

8. Fair Trial

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A common law right

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

8.2 Fundamentally, a fair trial is designed to prevent innocent people being convicted of crimes. It protects people’s life, liberty and reputation. Being wrongly convicted of a crime has been called a ‘deep injustice and a substantial moral harm’.⁴ By helping prevent the punishment of the innocent, fair trials also promote the prosecution and punishment of the guilty.⁵

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, if ever, laws that encroach on the right may be justified. The ALRC calls for submissions on two questions about this right.

Question 8–1 What general principles or criteria should be applied to help determine whether a law that limits the right to a fair trial is justified?

Question 8–2 Which Commonwealth laws unjustifiably limit the right to a fair trial, and why are these laws unjustified?

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

2 *Brown v Scott* [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 Civil trials should also be fair, but this chapter focuses on criminal trials.

8.4 The High Court of Australia has said that a right to a fair trial is ‘commonly manifested in rules of law and of practice designed to regulate the course of the trial’.⁶

8.5 Many attributes of a fair trial are now set out in international treaties, conventions, human rights statutes and bills of rights,⁷ but many of these attributes have their roots in older statutes and the common law.

8.6 Although a fair trial may now be called a traditional and fundamental right, what amounts to a fair trial has changed over time. Many criminal trials of history would now seem strikingly unfair. In his book, *Criminal Discovery: From Truth to Proof and Back Again*, Dr Cosmas Moisidis 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.⁸

8.7 Even later, trials by jury—an important element of a fair trial—remained in many ways unfair. In his *Introduction to English Legal History*, J H Baker wrote that for some time the accused remained ‘at a considerable disadvantage compared with the prosecution’:

His right to call witnesses was doubted, and when it was allowed the witnesses were not sworn. The process for compelling the attendance of witnesses for the prosecution, by taking recognisances, was not available to the defendant. 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. ... 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.⁹

8.8 Baker describes the ‘unseemly hurry of Old Bailey trials in the early nineteenth century’ and calls it ‘disgraceful’:

the average length of a trial was a few minutes, and ‘full two thirds of the prisoners, on their return from their trials, cannot tell of any thing which has passed in court, nor even, very frequently, whether they have been tried’. It is impossible to estimate how

6 *Jago v The District Court of NSW* (1989) 168 CLR 23, 29 (Mason CJ).

7 Eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14 (discussed further below).

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

9 J. Baker, *An Introduction to English Legal History* (Butterworths, 1971) 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. ‘Until the late 18th century, it was typical for defendants in criminal trial to respond in person to all accusations’: Moisidis, above n 8, 10.)

far these convictions led to wrong convictions, but the plight of the uneducated and unbefriended prisoner was a sad one.¹⁰

8.9 The most important reforms, Baker writes, ‘were put off until the nineteenth century’:

In 1836 prisoners on trial for felony were at last given the right to ‘make full answer and defence thereto by counsel learned in the law’. In 1867 they were given facilities, comparable to those of the prosecution, for calling witnesses to depose evidence before the trial and having such witnesses bound over to attend the trial. And in 1898 prisoners were accorded the dangerous privilege of giving sworn evidence themselves.¹¹

Protections from statutory encroachment

International law

8.10 Article 14 of the *International Covenant on Civil and Political Rights* sets out many elements of a fair trial, including the following:

- the court must be ‘competent, independent and impartial’;
- the trial should be held in public and judgment given in public;
- the defendant should be presumed innocent until proved guilty (the prosecution therefore bears the onus of proof and must prove guilt beyond reasonable doubt);¹²
- the defendant should be informed of the nature and cause of the charge against him—promptly, in detail, and in a language which he understands;
- the defendant must have time and the facilities to prepare his defence;
- the defendant must be tried without undue delay;
- 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’;
- 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’;
- the defendant is entitled to the ‘free assistance of an interpreter if he cannot understand or speak the language used in court’;

