15. Procedural fairness

Contents

The common law

15.1 The common law recognises a duty to accord a person procedural fairness—a term often used interchangeably with natural justice—when a decision is made that affects a person's rights, interests or legitimate expectations.[1] Courts may construe a statutory provision as implying that a power be exercised with regard to procedural

1 *Kioa v West* (1985) 159 CLR 550. See also David Clark, *Introduction to Australian Public Law* (Lexis Nexis Butterworths, 4th ed, 2013) [12.34]. The common law doctrine has a 'wide application and is presumed by the courts to apply to the exercise of virtually all statutory powers': Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39 *Monash University Law Review* 285, 285.

fairness where a party's interests might be adversely affected by the exercise of that power.[2]

15.2 This chapter considers the duty to afford procedural fairness in administrative decision-making.[3] This chapter discusses the source and rationale for procedural fairness; how it is protected from statutory encroachment; and when laws that deny procedural fairness may be justified.

15.3 In *Plaintiff M61/2010 v Commonwealth*, the full bench of the High Court explained the scope of the common law duty to afford procedural fairness to persons affected by the exercise of public power:

> It was said in *Annetts v McCann*, that it can now be taken as settled that when a statute confers power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, principles of natural justice generally regulate the exercise of that power. In *Kioa v West*, different views were expressed about whether the requirements of procedural fairness arise from the common law or instead depend upon drawing an implication from the legislation which confers authority to decide. It is unnecessary to consider whether identifying the root of the obligation remains an open question or whether the competing views would lead to any different result. It is well established, as held in *Annetts*, that the principles of procedural fairness may be excluded only by 'plain words of necessary intendment'.[4]

15.4 In *Kioa v West*, Mason J said:

> It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[5]

15.5 Further, in *S10/2011 v Minister for Immigration*, the High Court held that the principle and presumptions of statutory construction reflect the interactions of the three branches of government, and while not constitutionally entrenched, are part of the common law of Australia:

> [O]ne may state that the 'common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power. If the matter be understood in that way, a

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2 *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. There is also an exclusionary aspect to this concept of implication so that clear and unambiguous statutory language can exclude the common law duty to afford procedural fairness.

3 The common law duty to afford procedural fairness is also raised by Ch III courts in the context of due process and open justice considerations in criminal law. See, for example, the High Court case of *Pompano* where the High Court ruled on the validity of closed hearing provisions of the *Criminal Organisation Act 2009* (Cth): *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38. This is discussed in more detail in Ch 10 on the right to a Fair Trial.

4 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, [74]. (References omitted).

5 *Kioa v West* (1985) 159 CLR 550, 582 (Mason J). Justice Mason's approach to natural justice in *Kioa* is at odds with that of Brennan J in *Kioa* who reasoned that 'there is no free-standing common law right to be accorded natural justice by the repository of a statutory power': 610.

> debate whether procedural fairness is to be identified as a common law duty or as an implication from state proceeds upon a false dichotomy and is unproductive.[6]

15.6 Procedural fairness relates to the manner in which a decision is made, rather than the reasoning behind the decision. Issues of procedural fairness arise in the context of administrative decision-making, that is, decisions made by government departments and officials and tribunals.[7] Such decisions may affect people in a range of contexts, including where:

- decisions may curtail a person's liberty;
- affect their freedom of movement;
- damage their reputation; or
- have a significant effect on their economic well-being.

15.7 The Law Council of Australia explained that procedural fairness will

> promote better decision-making in government because the decision-maker will have before him or her all the relevant information required. The procedural rigour required in a hearing and the injunction to behave impartially is likely to make a decision-maker more conscientious and objective in reaching his or her conclusions.[8]

15.8 One of the key features of procedural fairness is that 'in origin it is a common law doctrine or obligation … the requirements of natural justice are fashioned by courts, and are read into or attached to statutory powers so as to ensure procedural fairness in the administration of statutes'.[9] While procedural fairness is protected at common law, statute also provides some protection for individuals. For instance, a breach of the rules of natural justice is a ground for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[10] This Act does not impose a duty to afford procedural fairness.

Doctrine

15.9 Procedural fairness usually involves two requirements: the fair hearing rule and the rule against bias.[11]

15.10 The hearing rule requires a decision-maker to inform a person of the case against them, provide them with an opportunity to be heard, and prior notice of a decision that adversely affects their interests. In *Commissioner of Police v Tanos*, Dixon CJ and Webb J stated that

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6 *Plaintiff S10/2011* (2012) 246 CLR 636, [97] (Gummow, Hayne, Crennan and Bell JJ).
7 Procedural fairness overlaps with some principles associated with the right to fair trial and judicial review, discussed in Chs 10 and 18.
8 Law Council of Australia, *Submission 75*.
9 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012) [10.1.5].
10 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 1(a).
11 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 489 (Gleeson CJ).

> it is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by a judicial or quasi-judicial proceeding he must be afforded an adequate opportunity to be heard.[12]

15.11 The content of the hearing rule in relation to procedural fairness varies across the spectrum of administrative decision-making, depending on the circumstances of a particular case.[13]

15.12 Taking into account this caveat, the minimum required for a fair hearing in administrative law involves the following;

- notice that a decision adversely affecting a person's interests will be made;
- disclosure of evidence relied on when determining the adverse decision;[14]
- a substantive hearing—oral or written—with a reasonable opportunity to present a case in response to an adverse decision;[15] and
- in some circumstances, access to legal representation.[16]

15.13 On the last point, any right to access legal representation will depend on whether an oral or written hearing is provided. At common law, a person is entitled to be represented by an agent, or lawyer, in an oral hearing before a statutory body.[17] Whether legal representation must be provided to a person whose rights, interests or legitimate expectations are adversely affected in administrative decision-making will depend on the empowering Act of the appropriate statutory body. In some cases legal representation may not be required and may even be contrary to the informal or inquisitorial setting of a tribunal.

15.14 The bias rule of procedural fairness requires that a decision-maker must not be biased or be seen by an informed observer to be biased in any way—apprehended or ostensible bias.

15.15 When a court considers whether a decision-maker had a duty to afford procedural fairness, it will, generally speaking, consider the following questions.

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12 *Commissioner of Police v Tanos* (1985) 98 CLR 383, 395. 'The fundamental rule is that a statutory authority having power to effect the rights of a person is bound to hear him before exercising the power': *Kioa v West* (1985) 159 CLR 550, 563 (Gibbs CJ) quoting Mason J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360.

13 *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

14 The rules of evidence will differ depending on the procedures of the relevant tribunal or body.

15 There is no right to an oral hearing, unless specified in the empowering Act of the relevant statutory body. For instance, in *Chen v Minister for Immigration and Ethnic Affairs*, it was held that there is no requirement of an oral hearing in a person's refugee assessment: *Chen v Minister for Immigration and Ethnic Affairs* (1993) 45 FCR 591.

16 Margaret Allars, *Introduction to Australian Administrative Law* (Butterworths, 1990) [6.60].

17 *R v Board of Appeal; Ex parte Kay* (1916) 22 CLR 183. It is, however, important to note that a person affected by the administrative decision of a statutory body does not have a right to legal representation at government expense: *New South Wales v Canellis* (1994) 181 CLR 309, 328–9.

