to secure the proper administration of justice’: *Hogan v Hinch* (2011) 243 CLR 506, [21] (French CJ). ‘A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule’: *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]–[477] (McHugh JA, Glass JA agreeing).

8.59 In *Russell v Russell*, Gibbs J said that there are ‘established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament’.<sup>80</sup> His Honour went on to say that ‘the need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court’.<sup>81</sup>

8.60 The common law has recognised a number of cases in which the principle of open justice may be limited in some circumstances, for example, to protect: secret technical processes; an anticipated breach of confidence; the name of a blackmailer’s victim; the name of a police informant or the identity of an undercover police officer; and national security.<sup>82</sup> French CJ has said that the categories of case are not closed, but they ‘will not lightly be extended’.<sup>83</sup>

8.61 In *John Fairfax Group v Local Court of New South Wales*, Kirby P said:

The common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourages its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of a particular case.<sup>84</sup>

8.62 Exceptions are provided for in international law. Article 14.1 of the ICCPR provides, in part:

The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.<sup>85</sup>

80 *Russell v Russell* (1976) 134 CLR 495, 520.

81 *Ibid* 520 [8].

82 These examples are taken from *Hogan v Hinch* (2011) 243 CLR 506, [21] (French CJ) (citations omitted). Concerning national security, French CJ said: ‘Where “exceptional and compelling considerations going to national security” require that the confidentiality of certain materials be preserved, a departure from the ordinary open justice principle may be justified’: *Ibid* [21].

83 *Hogan v Hinch* (2011) 243 CLR 506, [21].

84 *John Fairfax Group v Local Court of NSW* (1991) 36 NSWLR 131, 141 (citations omitted).

85 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.1. The meaning of many terms related to limitations in the ICCPR was considered by a panel of experts and set out in the *Siracusa Principles: United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984).

8.63 Among other common law powers to limit open justice, courts may in some circumstances conduct proceedings *in camera* and make suppression orders.<sup>86</sup> Such powers are also provided for in Commonwealth statutes. There are a range of such laws, including those that concern:

- the general powers of the courts;
- national security; and
- witness protection.

### General powers of the courts

8.64 Federal courts have express statutory powers to make suppression orders and non-publication orders.<sup>87</sup> Section 37AE of the *Federal Court of Australia Act 1976* (Cth), for example, provides that ‘in deciding whether to make a suppression order or non-publication order, the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice’.<sup>88</sup>

8.65 Section 37AG sets out the grounds for making a suppression or non-publication order:

- (a) the order is necessary to prevent prejudice to the proper administration of justice;
- (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
- (c) the order is necessary to protect the safety of any person;
- (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).<sup>89</sup>

8.66 These grounds are reflected in other statutes, discussed below, that concern limits on open justice.

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86 ‘It has long been accepted at common law that the application of the open justice principle may be limited in the exercise of a superior court’s inherent jurisdiction or an inferior court’s implied powers’: *Hogan v Hinch* (2011) 243 CLR 506, [21] and cases cited there. ‘The federal courts also have such implied powers as are incidental and necessary to exercise the jurisdiction or express powers conferred on them by statute: *DJL v The Central Authority* (2000) 201 CLR 226, 240–1. The Federal Court has power to make suppression orders as a result of these implied powers, including in relation to documents filed with the Court: *Central Equity Ltd v Chua* [1999] FCA 1067 (29 July 1999).

87 Eg, *Federal Court of Australia Act 1976* (Cth) ss 37AE–37AL. Model statutory provisions on suppression and non-publication orders were endorsed by Commonwealth, state and territory Attorneys-General in 2010. See *Access to Justice (Federal Jurisdiction) Amendment Act 2011* (Cth). NSW and Victoria have also implemented the model provisions.

88 Ibid s 37AE.

89 Ibid s 37AG(1). The Explanatory Memorandum for the relevant Bill said the amendments were designed to ‘ensure that suppression and non-publication orders are made only where necessary on the grounds set out in the Bill, taking into account the public interest in open justice, and in terms that clearly define their scope and timing’: Explanatory Memorandum, *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* (Cth).



8.67 Under s 17(4) of the *Federal Court of Australia Act 1976* (Cth), the Federal Court may exclude members of the public where it is satisfied that this would be in the interests of justice.

8.68 These provisions will have a relatively limited effect on criminal trials, given that criminal trials are rarely heard in federal courts, although in 2009 the Federal Court was given jurisdiction to deal with indictable cartel offences.<sup>90</sup>

### National security

8.69 A number of provisions limit open justice for national security reasons. For example, sch 1 s 93.2 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) provides that a court may exclude the public from a hearing or make a suppression order, if it is 'satisfied that it is in the interest of the security or defence of the Commonwealth'.<sup>91</sup>

8.70 Similar provisions include s 85B of the *Crimes Act 1914* (Cth) and s 31(1) of the *Defence (Special Undertakings) Act 1952* (Cth), although the relevant proviso reads: if 'satisfied that such a course is *expedient* in the interest of the defence of the Commonwealth'.<sup>92</sup>

8.71 In making orders under these provisions, courts may consider the principles of open justice and the need to provide a fair trial.<sup>93</sup> In *R v Lodhi*, McClellan CJ at CL said:

Neither the *Crimes Act* or the *Criminal Code* expressly acknowledges the principle of open justice or a fair trial. However, by the use of the word 'may' the Court is given a discretion as to whether to make an order. Accordingly, the Court must determine whether the relevant interest of the security of the Commonwealth is present and, after considering the principle of open justice and the objective of providing the accused with a fair trial, determine whether, balancing all of these matters, protective orders should be made.<sup>94</sup>

8.72 Under s 127(4) of the *Service and Execution of Process Act 1992* (Cth), a court may direct that a proceeding to which the section applies, which concerns matters of state, is to be held *in camera*. Suppression orders can be made under s 96.

8.73 Section 40 of the *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth) concerns closing courts and making suppression orders to prevent the disclosure of information related to nuclear weapons and other such material.

8.74 The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (*NSI Act*) aims to prevent the disclosure of information in federal criminal and civil proceedings where the disclosure is likely to prejudice national security.<sup>95</sup> The *NSI Act's* interference with the principle of full disclosure is discussed later in this chapter. Limits on disclosure affect open justice, but open justice may be more directly

90 See *Competition and Consumer Act 2010* (Cth) s 163.

91 *Criminal Code* s 93.2(1).

92 Emphasis added.

93 *Lodhi v R* (2006) 65 NSWLR 573; *R v Benbrika (Ruling No 1)* [2007] VSC 141 (21 March 2007).

94 *Lodhi v R* (2006) 65 NSWLR 573, 584 [27] (McClellan CJ at CL).

95 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 3.

affected by the closed hearing provisions in the Act.<sup>96</sup> Further, the court may exclude both the defendant and their lawyer from these hearings, if the lawyer does not have an appropriate security clearance.<sup>97</sup> These procedures have been criticised.<sup>98</sup>

### Witness protection

8.75 The other major ground for limiting open justice is to protect certain witnesses, particularly children and other vulnerable witnesses.

8.76 In the Federal Court, all witnesses in ‘indictable primary proceedings’ may be protected (not just those involved in criminal proceedings involving a sexual offence). Under s 23HC(1)(a) of the *Federal Court of Australia Act 1976* (Cth), the Court may make such orders as it thinks appropriate in the circumstances to protect witnesses.<sup>99</sup> However, although the Federal Court has been given jurisdiction to hear indictable cartel offences,<sup>100</sup> criminal trials are otherwise rarely heard in federal courts.

