

10. Fair Trial

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A common law right

10.1 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

10.2 Fundamentally, a fair trial is designed to prevent innocent people being convicted of crimes. It protects liberty, property, reputation and other fundamental interests. Being wrongly convicted of a crime has been called a ‘deep injustice and a substantial moral harm’.⁴ Fairness also gives a trial its integrity and moral legitimacy or authority.⁵

10.3 Furthermore, fair trials are presumably more likely to reach correct verdicts than unfair trials, and therefore they may not only help prevent wrongful convictions of the innocent, but also indirectly promote the prosecution and punishment of the guilty.

10.4 The right to a fair trial is ‘manifested in rules of law and of practice designed to regulate the course of the trial’.⁶ 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’.⁷

10.5 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 statutory limits, for example:

- a trial should be held in public and the court’s reasons for its decision should be delivered in public;
- a defendant has a right to a lawyer; and
- a defendant has the right to confront the prosecution’s witnesses and to test the evidence said to prove his or her guilt.

10.6 Other important components of a fair trial are discussed in separate chapters of this Interim Report: the burden of proof and the right to be presumed innocent;⁸ the

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

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

8 See Ch 11.

right not to incriminate oneself;⁹ and the right to have one's communications with one's lawyer kept confidential.¹⁰

10.7 The right to a fair trial 'extends to the whole course of the criminal process'.¹¹ It has been said that there is 'no aspect of preparation for trial or of criminal procedure which is not touched by, or indeed determined by, the principle of a fair trial'.¹² However, 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, but rather highlights particular examples of laws that interfere with accepted principles of a fair trial.¹³

10.8 Further, because some state courts exercise federal jurisdiction and, by virtue of s 68 of the *Judiciary Act 1903* (Cth) (*Judiciary Act*), the courts apply their own state procedures, a more thorough review of fair trial laws might need to consider all these state laws.

10.9 This chapter and the burden of proof chapter focus on criminal laws, although many of the principles will also be relevant to civil trials, which must of course also be fair, particularly considering the very serious consequences—including sometimes substantial legal costs and civil penalties—that may follow a civil trial.¹⁴

A traditional right?

10.10 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.

10.11 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 history of the development of criminal law and procedure'. Even some fundamental features of the criminal trial process 'are of relatively recent origin':

So, for example, what now are axiomatic principles about the burden and standard of proof in criminal trials were not fully established until, in 1935, *Woolmington v The Director of Public Prosecutions* decided that '[t]hroughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt'. Any reference to the history of the privilege against self-incrimination, or its place in English criminal trial process, must also

9 See Ch 12.

10 See Ch 13.

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

12 *John Fairfax Publications Pty Ltd v Hitchcock* (2004) 61 NSWLR 344, [22], [23] (Spigelman CJ, Handley JA and M W Campbell A-JA agreeing).

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

14 The Terms of Reference refer to laws that 'alter *criminal* law practices based on the principle of a fair trial' (emphasis added).

recognise that it was not until the last years of the nineteenth century that an accused person became a competent witness at his or her trial.¹⁵

10.12 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.¹⁶

10.13 Even later, 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 JH 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.¹⁷

10.14 There was ‘little of the care and deliberation of a modern trial before the last 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.¹⁸

10.15 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 far these convictions led to wrong convictions, but the plight of the uneducated and unbefriended prisoner was a sad one.¹⁹

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

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

17 JH 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’: Moisisdis, above n 16, 10.

18 Baker, above n 17, 417.

19 *Ibid.*

10.16 The most important reforms, Baker writes, ‘were put off until the nineteenth century’. A person on trial for a felony was given the right to have a lawyer represent him in court in 1836; to call his own witnesses in 1867; and to give his own sworn evidence in 1898.²⁰

Attributes of a fair trial

10.17 Widely accepted general attributes of a fair trial—some traceable to the common law, others to important Parliamentary reforms—may now be found set out in international treaties, conventions, human rights statutes and bills of rights.²¹ 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;²²
- **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 he or she understands;
- **time and facilities to prepare:** the defendant must have adequate time and facilities to prepare a defence and to communicate with counsel of his own choosing;
- **trial without undue delay:** the defendant must be tried without undue delay—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;²³
- **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’;

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

21 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).