15.16 First, the implication question: is there an implied duty to accord procedural fairness? In the absence of a clear legislative intention to exclude procedural fairness, courts may imply procedural fairness to ensure that 'the justice of the common law will supply the omission of the legislature'.[18]

15.17 In *Kioa v West*, Deane J explained that where an individual has been denied procedural fairness, they can

> demand the observance of the ordinary restraints which control the exercise of administrative power including, unless they be excluded by reason of statutory provision, or the special nature of the case, the standards of procedural fairness which are recognised as fundamental by the common law.[19]

15.18 The exclusion question is also considered at this stage: has the legislature shown an intention to exclude the obligation to observe the requirements of procedural fairness? Procedural fairness cannot be implied where a law expressly excludes it.[20] Related to this question is the principle of duality in decision-making. That is, where a decision-making process involves different steps or stages before a final decision is made, the requirements of procedural fairness are satisfied if the decision-making process, viewed in its entirety, entails procedural fairness.[21] Displacement of procedural fairness may occur where provision has been made for a certain type of hearing or procedure to take place, for example, where legislation provides for a hearing at one stage of a decision-making process but not at another.[22]

15.19 Second, the content question: what kind of hearing is the decision-maker required to provide to the applicant?[23] The content rule will vary depending on the circumstances of a particular case and the statutory context in which it arises.[24]

History

15.20 The rule against bias and the hearing rule in their contemporary form are drawn from natural law. Natural law developed through the work of the medieval philosopher and theologian, Thomas Aquinas.[25] French CJ explained:

> As a normative marker for decision-making it [the rule against bias] predates by millennia the common law of England and its voyage to Australian colonies.[26]

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18 *Cooper v Board of Works for the Wandsworth District* [1863] 143 ER 414 Court of Common Pleas (1863) 180 (Byles J).

19 *Kioa v West* (1985) 159 CLR 550, 631.

20 *Plaintiff S10/2011* (2012) 246 CLR 636, [97].

21 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, [29] (Mason CJ, Dawson and Toohey JJ). See also *South Australia v O'Shea* (1987) 163 CLR 378. Procedural fairness may not necessarily be implied in relation to decisions made under delegated legislation; for more, see: Groves, above n 1, 314.

22 Allars, above n 16, [6.23].

23 Creyke, McMillan and Smyth, above n 9, [10.1.12].

24 *Ridge v Baldwin* [1964] AC 40 65, 72 (Lord Reid); *Kioa v West* (1985) 159 CLR 550, 584 (Mason J). The 'particular requirements of compliance with the rules of natural justice will depend on the circumstances': *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, [48].

25 Chief Justice Robert S French, 'Procedural Fairness - Indispensable to Justice?' (2010). The hearing rule appeared in cases in the medieval Year Books: HH Marshall, *Natural Justice* (Sweet & Maxwell, 1959) 18–19.

26 French, above n 25.

15.21 Procedural fairness may not necessarily be implied in relation to decisions made under delegated legislation, or when the decision was one characterised by general policy decision-making.

15.22 Procedural fairness developed through the common law in the early 17th century.[27] Historically, procedural fairness only applied to decisions by courts or bodies that had a duty to act judicially. The scope of procedural fairness was extended in the mid-19th century to all 'quasi-judicial' decisions in *Cooper v Board of Works for the Wandsworth District*.[28]

15.23 In *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (*Lam*), Callinan J explained that 'natural justice by giving a right to be heard has long been the law of many civilised societies':

> That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden.[29]

15.24 Over the course of the 20th century, the concept of procedural fairness developed significantly, eventually applying to a diverse range of government decisions affecting property, employment, reputation, immigration and financial and commercial interests.[30] In *Annetts v McCann*, a case involving the right of two parents to make submissions at a coronial inquiry into the deaths of their two sons, Mason CJ, Deane and McHugh JJ explained the recent evolution of the concept of procedural fairness. The judges noted that

> many interests are now protected by the rules of natural justice which less than 30 years ago would not have fallen within the scope of that doctrine's protection.[31]

15.25 Stakeholders to this Inquiry highlighted the importance of procedural fairness in promoting accountability and transparency in government decision-making processes.[32] For instance, the UNSW Law Society submitted that

> The broad purpose of administrative law is to safeguard the rights and interests of people in their dealings with the government and its agencies. It confers a right to challenge a government decision by which a person feels aggrieved through

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27 Creyke, McMillan and Smyth, above n 9, [10.1.9]; French, above n 25, 3.

28 *Cooper v Board of Works for the Wandsworth District* [1863] 143 ER 414 Court of Common Pleas (1863). The court in this case extended natural justice to decisions interfering with property rights.

29 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, [140]. Callinan J was quoting Stanley de Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell, 5th ed, 1995) 378–79.

30 Creyke, McMillan and Smyth, above n 9, [10.1.9].

31 *Annetts v McCann* (1990) 170 CLR 596, 599.

32 Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; ANU Migration Law Program, *Submission 59*; Institute of Public Affairs, *Submission 49*; Australian Lawyers for Human Rights, *Submission 43*; Refugee Council of Australia, *Submission 41*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Service, *Submission 30*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

> independent adjudication to contribute to a greater measure of justice in administrative decision-making. This ensures that the Executive does not act arbitrarily, while promoting the observance of public law values of accountability, legality and transparency.[33]

Rationale

15.26 In extra-curial commentary, Chief Justice Robert French AC has said that procedural fairness is 'indispensable to justice', and highlighted five inter-related rationales for the duty to afford procedural fairness:

- that it is instrumental, that is to say, an aid to good decision-making;
- that it supports the rule of law by promoting public confidence in official decision-making;
- that it has a rhetorical or libertarian justification as a first principle of justice, a principle of constitutionalism;
- that it gives due respect to the dignity of individuals; and
- by way of participatory or republican rationale—it is democracy's guarantee of the opportunity for all to play their part in the political process.[34]

15.27 There are several principles which are said to guide administrative decision-making including rationality in decision-making, reasonableness[35] and practical justice. In relation to the last of these principles, Gleeson CJ in *Lam* emphasised that 'fairness is not an abstract concept' and that the 'concern of the law is to avoid practical injustice'.[36]

15.28 The ALRC has taken these, and other, common law principles into account when identifying Commonwealth laws that may deny procedural fairness.

Protections from statutory encroachment

Australian Constitution

15.29 The *Australian Constitution* does not provide express protection for procedural fairness. However, procedural fairness in relation to decisions made by officers of the Commonwealth may attract a remedy under the *Constitution*.[37] In *Re Refugee Tribunal; Ex parte Aala*, a majority of the High Court held that the denial of procedural

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33 UNSW Law Society, *Submission 19*.

34 Chief Justice Robert S French, 'Procedural Fairness—Indispensable to Justice?' (2010).

35 See for example, Deane J's discussion in *Australian Broadcasting Tribunal v Bond*, where he explains the connection between these principles and natural justice. Deane J stated that 'If a statutory tribunal is required to act judicially, it must act rationally and reasonably': *Australian Broadcasting Tribunal v Bond* (1990) 176 CLR 321, 367.

36 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, [38]. The concept of 'practical injustice' also arises in criminal law. For a more detailed discussion of 'practical justice', see Ch 10.