8.77 Under s 28 of the *Witness Protection Act 1994* (Cth), courts must hold certain parts of proceedings in private and make suppression orders when required to protect people in the National Witness Protection Program. However, it will not make such orders if ‘it considers that it is not in the interests of justice’.<sup>101</sup>

8.78 Similarly, law enforcement ‘operatives’ are given some protection under s 15MK(1) of the *Crimes Act*, which permits a court to make orders suppressing information if it ‘considers it necessary or desirable to protect the identity of the operative for whom [a witness identity protection certificate] is given or to prevent disclosure of where the operative lives’.

8.79 The courts may exclude members of the public from a proceeding where a vulnerable witness is giving evidence under s 15YP of the *Crimes Act*. Depending on the proceedings, this may include children (for sexual and child pornography offences) and all people for slavery, slavery-like and human trafficking offences.<sup>102</sup>

8.80 The court may also make such orders for a ‘special witness’. The court may declare a person to be a special witness ‘if satisfied that the person is unlikely to be able to satisfactorily give evidence in the ordinary manner because of: (a) a disability; or (b) intimidation, distress or emotional trauma arising from: (i) the person’s age, cultural background or relationship to a party to the proceeding; or (ii) the nature of the evidence; or (iii) some other relevant factor’.<sup>103</sup>

96 Ibid ss 27, 38G. The closed hearing requirements are set out in Ibid ss 29, 38I.

97 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 29(3), 38I(3). The limits on the right to a lawyer in the *NSI Act* are discussed later in this chapter.

98 See, eg, Law Council of Australia, *Submission 75*.

99 This protection can also be made in relation to ‘information, documents and other things admitted or proposed to be admitted’: *Federal Court of Australia Act 1976* (Cth) s 23HC(1)(b).

100 See *Competition and Consumer Act 2010* (Cth) s 163.

101 *Witness Protection Act 1994* (Cth) s 28A(1).

102 *Crimes Act 1914* (Cth) s 15Y.

103 Ibid s 15YAB(1). See also Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) Ch 7.

8.81 It is an offence under s 15YR(1) of the *Crimes Act* to publish, without leave, information which identifies certain children and vulnerable adults or ‘is likely to lead to the vulnerable person being identified’.

### Other laws

8.82 Other non-criminal Commonwealth statutes that may limit open justice, often to protect children and other vulnerable people, include:

- *Family Law Act 1975* (Cth) s 121—offence to publish an account of proceedings under the Act that identifies a party to the proceedings or a witness or certain others;
- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)—court can order that proceedings occur *in camera* if it is in the interests of justice and the interests of ‘Aboriginal tradition’;<sup>104</sup>
- *Migration Act 1958* (Cth) s 91X—the names of applicants for protection visas are not to be published by federal courts;
- *Child Support (Registration and Collection) Act 1988* (Cth) s 110X provides for an offence of publishing an account of proceedings, under certain parts of the Act, that identifies a party to the proceedings or a witness or certain others; and
- *Administrative Appeals Tribunal Act 1975* (Cth) ss 35(2), 35AA.

8.83 This chapter focuses on criminal trials, but laws that limit open justice and other fair trial rights in civil trials also warrant careful justification.

## Right to obtain and adduce evidence and confront witnesses

8.84 A person’s right to defend themselves against a criminal charge includes the right to cross-examine the prosecution’s witnesses and to obtain and adduce other evidence in support of their defence. Disclosure of evidence also serves the proper administration of justice. The High Court has spoken of ‘the desirability, in the interests of justice, of obtaining the fullest possible access to the facts relevant to the issues in a case’.<sup>105</sup>

8.85 At common law, the prosecution has a duty to disclose all relevant evidence in its possession to an accused.<sup>106</sup> This is said to be an incident of an accused’s right to a

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104 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 27.

105 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron and Gummow JJ).

106 *Grey v The Queen* (2001) 75 ALJR 1708; *Mallard v The Queen* (2005) 224 CLR 125, [17] (Gummow, Hayne, Callinan and Heydon JJ).

fair trial<sup>107</sup> and full disclosure has been called a ‘golden rule’.<sup>108</sup> An accused also has a right to adduce other evidence in support of their defence.

8.86 Confrontation and the opportunity for cross-examination has also been said to be of ‘central significance to the common law adversarial system of trial’.<sup>109</sup> The right to confront an adverse witness is ‘basic to any civilised notion of a fair trial’.<sup>110</sup> In *R v Davis*, Lord Bingham said:

It is a long-established principle of the English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence.<sup>111</sup>

8.87 This principle, Lord Bingham said, originated in ancient Rome and was later recognised by such authorities as Sir Matthew Hale, Blackstone and Bentham.

The latter regarded the cross-examination of adverse witnesses as ‘the indefeasible right of each party, in all sorts of causes’ and criticised inquisitorial procedures practised on the continent of Europe, where evidence was received under a ‘veil of secrecy’ and the door was left ‘wide open to mendacity, falsehood, and partiality’.<sup>112</sup>

8.88 These rights are also recognised in the *United States Constitution*. The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right ‘to be confronted with the witnesses against him’ and ‘to have compulsory process for obtaining witnesses in his favor’.

### Limitations

8.89 A number of laws may limit the right to confront witnesses, test evidence and adduce evidence, including laws that:

- provide exceptions to the hearsay rule;
- protect vulnerable witnesses, such as children;
- protect privileged information, such as communications between client and lawyer and between a person and religious confessor;
- allow matters to be proved by provision of an evidential certificate; and
- permit the use of redacted evidence in court, for national security reasons.

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107 *R v Ward* [1993] 1 WLR 619, 674. Quoted with approval by Lord Bingham in *R v H* [2004] 2 AC 134, 147. ‘The prosecution’s duty of disclosure is an incident of an accused’s right to a fair trial’: ‘*D’ v Western Australia* (2007) 179 A Crim R 377 (Buss JA).

108 *R v H* [2004] 2 AC 134, 147 (Lord Bingham).

109 *Lee v The Queen* (1998) 195 CLR 594, [32].

110 *R v Hughes* [1986] 2 NZLR 129, 149 (Richardson J).

111 *R v Davis* [2008] 1 AC 1128, [5].

112 *Ibid.*

## Hearsay evidence

8.90 Exceptions to hearsay allow evidence to be adduced that cannot be the subject of cross-examination, and therefore have some potential, in principle, to affect the fairness of a trial.<sup>113</sup>

8.91 The importance of being able to cross-examine adverse witnesses is one of the rationales for the rule against hearsay evidence.<sup>114</sup> As noted above, confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.<sup>115</sup> Terese Henning and Professor Jill Hunter have written about the ‘massive challenge in identifying an apparently elusive formula to satisfy the fair trial right to confront one’s accusers in the face of key witnesses who have died, fled or refused to testify’.<sup>116</sup>

8.92 However, many exceptions to the hearsay rule have been recognised both at common law and statute. The exceptions in the Uniform Evidence Acts are set out in ss 60–75 and have been said to be ‘a significant departure from the common law’.<sup>117</sup> Australia has ‘followed the common law trend of shifting the traditional exclusionary rule in a markedly pro-admissibility direction’.<sup>118</sup>

The Uniform Evidence Acts allow more out-of-court statements to be admitted and effectively abolishes the distinction between admitting statements for their truth or simply to prove that they were made. Also, implied, that is, unintended, assertions are not excluded, in contrast to the situation at common law where ... the situation remains unclear.<sup>119</sup>

8.93 If the Uniform Evidence Acts allow for more hearsay evidence to be admitted, this could, in principle, affect the fairness of a trial. But it is not suggested that they do in fact cause unfairness and no such suggestion was made in submissions.<sup>120</sup>

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113 The hearsay rule in the Uniform Evidence Acts is as follows: ‘Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation’: Uniform Evidence Acts s 59(1). Another formulation is set out in Cross on Evidence: ‘an assertion other than one made by a witness while testifying in the proceedings is inadmissible as evidence of any fact asserted’: JD Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [31010].