22 See Ch 11.

23 *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’;
- **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’.²⁴

10.18 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.²⁵

Practical justice

10.19 The attributes of a fair trial cannot, however, be conclusively and exhaustively defined.²⁶ 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

²⁴ See Ch 12. This list is 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). Their honours went on to say: ‘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’.

²⁶ 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.

essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience.²⁷

10.20 In *Dietrich v The Queen*, Mason CJ and McHugh J said:

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.²⁸

10.21 In this same case, 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’:

It is because of these matters that the inherent powers of a court to prevent injustice are not confined within closed categories. And it is because of those same matters that, save where clear categories have emerged, the inquiry as to what is fair must be particular and individual.²⁹

10.22 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.³⁰

10.23 The plurality in *Assistant Commissioner Michael James Condon v Pompano*, which approved Gleeson CJ’s statement, said that the ‘rules of procedural fairness do not have immutably fixed content’.³¹ Gageler J said:

Suggestions that there are exceptions to procedural fairness in the common practices of courts in Australia are unfounded. The suggested exceptions are more apparent than real ... All are examples of modifications or adjustments to ordinary procedures, invariably within an overall process that, viewed in its entirety, entails procedural fairness.³²

10.24 Evidently, considerable care must be taken in identifying laws that interfere with the right to a fair trial and, as discussed in Chapter 15, with procedural fairness in administrative decision making. Such laws must be understood in their broader context,

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

28 *Dietrich v The Queen* (1992) 177 CLR 292, 300.

29 *Ibid* 364.

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).

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.

10.25 Much might therefore 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’:

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.³³

10.26 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.³⁴

10.27 In his submission, 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: ‘in my view, 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’.³⁵

10.28 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—often may not, in practice, cause unfairness.

Protections from statutory encroachment

Australian Constitution

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

10.30 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’. However, the High Court has interpreted the words ‘trial on indictment’ to mean that Parliament may

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

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

35 J Gans, *Submission 2*.

determine whether a trial is to be on indictment, and thus, whether the requirement for a trial by jury applies.³⁶ This has been said to mean that s 80 provides ‘no meaningful guarantee or restriction on Commonwealth power’.³⁷

10.31 The concept of Commonwealth judicial power provides some limited protection to the right to a fair trial. The text and structure of Ch 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*’.³⁸ After quoting this passage, Gaudron J, in *Nicholas v The Queen*, 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.³⁹

10.32 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.⁴⁰

10.33 As noted in Chapter 1, the High Court may have moved towards—but stopped short of—entrenching procedural fairness as a constitutional right.⁴¹ If procedural fairness were considered an 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

36 *R v Archdall and Roskrugge; 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.

37 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).

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

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

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

41 Williams and Hume, above n 37, 375.

parties, and limitations on the power of a court or a judge to proceed where proceedings may be affected by actual or apprehended bias.⁴²

10.34 In *Pompano*, Gaegler 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.⁴³

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

Principle of legality

10.36 The principle of legality may provide some protection to fair trials.⁴⁴ 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.

10.37 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’,⁴⁵ 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.⁴⁶

10.38 The application of the principle of legality to particular fair trial rights is also discussed further below and in other chapters of this report dealing with fair trial rights.⁴⁷

International law

10.39 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.

42 Ibid 376.

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

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

45 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.

46 *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’).

47 See Chs 9 and 11–14.

10.40 International instruments, such as the ICCPR, cannot be used to ‘override clear and valid provisions of Australian national law’.⁴⁸ However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.⁴⁹

Bills of rights

10.41 In other jurisdictions, bills of rights or human rights statutes provide some protection to fair trial rights. Bills of rights and human rights statutes protect the right to a fair trial in the United States,⁵⁰ the United Kingdom,⁵¹ Canada⁵² and New Zealand.⁵³ 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.

10.42 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).⁵⁴

Open justice

10.43 Open justice is one of the fundamental attributes of a fair trial.⁵⁵ That the administration of justice must take place in open court is a ‘fundamental rule of the common law’.⁵⁶ 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’.⁵⁷

10.44 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

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

49 *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.

50 *United States Constitution* amend VI.