37 Under s 75(v) of the *Australian Constitution*, a writ of mandamus or prohibition or an injunction may be sought against an officer of the Commonwealth.

fairness by an officer of the Commonwealth may result in a decision made in excess of jurisdiction and thus attract the issue of prohibition under s 75(v) of the *Australian*.[38]

15.30 There is some suggestion that s 71 of the *Constitution* may provide some protection for procedural rights, though this relates more to due process considerations by Ch III courts. Section 71 provides:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

15.31 In *Re Tracey; Ex parte Ryan*, Deane J stated that s 71 is the 'Constitution's only general guarantee of due process'.[39] Similarly in *Leeth v Commonwealth*, a majority of the High Court stated:

> It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.[40]

Principle of legality

15.32 The principle of legality provides some protection for procedural fairness.[41] When interpreting a statute, courts will presume that Parliament did not intend to limit procedural fairness, unless this intention was made unambiguously clear.[42] In *Miah*, McHugh J held that the 'the common law rules of natural justice … are taken to apply to the exercise of public power unless clearly excluded'.[43]

15.33 In *Annetts v McCann*, Mason CJ, Deane and McHugh JJ said:

> It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.[44]

International law

15.34 Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that all persons should be 'equal before the courts and tribunals' and that, 'in the determination of any criminal charge against him, or of his rights and obligations in

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38 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82.

39 *Re Tracey; ex parte Ryan* (1989) 166 CLR 518, 580. The current state of High Court authority on the due process as derived from the separation of judicial power under the *Australian Constitution* is discussed in Leslie Zines, *The High Court and the Constitution* (Federation Press, 6th ed, 2015) 300–07.

40 *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).

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

42 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

43 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 93.

44 *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ). Quoted with approval in *Saaed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.

Bills of rights

15.35 In some countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. The right to procedural fairness for persons affected by the exercise of public power is expressed differently in other jurisdictions. In the United States, persons enjoy a constitutional guarantee of due process in the administration of the law.[45] In New Zealand, the human rights legislation requires observance of procedural fairness.[46]

15.36 In Canada, any deprivation of life, liberty and security of the person must be informed by principles of fundamental justice according to the Canadian *Charter of Rights and Freedoms*.[47]

Laws that deny procedural fairness

15.37 A wide range of Commonwealth laws may be seen to deny the duty to afford procedural fairness, broadly conceived, to persons affected by the exercise of public power.[48] Some of these laws impose limits on procedural fairness that have long been recognised by the common law, for example, imposing an obligation on courts to 'act judicially'.[49] While the concept of procedural fairness has developed significantly, these traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.

15.38 The Terms of Reference for this Inquiry asked the ALRC to include consideration of Commonwealth laws in commercial and corporate regulation, environmental regulation and workplace relations law that deny procedural fairness to persons affected by the exercise of public power. This chapter will examine some of these laws that arise in the following areas:

- corporate and commercial regulation;
- migration law; and
- national security legislation.

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45 *United States Constitution* amend V.

46 *New Zealand Bill of Rights Act 1990* (NZ) s 27(1).

47 *Canada Act 1982 c 11* s 7.

48 A range of stakeholders raised concerns about laws that deny procedural fairness to persons affected by the exercise of public power: Law Council of Australia, *Submission 75*; Australian Securities and Investments Commission, *Submission 74*; Law Society of NSW Young Lawyers, *Submission 69*; The Tax Institute, *Submission 68*; ANU Migration Law Program, *Submission 59*; Institute of Public Affairs, *Submission 49*; Refugee Council of Australia, *Submission 41*; Australian Lawyers for Human Rights, *Submission 43*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Service, *Submission 30*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

49 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 489 (Gleeson CJ).

Corporate and commercial regulation

15.39 The Australian Securities and Investments Commission (ASIC) highlighted provisions in corporate and commercial regulation that may be characterised as denying procedural fairness, noting that these provisions are 'the exception rather than the rule'.[50]

15.40 ASIC submitted that 'there are limitations to procedural fairness in provisions of the *Corporations Act 2001* (Cth)' which are designed to prevent financial loss caused by fraud or improper financial management. The provisions highlighted by ASIC in the *Corporations Act 2001* (Cth) included the following:

- Section 739 empowers ASIC to issue interim stop orders for offers of security made under a disclosure agreement where ASIC believes that an agreement contains: a misleading or deceptive statement; an omission of information required under legislation; or some new circumstance has arisen since the lodgement of the disclosure document. Stop orders are administrative mechanisms which can be issued by a regulatory agency without recourse to a court. Under an interim stop order issued in accordance with s 739, a company cannot offer, issue, sell or transfer shares. While this may be seen as denying procedural fairness, an interim order only operates for 21 days, after which time ASIC must hold a hearing to determine if the order should be ongoing.
- Section 915B enables ASIC to suspend or cancel an Australian Financial Services (AFS) licence without first providing procedural fairness by way of a hearing where, among other things, the licensee becomes insolvent, is convicted of serious fraud, loses their legal/mental capacity; or in the case of responsible entities of managed investment schemes—where the scheme members have or are likely to suffer loss because of a breach of the *Corporations Act*. However, ASIC is required under s 915B to give written notice to the person or licence-holder. Further, under s 915C, ASIC may offer a licensee an opportunity to appear or be represented at a hearing.

15.41 The content of the hearing rule required by the duty to afford procedural fairness may be reduced in such a statutory context. Also, given the operation of safeguards in both of these provisions which provide some opportunity for a hearing, it is not clear that these provisions could be characterised as denying procedural fairness. The ALRC welcomes submissions on this question.

15.42 ASIC's regulatory guide on licensing and administrative action explains that, where appropriate in all the circumstances, an AFS licence may be suspended without first offering a hearing or providing the party with an opportunity to make submissions. Under s 915C, ASIC has the discretion to offer the party a private hearing.[51] ASIC's

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50 Australian Securities and Investments Commission, *Submission 74*.

51 The principles and procedures ASIC adopts for such hearings are set out in a Regulatory Guide: Australian Securities and Investments Commission, *Licensing: Administrative Action against Financial Service Providers* Regulatory Guide 98 (July 2013). There is further information available about the

regulatory guide also outlines the factors ASIC will take when considering—on a case-by-case basis—the suspension or cancellation of an AFS licence including the following;

- whether ASIC has jurisdiction in the matter;
- the strategic significance of taking action;
- the benefits of pursuing misconduct;
- issues specific to the case; and
- alternatives to formal investigation.[52]

Migration law

15.43 The ALRC received a number of submissions from stakeholders regarding provisions in migration law that may be characterised as denying procedural fairness to persons affected by the exercise of public power.[53]

Migration Act

15.44 Some provisions of the *Migration Act 1958* (Cth) may be characterised as excluding procedural fairness. The provisions highlighted below explicitly exclude the rules of natural justice, while others vest significant discretionary and non-reviewable power in the Minister for Immigration and Border Security, effectively precluding access to a hearing, or to the reasons for a decision, regarding a decision by the Minister to revoke or cancel a visa.

15.45 The following provisions of the *Migration Act* may be characterised as denying procedural fairness:

- Under s 109, the Minister may cancel a visa if information provided to the Department of Immigration for the purpose of obtaining that visa was incorrect. Section 133A(4) provides that natural justice does not apply to a decision made under s 109.
- Section 133C(3) excludes natural justice from the Minister's decision to refuse or cancel a visa under s 116 and if the Minister is convinced that it would be in the public interest to do so. Section 116 provides the Minister with a power to cancel visas for a range of reasons.
- Section 134A states that the rules of natural justice do not apply to the emergency cancellation of visas on security grounds when the Minister is

process for conducting hearings under s 915C of the *Corporations Act 2001* (Cth) on the Australian Securities and Investments Commission website, see: <www.asic.gov.au/hearingsmanual>.

52 Ibid 14.

53 Law Council of Australia, *Submission 75*; ANU Migration Law Program, *Submission 59*; Institute of Public Affairs, *Submission 49*; Australian Lawyers for Human Rights, *Submission 43*; Refugee Council of Australia, *Submission 41*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Service, *Submission 30*; Kingsford Legal Centre, *Submission 21*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

advised by Australian Security Intelligence Organisation (ASIO) under s 134B that the visa-holder poses a security risk.

