6.111 The Explanatory Memorandum to the Fair Work (Registered Organisations) Amendment Bill 2012 (Cth) stated that the limitations which the Bill placed on the freedom of association fell within the express permissible limitations in the ICCPR and the ICESCR 'insofar as they are necessary in the interests of public order and the protection of the rights and freedoms of others'.[121]

Other issues

6.112 A number of other workplace relations issues were raised by stakeholders. One stakeholder submitted that restrictions on trade union membership and collective bargaining by members of the Australian Defence Force constitute an unjustified interference with freedom of association.[122]

6.113 The National Farmers' Federation submitted that s 237 of the *Fair Work Act* overrides the voluntary nature of collective bargaining and, therefore, infringes the right to freedom of association.[123] Similarly, AIG expressed concern that the introduction of compulsory enterprise bargaining and the removal of the right to bargain at the individual level 'interferes with freedom of association to the extent that an employer and employee may not wish to negotiate collectively when negotiating the terms and conditions of employment'.[124]

Conclusion

6.114 A number of stakeholders expressed the view that the *Fair Work Act* may not comply with international obligations in relation to freedom of association in the workplace, and the right to strike.[125]

6.115 The ACTU observed that the ILO Committee of Experts has 'repeatedly found that Australian law breaches international labour law'.[126] Similarly, the United Services Union stated that it is 'apparent that there is some divergence between Australia's obligations at international law and the system in place domestically when it comes to the right to strike'. It submitted that while there is scope for the Australian domestic legislative regime to diverge from the international law position where it is 'necessary', the restrictions currently placed upon employees are 'excessive and unnecessarily restrictive'.[127]

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121 Explanatory Memorandum, Fair Work (Registered Organisations) Amendment Bill 2012 (Cth).

122 D Black, *Submission 6*. The *Defence Act 1903* (Cth) regulates ADF remuneration.

123 National Farmers' Federation, *Submission 54*. Section 237 permits the Fair Work Commission to make a majority support determination if a majority of employees want to bargain with their employer, and the employer has not yet agreed to do so, effectively compelling the employer to bargain.

124 Australian Industry Group, *Submission 131*.

125 United Services Union, *Submission 117*; Kingsford Legal Centre, *Submission 110*; Australian Council of Trade Unions, *Submission 44*; Australian Lawyers for Human Rights, *Submission 43*; Australian Institute of Employment Rights, *Submission 15*. A group of legal academics submitted that, while the protections set out in the Fair Work Act 'fall some considerable way short' of ILO and ICESCR standards, the protections nevertheless 'at least go some way towards meeting Australia's international obligations': See B Creighton and Others, *Submission 24*.

126 Australian Council of Trade Unions, *Submission 44*.

127 United Services Union, *Submission 117*.

6.116 The AIER observed that the Australian Government has been 'put on notice'[128] that a number of provisions of the *Fair Work Act* infringe on freedom of association[129] as understood under the ILO *Freedom of Association and Protection of the Right to Organise Convention*.[130]

6.117 The Australian Government has provided a number of detailed reports to the ILO setting out the reasons why it considers that the *Fair Work Act* does comply with relevant ILO conventions.[131]

6.118 For example, in 2011, the ILO Expert Committee recorded that the Australian Government had not amended various provisions of the *Fair Work Act*,[132] despite the Committee's expressed concerns. The Australian Government explained that, overall, 'the industrial action provisions of the *Fair Work Act* strike the right balance between an employee's right to strike and the need to protect life and economic stability in a manner that is appropriate to Australia's national conditions and that [Fair Work Australia] has set a high threshold for allowing for suspension or termination of protected industrial action in specific circumstances'.[133]

6.119 While workplace relations laws in Australia have been subject to extensive local and overseas criticism on the basis of lack of compliance with ILO Conventions, the extent to which obligations under ILO conventions engage the scope of common law or traditional understandings of freedom of association may be contested.

6.120 At common law, employers and employees, whether individually or collectively, may bargain for the purpose of concluding employment contracts. However, the common law does not compel either party to engage in bargaining. Under the *Fair Work Act*, the Fair Work Commission may compel an employer to bargain with a group of employees if a majority of those employees wish to negotiate an enterprise agreement.[134] The Act creates many rights and duties in relation to enterprise bargaining agreements, the right to strike, the duration of industrial action and union access to workplaces. While some of these provisions may offend ILO norms, they do not necessarily infringe common law freedom of association.

6.121 Limits concerning the entry of union officials to workplaces, for example, do not seem to infringe common law freedom of association. Entry is a power granted by statute, not common law, and to unions but not to other persons.

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128 Australian Institute of Employment Rights, *Submission 15*.

129 See 'Reports of the Committee on Freedom of Association' (357th Report, International Labour Office, 2010) Case No. 2698 (Australia), [213]–[229].

130 International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950).

131 Australian Industry Group, *Submission 131*.

132 Including *Fair Work Act 2009* (Cth) ss 413(2); 409(4), 412, 422, 437(2); 408–411; 172, 194, 353, 409(1),(3), 470–475; 423, 424, 426, 431.

133 International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *Observation (CEACR)—Freedom of Association and Protection of the Right to Organize Convention–Australia* Adopted 2011, 101st ILC Session (2012).

134 *Fair Work Act 2009* (Cth) ss 236–7.

6.122 Laws that interfere with the constitution and internal arrangements of an association are more likely to interfere with common law freedom of association. In this context, a distinction needs to be drawn between laws that control the internal arrangements of an association and laws that deal with the activities of an association as they affect others. What is unlawful does not generally become lawful when done by an association of individuals.

6.123 Trade unions have special legal status, which carries rights and powers under the law that other associations do not enjoy. These are concerned with legal power and associated rights to take industrial action in pursuit of collective demands. The legal power to take industrial action is not a common law entitlement but a statutory grant. Therefore, the exercise of the power and the benefit of legal protection may be subject to statutory conditions.

6.124 However, some statutory provisions may infringe common law freedom of association if they unreasonably regulate the internal governance of an association. It is possible that some aspects of the *Fair Work (Registered Organisations) Act 2009* (Cth) may fall into this category.

Migration law character test

6.125 Freedom of association may be engaged by provisions of the *Migration Act* concerning the circumstances in which a visa may be refused or cancelled on character grounds.

6.126 Section 501(1) of the Act provides that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test. Section 501(6) provides that a person does not pass the character test if, among other things, the Minister reasonably suspects that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and that the group, organisation or person has been or is involved in criminal conduct.[135]

6.127 Section 501(6)(b) was broadened in 2014.[136] The Explanatory Memorandum to the amending legislation made it clear that membership of, or association with, a group or organisation that has or is involved in criminal conduct would be, by itself, grounds for cancellation on character grounds:

> The intention is that membership of the group or organisation alone is sufficient to cause a person to not pass the character test. Further, a reasonable suspicion of such membership or association is sufficient to not pass the character test. There is no requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder.[137]

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135 *Migration Act 1958* (Cth) s 501(6)(b).
136 *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) sch 1.
137 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).

6.128 In *Haneef*, Spender J, in the Federal Court, read down the previous version of s 501(6)(b) as meaning that there had to be an 'alliance or link or combination' between the person subject to the character test and the group, organisation or person engaged in criminal activity.[138]

6.129 On appeal, the Full Federal Court also considered the scope of the word 'association'. In a unanimous judgment, the Full Court agreed with Justice Spender that a narrower interpretation of 'association' than that applied by the Minister should be taken to reflect the intention of the Parliament:

> Having regard to its ordinary meaning, the context in which it appears and the legislative purpose, we conclude that the association to which s 501(6)(b) refers is an association involving some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation. The association must be such as to have *some* bearing upon the person's character.[139]

6.130 A number of stakeholders expressed concern about the present scope of s 501(6)(b).[140] The Refugee Advice and Casework Service (RACS) stated that s 501 'plainly encroaches on freedom of association'. RACS submitted that, because the consequence of failing the character test is generally the detention of the individual,[141] the test in effect 'authorises the detention of a person based on a suspicion in relation to that person's lawful association with others'.[142]

6.131 The Australian National University (ANU) Migration Law Program submitted that the provision 'is neither a reasonable or proportionate curtailment of the right to freedom of association' as it is 'now so broad that it would cover a range of circumstances where there is no appreciable risk to Australian society'.[143] The Law Council and the ANU Migration Law Program suggested that the legislation should be amended.[144]

6.132 In the ALRC's view, the character test in s 501 of the *Migration Act* may not be a proportionate limitation on the right to freedom of association. The provision might be amended to provide meanings of 'association' and 'membership' consistent with the Federal Court judgments in *Haneef*.[145] This issue could be dealt with in any future

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138 *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, [230].

139 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, [130] (emphasis in original).

140 Law Council of Australia, *Submission 140*; ANU Migration Law Program, *Submission 59*; Refugee Advice and Casework Service, *Submission 30*; UNSW Law Society, *Submission 19*.

141 That is, the result of being suspected of having or having had such an association is the refusal or cancellation of a visa, rendering the person an unlawful non-citizen and subject to mandatory detention: Refugee Advice and Casework Service, *Submission 30*.

142 Ibid.

143 For example, the provision would cover 'instances where a person was, but is no longer, a member of a group or organisation that is involved in criminal activities' and 'members of an organisation that committed criminal conduct many years ago, but is no longer involved in any criminal activity': ANU Migration Law Program, *Submission 59*.

144 Law Council of Australia, *Submission 140*; ANU Migration Law Program, *Submission 59*.

145 That is, something beyond mere membership and innocent association should be required to judge a person's character. For example, legislation could make it clear that association or membership requires that 'the person was sympathetic with or supportive of the criminal conduct': ANU Migration Law Program, *Submission 59*.

review of Australia's migration laws aimed at ensuring that these laws do not interfere unjustifiably with freedom of association, or other rights and freedoms.