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

52 *Canada Act 1982 c 11* ss 11, 14.

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

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

55 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.

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

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

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.⁵⁸

10.45 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’.⁵⁹

10.46 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.⁶⁰

10.47 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. Nothing should be done to discourage fair and accurate reporting of proceedings’.⁶¹

Common law limitations

10.48 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 otherwise it is in the public interest.⁶²

10.49 Open justice may be limited where proceedings are conducted *in camera* (the media and the public are not permitted in court); where the court orders that certain information be concealed from those present in court; where the court orders that a person be identified in court by a pseudonym; or where the court prohibits the publication of reports of the proceedings.⁶³

58 *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].

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

60 Bosland and Bagnall, above n 55, 674.

61 *John Fairfax Publications v District Court of NSW* (2004) 61 NSWLR 344, [18]–[21] (citations omitted).

62 ‘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).

63 Bosland and Bagnall, above n 55, 674.

10.50 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’.⁶⁴ 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’.⁶⁵

10.51 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.⁶⁶

10.52 French CJ said that the categories of case are not closed, but they ‘will not lightly be extended’.⁶⁷

10.53 In *John Fairfax Group v Local Court of New South Wales*, Kirby P discussed some of the justifications for common law limits on the principle of open justice:

Exceptions have been allowed by the common law to protect police informers; blackmail cases; and cases involving national security. 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.⁶⁸

10.54 Similar 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

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

65 *Ibid* 520 [8].

66 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].

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

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

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.

Statutes that limit open justice

10.55 Among other common law powers to limit open justice, courts may in some circumstances conduct proceedings *in camera* and make suppression orders.⁶⁹ 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 courts

10.56 Federal courts have express statutory powers to make suppression orders and non-publication orders.⁷⁰ The *Federal Court of Australia Act* (Cth) s 37AE, 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’.⁷¹

10.57 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;

69 ‘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 held that it 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): Explanatory Memorandum, Access to Justice (Federal Jurisdiction) Amendment Bill 2011 (Cth).

70 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. These were implemented in the High Court, Federal Court, Family Court of Australia and the Federal Magistrates Court and other courts exercising jurisdiction under the *Family Law Act 1975* (Cth) by amendments made by the *Access to Justice (Federal Jurisdiction) Amendment Act 2011* (Cth). NSW and Victoria have also implemented the model provisions.

71 *Ibid* s 37AE.

- (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).⁷²

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

10.59 Under the *Federal Court of Australia Act 1976* (Cth) s 17(4), the Federal Court may exclude members of the public where it is ‘satisfied that the presence of the public ... would be contrary to the interests of justice’.

10.60 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.⁷³

National security

10.61 A number of provisions limit open justice for national security. For example, the *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’.⁷⁴

10.62 Similar provisions appear in the *Crimes Act 1914* (Cth) s 85B and the *Defence (Special Undertakings) Act 1952* s 31(1), although the relevant proviso reads: if ‘satisfied that such a course is *expedient* in the interest of the defence of the Commonwealth’.⁷⁵

10.63 In making orders under these provisions, courts may consider the principles of open justice and the need to provide a fair trial.⁷⁶ In *R v Lodhi*, McClellan CJ 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

72 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).

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

74 *Criminal Code Act 1995* (Cth) sch 1 s 93.2(1) (*Criminal Code*). ‘At any time before or during the hearing, the judge or magistrate, or other person presiding or competent to preside over the proceedings, may, if satisfied that it is in the interest of the security or defence of the Commonwealth: (a) order that some or all of the members of the public be excluded during the whole or a part of the hearing; or (b) order that no report of the whole or a specified part of, or relating to, the application or proceedings be published; or (c) make such order and give such directions as he or she thinks necessary for ensuring that no person, without the approval of the court, has access (whether before, during or after the hearing) to any affidavit, exhibit, information or other document used in the application or the proceedings that is on the file in the court or in the records of the court.’

75 Emphasis added.

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

with a fair trial, determine whether, balancing all of these matters, protective orders should be made.⁷⁷

10.64 Under the *Service and Execution of Process Act 1992* (Cth) s 127(4), 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.