114 The High Court has said that one ‘very important reason why the common law set its face against hearsay evidence was because otherwise the party against whom the evidence was led could not cross-examine the maker of the statement’: *Lee v The Queen* (1998) 195 CLR 594, [32]. ‘Legal historians are divided between those who ascribe the development of the rule predominantly to distrust of the capacity of the jury to evaluate it, and those who ascribe it predominantly to the unfairness of depriving a party of the opportunity to cross-examine the witness’: Heydon, above n 113, [31015].

115 *Lee v The Queen* (1998) 195 CLR 594, [32].

116 Terese Henning and Jill Hunter, ‘Finessing the Fair Trial for Complainants and the Accused: Mansions of Justice or Castles in the Air’ in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Bloomsbury Publishing, 2012) 347.

117 Westlaw AU, *The Laws of Australia* (at 20 July 2015) 16 Evidence, ‘16.4 Testimony’ [16.4.1950].

118 Henning and Hunter, above n 116, 347.

119 Westlaw AU, *The Laws of Australia* (at 20 July 2015) 16 Evidence, ‘16.4 Testimony’ [16.4.1950].

120 Hearsay evidence was not discussed in submissions and the question of whether the exceptions in the statute are appropriate has not been considered in this Inquiry.

8.94 Gans and Palmer write that the past exceptions to hearsay at common law were developed in a haphazard way and were unsatisfactory in principle and policy and difficult to apply.<sup>121</sup> The legislation ‘comprehensively rationalises and liberalises’ the law.<sup>122</sup>

8.95 It is not only the prosecution that may wish to adduce hearsay evidence. Given a defendant may wish to do so in aid of their defence, some exceptions to the hearsay rule may be necessary to give a defendant a fair trial.

### Vulnerable witnesses

8.96 The vulnerable witness provisions under pt IAD of the *Crimes Act* are intended to protect child witnesses and victims of sexual assault. For example, there are restrictions on the cross-examination of vulnerable persons by unrepresented defendants.<sup>123</sup>

8.97 Such laws limit traditional rights of cross-examination, but were not criticised in submissions to this Inquiry. In fact, there have been calls for such laws to be extended. Women’s Legal Services Australia has called for similar protections to be included in the *Family Law Act*, to

protect victims of family and domestic violence in family law from being subject to cross-examination by the perpetrator who is self-representing and to provide assistance with the victim’s cross-examination of the perpetrator (if the victim is also self-representing).<sup>124</sup>

8.98 Laws to protect vulnerable witnesses recognise the importance of treating all participants in criminal proceedings fairly, rather than only the accused. In the past, Professors Paul Roberts and Jill Hunter have written, complainants and witnesses have ‘too often been treated in deplorable ways that betray the ideals of criminal adjudication’. Consequently:

Major procedural reforms have been implemented in many common law jurisdictions over the last several decades designed to assist complainants and witnesses to give

121 Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2014) 107–8.

122 Ibid 109.

123 *Crimes Act 1914* (Cth) pt IAD div 3. Concerning the Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013 (Cth), the Human Rights Committee said: ‘The committee appreciates that this is intended to protect vulnerable witnesses and does not limit the ability of the defendant’s legal representative from testing evidence. However, the committee is concerned that if a person is not legally represented this provision may limit the defendant’s ability to effectively examine the witnesses against them’: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Eighth Report of 2013* (June 2013) 5.

124 Women’s Legal Services Australia, *Submission 5*. Recommendations about the cross-examination of complainants in sexual assault proceedings have been made in previous inquiries: Productivity Commission, *Access to Justice Arrangements* (2014) rec 24.2; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) recs 18–3, 27–1, 27–2, 27–3. See further, Phoebe Bowden, Terese Henning and David Plater, ‘Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?’ (2014) 37 *Melbourne University Law Review* 539. Access to justice for persons with disability is discussed in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 7.

their best evidence in a humane procedure which treats them with appropriate concern and respect.<sup>125</sup>

8.99 Although these may be seen as laws that limit traditional fair trial rights, Roberts and Hunter stress that rights for victims and witnesses need not be ‘secured *at the expense of* traditional procedural safeguards, as though justice were a kind of commodity that must be taken from some (‘criminals’) so that others (‘victims’) can have more’.<sup>126</sup> This is said to be a common misconception. Victims ‘do not truly get justice when offenders are convicted unfairly, still less if flawed procedures lead to the conviction of the innocent’.<sup>127</sup>

### Evidentiary certificates

8.100 The use of evidentiary certificates has the potential to affect the fairness of a trial. An evidentiary certificate allows third parties to provide the court with evidence—without appearing in court and therefore without being challenged about that evidence. The *Guide to Framing Commonwealth Offences* states that evidentiary certificates should be used rarely:

Evidentiary certificate provisions are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute but that would be difficult to prove under the normal evidential rules, and should be subject to safeguards.<sup>128</sup>

8.101 Section 34AA of the *Australian Security Intelligence Organisation Act 1979* (Cth) enables evidentiary certificates to be issued, setting out facts in relation to certain acts done by ASIO. The Law Council of Australia (the Law Council) submitted that this may unjustifiably limit the right to a fair trial.

This principle requires that mechanisms designed to prevent disclosure of certain evidence must be considered exceptional, and limited only to those circumstances that can be shown to be necessary. The right to a fair trial may not have been appropriately balanced against the public interest in non-disclosure.<sup>129</sup>

8.102 However, the certificates in s 34AA are only ‘prima facie evidence of the matters stated in the certificate’.<sup>130</sup> More potentially problematic—though not necessarily unjustified—are provisions that provide that certain certificates are to be taken as *conclusive* evidence of the facts stated in the certificate.<sup>131</sup> There are a number

125 Paul Roberts and Jill Hunter, ‘Introduction—The Human Rights Revolution in Criminal Evidence and Procedure’ in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Bloomsbury Publishing, 2012) 20.

126 Ibid.

127 Ibid.

128 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 54.

129 Law Council of Australia, *Submission 75*. ‘These provisions relate to the use of special powers by ASIO, such as search warrants, computer search warrants, and listening and tracking device warrants’: Ibid.

130 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34AA(4).

131 Like placing a legal onus of proof on a defendant, this may undermine the presumption of innocence. On burdens of proof, see Ch 9.

of such provisions in the Commonwealth statute book. Concerning such certificates, the *Guide to Framing Commonwealth Offences* states:

In many cases it will be beyond the power of the Federal Parliament to enact provisions that specify that the certificate is conclusive proof of the matters stated in it. Requiring courts to exclude evidence to the contrary in this way can destroy any reasonable chance to place the complete facts before the court. However, conclusive certificates may be appropriate in limited circumstances where they cover technical matters that are sufficiently removed from the main facts at issue. An example of a provision permitting the use of conclusive certificates is subsection 18(2) of the *Telecommunications (Interception and Access) Act 1979*. These certificates only cover the technical steps taken to enable the transfer of telecommunications data to law enforcement agencies.<sup>132</sup>

### Public interest immunity and national security information

8.103 The common law and Commonwealth statutes both recognise some limits on disclosure—for example, when disclosure would not be in the public interest, perhaps because it might threaten national security, and when disclosure would involve breaking a protected confidence, such as that between client and lawyer. Such limits on these principles are discussed in the following section.

8.104 Statutes that provide that a court may order that evidence not be admitted or disclosed in a criminal trial on public interest grounds may limit a person's right to a fair trial. Although they appear to be justified, two such provisions are s 130 of the Uniform Evidence Acts and s 31 of the *NSI Act*.

8.105 A public interest immunity to protect certain information was recognised in the common law,<sup>133</sup> and is provided for in s 130 of the Uniform Evidence Acts, which provides in part:

If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.<sup>134</sup>

8.106 In making such a direction in criminal proceedings, the Acts state, a court may consider, among other things, 'whether the party seeking to adduce evidence of the

132 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 55.