Other laws

6.133 Commonwealth anti-discrimination laws potentially interfere with freedom of association by making unlawful certain forms of discrimination that can be manifested by excluding people, on prohibited grounds, from participating in an association (of a kind covered by the laws).[146]

6.134 For example, the *Disability Discrimination Act 1992* (Cth) makes it unlawful for a club or incorporated association to discriminate against a person by refusing membership on the ground of the person's disability.[147] A club for these purposes is defined as 'an association (whether incorporated or unincorporated) of persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities, in whole or in part, from the funds of the association'.[148]

6.135 Professor Patrick Parkinson observed that having an association 'inevitably means creating either explicit or implicit rules of membership', which 'both include and exclude'.[149] He stated that one area of major tension is 'between the right of people to form associations of various kinds and the claims of advocates for an expansion in the reach of anti-discrimination law'. In particular, he submitted that faith-based organisations should have a right to select staff on the basis of 'mission fit', which is seen as essential to the right of freedom of association.[150]

6.136 Similarly, FamilyVoice submitted that the 'development of voluntary associations in Australia today is hindered by the unnecessary, intrusive and counterproductive constraints imposed on voluntary associations by anti-discrimination laws'.[151] It stated that there are numerous examples of 'interference by antidiscrimination bodies to prevent Australians from being free to associate with others in accordance with their wishes, for social, cultural, sporting or other purposes'.[152]

6.137 Other stakeholders contested these views.[153] The Kingsford Legal Centre, for example, considered that freedom of association should protect 'the right of individuals to associate in political and religious organisations, and trade unions', but does not

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146 Commonwealth anti-discrimination laws prohibit breaches of human rights and discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, age, medical record, criminal record, marital status, impairment, disability, nationality, sexual preference and trade union activity: see *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984 (Cth)*; *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Australian Human Rights Commission Act 1986* (Cth).

147 *Disability Discrimination Act 1992* (Cth) s 27(1).

148 Ibid s 4.

149 P Parkinson, *Submission 9*.

150 Ibid.

151 FamilyVoice Australia, *Submission 73*.

152 Ibid.

153 A Lawrie, *Submission 112*; Kingsford Legal Centre, *Submission 110*.

'apply to organisations in their recruitment practices in order to permit them to discriminate unfairly'.[154] Another stakeholder observed:

> Any argument that might be raised that these schools, hospitals or aged care facilities should have the freedom to include or exclude 'whoever they want, on whatever basis they want' is outweighed by the public interest in having education, health and community services provided on a non-discriminatory basis, and specifically by the harm caused to LGBT people by allowing such discrimination to occur.[155]

6.138 Anti-discrimination legislation already contains exemptions that permit certain forms of association that would otherwise be discriminatory. For example, the *Sex Discrimination Act 1984* (Cth) (*SDA*) permits a voluntary body to discriminate against a person on certain grounds and in connection with membership and the provision of members' benefits, facilities or services.[156]

6.139 The Attorney-General, Senator the Hon George Brandis QC, has observed that the 'voluntary bodies' exemption

> recognises that rights may be limited to pursue a legitimate objective, such as limiting the right to equality and non-discrimination in order to protect the right to freedom of association. While the right to freedom of association allows people to form their own associations, it does not automatically entitle a person to join an association formed by other people. However, nothing prevents other people from forming their own associations.[157]

6.140 There are some inconsistencies in the scope of exemptions that can be seen as protecting freedom of association. FamilyVoice questioned, for example, why the *Racial Discrimination Act 1975* (Cth) allows an exception only for charities—and not for clubs, educational institutions, religious organisations, sporting bodies or voluntary associations, as does the *SDA*.[158]

6.141 Some concerns were also expressed about the operation of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (*ACNC Act*). The *ACNC Act* was established to 'provide a national regulatory system that promotes good governance, accountability and transparency for not-for-profit entities be introduced to maintain, protect and enhance public trust and confidence in the not-for-profit sector'.[159] The not-for-profit sector receives a range of funding, including donations from members of the public and tax concessions, grants and other support from Australian governments.

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154 Kingsford Legal Centre, *Submission 110*.
155 A Lawrie, *Submission 112*.
156 *Sex Discrimination Act 1984* (Cth) s 39.
157 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Tenth Report of 2013* (June 2013). The comments were made in connection with the Committee's consideration of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth).
158 FamilyVoice Australia, *Submission 122*. FamilyVoice submitted that anti-discrimination laws should be 'amended to affirm the priority of freedom of association over constraints on discrimination'.
159 *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) preamble.

6.142 Elizabeth Shalders submitted that while religious organisations and other charitable voluntary associations 'are required to be accountable to the broader public for their tax concessions' through the *ACNC Act* and the ACNC Commissioner, the 'considerable enforcement powers associated with that accountability can be said to impinge on freedom of association and freedom of religion'.[160]

6.143 The Law Council expressed some concern about a specific provision of the *ACNC Act*. Section 100–25 of the Act makes it an offence, in some circumstances, for a person who has been removed from the governing body of a charity, to communicate instructions to remaining members on the governing body. The Law Council submitted:

> While addressing legitimate concern over continuing influence of former directors and decision-makers, these powers may extend beyond those conferred upon the Australian Securities and Investments Commission over companies. The [Queensland Law Society] has noted that it does not seem appropriate to regulate charities and other forms of voluntary association more rigorously than commercial enterprises and inquiry into this limitation on freedoms is a proper subject for investigation.[161]

Conclusion

6.144 The ALRC concludes that the following Commonwealth laws should be further reviewed to determine whether they unjustifiably limit freedom of association:

- *Criminal Code* ss 102.8, divs 104–105 (control orders and preventative detention orders), s 119 (declared area offences). These provisions are subject to review by INSLM and the Intelligence Committee as part of their ongoing roles.
- The character test in s 501 of the *Migration Act*.

160 Elizabeth Shalders, *Submission 139*.
161 Law Council of Australia, *Submission 75*.

7. Freedom of Movement

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Summary

7.1 Freedom of movement at common law primarily concerns the freedom of citizens both to move freely within their own country and to leave and return to their own country. It has its origins in ancient philosophy and natural law, and has been regarded as integral to personal liberty.[1] The freedom is fundamental to the conduct of commerce, employment and cultural exchange, and is central to international law relating to asylum.

7.2 This chapter discusses the source and rationale of the common law right of freedom of movement; how this right is protected from statutory encroachment; and when laws that interfere with freedom of movement may be considered justified,

1 Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12 *Melbourne Journal of International Law* 27, 6.

including by reference to the concept of proportionality. While freedom of movement overlaps with concerns about personal liberty and the right to be free from arbitrary detention, these latter rights are not a focus of the chapter.

7.3 Freedom of movement, broadly conceived, may also be engaged by laws that restrict the movement or authorise the detention of any person—not only a citizen—lawfully within the territory of a state. That is, any non-citizen lawfully within Australia, whose entry into Australia has not been subject to restrictions or conditions, is entitled to the same right to freedom of movement as an Australian citizen.

7.4 Freedom of movement has commonly—both in theory and practice—been subject to exceptions and limitations. For example, the freedom does not extend to people trying to evade punishment for a crime and, in practice, a person's freedom to leave one country is limited by the willingness of other countries to allow that person to enter.

7.5 A range of Commonwealth laws may be seen as interfering with freedom of movement. Some of these provisions relate to limitations that have long been recognised by the common law itself, for example, in relation to official powers of arrest or detention, customs and passport controls, and quarantine.

7.6 While many laws interfering with freedom of movement have strong and obvious justifications, it may be desirable to review some laws to ensure that they do not unjustifiably interfere with the right to freedom of movement.

7.7 The areas of particular concern include various counter-terrorism measures. In particular, the justification for aspects of the control and preventative detention order provisions and declared area offences in sch 1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) have been questioned.

7.8 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not interfere unjustifiably with freedom of movement, or other rights and freedoms. Further review on this basis could be conducted by the Independent National Security Legislation Monitor (INSLM) and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).

7.9 There is also good reason to review s 77 of the *Bankruptcy Act 1966* (Cth), which provides that a bankrupt must, unless excused by a trustee in bankruptcy, give their passport to the trustee. This requirement may not be a proportionate response to concerns about bankrupt individuals absconding. Restrictions on freedom of movement should be imposed subject to precise criteria, and judicial oversight, rather than through automatic forfeiture of a bankrupt's passport.

The common law

7.10 In 13th century England, the *Magna Carta* guaranteed to local and foreign merchants the right, subject to some exceptions, to 'go away from England, come to

England, stay and go through England'.[2] William Blackstone wrote in his *Commentaries on the Laws of England* that every Englishman under the common law had the right to 'go out of the realm for whatever cause he pleaseth, without obtaining the king's leave'.[3]

7.11 Influenced by Blackstone, Thomas Jefferson, then President of the United States, wrote that he held 'the right of expatriation to be inherent in every man by the laws of nature, and incapable of being rightfully taken away from him even by the united will of every other person in the nation'.[4]

7.12 In Australia, O'Connor J said, in *Potter v Minahan*, that a citizen of Australia is entitled to 'depart from and re-enter Australia as he pleases without let or hindrance unless some law of the Australian community has in that respect decreed the contrary'.[5]

7.13 The common law freedom of movement is not absolute. Common law liability and property rules determine the basic boundaries of the freedom. A person who enters land without the owner's consent commits trespass. A person who moves in disregard of the safety of others commits other torts. A motorist has a duty of care not to drive in a way that causes harm to others. Non-citizens have no common law freedom to enter a country except as allowed by the law of the country.[6]

7.14 Different considerations apply to public property (*res communes*) and state-owned property. *Res communes* include the sea, foreshore, rivers, the atmosphere, commons and dedicated public areas. Members of the public have common law freedom to the use of these things, including the freedom to navigate. However, this freedom is often regulated by legislation enacted for reasons such as conservation and safety. In contrast, there is no general common law freedom to enter state-owned property. The state may grant public access to lands such as national parks and forests subject to conditions.

Protections from statutory encroachment

Australian Constitution

7.15 Section 92 of the *Australian Constitution* provides:

> On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.[7]

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2 *Magna Carta 1297* (UK) 25 Edw 1 c 42.
3 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol I, bk I, ch 7, s II, 256.
4 See McAdam, above n 1, 13.
5 *Potter v Minahan* (1908) 7 CLR 277, 305.
6 *Ruddock v Vadarlis* (2001) 110 FCR 491.
7 *Australian Constitution* s 92.