10.65 The *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth) s 40 concerns closing courts and making suppression orders and other orders when the court is satisfied that it would be expedient to prevent the disclosure of information related to nuclear weapons and other such material.

10.66 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.⁷⁸ Among other things, it provides that courts must, in some circumstances, consider closing the court to the public, where national security information may be disclosed.⁷⁹

10.67 Decisions about whether certain sensitive information will be admitted as evidence may also be decided in a closed hearing—without the defendant and their lawyer, if the lawyer does not have an appropriate security clearance.⁸⁰

10.68 In deciding to make certain orders, the courts must consider whether there would be a risk of prejudice to national security and whether the 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’. Section 31(8) provides that the court ‘must give greatest weight’ to the question of national security.⁸¹ 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. Yet the discretion remains intact ... 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.⁸²

10.69 On appeal, in *Lodhi v R*, 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

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

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

79 *Ibid* s 31.

80 *Ibid* s 29(3).

81 *Ibid* s 31(7)(8). There are also related provisions for civil proceedings in Pt 3A of the Act.

82 *R v Lodhi* [2006] NSWSC 571, [108]. The reasoning of Whealy J in this case was upheld in the NSW Court of Criminal Appeal: see *Lodhi v R* (2006) 65 NSWLR 573, [36].

provision of guidance, or an indication of weight, will affect the balancing exercise, it does not change the nature of the exercise.⁸³

10.70 The Independent National Security Legislation Monitor (INSLM) discussed s 31(8) and its judicial interpretation and suggested it nevertheless be repealed.⁸⁴ 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’.⁸⁵

10.71 The protection of national security information in criminal proceedings was the subject of the ALRC’s 2004 report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*.⁸⁶

Witness protection

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

10.73 In the Federal Court, all witnesses in ‘indictable primary proceedings’ may be protected (ie not limited to those in a criminal proceeding involving a sexual offence). Under the *Federal Court Act* s 23HC(1)(a), the Court may make such orders as it thinks appropriate in the circumstances to protect witnesses.⁸⁷ However, although the Federal Court has been given jurisdiction to hear indictable cartel offences,⁸⁸ criminal trials are otherwise rarely heard in federal courts.

10.74 Under the *Witness Protection Act 1994* (Cth) s 28, 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’.⁸⁹

10.75 Similarly, law enforcement operatives are given some protection under the *Crimes Act* s 15MK(1), 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’.

10.76 The courts may exclude members of the public from a proceeding where a vulnerable witness is giving evidence under the *Crimes Act* s 15YP. 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.⁹⁰

83 *Lodhi v R* (2006) 65 NSWLR 573, [45].

84 Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013) 139.

85 *Ibid.*

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

87 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).

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

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

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

10.77 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’.⁹¹

10.78 It is an offence under the *Crimes Act* s 15YR(1) 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

10.79 Other Commonwealth statutes that may limit open justice, but not in the context of criminal trials, 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’;⁹²
- *Migration Act 1958* (Cth) s 91X—the names of applicants for protection visas 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;
- *Administrative Appeals Tribunal Act 1975* (Cth) ss 35(2), 35AA;
- *Australian Crime Commission Act 2002* (Cth) ss 25A(9), 29B;
- *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 90, 92.

10.80 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 confront witnesses and test evidence

10.81 The High Court has said that ‘confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial’.⁹³ The right to confront an adverse witness has been said to be ‘basic to any civilised notion of a fair trial’.⁹⁴ In *R v Davis*, Lord Bingham said:

91 *Ibid* s 15YAB(1).

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

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

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

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.⁹⁵

10.82 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’.⁹⁶

10.83 The Sixth Amendment to the *United States Constitution* provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.

Statutory limitations

10.84 A number of laws may limit the right to confront witnesses and test 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.

Hearsay evidence

10.85 The importance of being able to cross-examine adverse witnesses is one of the rationales for the rule against hearsay evidence.⁹⁷ The hearsay rule, as set out 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.⁹⁸

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

96 *Ibid.*

97 ‘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’: JD Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [31015].

98 *Evidence Act 1995* (Cth) 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’: Heydon, above n 97, [31010].