- Sections 500A(11) and 501A(3) exclude the rules of natural justice from decisions made by the Minister to refuse to grant to a person a temporary safe haven visa, or to cancel a person's temporary safe haven visa.
- Section 501(3) excludes natural justice from the Minister's discretionary power to cancel or revoke a non-citizen's visa if the Minister reasonably suspects that a person does not satisfy the 'character test' and the decision is in the national interest.
- Section 501(5) provides that decisions under ss 501(3) and 501(3A) are not subject to the rules of natural justice. Section 501(3) allows the Minister to refuse to grant a visa or to cancel a visa if the Minister 'reasonably suspects' the person does not pass the character test. Section 501(3A) compels the Minister to revoke or cancel a non-citizen's visa if the Minister reasonably suspects that a person does not satisfy the 'character test' where the person has a substantial criminal record; has committed a sexually-based offence against a child; or the person is serving a custodial sentence at the time of cancellation or revocation.

15.46 Other provisions in the *Migration Act* may be characterised as excluding procedural fairness in the processing of unauthorised maritime arrivals (UMAs):

- Section 198AE provides that natural justice rules do not apply to a decision by the Minister that an UMA be taken to a regional processing centre under s 198AD.
- Section 473DA confines the Immigration Assessment Authority (IAA) to observe the rules of natural justice by way of an exhaustive statement of natural justice requirements. Under pt 7AA, the Minister may refer to the IAA all applications for protection visas made by UMAs who arrived in Australia on or after 13 August 2012 that have been subject to a so-called 'fast track application process'. The IAA will conduct a limited merits review and either affirm the fast track reviewable decision, or remit the decision for reconsideration in accordance with prescribed directions or recommendations.

15.47 There are several provisions in the *Maritime Powers Act 2013* (Cth) which suspend the rules of natural justice as they relate to the powers of the maritime authority:

- Section 22B provides that the rules of natural justice do not apply to authorisations made under the *Maritime Powers Act.*
- Section 75B excludes the rules of natural justice from ss 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G and 75H. These provisions largely relate to the maritime authority's coercive powers to intercept and detain vessels within and outside of Australian maritime waters, as well as to detain and move individuals aboard those vessels.

15.48 Other migration laws that exclude the requirements of procedural fairness include, for example:

- Section 48A of the *Australian Passports Act 2005* (Cth), which provides that there are multiple circumstances in which the Minister is not required to notify a person when the Minister receives a notice of refusal or cancellation of a non-citizen's visa or other travel document.
- Section 36 of the *Australian Securities and Intelligence Organisation Act 1979* (Cth) (*ASIO Act*), which provides that any adverse security assessment made in respect of a non-citizen is not subject to the hearing requirements under pt IV of that Act.[54] Notice of an adverse security assessment, and the reasons for that assessment, are therefore not disclosed to affected parties or their legal representatives, contrary to the principle of procedural fairness.

15.49 There are four areas of migration and related laws that have been the subject of debate in parliamentary inquiries—outlined in the following sections. These laws have also been highlighted as being of concern by stakeholders who made submissions to this Inquiry on the basis of excluding procedural fairness. These provisions, which are discussed in more detail below, concern:

- mandatory cancellation of visas;
- fast track assessment process for UMAs;
- changes to the *Maritime Powers Act*; and
- ASIO security assessments for non-citizens.

Mandatory cancellation of visas

15.50 Several stakeholders noted concerns with two parts of the *Migration Act* that require the Minister to cancel or revoke a visa on character or other grounds.[55] By removing any discretion from the Minister's decision-making process, visa applicants and visa-holders are unable to contest the reasons for the decision.

15.51 The first is s 501(3A) of the *Migration Act*, introduced by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth). This provision compels the Minister to revoke or cancel a non-citizen's visa if the Minister reasonably suspects that a person does not satisfy the 'character test' where the person has a substantial criminal record; has committed a sexually-based offence against a child; or the person is serving a custodial sentence at the time of cancellation or revocation. Section 501(5) provides that a decision is not subject to the rules of natural justice.

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54 To be eligible for a protection visa, non-citizens cannot have received an adverse security risk assessment from ASIO: *Migration Act 1958* (Cth) s 36(1B).

55 ANU Migration Law Program, *Submission 59*; Refugee Council of Australia, *Submission 41*; Refugee Advice and Casework Service, *Submission 30*; Kingsford Legal Centre, *Submission 21*.

15.52 Several stakeholders expressed concerns about this provision, with some arguing that the seriousness of a decision to refuse or cancel a visa necessitated the application of procedural fairness to the decision-making process.[56] The Refugee and Advice Casework Service (RACS) argued that the cancellation of visas should be subject to procedural fairness requirements given the seriousness of an adverse decision for certain visa applicants and visa holders—for example, asylum seekers or stateless persons—for whom a refusal or cancellation decision 'may result in indefinite detention'.[57]

15.53 The ANU Migration Law Program similarly commented that

> Visa cancellation has serious consequences for the individuals concerned, and for this reason, visa cancellation decisions should be subject to strict procedural fairness obligations.[58]

15.54 Kingsford Legal Centre noted that the formulation of the provision prior to the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) specified a range of factors a decision-maker could consider when exercising discretion to refuse or cancel a visa. The Centre wrote that, 'in removing the Minister's discretion to consider these factors, the person whose visa is to be cancelled is denied due process'.[59]

15.55 The Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 did not provide specific justifications for the removal of discretion. However, it did underscore the importance that the provision places on ministerial decision-making:

> The community holds the Minister responsible for decisions within his portfolio, even where those decisions have resulted in merits review. Therefore, it is appropriate that the Minister have the power to be the final decision-maker in the public interest.[60]

15.56 Section 134A provides that the rules of natural justice do not apply to the Minister's decision to cancel or revoke a visa on security grounds under ss 109 and 134B. These provisions were introduced into the *Migration Act* by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

15.57 The Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 explained that the obligation to cancel a visa under s 134A will arise if ASIO suspects that a person might be a risk to national security and recommends cancellation of the person's visa. The power could be used in circumstances where ASIO suspects that a person, who applies for a visa from outside Australia, may pose a risk to national security but ASIO either has insufficient

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56 ANU Migration Law Program, *Submission 59*; Institute of Public Affairs, *Submission 49*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Service, *Submission 30*.

57 Refugee Advice and Casework Service, *Submission 30*.

58 ANU Migration Law Program, *Submission 59*.

59 Kingsford Legal Centre, *Submission 21*.

60 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).

information or a lack of time to furnish a security assessment in advance of the person's anticipated arrival in Australia.[61]

15.58 These provisions mean that the Minister cannot exercise discretion to consider individual circumstances on a case-by-case basis. The Kingsford Legal Centre was concerned by this, arguing that

> Previously, the Minister's discretion afforded procedural fairness to the visa holder by ensuring that the decision was made in light of the relevant factors. The process is now automatic and applies to all regardless of the circumstances of their particular situation … The provision precludes the circumstances of the individual from being taken into account.[62]

15.59 In examining the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) found that

> A significant feature of the scheme is that the rules of natural justice are expressly excluded by proposed section 134A in relation to decisions made under proposed subdivision FB.[63]

15.60 Despite this finding, the Scrutiny of Bills Committee's conclusion was to refer any future consideration of the impact of this legislation on an individual's access to procedural fairness to the Senate:

> the committee leaves the general question of the appropriateness of the overall scheme, including the exclusion of the rules of natural justice which would require a fair hearing prior to the exercise powers which directly affect rights or interests, to the Senate as a whole.[64]

Fast track assessment process for Unauthorised Maritime Arrivals

15.61 The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 amended the *Migration Act* to create a new fast track assessment process for UMAs who entered Australia after a prescribed time. Several stakeholders argued that this new process arbitrarily and unfairly excludes procedural fairness from protection visa application processes for UMAs.[65]

15.62 Under pt 7AA of the *Migration Act*, the Minister may refer fast track reviewable decisions made by immigration officials to a new body, the IAA, within the Refugee Review Tribunal (RRT), which will conduct a limited merits review. The fast track process radically confines any obligation for the IAA to observe the rules of natural

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61 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

62 Kingsford Legal Centre, *Submission 21*. The Refugee Council of Australia also raised concerns about the failure to conduct 'individualised assessments': Refugee Council of Australia, *Submission 41*.