7.16 In *Gratwick v Johnson*, Starke J said that the 'people of Australia are thus free to pass to and fro among the states without burden, hindrance or restriction'.[8] However, in *Cole v Whitfield*, the High Court said that this does not mean that 'every form of intercourse must be left without any restriction or regulation in order to satisfy the guarantee of freedom':[9]

> For example, although personal movement across a border cannot, generally speaking, be impeded, it is legitimate to restrict a pedestrian's use of a highway for the purpose of his crossing or to authorize the arrest of a fugitive offender from one State at the moment of his departure into another State.[10]

7.17 In *Cunliffe v Commonwealth*, Mason CJ said that the freedom of intercourse which s 92 guarantees is not absolute:

> Hence, a law which in terms applies to movement across a border and imposes a burden or restriction is invalid. But, a law which imposes an incidental burden or restriction on interstate intercourse in the course of regulating a subject-matter other than interstate intercourse would not fail if the burden or restriction was reasonably necessary for the purpose of preserving an ordered society under a system of representative government and democracy and the burden or restriction was not disproportionate to that end. Once again, it would be a matter of weighing the competing public interests.[11]

7.18 It has also been suggested that a right to freedom of movement is implied generally in the *Constitution*. In *Miller v TCN Channel Nine*, Murphy J said that freedom of movement between states and 'in and between every part of the Commonwealth' is implied in the *Constitution*.[12]

7.19 However, this view has not been more broadly accepted by the High Court.[13] Professors George Williams and David Hume wrote:

> This reflects the lack of a clear textual basis for such a freedom and for the incidents of the constitutionally prescribed system of federalism which would support it, and an

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8 *Gratwick v Johnson* (1945) 70 CLR 1, 17.

9 *Cole v Whitfield* (1988) 165 CLR 360, 393.

10 Ibid, 393. See also *AMS v AIF* (1999) 199 CLR 160, [40]–[45] (Gleeson CJ, McHugh, Gummow JJ).

11 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 307–8 (Mason CJ).

12 *Miller v TCN Channel Nine* (1986) 161 CLR 556, 581–2. 'The Constitution also contains implied guarantees of freedom of speech and other communications and freedom of movement not only between the States and the States and the territories but in and between every part of the Commonwealth. Such freedoms are fundamental to a democratic society … They are a necessary corollary of the concept of the Commonwealth of Australia. The implication is not merely for the protection of individual freedom; it also serves a fundamental societal or public interest'. Williams and Hume wrote that freedom of movement is arguably 'implicit in the system of free trade, commerce and intercourse in s 92, the protection against discrimination based on state residence in s 117 and any protection of access to the seat of government as well as in the very fact of federalism': George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 120. In *Williams v Child Support Registrar*, the applicant was unsuccessful in arguing that there was a constitutional right of freedom of movement into and out of Australia: *Williams v Child Support Registrar* (2009) 109 ALD 343.

13 In *Kruger v Commonwealth*, Brennan J said that a constitutional right to freedom of movement and association, which restricts the scope of s 122, had not been held to be implied in the *Constitution* and 'no textual or structural foundation for the implication has been demonstrated in this case': *Kruger v Commonwealth* (1997) 190 CLR 1, 45.

> implicit view that the Constitution's federalism is not intended to protect individuals.[14]

7.20 In any event, a right to freedom of movement implicit in federalism would only extend to movement within Australia.

7.21 In relation to citizens returning to Australia, the High Court has held that the right of Australian citizens to enter the country is not qualified by any law imposing a need to obtain a licence or 'clearance' from the executive. Therefore, any such impost 'could not be regarded as a charge for the privilege of entry', encroaching on freedom of movement.[15]

7.22 Section 117 of the *Constitution*, which provides protection against discrimination on the basis of state of residence, may also protect freedom of movement within Australia. For example, in *Street v Queensland Bar Association*,[16] the High Court held that a state cannot impose limits on professional practice qualifications on grounds that a person is not permanently residing in that state. The decision can be seen as removing an important impediment to cross-border movement for occupational purposes.

Principle of legality

7.23 The principle of legality provides some protection to freedom of movement, because freedom of movement is an essential part of personal liberty.[17] When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of movement, unless this intention was made unambiguously clear.

7.24 For example, in *Potter v Minahan*, O'Connor J said that in the interpretation of migration laws, it must be assumed that 'the legislature did not intend to deprive any Australian-born member of the Australian community of the right after absence to re-enter Australia unless it has so enacted by express terms or necessary implication'.[18]

7.25 In relation to non-citizens, the High Court in *Plaintiff M47 v Director General of Security* held that provisions of the *Migration Act 1958* (Cth) should not be interpreted to mean that an unlawful non-citizen may be kept in immigration detention permanently or indefinitely—at least where the Parliament has not 'squarely confronted' this issue.[19] Bell J stated that 'the application of the principle of legality

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14 Williams and Hume, above n 12, 120.

15 *Air Caledonie v Commonwealth* (1988) 165 CLR 462, 469. This case concerned a 'fee' payable under of the *Migration Act 1958* (Cth) s 34A by passengers, citizens and non-citizens, for immigration 'clearance', with power vested in the executive to grant exemptions by regulation. This law was held to be a tax, at least in so far as it related to passengers who were Australian citizens.

16 *Street v Queensland Bar Association* (1989) 168 CLR 461.

17 See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 256.

18 *Potter v Minahan* (1908) 7 CLR 277, 305.

19 *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, [116]. See also, in relation to indefinite detention, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219.

requires that the legislature make plain that it has addressed that consequence and that it is the intended consequence'.[20]

International law

7.26 Freedom of movement is widely recognised in international law and bills of rights. For example, art 13 of the *Universal Declaration of Human Rights* provides:

> (1) Everyone has the right to freedom of movement and residence within the borders of each state.
>
> (2) Everyone has the right to leave any country, including his own, and to return to his country.

7.27 Article 12 of the *International Covenant on Civil and Political Rights* (ICCPR) provides, in part:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> …
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country.[21]

7.28 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[22] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[23]

Bills of rights

7.29 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. Freedom of movement is protected in the *United States Constitution*,[24] and in the human rights statutes in Canada[25] and New Zealand.[26]

7.30 Freedom of movement is also expressly protected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).[27] Section 12 of the Victorian Act, for example, provides:

> Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

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20 *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, [529].
21 In addition, art 9 of the ICCPR provides that no one shall be subjected to arbitrary arrest or detention.
22 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).
23 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).
24 *United States Constitution* amend IV.
25 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 6(1)–(2).
26 *New Zealand Bill of Rights Act 1990* (NZ) s 18.
27 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 12; *Human Rights Act 2004* (ACT) s 13.

Justifications for limits on freedom of movement

7.31 Freedom of movement will sometimes conflict with other rights and interests, and limitations on the freedom may be justified, for example, for reasons of public health and safety.

7.32 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[28]

7.33 The following section discusses some of the principles and criteria that may be applied to help determine whether a law that interferes with freedom of movement is justified, including those under international law.

Legitimate objectives

7.34 The threshold question in a proportionality test is whether the objective of a law is legitimate. Some guidance on what should be considered legitimate objectives of a law that interferes with freedom of movement may be derived from the common law and international human rights law.

7.35 The common law and international human rights law recognise that freedom of movement can be restricted in order to pursue legitimate objectives such as the protection of national security and public health. Some existing restrictions on freedom of movement are a corollary of pursuing other important public or social needs, such as the need to protect ecologically sensitive areas, or ensure safety at sea.

7.36 In considering how restrictions on freedom of movement may be appropriately justified, one starting point is international human rights law, and the restrictions permitted by the ICCPR. The ICCPR provides grounds for restrictions on freedom of movement in general terms. Article 12.3 of the ICCPR provides that freedom of movement

> shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

7.37 Many of the laws discussed below pursue these objectives. For example, counter-terrorism and other criminal laws clearly protect the rights of others, including the right not to be a victim of terrorism or other crime. They are also concerned with the protection of national security or public order.

7.38 Other counter-terrorism laws affecting aspects of citizenship, passports and border protection may also be necessary to protect legitimate national security and other interests. Some aspects of quarantine laws, such as quarantine zones, are necessary to protect public health.

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28 *Canadian Charter of Rights and Freedoms* s 1. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

7.39 A range of laws that restrict entry, for example into military security zones, safety zones and accident sites, may be necessary to protect legitimate objectives such as protecting public safety and health and ensuring public order.

7.40 There remain other laws that restrict freedom of movement and do not as obviously fall within the permissible restrictions referred to in art 12.3 of the ICCPR, for example, the requirement placed on bankrupt persons to automatically surrender their passports.

Balancing rights and interests

7.41 Whether all of the laws identified below as potentially interfering with freedom of movement in fact pursue legitimate objectives of sufficient importance to warrant restricting the freedom, may be contested.

7.42 However, even if a law does pursue such an objective, it will be important also to consider whether the law strikes an appropriate balance between freedom of movement and other rights and interests. A recognised starting point for determining whether an interference with freedom of movement is justified is the concept of proportionality.[29] Applying the Siracusa Principles, for example, a state must use 'no more restrictive means than are required' to achieve the purpose of the limitation.[30]

7.43 The UN Human Rights Committee has said that restrictions on freedom of movement 'must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed'.[31] The UN Human Rights Committee has also said:

> The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution … [I]t is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.[32]

Laws that interfere with freedom of movement

7.44 A wide range of Commonwealth laws may be seen as interfering with freedom of movement, broadly conceived. Some of these laws impose limits on freedom of movement that have long been recognised by the common law, for example, in relation to official powers of arrest or detention, customs and quarantine. Arguably, such laws

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29 See Ch 2.

30 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [11].

31 United Nations Human Rights Committee, *General Comment No 27 (1999) on Article 12 of the Convention–Freedom of Movement*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [13]–[14].

32 Ibid [13]–[14]. Legal and bureaucratic barriers were, for the Committee, a 'major source of concern': Ibid [17]. See also United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984).

do not encroach on the traditional freedom, but help define it. However, these traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.

7.45 Commonwealth laws that prohibit or constrain the movement of individuals include:

- criminal laws;
- customs and border protection laws;
- citizenship and passport laws;
- environmental regulation;
- child support laws; and
- laws restricting entry to certain areas.