10.86 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’.⁹⁹

Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.¹⁰⁰

10.87 However, 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’.¹⁰¹

10.88 Exceptions to the hearsay rule have been recognised both at common law and in statutes. However, hearsay under the Uniform Evidence Acts extends the common law exceptions and has been said to be ‘a significant departure from the common law’.¹⁰² The exceptions are set out in ss 60–75 of the Uniform Evidence Acts.

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.¹⁰³

10.89 Henning and Hunter write that, in recent years, ‘many common law systems have introduced sweeping legislative reforms’ in this area, and ‘Australia’s legislature and courts have followed the common law trend of shifting the traditional exclusionary rule in a markedly pro-admissibility direction’.¹⁰⁴

Vulnerable witnesses

10.90 The vulnerable witness provisions under the *Crimes Act* pt IAD 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 in pt IAD div 3.¹⁰⁵

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

100 *Ibid.*

101 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.

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

103 *Ibid.*

104 Henning and Hunter, above n 101, 347.

105 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.

10.91 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 provided for 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).¹⁰⁶

10.92 Such laws are part of the trend towards considering the importance of treating fairly all participants in criminal proceedings, rather than the traditional focus on fairness only for the accused.¹⁰⁷ 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'.

Major procedural reforms have been implemented in many common law jurisdictions over the last several decades designed to assist complainants and witnesses to give their best evidence in a humane procedure which treats them with appropriate concern and respect.¹⁰⁸

10.93 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'.¹⁰⁹ 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'.¹¹⁰

Privileges

10.94 Statutory privileges have the potential to prevent an accused person from obtaining or adducing evidence of their innocence, and may therefore deny a person a

106 Women's Legal Services Australia WLSA, *Submission 5*. The Productivity Commission and the ALRC and NSW Law Reform Commission have made recommendations about the cross-examination of complainants in sexual assault proceedings 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 128 (October 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.

107 This is discussed more generally later in the chapter.

108 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.

109 Ibid.

110 Ibid.

fair trial.¹¹¹ A privilege is essentially a right to resist disclosing information that would otherwise be required to be disclosed.¹¹²

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.¹¹³

10.95 The recognition of certain privileges suggests that ‘truth may sometimes cost too much’.¹¹⁴ Unlike other rules of evidence, privileges are ‘not aimed at ascertaining truth, but rather at upholding other interests’.¹¹⁵

10.96 Many statutory privileges provide for exceptions, usually with reference to the public interest, which may allow a court to permit a defendant to adduce otherwise privileged evidence of his or her innocence. Such exceptions exist for the privileges for journalists’ sources, self-incrimination, public interest immunity and settlement negotiations.¹¹⁶ However, they are arguably more limited or do not exist for client legal privilege and the privilege for religious confessions.¹¹⁷ Professor Gans submitted that this needs careful review.¹¹⁸

10.97 Section 123 of the *Evidence Act 1995* (Cth) does provide for an exception for defendants seeking to adduce evidence in criminal proceedings, but Gans was critical of a confined interpretation given to the exception in a 2014 decision of the Victorian Court of Appeal.¹¹⁹

Evidentiary certificates

10.98 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:

111 J Gans, *Submission 2*.

112 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.

113 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.

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

115 J Gans, *Submission 2*.

116 *Evidence Act 1995* (Cth) ss 126H(2), 128(4), 129(5), 130(5), 131(2). See J Gans, *Submission 2*.

117 *Evidence Act 1995* (Cth) ss 118–120, 127.

118 J Gans, *Submission 2*.

119 *DPP (Cth) v Galloway (a pseudonym) & Ors* [2014] VSCA 272 (30 October 2014).

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.¹²⁰

10.99 The *Australian Security Intelligence Organisation Act 1979* (Cth) s 34AA enables evidentiary certificates to be issued, setting out facts in relation to certain acts done by ASIO. The Law Council of Australia 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.¹²¹

10.100 However, the certificates in s 34AA are only ‘prima facie evidence of the matters stated in the certificate’.¹²² 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. There are a number 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.¹²³

Redacted evidence

10.101 There is a potential for redacted evidence to affect the fairness of a trial. Redacted evidence is documentary evidence that has been altered in some way, usually by being partially deleted to protect certain information from disclosure. As the INSLM explained, ‘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’.¹²⁴

10.102 The NSI Act places certain limits on the disclosure of national security information, but also provides that a copy of a document that contained such information may be disclosed in federal criminal proceedings, if the relevant national

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

121 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*.