63 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014) 73.

64 Ibid.

65 Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; ANU Migration Law Program, *Submission 59*; Refugee Council of Australia, *Submission 41*; Refugee Advice and Casework Service, *Submission 30*.

justice by way of an exhaustive statement of natural justice requirements in s 473DA. This provision excludes any obligation to provide a visa applicant with a hearing.

15.63 RACS wrote that the practical effect of s 473DA is that the IAA will, generally:

- not hold hearings;
- not allow a fast track review applicant to respond or comment on adverse information raised at the primary stage, or the reasons for the decision to refuse the application;
- not seek new information from a fast track review applicant; and
- not be permitted to consider new information provided by the fast track review applicant, other than in what it identifies as exceptional circumstances.[66]

15.64 The IAA is empowered to make a decision based on the paperwork alone. Further, the IAA

- will not offer a review applicant an interview or the opportunity to comment on an application, except in 'exceptional circumstances';[67]
- is prohibited from considering new information or new evidence except in exceptional circumstances;[68] and
- is under no obligation to provide an applicant with any documents relied upon in the initial decision by a delegate.[69]

15.65 The ANU College of Law's Migration Law Program distinguished between s 425 of the *Migration Act*, which requires the RRT to hold a hearing for protection visa applicants who arrived in Australia before 13 August 2012, and s 473DA which applies to UMAs who arrived after this date. The ANU Migration Law Program explained that the later section has been interpreted to mean that the IAA need not conduct a hearing with, or otherwise interview the applicant, except in exceptional circumstances.[70]

15.66 The ANU Migration Law Program argued that pt 7AA is 'unnecessary' as there is an existing and established merits review system for migration matters with procedural fairness obligations.[71]

15.67 The statement of compatibility with human rights for the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 explained the policy rationale behind the creation of the IAA:

> [t]he establishment of the IAA as a separate office within the RRT, will allow it to make findings independent of the Department and therefore the primary assessment

66 Refugee Advice and Casework Service, *Submission 30*.
67 Ibid.
68 ANU Migration Law Program, *Submission 59*.
69 Ibid.
70 Ibid.
71 Ibid.

> process … The measures in this Bill are a continuation of the Government's protection reform agenda and make it clear that there will not be permanent protection for those who travel to Australia illegally. The measures will support a robust protection status determination process and enable a tailored approach to better prioritise and assess claims and support the removal of unsuccessful asylum seekers.[72]

15.68 The Scrutiny of Bills Committee noted that the aim of the Bill was to introduce a more rapid processing and streamlined model for the processing of protection claims. However, the Committee asked the Immigration Minister for advice

> as to whether the fast track assessment process is compatible with the obligation to consider the best interests of the child and the right to a fair trial, and particularly: whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.[73]

15.69 In the second reading speech to the Bill, the Minister for Immigration explained that this new approach to review will 'discourage asylum seekers who attempt to exploit the current review process by presenting manufactured claims or evidence to bolster their original unsuccessful claims'.[74]

15.70 In the Senate debate over the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), Government Senator Michaelia Cash explained that the government

> must have the ability to act decisively and effectively, wherever necessary, to protect the Australian community. The government must also have the legislative basis to refuse a protection visa, or to cancel a protection visa, for those noncitizens who are a security risk. We must prevent and deter any threats posed by those who are a risk to the security of our nation and must implement legislative amendments such as those proposed in this bill to ensure the security and safety of the Australian community.[75]

15.71 On the other hand, some have argued that the provisions unjustifiably deny procedural fairness by limiting access to a review process, thus denying a fair hearing. The Refugee Council of Australia (RCA) argued that the new fast track system administered by the IAA fails to provide 'an adequate framework for ensuring accuracy and procedural fairness in decision-making'.[76] The RCA distinguished between the IAA and RRT, stating that, unlike the RRT,

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72 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).

73 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) [1.401].

74 Commonwealth, *Parliamentary Debates* House of Representatives, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 Second Reading Speech, 25 September (Scott Morrison).

75 Commonwealth, *Parliamentary Debates* Senate, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 Second Reading Speech, 4 December (Michaelia Cash).

76 Refugee Council of Australia, *Submission 41*.

> asylum seekers cannot apply to the IAA in their own right: cases must be referred to the IAA by the Minister. In most circumstances, the IAA will make assessments based solely on the information provided to it by the Secretary of the Department of Immigration … The applicant will not be permitted to participate in the process and cannot provide new information to support their claims other than in exceptional circumstances and within certain restrictions.[77]

15.72 Submissions to the Senate's Legal and Constitutional Affairs Committee's Inquiry into the Bill by the Law Council of Australia[78] and the Refugee and Immigration Legal Centre[79] noted that the IAA's process excludes important procedural fairness guarantees, such as the right to be heard, to present and challenge evidence. The Law Council observed that the Bill 'appears to infringe upon traditional rights and freedoms outlined in the Terms of Reference to the ALRC's Inquiry', including procedural fairness.[80]

Maritime Powers Act

15.73 Several stakeholders raised concerns about the exclusion of natural justice from the *Maritime Powers Act* under changes in 2014 that increased the powers of maritime officials to turn around vessels on the high seas without providing accountability for such decisions.[81]

15.74 The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) amended the *Maritime Powers Act* to exclude the requirements of natural justice in relation to the exercise of maritime powers under div 2, pt 2 of that Act. The Explanatory Memorandum to the Bill explained that the amendments provide

> both substantive and procedural protections to individuals held by maritime officers. These protections strike a balance between, on the one hand, the necessity of treating individuals in accordance with natural justice and human dignity and, on the other hand, recognising the unique circumstances facing law enforcement in a maritime environment. Part 5 does not impose a general requirement to provide natural justice, and the explanatory memorandum clearly acknowledges that the 'unique circumstances … in a maritime environment' render the provision of natural justice in most circumstances impracticable. In dealing with powers to detain and move persons, Part 5 does not provide for natural justice. Nevertheless, to provide authorising officers with the greatest certainty while performing their work, it is

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77 Ibid.

78 Law Council of Australia, Submission No 129 to Senate Legal and Constitutional Affairs Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 2014.

79 Refugee and Immigration Legal Centre, Submission No 165 to Senate Legal and Constitutional Affairs Committee, *Migration and Maritime Powers Legislation (Resolving the Asylum Legacy Caseload) Bill 2014*, 2014.

80 Law Council of Australia, Submission No 129 to Senate Legal and Constitutional Affairs Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 2014.

81 Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; ANU Migration Law Program, *Submission 59*; Refugee Council of Australia, *Submission 41*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Service, *Submission 30*; UNSW Law Society, *Submission 19*.