7.46 These laws are summarised below. Some of the justifications that have been advanced for laws that interfere with freedom of movement, and criticisms of laws on that basis, are also discussed.

Criminal laws

7.47 Part 5.3 of the *Criminal Code* contains a range of provisions with implications for freedom of movement.[33] Importantly, these include provisions concerning:

- counter-terrorism control orders, which may contain a prohibition or restriction on a person being at specified areas or places or leaving Australia or a requirement that a person remain at specified premises;[34] and
- counter-terrorism preventative detention orders, which may be issued where it is suspected that a person will or has engaged in a terrorist act.[35]

7.48 The *Criminal Code* also criminalises entering or remaining in 'declared areas' in foreign countries.[36]

7.49 The declared areas offences were introduced into the *Criminal Code* by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (*Foreign Fighters Act*), in response to the potential threat of individuals returning from conflict zones in Syria and Iraq. This legislation also extended the operation of the control orders and preventative detention regimes and the Australian Security Intelligence Organisation's questioning and detention warrant powers.

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33 The control orders and preventative detention orders regimes also have implications for freedom of speech and freedom of association: see Chs 4, 6. For example, under *Criminal Code* (Cth) s 104.5(3)(e), a prohibition or restriction on the person communicating or associating with specified individuals may be imposed.

34 *Criminal Code* s 104.5(3)(a)–(c).

35 Ibid s 105.4.

36 Ibid s 119.2.

7.50 All of these provisions have been subject to critical scrutiny in parliamentary committee and other inquiries.[37] These previous inquiries include that conducted in 2011–12 by the INSLM.[38] The Law Council of Australia supported further review of these provisions by the INSLM, 'with a particular focus on determining any undue encroachment on freedom of movement'.[39]

Criminal Code—control orders

7.51 The objects of div 104 of the *Criminal Code* are to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for one or more of the following purposes:

- protecting the public from a terrorist act;
- preventing the provision of support for or the facilitation of a terrorist act; or
- preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.[40]

7.52 Among the restrictions that may be placed on an individual subject to a control order is that they may be restricted from being in specified areas or places; prohibited from leaving Australia; and required to remain at specified premises between specified times.[41] An individual may be required to wear a tracking device.[42]

7.53 In making an interim control order at the request of the Australian Federal Police (AFP), the issuing court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person 'is reasonably necessary, and reasonably appropriate and adapted' for the purpose of preventing terrorism.[43]

7.54 The control order regime, along with preventative detention, was first introduced by the *Anti-Terrorism Act (No. 2) 2005* (Cth).

7.55 In 2012, then INSLM, Bret Walker SC recommended that the control order regime should be repealed.[44] The control order regime was also reviewed as part of the 2012–13 Council of Australian Governments (COAG) review of counter-terrorism legislation. The COAG report recommended that the control order regime should be retained with additional safeguards and protections.[45]

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37 See eg, Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 68; Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 44, 67, 106. See Gilbert and Tobin Centre of Public Law, *Submission 22*.

38 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012).

39 Law Council of Australia, *Submission 140*.

40 *Criminal Code* s 104.1.

41 Ibid s 104.5(a)–(c).

42 Ibid s 104.5(3)(d).

43 Ibid s 104.4(1)(d). See *Jabbour v Hicks* [2008] FMCA 178.

44 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 44.

45 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) x–xvi (Recommendations).

7.56 Following the expiration of a ten-year sunset period, the regime was extended for a further ten years by the *Foreign Fighters Act*. The Explanatory Memorandum for the legislation extending these regimes observed that the restriction of freedom of movement implicit in control orders must be 'reasonable, necessary and proportionate' to achieving the objective of protecting the Australian public.[46] It stated that these requirements ensure the 'gravity of consequences likely to be occasioned by a terrorist act justifies a reasonable and proportionate limitation of free movement'.[47]

7.57 Although expressing a justification in terms of a proportionality standard, and notwithstanding safeguards, the Parliamentary Joint Committee on Human Rights (Human Rights Committee) concluded that the control order regime may not satisfy the requirement of being reasonable, necessary and proportionate in pursuit of its legitimate objective. It considered that, in the absence of further information regarding its necessity and proportionality, the control order regime was likely to be incompatible with human rights, including the right to freedom of movement.[48]

7.58 The control order regime was subsequently amended by the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* (Cth) to, among other things, expand the objects of the control order regime to include preventing support for a terrorist act or hostile activity in a foreign country; reduce the documentation the AFP is required to provide when seeking the Attorney-General's consent to apply for a control order; and streamline certain other requirements.[49]

7.59 The Bill was examined by the Human Rights Committee, which observed that these amendments would 'significantly expand the circumstances in which control orders could be sought against individuals, and significantly alter the purpose of control orders'. As a result, 'control orders are likely to be used more widely and, as such, circumvent ordinary criminal proceedings'.[50]

7.60 The Human Rights Committee stated that, by extending the grounds for control orders to acts that 'support' or 'facilitate' terrorism, the Bill would allow an order to be sought in circumstances where there is not necessarily an imminent threat to personal safety—a critical rationale relied on by the government for the need to use control orders rather than ordinary criminal processes. Accordingly, the Committee concluded

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46 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [156].

47 Ibid.

48 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.74]–[1.75]. The concerns expressed did not meet with a response from the Attorney-General and the control order provisions were enacted without significant change: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 16th Report of the 44th Parliament* (November 2014) [1.28]–[1.29].

49 See Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth) [30].

50 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 16th Report of the 44th Parliament* (November 2014) [1.35].

that the amendments to control orders impose limits on human rights, including freedom of movement, that are neither necessary nor reasonable.[51]

7.61 Further, under the amendments, when requesting the court make an interim control order, a senior AFP member would no longer be required to provide the court with an explanation of 'each' obligation, prohibition and restriction sought to be imposed. Rather, the AFP member would only be required to provide an explanation as to why the obligations, prohibitions or restrictions generally should be imposed and, to the extent known, a statement of facts as to why the obligations, prohibitions or restrictions—as a whole rather than individually—should not be imposed.[52] The Human Rights Committee stated that it therefore considered that these amendments would result in 'control orders not being proportionate because they are not appropriately targeted to the specific obligation, prohibition or restriction imposed on a person':

> As a control order is imposed in the absence of a criminal conviction, it is critical that the individual measures comprising the control order are demonstrated in each individual instance to be proportionate. As a result, the committee considers that these amendments are not proportionate to the stated legitimate objective.[53]

7.62 The Human Rights Committee sought the Attorney-General's further advice on how the limits the legislation imposes on human rights are reasonable, necessary or proportionate to achieve the legitimate aim of responding to threats of terrorism.[54]

7.63 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) also raised concerns about the extension of the control order regime, in relation to their potential to trespass on personal rights and liberties.[55] In response, the Attorney-General observed, among other things, that:

> Despite having been in operation for almost nine years, only two control orders have been requested or made to date. This demonstrates both the extraordinary nature of the regime and the approach of Australia's police service to utilise traditional law enforcement tools where appropriate, relying on control orders only when absolutely necessary.[56]

7.64 The control order regime was continued by the *Foreign Fighters Act*, without significant amendment, on 12 December 2014.

7.65 In 2015, the INSLM sought public submissions, by 18 September 2015, for an inquiry concerning the adequacy of the safeguards relating to the control order regime. The INSLM Inquiry will examine whether additional safeguards recommended by the COAG review of counter-terrorism legislation[57] are desirable, with particular

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51 Ibid [1.36].
52 Ibid [1.37].
53 Ibid [1.38].
54 Ibid [1.39].
55 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (2014) 797.
56 Ibid 799.
57 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013).

consideration of the advisability of introducing a system of 'special advocates' into the regime.[58]

7.66 A number of stakeholders to this ALRC Inquiry submitted that the control order regime constituted an unjustified interference with freedom of movement.[59] The Law Council referred to its concerns, expressed previously in submissions to parliamentary, UN and other bodies, that control orders and preventative detention orders 'allow restriction of freedom of movement based on suspicion rather than charge'.[60]

7.67 The Human Rights Law Centre raised the particular concern that control orders can be made even in circumstances where a person has not been charged and may never be tried and 'irrespective of a person's ongoing dangerousness'. The Centre submitted that the Australian Government should repeal the control order regime or substantially amend it to ensure it does not disproportionately limit rights.[61]

7.68 The Gilbert and Tobin Centre for Public Law submitted that control orders clearly infringe the rights to freedoms of movement and association, and undermine the idea that individuals should not be subject to severe constraints on their liberty without a finding of criminal guilt by a court. The Centre stated that if control orders are to be retained, they should be 'substantially amended to require prior conviction for a terrorism offence and some finding as to the ongoing dangerousness of the person'.[62]

7.69 The UNSW Law Society highlighted that, unlike in the UK, there is no express requirement for less restrictive alternatives to be considered before a control order is issued—including the viability of a criminal prosecution.[63]

Criminal Code—preventative detention orders

7.70 The objects of div 105 of the *Criminal Code* are to allow a person to be taken into custody and detained for a short period of time in order to:

- prevent an imminent terrorist act occurring; or
- preserve evidence of, or relating to, a recent terrorist act.[64]

7.71 The preventative detention orders regime was also extended by the *Foreign Fighters Act*.

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58 Department of the Prime Minister and Cabinet, *Independent National Security Legislation Monitor* <http://www.dpmc.gov.au/pmc/about-pmc/core-priorities/independent-national-security-legislation-monitor>.

59 Human Rights Law Centre, *Submission 39*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

60 Law Council of Australia, *Submission 75*.

61 Human Rights Law Centre, *Submission 39*.

62 Gilbert and Tobin Centre of Public Law, *Submission 22*. The Centre stated: 'Given their extraordinary nature, control orders should only be available for the purpose of protecting the community from direct harm, and not for the purpose of preventing support or facilitation of terrorism as ends in themselves'.

63 UNSW Law Society, *Submission 19*.

64 *Criminal Code* s 105.1.