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

123 Attorney-General’s Department, above n 120, 55.

124 Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013) 142.

security information has been deleted.¹²⁵ In making such an order, a court must consider a number of factors, but must give ‘greatest weight’ to questions of national security.¹²⁶ The Law Council submitted that this ‘may unduly restrict the court’s discretion to determine how and when certain information may be disclosed in federal criminal proceedings’ and have an impact on ‘a defendant’s opportunity to examine the prosecution’s case and may not be a proportionate response to the risk identified, in view of the potential prejudice’.¹²⁷

10.103 In making such an order, a court must also 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’.¹²⁸ In the opinion of the INSLM, this suffices to protect against any potential unfairness.¹²⁹

Secret evidence

10.104 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*.¹³⁰

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

10.106 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’.¹³¹

125 See *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(2).

126 *Ibid* s 31(8).

127 Law Council of Australia, *Submission 75*.

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

129 Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013) 143. This matter is discussed extensively in this report.

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

131 Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013) 140.

10.107 The use of secret evidence in tribunals, particularly in immigration cases, is discussed in the ALRC's report, *Keeping Secrets*.¹³²

Right to a lawyer

10.108 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.

10.109 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 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.

10.110 Although now well entrenched in the common law, even this first type of right does in fact not have a particularly long history. In England, people accused of a felony had no right to be represented by a lawyer at their trial until 1836.¹³³ However, the right to a lawyer is now widely recognised and subject to relatively few restrictions, as discussed below.

10.111 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.¹³⁴

10.112 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'.¹³⁵

10.113 In this same case, Mason CJ and McHugh J said that, although 'the common law of Australia does not recognize the right of an accused to be provided with counsel at public expense',

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

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

133 *Dietrich v The Queen* (1992) 177 CLR 292, 317 (citations omitted).

134 *Ibid* 311.

135 *Ibid*.

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.¹³⁶

Laws that limit legal representation

10.114 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.

10.115 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 exception for when questioning is considered so urgent, having regard to the safety of other people, that it cannot be delayed.¹³⁷

10.116 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.¹³⁸ The ALRC has not received submissions suggesting that these limits are unjustified.

10.117 The Law Council criticised the limited access to a lawyer for persons subject to a preventative detention order under the *Criminal Code* pt 5.3 div 105, which 'enables a person to be taken into custody and detained by the AFP 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.¹³⁹

10.118 The *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZO 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'.

136 Ibid [1].

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

138 '[T]he 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).

139 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. Client legal privilege is discussed in Ch 13.

10.119 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.¹⁴⁰ 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.¹⁴¹

10.120 This scheme was criticised by the Law Council, which submitted that it 'may unjustifiably encroach on the right to a fair trial in two ways':

Firstly, it potentially restricts a person's right to a legal representative of his or her choosing, inconsistent with the rule of law, by limiting the pool of lawyers who are permitted to act in cases involving classified or security sensitive information. Secondly, the security clearance scheme threatens the independence of the legal profession by potentially allowing the executive arm of government to effectively 'vet' and limit the class of lawyers who are able to act in matters which involve, or which might involve, classified or security sensitive information.¹⁴²

Legal aid and access to justice

10.121 The positive right to be provided with a lawyer at the state's expense is not a traditional common law right. Even if a court orders a stay of proceedings against an unrepresented defendant in a serious criminal trial, this power is of little assistance to others who seek access to justice. 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.

10.122 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.¹⁴³ 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'.¹⁴⁴

10.123 Access to justice has been the subject of many reports, in Australia and elsewhere, including recent reports by the Attorney-General's Department¹⁴⁵ and the Productivity Commission.¹⁴⁶

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

141 *Ibid* s 39(5).

142 Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011) principle 4.