> appropriate to put it beyond doubt that they are not bound to provide natural justice in deciding to authorise the exercise of maritime powers.[82]

15.75 The Senate Committee found that proposed s 22B amounted to a possible undue trespass on personal rights and liberties.[83] The Committee went on to underscore the importance of procedural fairness in migration law:

> The rules of natural justice are considered to be fundamental principles of the common law. The *Maritime Powers Act* contains a number of significant and coercive 'maritime powers' and the explanatory memorandum does not provide sufficient justification for the exclusion of natural justice for all of the powers in the *Maritime Powers Act.* Not all the powers are the same or require the same considerations in relation to their exercise. For example, different considerations may arise in relation to powers which enable a person or vessel to be detained than in relation to powers which enable a person or vessel to be transported to a destination (which may be outside of Australia). Without further details and analysis, the claim that application of the rules of natural justice is not consistent with the 'unique circumstances … in a maritime environment' does not enable the committee to properly consider the appropriateness of the proposed exclusion of natural justice.[84]

15.76 In light of these concerns, the Committee sought the Minister's advice as to why the exclusion of natural justice was considered reasonable.[85] While the Minister provided a detailed reply that explained the effect of each new provision, the Committee reiterated its concerns about the exclusion of the rules of procedural fairness and referred the provisions to the Senate for further consideration.[86]

15.77 The Law Council argued that the exclusion of the rules of procedural fairness cannot be justified in light of the seriousness of the consequences for persons removed from Australian waters—for example, 'the relocation of affected individuals to a place where they face a real risk of persecution'.[87]

15.78 The Human Rights Law Centre argued that the government should repeal the provisions in the *Maritime Powers Act* that exclude natural justice. The Centre contested the justification that 'fairness at sea can be "impracticable"', arguing that

> 'impracticability' does not justify completely excluding the duty to act fairly. It is a factor relevant to what fairness practically requires in the particular circumstances. More fundamentally, to the extent that acting fairly at sea could carry practical challenges, administrative inconvenience is a necessary and reasonable price to pay to ensure important decisions affecting people's rights and liberties are properly made.[88]

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82 Explanatory Memorandum, Migration Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).
83 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014) 909.
84 Ibid 909–10.
85 Ibid 910.
86 Ibid 914.
87 Law Council of Australia, *Submission 75*.
88 Human Rights Law Centre, *Submission 39*.

ASIO security assessments for non-citizens

15.79 Several stakeholders raised concerns about the exclusion of the fair hearing rule from ASIO's adverse security assessment process in s 36 of the *ASIO Act* as it applies to non-citizens.[89] Under s 36, notice of an adverse security assessment, and the reasons for that assessment, are not disclosed to affected parties or their legal representatives.[90]

15.80 To be eligible for a protection visa, non-citizens must not have received an adverse security risk assessment from ASIO.[91] According to the RCA, at the time of their submission to this Inquiry, there were 'at least 32 people who have been found to be owed refugee protection but remain in indefinite immigration detention because they have received adverse security assessments'.[92]

15.81 In February 2014, the Senate Legal and Constitutional Affairs Committee conducted an Inquiry into the Migration Amendment Bill 2013. The Legislation Committee's report noted that the Bill aimed to 'clarify administrative certainty'.[93] However, some submissions to that Inquiry expressed concern over the means adopted to achieve this end.[94] Notably, the United Nations High Commissioner for Refugees (UNHCR) noted

> its concern that a refugee who has received an adverse assessment has very limited legal avenues to contest a negative assessment and is not afforded procedural fairness or natural justice.[95]

15.82 There has been criticism from Australian commentators and international bodies about the lack of transparency in this process. For instance, the UN's Human Rights Committee received communications from two Royhingan asylum seekers in 2011 and 2012 who had received adverse ASIO security assessments. The Committee wrote that

> The secret basis of the security assessment renders it impossible to evaluate the justification for detention.[96]

15.83 In 2013, the Australian Human Rights Commission noted its concern about

> the lack of transparency of the ASIO security assessment process. Under the new Independent Reviewer process refugees are provided with an unclassified written summary of reasons for the decision to issue an adverse security assessment. However, there is limited information available about the content of the summaries of

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89 Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

90 For Australian citizens subject to an adverse ASIO security assessment, s 27AA of the *Australian Administrative Appeals Tribunal Act 1975* (Cth) provides that an individual may not be informed of the reasons for ASIO's decision, including any evidence obtained against the individual.

91 *Migration Act 1958* (Cth) s 36(1B).

92 Refugee Council of Australia, *Submission 41*.

93 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Migration Amendment Bill 2013* (2014) [1.10].

94 UNHCR, Submission No 9 to Senate Legal and Constitutional Affairs Committee, *Migration Amendment Bill 2013*, 2014; Amnesty International, Submission No 1 to Senate Legal and Constitutional Affairs Committee, *Migration Amendment Bill 2013*, 2014.

95 UNHCR, Submission No 9 to Senate Legal and Constitutional Affairs Committee, *Migration Amendment Bill 2013*, 2014.

96 Human Rights Committee, Communication No 2094/2011 (28 August 2011) and No 2136/2011 (21 March 2012) [3.5].

> reasons. In particular, it is unclear whether they will set out any details about the information that ASIO relied upon to make the adverse assessment.[97]

15.84 Professor Ben Saul was critical of the lack of notice and reasoning provided to asylum seekers and their legal representatives:

> An affected person is only able to adequately respond to the case against them if they know the essential substance of that case. Currently, at the decision-making stage, ASIO need not disclose anything that they reasonably believe would prejudice national security.[98]

15.85 In the ALRC's 2004 report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, there was a lengthy discussion of the use of secrecy provisions in migration law, including an earlier and similar iteration of s 36 of the *ASIO Act*. In that Inquiry, the ALRC considered that

> the real issue is the availability of meaningful review which allows the aggrieved party a proper opportunity to consider and seek to challenge or contradict all the evidence available to the decision maker. Thus, the ALRC considers that there is a legitimate concern in relation to the use of secret evidence in immigration and similar matters.[99]

15.86 Several stakeholders raised concerns about the justifications for this process, given the seriousness of the likely consequence of an adverse security assessment—indefinite detention or deportation. For instance, the Human Rights Law Centre submitted that:

> Given the seriousness of the consequences flowing from an adverse ASIO security assessments, it is crucial that they be made through a process that is fair, transparent and reviewable.[100]

15.87 The Victorian Foundation for Survivors of Torture stated that it has had more than 20 clients who have been in prolonged, indefinite detention because of receiving adverse security assessments.[101]

15.88 Some stakeholders argued that the balance between individual rights to procedural fairness and the advancement of national security rests too far towards the latter. The Law Council argued that

> Restricting a person's freedom of movement may be for the legitimate purpose of preventing individuals from taking part in hostilities, engaging in terrorist activities or crime. However, questions arise as to whether certain counter-terrorism legislative measures are proportionate to achieving this objective and justified.[102]

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97 Australian Human Rights Commission, *Factsheet: Refugees with an Adverse Security Assessment by ASIO* (16 May 2014).

98 Ben Saul, '"Fair Shake of the Sauce Bottle"' [2012] *Alternative Law Journal* 221, 222.

99 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Final Report No 98 (2004) [10.82].