10 Baker, above n 9, 417.

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

12 See Ch 9.

- the defendant ‘is entitled to disclosure of material which is helpful to him because it weakens the prosecution case or strengthens his’; and
- the defendant has a right not ‘not to be compelled to testify against himself or to confess guilt’.¹³

8.11 International instruments, such as the ICCPR, cannot be used to ‘override clear and valid provisions of Australian national law’.¹⁴ However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.¹⁵

Bills of rights

8.12 In other countries, bills of rights or human rights statutes provide some protection to fair trial procedures. Bills of rights and human rights statutes protect the right to a fair trial in the United States,¹⁶ the United Kingdom,¹⁷ Canada¹⁸ and New Zealand.¹⁹ For example, the Sixth Amendment to the US 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.

8.13 Principles of a fair trial are also set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).²⁰

Australian Constitution

8.14 The *Australian Constitution* does not expressly provide that criminal trials must be fair, nor does it set out the elements of a fair trial.

8.15 Trial by jury is commonly considered a feature of a fair trial, and s 80 of the *Constitution* provides a limited guarantee of a trial by jury:

the trial on indictment of any offence against any law of the Commonwealth shall be by jury.

8.16 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

13 This list is drawn from *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. The privilege against self-incrimination is discussed in Ch 10.

14 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

15 *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 1.

16 *United States Constitution* amend VI.

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

18 *Canada Act 1982 c 11, Sch B Pt 1* (‘*Canadian Charter of Rights and Freedoms*’) ss 11, 14.

19 *Bill of Rights Act 1990* (NZ) ss 24, 25.

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

the requirement for a trial by jury applies.²¹ This has been said to mean that s 80 provides ‘no meaningful guarantee or restriction on Commonwealth power’.²²

8.17 The concept of Commonwealth judicial power provides some limited protection to the right to a fair trial. The text and structure of Chapter III of the *Constitution* implies 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*’.²³ After quoting this passage, Gaudron J, in *Nicholas v The Queen* (1998), 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.²⁴

8.18 However, regulating judicial processes (for example the power to exclude evidence) is considered permissible, and is not an incursion on the judicial power of the Commonwealth.²⁵

Principle of legality

8.19 The principle of legality may provide some protection to fair trials.²⁶ When interpreting a statute, courts are likely to presume that Parliament did not intend to interfere with fundamental principles of a fair trial, unless this intention was made unambiguously clear.

8.20 Discussing the principle of legality in *Malika Holdings v Stretton* (2001), Justice McHugh said it is a fundamental legal principle that ‘a civil or criminal trial is to be a fair trial’,²⁷ and that ‘clear and unambiguous language is needed before a court will

21 *R v Archdall and Roskrugge; Ex parte Carrigan and Brown* (1928) 41 CLR 128, 139–140; *R v Bernasconi* (1915) 19 CLR 629, 637; *Kingswell v The Queen* (1985) 159 CLR 264, 276–277; *Zarb v Kennedy* (1968) 121 CLR 283.

22 George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 355. See also *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 58 CLR 556, 581–2 (Dixon and Evatt JJ).

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

24 *Nicholas v The Queen* (1998) 193 CLR 173, 208–209 (Gaudron J).

25 *Nicholas v The Queen* (1998) 193 CLR 173.

26 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

27 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, 541–42; *R v Lord Chancellor; Ex parte Witham* [1998] QB 575, 585.

find that the legislature has intended to repeal or amend' this and other fundamental principles.²⁸

Justifications for encroachments

8.21 Factors which may inform whether a limitation is justified include:

- the nature of the right affected;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation; and
- its connection to the underlying purpose.

8.22 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.²⁹

8.23 The ALRC calls for submissions identifying Commonwealth laws that encroach on accepted principles of a fair trial and that are *not* justified, and explaining why these laws are not justified.

28 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298 [28] (McHugh J, in a passage discussing why 'care needs to be taken in declaring a principle to be fundamental').

29 *Canada Act 1982 c 11, Sch B Pt 1* ('Canadian Charter of Rights and Freedoms') s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.