133 'The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it': *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ). 'Public interest immunity is a doctrine of substantive law. It represents a fundamental immunity. It allows for the withholding of documents in a variety of circumstances where disclosure of the documents would harm the public interest. The balancing process applied in determining whether a claim for public interest immunity should be upheld requires that the public interest in confidentiality must be weighed against the public interest in disclosure. Section 130 of the *Evidence Act* invokes the same two stage process of analysis as the common law': *R v Richard Lipton* (2011) 82 NSWLR 123, [84] (McColl JA).

134 Uniform Evidence Acts s 130(1).



information or document is a defendant or the prosecutor'.<sup>135</sup> If the information or document is needed to support the defence, this will strongly favour disclosure.<sup>136</sup>

8.107 A related provision is s 31 of the *NSI Act*, which provides that in a criminal trial a court may make orders to prevent, or place conditions on, the disclosure of national security information.<sup>137</sup> The court must consider not only any risk to national security, but 'whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence'.<sup>138</sup>

8.108 This provision of the *NSI Act* has attracted some criticism, particularly in relation to s 31(8),<sup>139</sup> which provides that in deciding whether to make an order to protect national security information, a court 'must give greatest weight' to the question of national security.<sup>140</sup> However, in *R v Lodhi*, Whealy J said that this 'does no more than to give the Court guidance as to the comparative weight it is to give one factor when considering it alongside a number of others'. His Honour also said:

The legislation does not intrude upon the customary vigilance of the trial judge in a criminal trial. One of the court's tasks is to ensure that the accused is not dealt with unfairly. This has extended traditionally into the area of public interest immunity claims. I see no reason why the same degree of vigilance, perhaps even at a higher level, would not apply to the Court's scrutiny of the Attorney's certificate in a s 31 hearing.<sup>141</sup>

8.109 The Gilbert and Tobin Centre of Public Law suggested the provision's impact on procedural fairness was nevertheless neither justified nor appropriate:

The court's decision-making process should be rebalanced to give equal weight to procedural fairness and national security considerations, and it should require that information be excluded from the proceedings altogether if admitting it in summary or redacted form would undermine the defendant's right to a fair trial.<sup>142</sup>

8.110 The Councils for Civil Liberties also criticised the provision, preferring the balancing test in the Uniform Evidence Acts s 130.<sup>143</sup>

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135 Ibid s 130(5)(b).

136 Stephen Odgers, *Uniform Evidence Law* (Lawbook Company, 9th ed, 2009) [1.3.13600].

137 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) 31. For civil proceedings, see s 38L.

138 Ibid 31(7)(b).

139 Eg, Gilbert and Tobin Centre of Public Law, *Submission 22*; Law Council of Australia, *Submission 75*.

140 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(7),(8). There are also related provisions for civil proceedings in pt 3A of the Act.

141 *R v Lodhi* (2006) 163 A Crim R 448, [108]. The reasoning of Whealy J in this case was upheld in the NSW Court of Criminal Appeal: see *Lodhi v R* (2007) 129 A Crim R 470 [36]. In a related appeal, Spigelman CJ said: 'This tilting or "thumb on the scales" approach to a balancing exercise does not involve the formulation of a rule which determines the outcome in the process. Although the provision of guidance, or an indication of weight, will affect the balancing exercise, it does not change the nature of the exercise': *Lodhi v R* (2006) 65 NSWLR 573, [45].

142 Gilbert and Tobin Centre of Public Law, *Submission 22*.

143 Councils for Civil Liberties, *Submission 142*.

8.111 Although not greatly concerned by its impact,<sup>144</sup> the Independent National Security Legislation Monitor (INSLM) suggested s 31(8) be repealed.<sup>145</sup> While it has ‘survived constitutional challenge, if its tilting or placing a thumb on the scales produces no perceptible benefit in the public interest, it would be better if it were omitted altogether’.<sup>146</sup>

8.112 However, even without this amendment, the *NSI Act* does not, in the INSLM’s view, undermine a person’s right to a fair trial. In making an order under s 31, the *NSI Act* provides that a court must consider ‘whether any such order would have a substantial adverse effect on the defendant’s right to receive a fair hearing, including in particular on the conduct of his or her defence’.<sup>147</sup> In the opinion of the INSLM, this suffices to protect against any potential unfairness.<sup>148</sup>

8.113 More generally, the INSLM said that the *NSI Act* ‘represents a serious and valuable reform in granting to the court a power to modify disclosure so as to protect national security information while vindicating open and fair, or at least fair, justice’.<sup>149</sup>

### **Secret evidence**

8.114 Withholding secret evidence from one party to a criminal or civil procedure—particularly from a defendant in a criminal trial—is a more serious matter. Here, the court is asked to rely on evidence that the other party has no opportunity to see or challenge. There is a strong common law tradition against the use of secret evidence. In *Pompano*, French CJ said:

At the heart of the common law tradition is ‘a method of administering justice’. That method requires judges who are independent of government to preside over courts held in public in which each party has a full opportunity to present its own case and to meet the case against it. Antithetical to that tradition is the idea of a court, closed to the public, in which only one party, a government party, is present, and in which *the judge is required by law to hear evidence and argument which neither the other party nor its legal representatives is allowed to hear*.<sup>150</sup>

8.115 The INSLM has said that ‘an accused simply should not be at peril of conviction of imprisonment (perhaps for life) if any material part of the case against him or her has not been fully exposed to accused and counsel and solicitors’.<sup>151</sup>

144 The INSLM said the provision is ‘little more than an otiose reminder’ to judges of the importance of national security: Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013) 139.

145 *Ibid.*

146 *Ibid.*

147 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(7)(b).

148 Independent National Security Legislation Monitor, Australian Government, above n 144, 143. The matter is discussed extensively in this INSLM report.

149 *Ibid.* 136. The protection of national security information in criminal proceedings was the subject of a 2004 ALRC report: Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004).

150 *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [1] (French CJ) (emphasis added).

151 Independent National Security Legislation Monitor, Australian Government, above n 144, 142.

8.116 Article 14 of the ICCPR also provides that defendants must have the opportunity to examine witnesses against them.

8.117 The ALRC is not aware of any Commonwealth provisions that allow for so-called secret evidence in criminal trials. Although there have been criticisms of the *NSI Act* in relation to this, the INSLM has stated that the Act ‘is not a legislative system to permit and regulate the use of secret evidence in a criminal trial—ie evidence adverse to an accused, that the accused is not allowed to know’.<sup>152</sup>

8.118 The use of secret evidence in tribunals, particularly in immigration cases, is discussed in the ALRC’s 2004 report, *Keeping Secrets*.<sup>153</sup>

### Privileges

8.119 Statutory privileges have the potential to prevent an accused person from obtaining or adducing evidence of their innocence, and may have some potential to deny a person a fair trial.<sup>154</sup> A privilege is essentially a right to resist disclosing information that would otherwise be required to be disclosed.<sup>155</sup>

Privileged communications may be highly probative and trustworthy, but they are excluded because their disclosure is inimical to a fundamental principle or relationship that society deems worthy of preserving and fostering even at the expense of truth ascertainment in litigation. There is a constant tension between the competing values which various privileges promote, and the need for all relevant evidence to be adduced in litigation.<sup>156</sup>

8.120 The recognition of certain privileges suggests that ‘truth may sometimes cost too much’.<sup>157</sup> Unlike other rules of evidence, privileges are ‘not aimed at ascertaining truth, but rather at upholding other interests’.<sup>158</sup>

8.121 Many statutory privileges provide for exceptions, usually with reference to the public interest, which may allow a court to permit a defendant in criminal proceedings to adduce what would otherwise be privileged evidence. Such exceptions exist to the privileges for journalists’ sources, self-incrimination, public interest immunity and

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152 Ibid 140.

153 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004) ch 10.