100 Human Rights Law Centre, *Submission 39*.

101 Victorian Foundation for the Survivors of Torture, *Submission 56*.

102 Law Council of Australia, *Submission 75*. The UNSW Law Society similarly argued that 'while a level of secrecy in national security affairs is necessary, the powers granted to ASIO in this area represent a serious infringement of common law procedural fairness': UNSW Law Society, *Submission 19*.

15.89 Finally, the Gilbert and Tobin Centre for Public Law and the UNSW Law Society pointed to the use of a special advocate regime in the UK, Canada and New Zealand where lawyers, having passed security clearance processes, are given access to the charges and evidence laid against their clients. They proposed this as an alternative model to the current regime under s 36 of the *ASIO Act*.[103]

15.90 In 2012, the Australian Government established the Independent Reviewer of Adverse Security Assessments, tasked with reviewing non-citizens' adverse ASIO security assessments. The Reviewer's role is to examine material relied upon by ASIO when making an adverse security assessment, with a view to deciding whether the assessment was appropriate.[104] The applicant may also submit material to the Reviewer.

National security legislation

15.91 Some provisions in criminal and national security laws deny concerned parties the right to a hearing or to access evidence against them. These provisions include the following:

- *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 29(3)(c), 31, 38L and 38I(3) set out the closed hearing requirements—including closed hearing certificates—that apply to certain federal criminal proceedings and civil proceedings respectively, whereby a court may exclude a defendant's legal representative on the grounds that a disclosure of information may lead to a national security risk.
- *ASIO Act* s 35 empowers ASIO to issue an adverse security assessment against an Australian citizen in order to recommend administrative action be taken against an individual's interest, such as cancelling their passport. An adverse assessment of a citizen may be challenged in the Administrative Appeals Tribunal under s 54, but the Attorney-General may issue public interest certificates under s 38(2) that require any sensitive national security information to be withheld from the applicant.[105]
- *ASIO Act* s 34ZQ(4)(b) provides that the lawyer of a person subject to a questioning or detention warrant under ASIO's special powers regime is only entitled to view the warrant conditions and is not therefore able to view any of the supporting evidence.

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103 Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

104 The role of the Independent Reviewer is outlined on the Attorney-General's Department's website, see: <http://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/IndependentReviewofAdverseSecurityAssessments.aspx>.

105 Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

ASIO's powers under questioning and detention warrants

15.92 Several stakeholders raised concerns about the operation of s 34ZQ(4)(b) of the ASIO Act on the grounds that it limits an individual's rights to hear the evidence supplied in a warrant for their questioning or detention.[106]

15.93 The Human Rights Law Centre submitted that, in practice, this provision means that the person who is the subject of a warrant is not informed of the reasons put forward for the issue of the warrant. The Centre went on to argue that the denial of procedural fairness posed by this provision goes 'far beyond what is necessary'.[107]

15.94 The Law Council raised general objections to pt III div 3 of the ASIO Act, arguing that

> the secrecy surrounding detention under an ASIO warrant makes it very difficult for a detained person to both know and challenge the lawfulness of detention.[108]

15.95 In assessing the effects of this regime on individual rights and freedoms, the Gilbert and Tobin Centre for Public Law argued that

> The infringement of these rights and privileges is unjustified not only on principled grounds, but also because the provisions appear to have little practical benefit in preventing terrorism. After repeatedly questioning government agencies as to why ASIO's warrant powers are necessary, the Independent National Security Legislation Monitor (INSLM) was presented with '[n]o scenario, hypothetical or real … that would require the use of a QDW [questioning and detention warrant] where no other alternatives existed to achieve the same purpose'. He recommended that ASIO's questioning power be retained, but its detention power be repealed.[109]

15.96 The Independent National Security Monitor (INSLM) has recommended the repeal of questioning and detention warrants. The INSLM found that they are an unjustifiable intrusion on personal liberty and either violate, or are dangerously close to violating, the right to freedom from arbitrary detention under art 9(1) of the ICCPR.[110]

Other laws

15.97 There are provisions in the empowering Acts of some statutory bodies that limit access to legal representation. There may be circumstances where a person whose interests are adversely affected by an administrative decision, is entitled to legal representation. Section 596(1) of the *Fair Work Act 2009* (Cth) is an example of a provision that may deny procedural fairness by limiting or qualifying the circumstances when a party may access legal representation. The section provides that a person may be represented by an agent or a lawyer at the Fair Work Commission (FWC) only with

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106 Law Council of Australia, *Submission 75*; Human Rights Law Centre, *Submission 39*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

107 Human Rights Law Centre, *Submission 39*.

108 Law Council of Australia, *Submission 75*.

109 Gilbert and Tobin Centre of Public Law, *Submission 22*. See also Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (2012) 105.

110 Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (2012) 106.

the permission of the FWC, subject to exceptions in s 596(4). Section 596(2) outlines the factors the FWC will consider when assessing an application for representation by a lawyer or an agent.[111]

15.98 The *Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) would contains a number of clauses[112] that would deny procedural fairness to persons affected by the exercise of ministerial discretion to cancel their Australian citizenship in light of their allegiance to, or activity with, foreign fighting and terrorist organisations.[113] Several clauses in the Bill exclude the rules of natural justice and exclude s 47 of the *Australian Citizenship Act 2007* (Cth) which requires the Minister to provide notice of decisions to persons whose citizenship is revoked.

Justifications for laws that deny procedural fairness

15.99 As with other rights, freedoms and privileges, laws that limit or deny procedural fairness may be justified on policy grounds, typically in the interests of quick and efficient decision-making, or when a matter is sufficiently clear or serious such as in national security matters.

15.100 Academic writing and extra-judicial commentary provide useful criteria or principles from which to assess when it is appropriately justified to exclude procedural fairness.

15.101 Professor Saul has suggested a list of principles to be considered in any decision to exclude procedural fairness. These are:

- the public interest in national security;
- fairness to affected individuals;
- the accountability of administrative decision-making; and
- public confidence in open justice.[114]

15.102 Professor Matthew Groves has observed that 'the evolution of the principles governing the implication of the duty to observe the rules of procedural fairness has been matched by a similar evolution in their exclusion'.[115] Groves goes on to explain that

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111 The FWC issues Practice Notes that guide employees and employers in the FWC's rules and procedures. These are published on the FWC's website at <www.fwc.gov.au>. See for instance, Australian Fair Work Commission, *Practice Note 2/2013: Fair Hearings* (March 2015).

112 Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) ss 33AA, 35 and 35A.

113 At the time of writing, the Bill had been referred to the Parliamentary Joint Committee on Intelligence and Security. The Committee was asked to report to Parliament by 21 August 2015.

114 Ben Saul, 'Security and Fairness in Australian Public Law' (2013) No. 13/22 *Sydney Law School Legal Studies Research Paper* 1.

115 Groves, above n 1, 302.

> The cases which have accepted that natural justice has been excluded or greatly limited by implication do not yield a clear general principle because they depend heavily on the purpose and content of the statute under consideration.[116]

15.103 Other factors have been highlighted to provide guidance as to when it is appropriate to limit or exclude procedural fairness. These are:

- the statutory framework;
- the circumstances concerning the individual decision to be made;
- the subject matter of the decision;
- the nature of the inquiry; and
- the rules of a tribunal (for example, the procedures that it has normally adopted or which are statutorily required).[117]

15.104 Bodies such as the Administrative Review Council and guides such as the Attorney-General's Department's *Administrative Law Policy Guide 2011* explain the scope and meaning of the duty to afford procedural fairness. They do not, however, provide justifications for when it may be appropriate to deny procedural fairness and this is perhaps not their role.