7.72 The Explanatory Memorandum addressed issues of proportionality, and stated that the preventative detention order regime provides sufficient protection against unreasonable and disproportionate limitations of an individual's right to freedom of movement. It stated:

> This is evidenced by the high threshold required to be satisfied when applying for and issuing a [preventative detention order]. The application for a [preventative detention order] requires that an AFP member must be satisfied on reasonable grounds that the suspect will engage in a terrorist act, possess a thing related to or done an act in preparation for or planning a terrorist act … Even if this is satisfied, an AFP member must still demonstrate that the [preventative detention order] will substantially assist in preventing a terrorist act occurring and demonstrate that detention is reasonably necessary for the purpose of preventing a terrorist act.[65]

7.73 These limitations on the instances under which a preventative detention order may be sought were said to demonstrate that an order can be applied only when reasonable, necessary and proportionate.[66]

7.74 The Human Rights Committee observed that the preventative detention regime 'involves very significant limitations on human rights', including freedom of movement.

> Notably, it allows the imposition of a [preventative detention order] on an individual without following the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt. Effectively, [preventative detention orders] permit a person's detention by the executive without charge or arrest.[67]

7.75 The Human Rights Committee concluded that, in the absence of further information, the preventative detention order regime was likely to be incompatible with human rights, including the right to freedom of movement.[68]

7.76 The Scrutiny of Bills Committee also raised concerns about the extension of the preventative detention order regime, in relation to its potential to trespass on personal rights and liberties.[69] In response, the Attorney-General similarly observed that only one preventative detention order has been made to date, demonstrating the approach of Australia's police service to utilise the other law enforcement tools available to them, relying on preventative detention only when absolutely necessary.[70]

7.77 The preventative detention order regime was continued by the *Foreign Fighters Act* without significant amendment.

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65 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [194].
66 Ibid.
67 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.100].
68 Ibid [1.104].
69 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (2014) 776.
70 Ibid 777.

Offence of entering or remaining in a 'declared area'

7.78 The *Foreign Fighters Act* also amended the *Criminal Code* to criminalise entering or remaining in declared areas in foreign countries, thus engaging freedom of movement.[71] As at 1 November 2015, these declared areas were Al-Raqqa Province, Syria and Mosul District, Ninewa Province, Iraq.[72] The Attorney-General's Department has issued a protocol that provides guidance on the process for the declaration of areas for the purposes of s 119.2 of the *Criminal Code*.[73]

7.79 The declared areas restriction was justified in the Explanatory Memorandum on the basis that it achieves the legitimate objective of deterring Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so:

> People who enter, or remain in a declared area will put their own personal safety at risk. Those that travel to a declared area without a sole legitimate purpose or purposes may engage in a hostile activity with a listed terrorist organisation. These people may return from a declared area with enhanced capabilities which may be used to facilitate terrorist or other acts in Australia. The radicalisation of these individuals abroad may enhance their ability to spread extremist messages to the Australian community which thereby increases the likelihood of terrorist acts being undertaken on Australian soil.[74]

7.80 The Explanatory Memorandum cited several factors indicating that the restriction achieves 'an appropriate balance between securing Australia's national security and preserving an individual's civil liberties'.[75]

7.81 These factors included that a legitimate purpose defence is provided—the breadth of which is intended to ensure that legitimate travel is not unduly restricted by the new offence—and the existence of safeguards to ensure that the declaration process and prosecution processes are rigorous. On this basis, it was claimed that the 'impact of the new declared area offence on the right to freedom of movement is reasonable, necessary and proportionate in order to achieve the legitimate objective of protecting Australia and its national security interests'.[76]

7.82 The Human Rights Committee, in its examination of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Foreign Fighters Bill), considered the new 'declared area' offence provision. The Committee observed that there are significant numbers of Australians with connections to countries that may be

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71 *Criminal Code* s 119.2.

72 Ibid; *Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2014—Al-Raqqa Province, Syria* (Cth); *Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2015—Mosul District, Ninewa Province, Iraq* (Cth).

73 Attorney-General's Department (Cth), 'Protocol for Declaring an Area in a Foreign Country Where a Listed Terrorist Organisation Is Engaging in a Hostile Activity under the Criminal Code Act 1995'.

74 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [234].

75 Ibid.

76 Ibid [237].

subject to a declaration, and many of these individuals could have legitimate and innocent reasons to travel and could be affected by the new offence.[77]

7.83 It stated that, as a result, there is 'not a necessary or strong link between travel to a certain area and proof of intent to engage in terrorist activity'. Further, it was not a defence to visit friends, transact business, retrieve personal property, attend to personal or financial affairs or to undertake a religious pilgrimage and, therefore, there were 'a number of significant, innocent reasons why a person might enter or remain in a declared zone, but that would not bring a person within the scope of the sole legitimate purpose defence'.[78] The Human Rights Committee expressed concern that the offence provision 'will operate in practice to deter and prevent Australians from travelling abroad for legitimate purposes due to fear that they may be prosecuted for an offence'. The Committee considered that the offence 'unnecessarily restricts freedom of movement, and is therefore likely to be impermissible as a matter of international human rights'.[79]

7.84 The Scrutiny of Bills Committee also examined the declared area offence. The Committee expressed concern about its scope and observed that, to the extent that it may apply despite any intentional wrongdoing, it may be considered to unduly trespass on personal rights and liberties.

> In particular, it is not necessary for the person to specifically know that an area has been declared under section 119.3. Moreover, there is no requirement that the person intend to commit any particular crime or undertake any specific action when in the territory …[80]

7.85 The Scrutiny of Bills Committee observed that, notwithstanding the power to prescribe further legitimate purposes,[81] the absence of some purposes on the list, such as business travel, would limit personal freedom of movement until such time as it is included in the regulations. Persons might also be prosecuted for travel which is 'legitimate' until such time as it has been included on the list—even where they have no intent to commit a wrongful act and are not aware that an area is a declared area.[82]

7.86 The Scrutiny of Bills Committee expressed concern that the declared area offence might unduly trespass on personal rights and liberties, and sought advice from the Attorney-General as to 'why it is not possible to draft the offence in a way that more directly targets culpable and intentional actions'.[83]

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77 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.197].

78 Ibid [1.199].

79 Ibid [1.203].

80 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia *Report Relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014) 57.

81 *Criminal Code* s 119.3(h).

82 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia *Report Relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014) 58.

83 Ibid.

7.87 The concerns of the Human Rights and Scrutiny of Bills Committees did not result in significant changes being made to the proposed declared area offence.

7.88 Stakeholders in this ALRC Inquiry identified the declared area offence as unjustifiably interfering with freedom of movement.[84]

7.89 Australian Lawyers for Human Rights, for example, highlighted that there is a 'very limited list of permitted defences to what is effectively a blanket prohibition'. Further, it is 'perfectly possible that an Australian could be in a declared area with no knowledge that it has been made illegal for Australians to be there and with no guilty intent'. A related concern was that the 'humanitarian aid exception' only applies where providing humanitarian aid (or another listed reason) is the sole reason for being in a declared area.[85]

7.90 Similar concerns were expressed by the Gilbert and Tobin Centre for Public Law. The Centre stated that the declared area offence is unjustified because it criminalises a range of legitimate behaviours that are not sufficiently connected to the threat of foreign fighters:

> This is clear for two reasons. First, the list of specified defences does not include a range of other legitimate reasons why somebody might travel to a foreign country in a state of conflict … Second, the offence may prevent individuals from travelling not only to Syria and Iraq, but also areas of other countries where terrorist organisations operate and which might plausibly be designated as declared areas (such as in Israel and Indonesia).[86]

7.91 The Human Rights Law Centre stated that the declared area offence is 'extraordinary' because it substantially interferes with a person's freedom of movement, and 'because the operation of the provisions will effectively, although not technically, reverse the onus of proof'.[87] That is, the offence

> may require a defendant to prove a negative—that they did not travel to the declared area for a purpose or purposes other than the sole legitimate purpose on which they wish to rely. This limits the presumption of innocence and unjustifiably reverses the burden of proof in substance if not in form.[88]

Other criminal laws

7.92 Many other Commonwealth criminal laws can be considered to interfere with freedom of movement, including those that allow for arrest, refusal of bail and for the imprisonment of offenders. Traditional powers of arrest, and the jurisdiction of courts over bail and the sentencing of offenders are arguably matters that limit the scope of common law or traditional understandings of freedom of association, rather than interfering with the freedom.

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84 Law Council of Australia, *Submission 75*; Australian Lawyers for Human Rights, *Submission 43*; Human Rights Law Centre, *Submission 39*; Gilbert and Tobin Centre of Public Law, *Submission 22*.
85 Australian Lawyers for Human Rights, *Submission 43*.
86 Gilbert and Tobin Centre of Public Law, *Submission 22*.
87 Human Rights Law Centre, *Submission 39*.
88 Ibid.

7.93 Some Commonwealth laws concerning police powers have been criticised, including police search and seizure powers in relation to terrorist acts and terrorism offences contained in the *Crimes Act 1914* (Cth).[89]

7.94 These provisions empower the Attorney-General to prescribe a security zone where anyone in the zone can be subject to police stop, search, questioning and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. The Law Council submitted:

> Detention for searching based only on an individual's presence in a particular geographical location is an encroachment on freedom of movement. The broad nature and significant scope of this power brings into question its proportionality, particularly as, once a security zone is prescribed, there are few restrictions on the exercise of the power.[90]

7.95 The Law Council also raised questions about provisions of the *Crimes Act* that prescribe periods for which a person may be detained without charge, on arrest for a terrorism offence.[91] These provisions allow for up to seven days to be excluded from the calculation of the investigation period in terrorism cases. The Law Council submitted:

> This is considerably longer than the period of pre-charge detention permitted under the *Crimes Act* in non-terrorism cases. While national security is a balancing factor, detention for lengthy periods without charge brings into question whether the encroachment is proportionate or justified.[92]

ASIO questioning and detention warrants

7.96 The *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*) allows for the issuing of a questioning and detention warrant where there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.[93]

7.97 In 2012, the INSLM recommended that these provisions of the *ASIO Act* should be repealed as an unjustifiable 'intrusion on personal liberty'.[94] He stated that agencies and departments had been asked to give evidence demonstrating why questioning and detention warrants were necessary and that

> [n]o scenario, hypothetical or real, was shown that would require the use of a [questioning and detention warrant] where no other alternatives existed to achieve the same purpose. The power to arrest and question without charge for a broad range of preparatory and inchoate offences, the power to order the surrender of passports and prohibit a person from leaving Australia and the existing powers of detention or

89 *Crimes Act 1914* (Cth) pt 1AA, div 3A.
90 Law Council of Australia, *Submission 75*.
91 *Crimes Act 1914* (Cth) ss 23DB–23DF.
92 Law Council of Australia, *Submission 75*.
93 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34F–34H.
94 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 106.