154 J Gans, *Submission 2*.

155 Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006) [14.1]. See also Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (Cavendish Publishing Ltd, 2004) 91.

156 Jill B Hunter, Camille Cameron and Terese Henning, *Evidence and Criminal Process* (LexisNexis Butterworths, 2005) 276 [8.1]. In *McGuinness v Attorney-General (Vic)* Rich J said: ‘Privilege from disclosure in courts of justice is exceptional and depends upon only the strongest considerations of public policy. The paramount principle of public policy is that the truth should be always accessible to the established courts of the country. It was found necessary to make exceptions in favour of state secrets, confidences between counsel and client, solicitor and client, doctor and patient, and priest and penitent, cases presenting the strongest possible reasons for silencing testimony’: *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 87.

157 *R v Young* (1999) 46 NSWLR 681, 696–7 (Spigelman CJ).

158 J Gans, *Submission 2*.

settlement negotiations.<sup>159</sup> However, these exceptions are arguably more limited or do not exist for client legal privilege and the privilege for religious confessions.<sup>160</sup> Gans submitted that this needs careful review.<sup>161</sup>

8.122 Section 123 of the Uniform Evidence Acts appears to provide for an exception to client legal privilege for defendants seeking to adduce evidence in criminal proceedings.<sup>162</sup> However, the provision was given a confined interpretation in *DPP (Cth) v Galloway*.<sup>163</sup> The Victorian Court of Appeal ruled that s 123 applied only to ‘the adducing by an accused of evidence already in the accused’s possession or knowledge’.<sup>164</sup> The section therefore simply preserved a more limited exception recognised by the common law.<sup>165</sup> The High Court in *Carter v Northmore Hale Davey & Leake*<sup>166</sup> and the House of Lords in *R v Derby Magistrates’ Court*<sup>167</sup> had both rejected an exception to the privilege in favour of a defendant seeking to adduce evidence in their defence.<sup>168</sup>

8.123 Nevertheless, that the privilege may sometimes conflict with fair trial principles has been recognised. In *Grant v Downs*, the existence of the privilege was said to reflect that one public interest is paramount over ‘a more general public interest’ that ‘requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available’.<sup>169</sup> In *Carter v Northmore Hale Davey & Leake*, Toohey J noted that ‘it may seem somewhat paradoxical that “the perfect administration of justice” should accord priority to confidentiality of disclosures over the interests of a fair trial, particularly where an accused is in jeopardy in a criminal trial for a serious offence’.<sup>170</sup>

8.124 Some have criticised the priority given to the privilege. Professor Colin Tapper, co-author of the classic text, *Cross and Tapper on Evidence*, has written that in *Derby Magistrates* the House of Lords ‘chose to exult the doctrine of legal professional privilege into an absolute right to which the need of the accused for access to evidence to promote his defence was subordinate’.<sup>171</sup> Professor Tapper argued that ‘this betrays conceptual confusion, and can be justified neither in principle nor on authority’.<sup>172</sup> Others have called the House of Lords decision a ‘significant—and somewhat surprising—derogation from traditional priorities’.<sup>173</sup> Jonathan Auburn was also critical

159 Uniform Evidence Acts ss 126H(2), 128(4), 129(5), 130(5), 131(2). See J Gans, *Submission 2*.

160 Uniform Evidence Acts ss 118–120, 127.

161 J Gans, *Submission 2*.

162 Although the exception does not apply to a co-accused’s privileged communications and documents.

163 *DPP (Cth) v Galloway* [2014] VSCA 272.

164 *Ibid.*

165 *Ibid.*

166 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121.

167 *R v Derby Magistrates’ Court; Ex parte B* [1996] 1 AC 487.

168 Roberts and Zuckerman state that such an exception was well established at common law: Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford University Press, 2004) 237.

169 *Grant v Downs* (1976) 135 CLR 674, 685.

170 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 154 [35].

171 Colin Tapper, ‘Prosecution and Privilege’ (1996) 1 *International Journal of Evidence & Proof* 5, 24.

172 *Ibid.*

173 Roberts and Zuckerman, above n 168, 238.

of the position taken by the courts in Australia and England, and stressed the strong interest in giving a criminal accused access to all exculpatory evidence.<sup>174</sup>

8.125 An exception to the privilege has been recognised in Canada<sup>175</sup> and New Zealand. Section 67(2) of the *Evidence Act 2006* (NZ) makes an exception for communications or information where ‘the Judge is of the opinion that evidence of the communication or information is necessary to enable the defendant in a criminal proceeding to present an effective defence’.

8.126 Client legal privilege is an important right which should only be limited when strictly necessary. However, given the importance of allowing a defendant to bring evidence in support of their defence, the ALRC considers that s 123 of the Uniform Evidence Acts should be reviewed and further consideration should be given to enacting a clear exception to the privilege for defendants seeking to adduce evidence.

## Right to a lawyer

8.127 A defendant’s right to a lawyer does not have a particularly long history. People accused of a felony had no right to be represented by a lawyer at their trial until 1836.<sup>176</sup> Moisisdis explains that ‘English criminal procedure for centuries stood for the principle that an accused charged with a felony should not be represented by counsel’.<sup>177</sup> The truth, it was thought, might be hidden behind the ‘artificial defence’ of a lawyer—better for the court to hear the accused speak for themselves and judge their manner and countenance.<sup>178</sup> Therefore, up until the late 18th century, defendants would typically respond to accusations in person.<sup>179</sup>

8.128 The right to a lawyer is now much more widely recognised and subject to relatively few restrictions, as discussed below. However, it is important to distinguish between two senses in which a person may be said to have a right to a lawyer. The first (negative) sense essentially means that no one may prevent a person from using a lawyer. The second (positive) sense essentially suggests that, governments have an obligation to provide a person with a lawyer, at the government’s expense, if necessary.

8.129 Both of these types of rights are reflected in art 14 of the ICCPR, which provides, in part, that a defendant to a criminal charge must be:

tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and

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174 Jonathan Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000) 192, and more generally, Ch 9, ‘Criminal Exculpatory Evidence’.

175 *Smith v Jones* [1999] 1 SCR 455.

176 *Dietrich v The Queen* (1992) 177 CLR 292, 317 (citations omitted). ‘The defendant could not have the assistance of counsel in presenting his case, unless there was a point of law arising on the indictment; since the point of law had to be assigned before counsel was allowed, the unlearned defendant had little chance of professional help’: Baker, above n 14, 417. ‘So the prosecutor could tell the jury why the defendant was guilty, but there was no advocate to say why he was not’: Bingham, above n 3.

177 Moisisdis, above n 13, 10.

178 *Ibid* 9.

179 *Ibid* 10.

to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

8.130 In Australia, the second type of right—to be provided a lawyer at the state’s expense—is less secure. In *Dietrich v The Queen*, Mason CJ and McHugh J said:

Australian law does not recognize that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial.<sup>180</sup>

8.131 The court held that the seriousness of the crime is an important consideration: ‘the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only’.<sup>181</sup> Mason CJ and McHugh J also said that

the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence.<sup>182</sup>

8.132 While it is within judicial power to delay a trial or set aside a conviction on natural justice or procedural fairness grounds, it is questionable whether it is part of the judicial function to order government to provide a service.

8.133 The right to a lawyer is undermined—made considerably less useful—where communications between client and lawyer are monitored or may later be required to be disclosed. Chapter 12 discusses the importance of protecting lawyer-client confidentiality and statutory limits on legal professional privilege.

### **Laws that limit legal representation**

8.134 The ALRC is not aware of any Commonwealth laws that limit a court’s power to stay proceedings in a serious criminal trial on the grounds that the accused is unrepresented and therefore will not have a fair trial.