15.105 The Administrative Review Council's report, *The Scope of Judicial Review*, provides that procedural fairness should be an element in government decision-making in all contexts, and accepts that what is considered to be fair will vary with the circumstances.[118]

15.106 The Attorney-General's Department's *Administrative Law Policy Guide 2011* provides that

> Administrative power that affects rights and entitlements should be sufficiently defined to ensure the scope of the power is clear. Legislative provisions that give administrators ill-defined and wide powers, delegate power to a person without setting criteria which that person must meet, or fail to provide for people to be notified of their rights of appeal against administrative decisions are of concern to the Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances.[119]

Legitimate objectives

15.107 When considering how limitations on procedural fairness may be appropriately justified, one useful starting point is the ICCPR.[120] Article 14 of the ICCPR protects the proper administration of justice, equality before courts and tribunals and the right to a fair and public hearing by a competent, independent and

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116 Ibid.
117 Creyke, McMillan and Smyth, above n 9, [10.4.4].
118 Administrative Review Council, 'The Scope of Judicial Review' (Report 47, Australian Government, 2006) 52.
119 Administrative Review Council, *Australian Administrative Law Policy Guide* (2011).
120 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

impartial tribunal established by law. This right extends to all individuals including non-citizens such as refugees.[121]

15.108 Article 14(1) acknowledges that courts have the power to exclude all or part of the public from hearings 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 be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public.

15.109 Article 4 of the ICCPR is a derogation clause that provides States Parties may derogate from their obligations in times of 'public emergency which threatens the life of the nation and the existence of which is officially proclaimed'.

15.110 The UN Human Rights Committee, commenting on arts 4 and 14, stressed that even in such emergencies, the derogations must be proportionate in the circumstances:

> While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.[122]

15.111 Broadly speaking, legislatures have justified the limitation or exclusion of procedural fairness rules in the interests of urgency in certain decision-making, and to prevent a more serious harm.

Reduce delay

15.112 The need for quick action on a pressing matter and the desire to reduce delay by streamlining administrative processes is often raised as a justification for excluding procedural fairness.[123]

15.113 In some circumstances, urgent action to prevent an imminent harm may necessitate justifiable limits on procedural fairness. In *Marine Hull and Liability Insurance Co Ltd v Hurford*, Wilcox J explained that the requirements of procedural fairness may be appropriately limited where 'powers which, by their very nature, are inconsistent with an obligation to accord an opportunity to be heard'.[124]

15.114 However, some argued that the aim of quick decision-making should not justify laws that deny procedural fairness. ANU's Migration Law Program argued that,

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121 United Nations Human Rights Committee, General Comment No 32 on Article 14 (Administration of Justice) of the ICCPR (CCPR/C/GC/32).

122 Ibid [6].

123 For discussion on when courts may construe a legislative intention to exclude procedural fairness in the interests of urgency, see, Allars, above n 16, [6.38].

124 *Marine Hull and Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234, 241.

in the context of migration law, 'the erosion of procedural fairness obligations should not be justified on the basis of efficiency or expediency in decision-making'.[125]

15.115 Similarly, RACS argued that while consideration may be given to questions of urgency, 'given the imperative for administrative decisions to be wise, just and fair, any limits on procedural fairness should be a last resort, and avoided to the greatest extent possible'.[126]

15.116 Some laws, particularly statutes empowering tribunals and other quasi-judicial bodies with legal and regulatory powers, explicitly require such bodies to make 'speedy' decisions while still balancing this imperative with the rules of procedural fairness.[127]

Prevent serious harm

15.117 There may also be circumstances where it is appropriate to exclude procedural fairness in order to prevent a more pressing or serious harm. ASIC supported this justificatory principle, noting that it may be appropriate to limit procedural fairness to 'prevent financial loss or to protect the integrity of financial markets'.[128]

15.118 This justification may fall within the permissible limitations on procedural rights to ensure 'public order', as stipulated in art 14(1) of the ICCPR.

Proportionality and procedural fairness

15.119 Some stakeholders favoured the adoption of a proportionality test to determine if a law that excludes procedural fairness is justified.[129] For instance, the UNSW Law Society argued that a

> test of proportionality, while a flexible test, ought to be considered through a different tone depending on what right is being infringed upon. The weight or importance of the particular right is formally recognised as part of the test as a factor considered in the determination of the 'overall social detriment' in the appropriateness stage. It is clear that the more essential a right is perceived to be, the law infringing upon it must either provide great benefits and/or be as least intrusive as possible. The elements of suitability and necessity, while normally low thresholds, will be elevated in importance in cases of fundamental rights. Procedural fairness is such a right.[130]

15.120 As the UNSW Law Society outlined, applying a proportionality test to laws that deny procedural fairness would involve assessing whether the laws are

(1) practically suitable for achieving a legitimate policy objective;

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125 ANU Migration Law Program, *Submission 59*.
126 Refugee Advice and Casework Service, *Submission 30*.
127 Examples of these, many of which are state statutes, are outlined in a speech given by the Hon Justice Alan Wilson, 'Procedural Fairness v Modern Tribunals: Can the Twain Meet?' (speech delivered at the Queensland Law School, Brisbane, 31 May 2013).
128 Australian Securities and Investments Commission, *Submission 74*.
129 Human Rights Law Centre, *Submission 39*; UNSW Law Society, *Submission 19*.
130 UNSW Law Society, *Submission 19*.

(2) necessary, in the sense that there are no alternative means of pursuing that objective that are less inimical to procedural fairness, yet are equally practicable and as likely to succeed; and

(3) appropriate, in that the detriment caused by infringing on procedural fairness must not exceed the social benefit of the legislation. Legislation is particularly likely to be inappropriate when it detrimentally affects the essential content of the right.[131]

15.121 The Law Council submitted that the process for determining whether a limit is 'reasonable' and 'demonstrably justified' involves answering two instructive questions:

(a) Is the purpose of the limit justified?

(b) Are the means which the limit operates reasonable?

In responding to the first question, the purpose must be, on the balance of probabilities:

(a) lawful or 'prescribed by law'—that is, not ultra vires, as well as clear and accessible to the public; and

(b) directed toward a 'pressing and substantial' public interest.132

Conclusions

15.122 A wide range of Commonwealth laws may be seen as affecting the common law duty to afford procedural fairness to persons affected by the exercise of public power. These laws exclude the rules of procedural fairness in many different contexts by limiting or excluding access to hearings, to the reasons for a decision, to the evidence relied upon to reach a decision, to legal representation, and often deny an individual the right to respond to reasons and evidence.

15.123 There are departmental and other materials that provide guidance on the scope of the duty to afford procedural fairness in decision-making. Bodies such as the Administrative Review Council and the Attorney-General's Department's *Administrative Law Policy Guide 2011* have produced such material, however they do not—and perhaps nor is it their role to—provide justifications for when it may be appropriate to deny procedural fairness.

15.124 The areas of Commonwealth law that may provide particular concern, as evidenced by parliamentary committee materials, submissions and other commentary are provisions in migration law and national security legislation related to the following areas of law;

- the mandatory cancellation of visas in the *Migration Act*;
- the fast track assessment process for UMAs in the *Migration Act*;

131 Ibid.
132 Law Council of Australia, *Submission 75*.

- the exclusion of natural justice from decisions under the *Maritime Powers Act*; and
- the process for ASIO security assessments for non-citizens in the ASIO Act.

15.125 These aspects of Commonwealth law might be reviewed to ensure that these laws do not unjustifiably deny procedural fairness. Any review of the process for ASIO security assessments of non-citizens falls within the remit of the INSLM.