143 Women's Legal Services Australia WLSA, *Submission 5*.

144 Law Council of Australia, *Submission 75*.

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

146 Productivity Commission, above n 106.

Appeal from acquittal

10.124 ‘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’.¹⁴⁷ 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.¹⁴⁸

10.125 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,¹⁴⁹ or appeals from an acquittal by a court of appeal following conviction by a jury.¹⁵⁰

10.126 The rule against double jeopardy can be traced to Greek, Roman and Canon law, and is considered a cardinal principle of English law.¹⁵¹ By the 1660s it was considered a basic tenet of the common law.¹⁵² 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’.¹⁵³

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

148 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). The Hon Michael Kirby AC CMG has identified and discussed ten separate grounds offered by the law for a 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 Hon 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).

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

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

151 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).

152 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.

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

10.127 In Australia, the principle of legality provides some protection for this principle.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷

10.128 The double jeopardy principle is enshrined 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'.

10.129 Bills of rights and human rights statutes prohibit laws that permit an appeal from an acquittal in the United States,¹⁵⁸ Canada¹⁵⁹ and New Zealand.¹⁶⁰ The prohibition is also recognised in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).¹⁶¹

10.130 Laws that allow an appeal from an acquittal

10.130 Section 73 of the *Constitution* provides the High Court with extensive jurisdiction, including, the High Court has held, jurisdiction to hear appeals from an acquittal made by a judge or jury at first instance.¹⁶² 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.¹⁶³ In *R v Wilkes*, Dixon CJ said the Court should

154 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

155 *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* 211 CLR 287, 289.

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

157 '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] NSWCCA 272 [115] (Spigelman CJ).

158 *United States Constitution* amend V.

159 *Canada Act 1982 c 11* s 11(h).

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

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

162 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).

163 *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.¹⁶⁴

10.131 The ALRC is not aware of any other Commonwealth law that allows an appeal from an acquittal.¹⁶⁵

10.132 Some state laws permit an appeal from an acquittal,¹⁶⁶ and such laws will be picked up and applied by s 68 of the *Judiciary Act*.¹⁶⁷ The state laws largely follow the model developed by the Council of Australian Governments in 2007. Professor Gans has raised a number of concerns about the Victorian law,¹⁶⁸ 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.¹⁶⁹

10.133 However, as noted above, state laws are not reviewed in this report, and nor is s 68(2) of the *Judiciary Act*—the general policy of 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’.¹⁷⁰

10.134 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 be not only 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’.¹⁷¹

164 *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].

165 ‘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*.

166 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.

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

168 J Gans, *Submission 2*.

169 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’: *Ibid*.

170 *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).

171 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 149.

10.135 Professor 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?’¹⁷²

10.136 Limits on the principle may only be justified when they are strictly necessary. The Law Commission of England and Wales considered the rule against double jeopardy and prosecution appeals following a reference in 2001. Its findings and recommendations have laid the foundation for laws limiting the rule in UK and in other jurisdictions, such as 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’.¹⁷³ The scope of the interference must be clear-cut and notorious.¹⁷⁴

10.137 The Law Commission recommended that additional incursions on the rule against double jeopardy be limited to acquittals for murder or genocide.¹⁷⁵ This built on existing rights of appeal from an acquittal where the accused has interfered with or intimidated a juror or witness.¹⁷⁶

Other laws

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

Trial by jury

10.139 The *Australian Constitution* provides that the ‘trial on indictment of any offence against any law of the Commonwealth shall be by jury’.¹⁷⁷ But as discussed above, this has been given a narrow interpretation: Parliament may determine which offences are indictable. Therefore any criminal law that is not indictable may, broadly speaking, be said to deny a jury trial to a person charged with that offence.

10.140 *Crimes Act* s 4G 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.’

172 J Gans, *Submission 2*.

173 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].

174 *Ibid* [4.35].

175 *Ibid* [4.30]–[4.36].

176 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.

177 *Australian Constitution* s 80.

10.141 *Crimes Act* s 4H 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.’

10.142 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.

10.143 The second situation is perhaps of greater concern. An example is the *Customs Act 1901* (Cth) s 232A, 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’.

10.144 *Crimes Act* s 4J 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

10.145 The use in a trial of evidence obtained by torture or duress would not be fair, whether the torture was conducted in Australia or in another country. This is not because torture is immoral and a breach of a fundamental human right, but because evidence obtained by torture is unreliable.¹⁷⁸

10.146 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 the Torture Convention’.¹⁷⁹ 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.¹⁸⁰

178 In *Montgomery v HM Advocate*, Lord Hoffmann observed 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.

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

180 *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].