8.135 Nevertheless, Commonwealth laws place limits on access to a lawyer. Under s 23G of the *Crimes Act*, an arrested person has a right to communicate with a lawyer and have the lawyer present during questioning, but this is subject to exceptions, set out in s 23L. There are exceptions where an accomplice of the person may try to avoid apprehension or where contacting the legal practitioner may lead to the concealment, fabrication or destruction of evidence or the intimidation of a witness. There is also an

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180 *Dietrich v The Queen* (1992) 177 CLR 292, 311.

181 *Ibid.*

182 *Ibid* [1].

exception for when questioning is considered so urgent, having regard to the safety of other people, that it cannot be delayed.<sup>183</sup>

8.136 Although these exceptions may mean a person cannot in some circumstances see a lawyer of their own choosing, the person must nevertheless be offered the services of another lawyer.<sup>184</sup> The ALRC has not received submissions suggesting that these limits are unjustified.

8.137 The Law Council criticised the limited access to a lawyer for persons subject to a preventative detention order under pt 5.3 div 105 of the *Criminal Code*, which enables a person to be taken into custody and detained by the Australian Federal Police in a State or Territory prison or remand centre for an initial period of up to 24 hours:

Preventative detention orders restrict detainees' rights to legal representation by only allowing detainees access to legal representation for the limited purpose of obtaining advice or giving instructions regarding the issue of the order or treatment while in detention (Section 105.37 of the *Criminal Code*). Contact with a lawyer for any other purpose is not permitted.<sup>185</sup>

8.138 Section 34ZO of the *Australian Security Intelligence Organisation Act 1979* (Cth) limits a detained person's contact with a lawyer; s 34ZP allows a detained person to be questioned without a lawyer; and s 34ZQ(9) allows for the removal of legal advisers whose conduct 'the prescribed authority considers ... is unduly disrupting the questioning' of a detained person. However, s 34ZQ(10) provides that in the event of the removal of a person's legal adviser, 'the prescribed authority must also direct ... that the subject may contact someone else'.

8.139 The right to have a lawyer of one's own choosing may be limited by provisions in the *NSI Act* that provide that parts of a proceeding may not be heard by, and certain information not given to, a lawyer for the defendant who does not have the appropriate level of security clearance.<sup>186</sup> The Act also provides that the court may recommend that the defendant engage a lawyer who has been given, or is prepared to apply for, a security clearance.<sup>187</sup>

8.140 This scheme has been criticised.<sup>188</sup> The Law Council, for example, submitted that it restricts a person's right to a lawyer of his or her choosing and 'threatens the independence of the legal profession'.<sup>189</sup>

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183 *Crimes Act 1914* (Cth) s 23L(1)(b). See also Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *12th Report of 2002* (October 2002) 416.

184 The investigating official 'must offer the services of another legal practitioner and, if the person accepts, make the necessary arrangements': *Crimes Act 1914* (Cth) s 23L(4).

185 Law Council of Australia, *Submission 75*. The Law Council also said that 'both the content and the meaning of communication between a lawyer and a detained person can be monitored. Such restrictions could create unfairness to the person under suspicion by preventing a full and frank discussion between a client and his or her lawyer and the ability to receive relevant legal advice': *Ibid*. See Ch 12.

186 See, eg, *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 29, 39, 46.

187 *Ibid* s 39(5).

188 Law Council of Australia, *Submission 75*; Councils for Civil Liberties, *Submission 142*.

189 Law Council of Australia, *Submission 75*.

8.141 Some have suggested that ‘special advocates’—lawyers with a security clearance permitted to access classified information—could be appointed to represent defendants in certain circumstances.<sup>190</sup> Special advocate regimes are found in Canada, New Zealand and the United Kingdom.<sup>191</sup>

### Legal aid and access to justice

8.142 As discussed above, the positive right to be provided with a lawyer at the state’s expense is not a traditional common law right, but it is nonetheless very important—particularly, as the High Court has recognised, for those on trial for serious offences.<sup>192</sup> Even if a court will order a stay of proceedings against an unrepresented defendant in a serious criminal trial, this may be of little assistance to those charged with non-serious offences. It will also not help victims of crimes and others who may seek access to justice but cannot afford to pay for legal representation. The focus of the fair trial rights in this chapter is on the rights of people accused of crimes, but this is not to discount the importance of access to justice more broadly.

8.143 The importance of funding for legal aid was raised by some stakeholders to this Inquiry. Women’s Legal Services Australia submitted that many of their clients cannot afford legal representation and legal aid funding is insufficient for their needs. These clients must either continue their legal action unrepresented or not pursue legal action.<sup>193</sup> The Law Council said that ‘the right to a fair trial and effective access to justice is undermined by a failure of successive governments to commit sufficient resources to support legal assistance services, as evidenced by increasingly stringent restrictions on eligibility for legal aid’.<sup>194</sup> The Council stressed the importance of access to legal representation and highlighted some of the practical restrictions on access to legal aid, stating that ‘it is clear that under existing guidelines it is possible to convict and imprison a person who is not deemed eligible for legal aid’.<sup>195</sup>

8.144 Access to justice has been the subject of many reports, in Australia and elsewhere, including recent reports by the Attorney-General’s Department<sup>196</sup> and the Productivity Commission.<sup>197</sup> The Law Council suggested that an ‘in-depth inquiry into the consequences of denials of legal assistance’ still needs to be conducted.<sup>198</sup>

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190 Gilbert and Tobin Centre of Public Law, *Submission 22*; Law Society of NSW Young Lawyers, *Submission 69*.

191 Gilbert and Tobin Centre of Public Law, *Submission 22*.

192 *Dietrich v The Queen* (1992) 177 CLR 292.

193 Women’s Legal Services Australia, *Submission 5*.

194 Law Council of Australia, *Submission 75*.

195 Law Council of Australia, *Submission 140*.

196 Attorney-General’s Department, ‘A Strategic Framework for Access to Justice in the Federal Civil Justice System’ (2009).

197 Productivity Commission, above n 124.

198 Law Council of Australia, *Submission 140*.



## Appeal from acquittal

8.145 ‘It is a golden rule, of great antiquity, that a person who has been acquitted on a criminal charge should not be tried again on the same charge’.<sup>199</sup> To try a person twice is to place them in danger of conviction twice—to ‘double their jeopardy’. The general principles underlying the double jeopardy rule include:

the prevention of the State, with its considerable resources, from repeatedly attempting to convict an individual; the according of finality to defendants, witnesses and others involved in the original criminal proceedings; and the safeguarding of the integrity of jury verdicts.<sup>200</sup>

8.146 The principle applies where there has been a hearing on the merits—whether by a judge or a jury. It does not extend to appeals from the quashing or setting aside of a conviction,<sup>201</sup> or appeals from an acquittal by a court of appeal following conviction by a jury.<sup>202</sup>

8.147 The rule against double jeopardy can be traced to Greek, Roman and Canon law and is considered a cardinal principle of English law.<sup>203</sup> By the 1660s it was considered a basic tenet of the common law.<sup>204</sup> Blackstone in his *Commentaries on the Laws of England* grounds the pleas of *autrefois acquit* (former acquittal) and *autrefois convict* (former conviction for the same identical crime) on the ‘universal maxim of the common law of England, that no man ought to be twice brought in danger of his life for one and the same crime’.<sup>205</sup>

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199 *Davern v Messel* (1984) 155 CLR 21, 338 (Murphy J).

200 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, ‘Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals, Discussion Paper, Chapter 2’ (2003). Justice Michael Kirby identified ten separate grounds offered by the law for the rule against double jeopardy: (a) controlling state power; (b) upholding accusatorial trial; (c) accused’s right to testify; (d) desirability of finality; (e) confidence in judicial outcomes; (f) substance not technicalities; (g) differential punishment; (h) upholding the privilege against self-incrimination; (i) increasing conviction chances; and (j) denial of basic rights: see Justice Michael Kirby, ‘Carroll, Double Jeopardy and International Human Rights Law’ (2003) 27(5) *Criminal Law Journal* 231. Justice Black of the US Supreme Court said in *Green v United States*: ‘the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty ... It may be seen as a value which underpins and affects much of the criminal law’: *Green v The United States*, 355 US 184 (1957), 187–188, quoted in *Pearce v The Queen* (1998) 194 CLR 610, [10] (McHugh, Hayne and Callinan JJ).