> forcibly compelled immediate attendance under [questioning warrants] all provide less restrictive alternatives to [questioning and detention warrants].[95]

7.98 The *Foreign Fighters Act* ensured the continuation of div 3 of the *ASIO Act*, which contains ASIO's special powers relating to terrorism offences and, in particular, the issuing of ASIO questioning and detention warrants.

7.99 An ASIO questioning and detention warrant authorises a person to be taken into custody immediately by a police officer and to be brought before a prescribed authority immediately for questioning under the warrant for a period of time described in s 34G(4).

7.100 The Explanatory Memorandum observed that these warrants infringe an individual's right to freedom of movement by requiring their presence before a prescribed authority. However, 'this is permissible on the basis it achieves the legitimate objective of protecting Australia's national security interests'; and because the warrants are only available where there are reasonable grounds for believing that the warrant will 'substantially assist' in the collection of 'intelligence that is important in relation to a terrorism offence'.[96]

7.101 The Human Rights Committee examined these provisions and other special powers of ASIO covered by the Foreign Fighters Bill. The Human Rights Committee concluded that, in the absence of further information, the ASIO special powers regime was likely to be incompatible with human rights, including the right to freedom of movement.[97]

7.102 The Gilbert and Tobin Centre submitted to this ALRC Inquiry that the power for ASIO to detain individuals for questioning 'clearly infringes the right to freedom of movement and the idea that individuals should not be held in custody without at least a reasonable suspicion of involvement in criminal activity'. This infringement is unjustified 'not only on principled grounds, but also because the provisions appear to have little practical benefit in preventing terrorism'.[98]

Customs and border protection

7.103 Under the *Customs Act 1901* (Cth), Australian Border Force (ABF) officers have extensive powers of detention.[99] For example, under s 219ZJB, an ABF officer has power to detain persons suspected of committing a serious Commonwealth offence or a prescribed state or territory offence. These powers generally only apply to persons in a

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95 Ibid 105–6.

96 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [78].

97 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.49].

98 Gilbert and Tobin Centre of Public Law, *Submission 22*. See Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 105. See also Human Rights Law Centre, *Submission 39*.

99 *Customs Act 1901* (Cth) pt XII div 1.

'designated place'—for example, certain ports, airports and wharves[100] and where there are reasonable grounds to suspect the commission of an offence.

7.104 The *Migration Act* also contains powers of detention. For example, under s 189, an officer must detain a person that an officer knows or reasonably suspects is an unlawful non-citizen.[101]

Customs Act detention powers

7.105 The *Foreign Fighters Act* amended the detention power in s 219ZJB of the *Customs Act 1901* (Cth). Broadly, the amendments extended the definition of 'serious Commonwealth offence'; expanded the applicability of the detention powers to include where an officer has reasonable grounds to suspect that the person is intending to commit a Commonwealth offence; expanded the required timeframe by which an officer must inform the detainee of their right to have a family member or other person notified of their detention from 45 minutes to 4 hours; and introduced a new section with a new set of circumstances in which a person may be detained in a designated area because of concerns about national security or security of a foreign country.[102]

7.106 The Explanatory Memorandum stated that these restrictions on freedom of movement are permissible on the basis that 'the primary reason underlying the expanded detention powers is to target individuals thought to be threats to Australia's national security leaving the country':

> The detention powers of Customs are not indefinite and are subject to significant safeguards including the right in all but the most extreme situations to notify a family member or others of their detention … and the requirement that if the officer detaining the individual ceases to be satisfied of certain matters, they must release the person from custody … accordingly, the restriction on the freedom of movement is reasonable, necessary and proportionate to achieving the legitimate objective of securing Australia's national security. [103]

7.107 The Human Rights Committee observed that the statement of compatibility provided 'no discussion of why the current powers are regarded as not sufficient in respect of the range of Commonwealth offences in relation to which they may be exercised, the range of circumstances to which they may be applied and the length of time for which a person may be detained'. In the absence of a 'sufficiently well-defined objective', analysis of whether the provisions might be regarded as reasonable and proportionate was not possible.[104]

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100 Ibid ss 4, 15.

101 An 'officer' includes ABF officers, protective services officers, members of the AFP or other police force, and others authorised by the Minister: *Migration Act 1958* (Cth) s 5. See also, in relation to persons on detained vessels or aircraft: *Maritime Powers Act 2013* (Cth) s 72.

102 *Customs Act 1901* (Cth) s 219ZJCA.

103 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [288].

104 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.316]–[1.317].

7.108 The Scrutiny of Bills Committee also examined this provision, commenting that it was not clear precisely how increasing the scope of 'serious Commonwealth offence' for the purposes of triggering the exercise of detention powers under s 219ZJB is a necessary response to the problem of foreign fighters.[105]

7.109 In response, the Attorney-General stated that the provisions are part of the targeted response to the threat posed by foreign fighters.

> The extension of the detention power, which is only a temporary power, is aimed at the Australian Customs and Border Protection Service facilitating other law enforcement agencies to exercise their powers to address national security threats. The current power may limit this facilitation across the full range of offences that are relevant to addressing national security threats. The new definition of 'serious Commonwealth offence' will, for example, allow officers of Customs to detain a person in respect of an offence under the *Australian Passports Act 2005* of using a passport that was not issued to the person.[106]

Quarantine

7.110 Quarantine has ancient origins, in times when the only means of containing epidemics such as the plague was by confinement of infected persons, and quarantining is considered to be part of the traditional police power of the state.

7.111 The Commonwealth has extensive powers to detain Australian citizens and non-citizens under the *Quarantine Act 1908* (Cth).[107] For example, under s 18 of the Act, every person who is on board a vessel or aircraft arriving in Australia from a place outside Australia is subject to quarantine. Such a person potentially may be detained, placed in exclusion or under observation for the purposes of preventing or controlling diseases or pests that could cause 'significant damage to human beings, animals, plants, other aspects of the environment or economic activities'.[108]

Environmental regulation

7.112 The operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) can result in restrictions being placed on freedom of movement. The Act provides for the making of management arrangements (management plans, regimes and policies) for environmentally significant areas, such as World Heritage properties.

7.113 These arrangements may include restrictions on freedom of movement, for example, to protect endangered plants or animals. Regulations may be made to regulate or prohibit access to conservation zones.[109]

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105 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (2014) 816–17.
106 Ibid 817.
107 See *Quarantine Act 1908* (Cth) pt IV. See the quarantine power in the *Australian Constitution* s 51(ix).
108 *Quarantine Act 1908* (Cth) s 4.
109 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 390E.

7.114 Under the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), the Director of National Parks may restrict entry to areas of Commonwealth reserves on a temporary or permanent basis.[110] For example, in the Uluru-Kata Tjuta National Park there are sites where visitors are generally not allowed to go, including the domes of Kata Tjuta, sacred sites around Uluru and the Mutitjulu Community.[111]

7.115 Under the *Great Barrier Marine Park Act 1975* (Cth), the Minister may make a direction prohibiting a certain person from entering and using the Marine Park; or imposing conditions on the person's entry to and use of the Marine Park.[112] Breach of such directions is an offence.[113]

7.116 Where a national park is state property, regulation of public access will not interfere with common law freedom of movement. If the area is *res communes* (property to which all persons have access), regulation may amount to a restriction of common law freedom of movement.

Citizenship and passport laws

7.117 A citizen's freedom of movement may be interfered with following revocation of citizenship under the *Australian Citizenship Act 2007* (Cth), if the person does not retain permanent residency status.

7.118 Australian citizenship can be revoked if citizenship was granted as a result of false statements or fraud, or a person was convicted of a serious criminal offence before becoming a citizen, and the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.[114]

7.119 However, revocation of citizenship by conferral, on the basis of a criminal conviction, may not occur if the person would be rendered stateless.[115] An Australian citizen by birth cannot have their Australian citizenship revoked under these provisions.

7.120 Australian citizenship, including of a citizen by birth, may be revoked if the person is a national or citizen of a foreign country; and serves in the armed forces of a country at war with Australia.[116]

7.121 Following passage of the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (*Allegiance to Australia Act*), the *Australian Citizenship Act* allows Australian citizenship to cease for dual nationals engaged in or supporting terrorist activities.

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110 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 12.23.
111 Uluru-Kata Tjuta National Park Board of Management, *Uluru-Kata Tjuta National Park Management Plan 2010-2020* (2010) 85.
112 *Great Barrier Reef Marine Park Act 1975* (Cth) s 61AEA. This applies where the person has been convicted of repeated offences against the Act, or repeatedly subject to penalties under the Act.
113 Ibid s 61AEB.
114 *Australian Citizenship Act 2007* (Cth) s 34(1), (2).
115 Ibid s 34(3).
116 Ibid s 35.

7.122 The amending Act introduced three new ways in which a person, who is a national or citizen of a country other than Australia, can cease to be an Australian citizen. These are as follows:

- The person, aged 14 years or older, renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct, where the conduct was engaged in outside Australia or the person left Australia before being charged and brought to trial for the conduct.
- The person, aged 14 years or older, ceases to be an Australian citizen if the person fights for, or is in the service of, a declared terrorist organisation. The Minister may, by legislative instrument, declare a terrorist organisation. This legislative instrument is subject to strict oversight.
- The Minister may determine in writing that a person ceases to be an Australian citizen because the person has been convicted of a specified terrorist-related offence with at least six years of imprisonment (or to periods of imprisonment that total at least six years).[117]

7.123 A number of stakeholders expressed concerns about the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), as first introduced.[118] The ANU Migration Law Program observed that removing citizenship from a person, by definition, 'removes their freedom to leave and return to their own country' and is a form of 'banishment' that may be unjustified.[119]

7.124 The Bill was the subject of inquiry by the Intelligence Committee, which recommended 27 changes.[120] The recommended changes were all implemented[121] including, for example, to provide that the Minister may consider exemptions in each case where conduct has led to automatic loss of citizenship; and the loss of citizenship following conviction occurs by discretionary decision of the Minister, rather than automatically. The legislation is subject to review by the INSLM and the Intelligence Committee.[122]

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117 Supplementary Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth). See *Australian Citizenship Act 2007* (Cth) ss 33AA, 35, 35AA, 35A, 35B.