10.147 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.¹⁸¹

10.148 The Law Council also submitted that s 27D ‘permits evidence of foreign material and foreign government material obtained *indirectly* by torture or duress’.¹⁸²

Civil penalty provisions that should be criminal

10.149 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.

10.150 The Parliamentary Joint Committee on Human Rights has published an interim practice note on this topic¹⁸³ and has discussed whether civil penalty provisions should instead be characterised as criminal offences in the context of a range of bills.¹⁸⁴

10.151 The Law Council has expressed concerns about the sometimes ‘punitive’ civil confiscation proceedings provided for in the *Bankruptcy Act 1966* (Cth),¹⁸⁵ 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.¹⁸⁶

10.152 The Human Rights Committee has said that this topic is complex and ‘should be the subject of continuing dialogue with government’.¹⁸⁷

Justifications for limits on fair trial rights

10.153 Although it will never be justified to hold an unfair trial, particularly an unfair criminal trial, as this chapter has shown, many of the general principles that characterise a fair trial are not absolute.¹⁸⁸

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

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

183 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) Appendix 2.

184 Eg, the Agricultural and Veterinary Chemicals Legislation Amendment Bill, 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).

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

186 Law Council of Australia, *Submission 75*.

187 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) Appendix 2.

188 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*

10.154 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 Gans submitted that ‘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’.¹⁸⁹

10.155 Another general question that might be asked is: does this law increase the risk of a wrongful conviction?¹⁹⁰

10.156 The structured proportionality principle discussed in Chapter 1 may also be a useful tool. The Human Rights Committee has suggested that proportionality reasoning can be used to evaluate limits of fair trial rights.¹⁹¹ Proportionality is also used in the fair trial context in international law.

10.157 In *Brown v Stott*, Lord Bingham said that limited qualification of the rights comprised within art 6 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.¹⁹²

10.158 This reflects a proportionality analysis. 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’.¹⁹³ Dennis cites examples of proportionality reasoning in English courts in relation to the privilege against self-incrimination,¹⁹⁴ the presumption of innocence,¹⁹⁵ and legal professional privilege.¹⁹⁶

(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 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.

189 J Gans, *Submission 2*.

190 *Ibid* 2.

191 ‘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, ‘Guide to Human Rights’ (March 2014) 26 <http://www.aph.gov.au/joint_humanrights/>. As noted in Ch 1, many stakeholders in their submissions 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.

192 *Brown v Stott* (2003) 1 AC 681, 704 (Lord Bingham).

193 Dennis, above n 189, 346.

194 *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 12.

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

196 *In Re McE* [2009] 2 Cr App R 1. See Ch 13 and Dennis, above n 189, 346.

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

Conclusions

10.160 Criminal trials must always be fair and it will generally not be justified to depart from the accepted attributes of a fair trial. However, both the common law and statute feature some limits on fair trial rights. This chapter has identified a number of Commonwealth laws that limit fair trial rights, for example, to protect vulnerable witnesses and in the interests of national security. For example, although justice should usually be done in public, it may sometimes be justified to close a court to protect a child or to protect trade secrets.

10.161 There is a tension between national security and fair trial rights, as highlighted by submissions criticising laws that limit these rights for national security reasons. Some limits on fair trial rights for national security reasons are justified, but any such limit clearly warrants ongoing and careful scrutiny, given the importance of fair trial principles. Reviewing laws that limit fair trial rights falls within the role of the INSLM, who reviews the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis.

10.162 Laws that protect communications between client and lawyer and between people and their religious confessor may also warrant review, to ensure there are adequate exceptions for defendants seeking to adduce evidence in criminal proceedings. These privileges are themselves important traditional rights, but arguably should sometimes be limited to allow defendants to adduce evidence of their innocence.

10.163 Other chapters of this Interim Report highlight laws that limit other fair trial rights, including laws that reverse the legal burden of proof and laws that abrogate the privilege against self-incrimination.

10.164 The ALRC is interested in further comment on which laws that limit fair trial rights merit further review.