201 *Davern v Messel* (1984) 155 CLR 21, 62 (Murphy J).

202 *Ibid* 39–40 (Gibbs CJ); *R v Benz* (1989) 168 CLR 110, 112 (Mason CJ).

203 See the judgment of Murphy J, which provides an account of the history of this principle: *Davern v Messel* (1984) 155 CLR 21, 62–63 (Murphy J).

204 Martin Friedland, *Double Jeopardy* (Clarendon Press, 1969) 5–6. At common law, the principle originated in the dispute between King Henry II and Archbishop Thomas Becket over the role of the King’s courts in punishing clerks convicted in the ecclesiastical courts.

205 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press reprinted by Legal Classics Library, 1765) vol IV, bk IV, ch 26, 329–30.

8.148 In Australia, the principle of legality provides some protection for this principle.<sup>206</sup> When interpreting a statute, courts will presume that Parliament did not intend to permit an appeal from an acquittal, unless such an intention was made unambiguously clear.<sup>207</sup> For example, in *Thompson v Mastertouch TV Service*, the Federal Court found that the court's power to 'hear and determine appeals' under s 19 of the *Federal Court Act 1970* (Cth) should not be interpreted as being sufficient to override the presumption against appeals from an acquittal.<sup>208</sup> However, the principle of legality has not been applied to confine s 68(2) of the *Judiciary Act*, which can operate to 'pick up' state laws that allow an appeal against an acquittal and apply them in state courts hearing Commonwealth offences.<sup>209</sup>

8.149 The double jeopardy principle is protected in international law. Article 14.7 of the ICCPR states that no one shall be 'liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.

8.150 Bills of rights and human rights statutes prohibit laws that permit an appeal from an acquittal in the United States,<sup>210</sup> Canada<sup>211</sup> and New Zealand.<sup>212</sup> The prohibition is also recognised in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).<sup>213</sup>

### Laws that allow an appeal from an acquittal

8.151 Section 73 of the *Constitution* provides the High Court with extensive jurisdiction, including jurisdiction to hear appeals from an acquittal made by a judge or jury at first instance.<sup>214</sup> However, while it is within the Court's power to hear an appeal from an acquittal, the Court will generally not grant special leave, unless issues of general importance arise.<sup>215</sup> In *R v Wilkes*, Dixon CJ said the Court should

206 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

207 *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, 408 (Deane J); *R v Snow* (1915) 20 CLR 315, 322 (Griffith CJ); *R v Wilkes* (1948) 77 CLR 511, 516–517 (Dixon J); *Macleod v Australian Securities and Investments Commission* (2002) 211 CLR 287, 289.

208 *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, 408 (Deane J).

209 'The *Judiciary Act* is legislation of a quasi constitutional character. Its purpose includes the purpose of ensuring that accused persons in each State are, with defined exceptions, the subject of incidents of a criminal trial which are the same for Commonwealth offences as they are for State offences. This is a purpose of overriding significance and is sufficient to displace the application of principles of statutory interpretation which lead the Court to read down general words to conform with principles which Parliament is presumed to respect': *R v JS* (2007) 175 Crim R 108, [115] (Spigelman CJ).

210 *United States Constitution* amend V.

211 *Canadian Charter of Rights and Freedoms* s 11(h).

212 *New Zealand Bill of Rights Act 1990* (NZ) s 26(2).

213 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 26; *Human Rights Act 2004* (ACT) s 24.

214 Deane J discusses the history of the consideration of s 73 of the *Constitution*, including the decision in *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, [17]–[19] (Deane J).

215 *Ibid* [18] (Deane J).

be careful always in exercising the power which we have, remembering that it is not in accordance with the general principles of English law to allow appeals from acquittals, and that it is an exceptional discretionary power vested in this Court.<sup>216</sup>

8.152 The ALRC is not aware of any other Commonwealth law that allows an appeal from an acquittal.<sup>217</sup>

8.153 Some state laws permit an appeal from an acquittal,<sup>218</sup> and such laws will be picked up and applied by s 68 of the *Judiciary Act*.<sup>219</sup> The state laws largely follow the model developed by the Council of Australian Governments in 2007. Gans has raised a number of concerns about the Victorian law, including that it ‘allows appeals against acquittal in some circumstances where there isn’t fresh and compelling evidence’ and includes a narrower safeguard than the one proposed by the Council of Australian Governments.<sup>220</sup>

8.154 However, as noted above, state laws are not reviewed in this Report, nor is the general policy of s 68(2) of the *Judiciary Act*, which is to ‘place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice’.<sup>221</sup>

8.155 However, a few possible justifications for limiting this principle may be noted. Victims of crime and their families will sometimes believe a guilty person has been wrongly acquitted. For these people particularly, the application of the principle that a person should not be tried twice may not only be unjust, but deeply distressing. The principle will seem acceptable when the person acquitted is believed to be innocent, but not when they are believed to be guilty. A balance must be struck, it has been said, ‘between the rights of the individual who has been lawfully acquitted and the interest held by society in ensuring that the guilty are convicted and face appropriate consequences’.<sup>222</sup>

216 *R v Wilkes* (1948) 77 CLR 511, 516–517 (Dixon CJ). This suggests the High Court is unlikely to interfere with a verdict of not guilty entered by a jury: see *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, [19].

217 Neither was the Law Council. ‘Apart from s 73 of the *Constitution*, which allows appeals to the High Court, the Law Council is unable to identify any Commonwealth laws which permit an appeal after acquittal’: Law Council of Australia, *Submission 75*.

218 See, eg, *Crimes (Appeal and Review) Act 2001* (NSW) pt 8; *Criminal Procedure Act 2004* (Vic) s 327H; *Criminal Code* (Qld) ch 68; *Criminal Appeals Act 2004* (WA) pt 5A; *Criminal Law Consolidation Act 1935* (SA) pt 10; *Criminal Code Act 1924* (Tas) ch XLIV.

219 See *R v JS* [2007] NSWCCA 272 [93]–[119] (Spigelman CJ).

220 Gans submitted that Victoria ‘lacks the crucial COAG safeguard that the Court of Appeal rule that a retrial would be “in the interests of justice”’, and instead, the Court ‘need only find that the retrial would be fair, which is a narrow matter’: J Gans, *Submission 2*.

221 *R v Williams* (1934) 50 CLR 551, 560 (Dixon J). Gleeson CJ said in *R v Gee* that this ‘reflects a legislative choice between distinct alternatives: having a procedure for the administration of criminal justice in relation to federal offences that is uniform throughout the Commonwealth; or relying on State courts to administer criminal justice in relation to federal offences and having uniformity within each State as to the procedure for dealing with State and federal offences. The choice was for the latter’: *R v Gee* (2003) 212 CLR 230, [7] (Gleeson CJ).

222 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 200.

8.156 Where fresh and truly compelling evidence of guilt emerges—perhaps, for example, from DNA evidence<sup>223</sup>—a new trial may seem particularly justified, not only to the victims of the particular crime, but also to the broader community.