118 Law Council of Australia, *Submission 140*; Legal Aid NSW, *Submission 137*; ANU Migration Law Program, *Submission 107*; Australian Lawyers for Human Rights, *Submission 106*.

119 ANU Migration Law Program, *Submission 107*. The Program noted that the measure also has an impact on individuals' freedom of association and, in particular, on their right to remain united with family. See also Law Council of Australia, *Submission 140*.

120 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015).

121 Supplementary Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth).

122 *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) sch 2.

Passports

7.125 Under the *Australian Passports Act 2005* (Cth) an Australian passport may be refused, suspended or cancelled, interfering with a citizen's ability to leave or re-enter Australia, or other countries.

7.126 A passport or other travel document may be refused for a range of reasons set out in div 2 of the *Australian Passports Act*. A 'competent authority' may, for example, request that the Minister cancel or refuse to issue a passport to a person who is the subject of a domestic or foreign arrest warrant for serious crimes or where the person will likely engage in harmful conduct in Australia or overseas if they were allowed to travel.[123]

7.127 A passport or other travel document may also be cancelled by the Minister for a range of prescribed reasons.[124] These include where the person has lost their Australian citizenship or a competent authority makes a request that the issue of a passport be refused or a passport be cancelled.

7.128 'Competent authorities' may make cancellation requests for reasons relating to Australian law enforcement matters, international law enforcement cooperation, potential for harmful conduct, repeated loss or thefts, the provision of financial assistance to travellers, and concurrently valid or suspended Australian travel documents.[125]

7.129 These authorities include Australian federal, state and territory police; Australian courts and parole boards; bankruptcy (public) trustees; the Australian Securities and Investments Commission; ASIO; specified officers of the Attorney-General's Department; the Australian Customs and Border Protection Service; and the Australian Crime Commission.[126] For example, passports may be cancelled as a result of recommendations made by ASIO following adverse security assessments under pt IV of the *ASIO Act*.[127]

7.130 The Law Council observed that some grounds to refuse, suspend or cancel a passport are 'straightforward', for example, 'where there is an order of the Family Court or a tax debt or other obligation, and the underlying facts are usually reviewable'. However, matters arising in decisions on national security grounds were said to be more problematic because, in practice, 'such decisions are unchallengeable due to non-disclosure directions given by the Executive, which prevent the affected party from knowing of or addressing the information relied on'.[128]

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123 *Australian Passports Act 2005* (Cth) ss 11–14.
124 Ibid s 22.
125 Ibid ss 12–14, 16; *Australian Passports Determination 2005* (Cth) pt 3.
126 *Australian Passports Act 2005* (Cth) ss 12–14, 16; *Australian Passports Determination 2005* (Cth) pt 3.
127 *Australian Passports Act 2005* (Cth) ss 14(1), 48A.
128 Law Council of Australia, *Submission 140*. The Law Council referred to *Hussain v Minister for Foreign Affairs*, as an example. *Hussain* involved an appeal from a decision of the Administrative Appeals Tribunal (AAT) affirming decisions to cancel an Australian passport and issue an adverse security assessment under the *ASIO Act*. The applicants were unsuccessful in arguing that the AAT erred in law in preventing their legal representatives from having access to all of the evidence and submissions made by the respondents: *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241.

7.131 The Law Council submitted that, in such cases, the Minister's power 'can be exercised on the basis of undisclosed material and in the knowledge that judicial review is hampered', resulting in a 'very significant restriction on the right of movement, with very limited scope to test its proportionality to the purported threat'.[129]

7.132 The *Foreign Fighters Act* amended the *Australian Passports Act 2005* (Cth) to enable the Minister for Foreign Affairs to suspend a person's Australian travel documents for a period of 14 days if requested by ASIO.[130]

7.133 These amendments enable ASIO to make a request that the Minister for Foreign Affairs suspend, for a period of 14 days, all Australian travel documents issued to a person if it suspects on reasonable grounds both that the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country, and that all the person's Australian travel documents should be suspended in order to prevent the person from engaging in the conduct.[131]

7.134 The Explanatory Memorandum noted that the new suspension mechanism will temporarily restrict a person's right to liberty of movement if that person seeks to travel while their Australian travel documents are suspended but that, consistent with art 12.3 of the ICCPR, the restriction will be provided by law and is necessary for the protection of Australia's national security.[132]

7.135 The introduction of the new suspension mechanism was considered 'reasonable and necessary to achieve the national security objective of taking proactive, swift and proportionate action to mitigate security risks relating to Australians travelling overseas who may be planning to engage in activities of security concern'.[133]

7.136 The Human Rights Committee expressed concern that the 'asserted necessity of a power to suspend passports for longer than seven days'—the period proposed by the INSLM—was not supported by empirical evidence.[134] The Human Rights Committee also noted, in relation to proportionality, that the measures excluded both administrative review of a decision to suspend a passport and judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth); and would provide, in certain circumstances, that a person did not have to be notified of a decision not to issue or to cancel a passport on the grounds of national security.[135]

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129 Law Council of Australia, *Submission 140*.

130 *Australian Passports Act 2005* (Cth) s 22A. The *Foreign Passports (Law Enforcement and Security Act) 2005* (Cth) contains similar provisions under which the Minister for Foreign Affairs may order the surrender of a person's foreign travel documents if requested by ASIO: *Foreign Passports (Law Enforcement and Security Act) 2005* (Cth) ss 15A, 16A.

131 *Australian Passports Act 2005* (Cth) s 22A.

132 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [49].

133 Ibid [50].

134 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.244].

135 Ibid [1.245].

7.137 In light of these factors, the Human Rights Committee considered that the statement of compatibility in the Explanatory Memorandum had not established that the measure could be regarded as proportionate and sought further advice from the Attorney-General on whether the measure was compatible with the right to freedom of movement, and particularly whether the limitation was reasonable and proportionate.[136]

7.138 The Scrutiny of Bills Committee also commented on these provisions of the Foreign Fighters Bill. It drew attention to the 'significant difference between the INSLM's proposal of rolling 48 hour suspensions (up to a maximum of seven days), with the 14-day suspension period as proposed in the bill' and sought further advice from the Attorney-General.[137]

7.139 The Attorney-General asserted, in response, that the INSLM's proposed timeframe of up to seven days 'would not allow ASIO sufficient time to assess whether to make a cancellation request and would not allow the Minister for Foreign Affairs appropriate time to consider whether to cancel a person's travel documents'.[138] The Scrutiny of Bills Committee resolved to leave the question of whether the proposed approach is appropriate to the Senate as a whole.[139]

7.140 The Law Council, in a submission to this ALRC Inquiry, queried whether s 22A contains 'sufficient safeguards to ensure proportionality'. The Law Council noted that there is no legislative safeguard preventing multiple suspensions of a travel document. As long as there is new information that was not before ASIO at the time of the suspension request and during the period of the suspension, 'multiple requests of suspension are conceivable'.[140] Finally, the absence of a notification obligation where passports are refused or cancelled for security or law enforcement reasons might affect whether the measures can be interpreted as proportionate under the ICCPR.[141]

7.141 The Law Council submitted:

> In an age where a passport is indispensable to international movement, such a 'discretionary power' is at odds with that part of freedom of movement which seeks to guarantee that 'everyone shall be free to leave any country, including his own'.[142]

Passports and bankruptcy

7.142 The *Bankruptcy Act 1966* (Cth) provides that a bankrupt must, unless excused by a trustee in bankruptcy, give his or her passport to the trustee.[143] This provision

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136 Ibid [1.246]–[1.247].
137 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (2014) 749.
138 Ibid 750.
139 Ibid.
140 Law Council of Australia, *Submission 75*.
141 Ibid. Referring to *Criminal Code* s 48A. See also UNSW Law Society, *Submission 19*.
142 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12.2.
143 *Bankruptcy Act 1966* (Cth) s 77. In practice, not every trustee collects passports: Christopher Symes, 'Bankrupts and Passports: A Call to Repeal Sections 77(1)(a)(ii) and 272(1)(c) of the Bankruptcy Act' (2014) 14 *QUT Law Review* 98, 99.

appeared in the Act as originally enacted—pre-dating modern parliamentary committee scrutiny processes.

7.143 Associate Professor Christopher Symes submitted that this restriction on freedom of movement should be reviewed, in view of the increased frequency of travel, ease of international communication, and the fact that no similar requirement is placed on directors of insolvent corporations.[144]

7.144 The primary purpose of the *Bankruptcy Act* is to provide a mechanism whereby a debtor's property can be taken and used to pay creditors, and to allow the debtor to be freed from the burden of accumulated debts. However, the scheme is 'not intended to be punitive', although there 'must necessarily be punitive aspects to the legislation in order to provide appropriate incentives for bankrupts to comply with their obligations under the Act'.[145]

7.145 For some bankrupts, the forfeiture of a passport and the requirement to seek a trustee's consent for international travel is a significant restriction on freedom of movement. The provision may not be proportionate, if it is not the least intrusive means of achieving the efficient administration of the bankruptcy.[146] Repeal of these provisions has been suggested because:

- where a bankrupt does not return from overseas, the bankrupt is liable to face extradition proceedings—and Australian courts and trustees may use existing cross-border laws to return the bankrupt to Australia;
- forfeiture of passports is unusual in other similar jurisdictions—the UK, US, Canada, New Zealand, South Africa, Malaysia, Singapore and India do not possess a legislative equivalent; and
- under the *Corporations Act 2001* (Cth), liquidators have the power to apply for court orders to prevent officers from absconding from Australia,[147] rather than legislative forfeiture of passports.[148]

7.146 There is good reason to review s 77 of the *Bankruptcy Act*. This requirement may not be a proportionate response to concerns about bankrupt individuals absconding. Arguably, restrictions on freedom of movement should be imposed subject to precise criteria, and judicial oversight, rather than through automatic forfeiture of a bankrupt's passport. A possible mechanism would be to provide trustees with a power to apply for court orders similar to those available to liquidators.