8.157 Gans suggested two general criteria that might be used to assess the question of justification. These are, first, ‘does the law contain appropriate constraints to ensure that the prosecutor cannot take advantage of the process to simply make repeated attempts to try a defendant until he or she is fortuitously convicted?’, and second, ‘do defendants have at least the same ability to appeal against a final conviction?’<sup>224</sup>

8.158 Limits on the principle appear only to be justified when they are strictly necessary. The Law Commission of England and Wales considered the rule against double jeopardy and prosecution appeals in 2001. Its findings and recommendations have laid the foundation for laws limiting the rule in the UK and in other jurisdictions, including New South Wales. The Law Commission concluded that interference with the rule may be justified where the acquittal is ‘manifestly illegitimate’ and ‘sufficiently damages the reputation of the criminal justice system so as to justify overriding the rule against double jeopardy’.<sup>225</sup> The scope of the interference must be clear-cut and notorious.<sup>226</sup>

8.159 The Law Commission recommended that additional incursions on the rule against double jeopardy be limited to acquittals for murder or genocide.<sup>227</sup> This built on existing rights of appeal from an acquittal where the accused has interfered with or intimidated a juror or witness.<sup>228</sup>

8.160 Civil Liberties Australia submitted that the right to appeal against *conviction* was also integral to the right to a fair trial and suggested that existing restrictions on the right of appeal in most Australian jurisdictions are too strict and failed to comply with Australia’s international human rights obligations.<sup>229</sup>

## Other laws

8.161 In addition to the laws discussed above, stakeholders commented on other laws that may limit fair trial rights.

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223 See Kelley Burton, ‘Reform of the Double Jeopardy Rules on the Basis of Fresh and Compelling DNA Evidence in New South Wales and Queensland’ (2004) 101 *James Cook University Law Review* 84. See also K Burton et al, *Submission 123*.

224 J Gans, *Submission 2*.

225 The Law Commission, ‘Double Jeopardy and Prosecution Appeals: Report on Two References under Section 3(1)(e) of the *Law Commissions Act 1965*’ [4.30].

226 *Ibid* [4.35].

227 *Ibid* [4.30]–[4.36].

228 In order for an appeal to lie, it must not be contrary to the interests of justice, and there must be a real possibility that the accused would not have been acquitted absent the interference or intimidation: *Criminal Procedure and Investigations Act 1996* (UK) ss 54–57.

229 Civil Liberties Australia, *Submission 94*.

### Trial by jury

8.162 The *Constitution* provides that the ‘trial on indictment of any offence against any law of the Commonwealth shall be by jury’.<sup>230</sup> As discussed above, this has been given a narrow interpretation: Parliament may determine which offences are indictable. Therefore any criminal law that provides for a summary trial may, broadly speaking, be said to deny a jury trial to a person charged with that offence.

8.163 Section 4G of the *Crimes Act* provides: ‘Offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears.’ Section 4H of the *Crimes Act* provides: ‘Offences against a law of the Commonwealth, being offences which: (a) are punishable by imprisonment for a period not exceeding 12 months; or (b) are not punishable by imprisonment; are summary offences, unless the contrary intention appears’.

8.164 Defendants may therefore be denied a jury trial where: (1) an offence is punishable by fine only, or by imprisonment for *less* than 12 months; and (2) an offence is punishable by a period of *more* than 12 months, but the statute evinces an intention that the offence be tried summarily.

8.165 The second situation is perhaps of greater concern. An example is s 232A of the *Customs Act 1901* (Cth), which concerns rescuing seized goods and assaulting customs officers, and provides that whoever does this: ‘shall be guilty of an offence and shall be liable, *upon summary conviction*, to a fine not exceeding 5 penalty units or to imprisonment for any period not exceeding 2 years’.

8.166 Section 4J of the *Crimes Act* provides that certain indictable Commonwealth offences may be dealt with summarily, but usually only with the consent of both the prosecutor and the defendant. Section 4JA also provides that certain indictable offences punishable by fine only may be dealt with summarily.

### Torture evidence from other countries

8.167 Evidence obtained by torture or duress is unreliable, and its use in a trial would not be fair, whether the torture was conducted in Australia or in another country.<sup>231</sup>

8.168 In a 2005 case concerning ‘third-party torture evidence’, Lord Bingham said ‘the English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to

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230 *Australian Constitution* s 80.

231 Lord Hoffmann said that ‘an accused who is convicted on evidence obtained from him by torture has not had a fair trial’, not because of the use of torture, which breaches another right, ‘but in the reception of the evidence by the court for the purposes of determining the charge’: *Montgomery v HM Advocate, Coulter v HM Advocate* [2003] 1 AC 641 649. Evidence obtained by torture is not only unreliable, but torture is of course widely recognised as immoral, criminal and a breach of an absolute human right. Freedom from torture is one of only a few absolute rights in the ICCPR: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 4, 7.

the Torture Convention'.<sup>232</sup> The common law's rejection of torture was 'hailed as a distinguishing feature of the common law' and the subject of 'proud claims' by many English jurists:

In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by *the inherent unreliability of confessions or evidence so procured* and by the belief that it degraded all those who lent themselves to the practice.<sup>233</sup>

8.169 Australian Lawyers for Human Rights submitted that the exception to admissibility in the *Foreign Evidence Act 1994* (Cth) may make it 'harder for a court to exclude evidence obtained by torture or duress', because the definition of torture in s 27D(3) is too narrow—it should have been inclusive, rather than exclusive.<sup>234</sup>

8.170 The Law Council also submitted that s 27D 'permits evidence of foreign material and foreign government material obtained *indirectly* by torture or duress'.<sup>235</sup>

### Civil penalty provisions that should be criminal

8.171 A person may be denied their criminal process rights where a regulatory provision is framed as a civil penalty, when it should—given the nature and severity of the penalty—instead have been framed as a criminal offence.

8.172 The Law Council has expressed concerns about the sometimes 'punitive' civil confiscation proceedings provided for in the *Bankruptcy Act 1966* (Cth),<sup>236</sup> and suggested that 'ordinary protections in respect of criminal matters should be applied':

The involvement of the Commonwealth DPP in the process offers a valuable safeguard and the guarantees that the person who commences and conducts the proceedings is an Officer of the Court and the Crown, with all the duties that entails, and thus has a personal obligation to ensure that the Court's powers and processes are adhered to in accordance with the right to a fair trial.<sup>237</sup>

8.173 The Parliamentary Joint Committee on Human Rights has discussed whether civil penalty provisions should instead be characterised as criminal offences in the context of a range of bills<sup>238</sup> and has published a valuable guidance note on this topic.<sup>239</sup>

232 *A v Secretary of State for the Home Department* [2005] 2 AC 68.

233 *Ibid* [11] (emphasis added). Lord Bingham later concluded: 'The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice': *Ibid* [52].

234 Australian Lawyers for Human Rights, *Submission 43*.

235 Law Council of Australia, *Submission 75* (emphasis added).

236 *Bankruptcy Act 1966* (Cth) ss 154(6A), 231A(2A).

237 Law Council of Australia, *Submission 75*.

238 Eg, the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2013 (Cth), the Biosecurity Bill 2012 (Cth), the Superannuation Legislation Amendment (Reducing Illegal Early Release and Other Measures) Bill 2012 (Cth) and the Australian Sports Anti-Doping Authority Amendment Bill 2013 (Cth).

239 Parliamentary Joint Committee on Human Rights, 'Offence Provisions, Civil Penalties and Human Rights' (Guidance Note No 2, Parliament of Australia, 2014) 3–5.

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**Conclusion**

8.174 Although it will never be justified to hold an unfair trial, specific fair trial rights are not absolute and may sometimes be qualified, for example to protect vulnerable witnesses and national security information. The structured proportionality test is a useful tool to test whether laws that limit fair trial rights are justified.

8.175 Laws that alter fair trial procedures for national security reasons were criticised in some submissions and clearly warrant ongoing and careful scrutiny, including by relevant parliamentary committees and the INSLM.

8.176 Client legal privilege and the privilege for religious confessions in the Uniform Evidence Acts may unjustifiably limit the right of a defendant in a criminal trial to adduce evidence in their defence and should therefore be reviewed.