Child support

7.147 Under the *Child Support (Registration and Collection) Act 1988* (Cth) (*Child Support Act*) the Child Support Registrar may make a 'departure prohibition order'

144 C Symes, *Submission 40*. See Symes, above n 143.
145 *Nguyen v Pattison* [2004] FMCA 517 (20 August 2004) [22].
146 Symes, above n 143, 108–9.
147 *Corporations Act 2001* (Cth) ss 486A, 486B.
148 Symes, above n 143, 109–10.

prohibiting a person from departing from Australia for a foreign country if, among other things, the person has a child support liability and the person has not made arrangements satisfactory to the Registrar for the child support liability to be wholly discharged.[149]

7.148 The justifications for the making of 'departure prohibition orders' under the *Child Support Act*[150] were discussed in the Federal Magistrates Court of Australia in *Williams v Child Support Registrar*.[151]

7.149 In this case, the applicant, Williams, sought orders varying a decision to issue a departure prohibition order against him. The applicant was unsuccessful in arguing that there was a constitutional right of freedom of movement into and out of Australia. In dismissing the appeal, the Magistrate expressed the opinion that, even if the *Child Support Act* did burden freedom of movement, it was 'nevertheless a law reasonably appropriate and adapted to serve the object intended'—being that children receive financial support that a parent is liable to provide and that that support is paid on a regular and timely basis.[152]

7.150 Professor Patrick Parkinson highlighted problems with the application of this provision to parents who are visiting Australia, but live permanently overseas. These problems were said to arise particularly in situations where the alleged child support debt is seriously contested, or is associated with a conflict of laws.[153] Parkinson recommended legislative amendments to ensure that orders can only be issued against a person 'who is domiciled in, or habitually resident in, or a taxpayer of Australia'.

7.151 This issue was considered by the House of Representatives Standing Committee on Social Policy and Legal Affairs. In its July 2015 report, the Committee recommended that the legislation be amended to ensure that departure prohibition orders are 'only issued by a tribunal or court on the application of the Registrar and after providing an opportunity for the subject of the [departure prohibition order] to be heard' and that whenever an order is being considered in relation to a person who resides outside of Australia, the tribunal, court or Registrar 'must give special consideration to those circumstances'.[154]

Laws restricting entry to specific areas

7.152 Many Commonwealth laws interfere with freedom of movement, broadly conceived, by providing that it is unlawful to 'enter or remain' in certain prescribed areas.

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149 *Child Support (Registration and Collection) Act 1988* (Cth) s 72D. The Explanatory Memorandum to the Child Support Legislation Amendment Bill (No. 2) 2000 introducing s 72D did not refer to freedom of movement.

150 Ibid.

151 *Williams v Child Support Registrar* (2009) 109 ALD 343.

152 Ibid [35] (Lucev FM).

153 P Parkinson, *Submission 9*.

154 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *From Conflict to Cooperation: Inquiry into the Child Support Program* (2015) 138–9, rec 21.

7.153 Of course, common law freedom of movement does not extend to unfettered access to all public property. For example, in the case of the parliamentary precincts, the Parliament has power to regulate the conduct of its business and, therefore, control access. Defence areas may be state-owned property (as distinguished from public property) and, if so, the public would have no common law freedom to enter them without licence.

7.154 Laws restrict entry to specific areas in Australia, including in relation to Aboriginal land. For example, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) restricts entry to Aboriginal land generally, and sacred sites in particular.[155] Other laws that may restrict entry to specific areas in Australia include:

- *Defence Act 1903* (Cth) s 51R (designated areas);
- *Offshore Minerals Act 1994* (Cth) s 404 (declared safety zones);
- *Parliamentary Precincts Act 1988* (Cth) s 6 (the Parliamentary precincts);
- *Sea Installations Act 1987* (Cth) s 57 (safety zones); and
- *Space Activities Act 1998* (Cth) s 103 (accident sites).

Migration law

7.155 The object of the *Migration Act 1958* (Cth) is to 'regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'.[156] To advance this object, the Act provides for visas, requires people entering Australia to do so legally, and provides for the removal and deportation of non-citizens whose presence in Australia is not permitted, and for the taking of unauthorised maritime arrivals from Australia to a regional processing country.[157]

7.156 Clearly, the *Migration Act* constrains the movement of people into Australia and, in some cases, their detention on, or prior, to arrival in Australia. However, to the extent that it applies to non-citizens it does not appear to engage freedom of movement, as that right has been understood by the common law. In *Ruddock v Vadarlis*, Beaumont J held that asylum seekers aboard the MV *Tampa* had not, and could not, assert a common law right to enter Australia; and it is unlikely they had other Australian common law rights which could be enforced.[158]

7.157 At common law, freedom of movement concerns the freedom of citizens to leave and return to their own country. Therefore, laws which infringe a non-citizen's

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155 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 70, 69.
156 *Migration Act 1958* (Cth) s 4(1).
157 Ibid s 4(2)–(4).
158 *Ruddock v Vadarlis* (2001) 110 FCR 491, [97]. Beaumont J stated that the absence of a common law claim was fatal to the case for relief in the form of the common law prerogative writ of *habeas corpus*. In the High Court, Keane J stated that it is 'well-settled that the power of the Executive government under the common law to deny entry into Australia of a non-citizen … including by compulsion, is an incident of Australia's sovereign power as a nation': *CPCF v Minister for Immigration and Border Protection* (2015) 316 ALR 1, [479]. However, this assertion may be contested: see Ibid [142]–[143] (Hayne and Bell JJ).

freedom of movement by, for example, restricting or imposing conditions on entry into or departure from Australia; establishing visa conditions on non-citizens that might restrict their movement; or requiring permanent residents to leave Australia under immigration processes, are not generally considered to engage common law freedom of movement.

Conclusion

7.158 The ALRC concludes that the following Commonwealth laws should be further reviewed to determine whether they unjustifiably limit freedom of movement:

- *Bankruptcy Act* s 77, which provides that a bankrupt person must automatically give their passport to the trustee in bankruptcy.
- *Criminal Code* divs 104–105 (control orders and preventative detention orders) and s 119 (declared area offences). These provisions are subject to review by INSLM and the Intelligence Committee as part of their ongoing roles.

8. Fair Trial

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Summary

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

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

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

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

8.4 Other components of a fair trial are discussed elsewhere in this Report.[6]

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

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

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1 *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).
2 *Brown v Stott* [2003] 1 AC 681, 719.
3 Tom Bingham, *The Rule of Law* (Penguin UK, 2011) ch 9.
4 Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 247. Ashworth goes on to say: 'It is avoidance of this harm that underlies the universal insistence on respect for the right to a fair trial, and with it the presumption of innocence': Ibid.
5 See Ian Dennis, *The Law of Evidence* (Sweet & Maxwell, 5th ed, 2013) 51–62.
6 The burden of proof and the right to be presumed innocent are discussed in Ch 9. The right not to incriminate oneself is discussed in Ch 11. Legal professional privilege, which among other things helps protect a person's right to communicate in confidence with a lawyer, is discussed in Ch 12. Other chapters that relate to the fairness of the justice system more broadly include Ch 13 (Retrospective Laws), Ch 14 (Procedural Fairness), and Ch 15 (Judicial Review).

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

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

8.9 The right to a fair trial 'extends to the whole course of the criminal process'.[7] 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.[8] Rather, this chapter highlights examples of laws that interfere with accepted principles of a fair trial and some of the concerns that have been raised about them.

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

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

A common law right

8.12 The right to a fair trial is 'manifested in rules of law and of practice designed to regulate the course of the trial'.[11] 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'.[12]

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

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

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

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

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

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

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

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

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

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

8.16 There was also 'little of the care and deliberation of a modern trial' before the 19th 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.[15]

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

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

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

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13 Cosmas Moisidis, *Criminal Discovery. From Truth to Proof and Back Again* (Institute of Criminology Press, 2008) 5.
14 JH Baker, *An Introduction to English Legal History* (Butterworths, 1971) 417.
15 Ibid.
16 Ibid.
17 Ibid 418. These reforms were made by Acts of Parliament.

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

Attributes of a fair trial

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

- **independent court**: the court must be 'competent, independent and impartial';
- **public trial**: the trial should be held in public and judgment given in public;
- **presumption of innocence**: the defendant should be presumed innocent until proved guilty—the prosecution therefore bears the onus of proof and must prove guilt beyond reasonable doubt;[21]
- **defendant told of charge**: the defendant should be informed of the nature and cause of the charge against him—promptly, in detail, and in a language which they understand;
- **time and facilities to prepare**: the defendant must have adequate time and facilities to prepare a defence and to communicate with counsel of their own choosing;
- **trial without undue delay**: the defendant must be tried without undue delay;[22]
- **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';

18 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [100].
19 Ibid.
20 Ibid.
21 See Ch 9.
22 That is, undue delay between arrest and the trial, perhaps having regard to such things as the length of the delay, the reasons for the delay, and whether there was any prejudice to the accused. See *R v Morin* (1992) 1 SCR 771.

- **right to examine witnesses**: the defendant must have the opportunity to 'examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him';
- **right to an interpreter**: the defendant is entitled to the 'free assistance of an interpreter if he cannot understand or speak the language used in court';
- **right not to testify against oneself**: the defendant has a right 'not to be compelled to testify against himself or to confess guilt';[23]
- **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]

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

Practical justice

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

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23 See Ch 11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32 Ibid [192] (Gageler J).

33 Ibid.

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

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

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

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

Protections from statutory encroachment

Australian Constitution

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

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

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

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34 *Dietrich v The Queen* (1992) 177 CLR 292, 363–4 (Gaudron J).
35 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [38] (French CJ and Crennan J) (citations omitted).
36 Eg, *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.
37 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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44 Ibid 376.

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

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

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

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

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

Principle of legality

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

8.42 Discussing the principle of legality in *Malika Holdings v Stretton*, McHugh J said it is a fundamental legal principle that 'a civil or criminal trial is to be a fair trial',[51] 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.[52]

8.43 The right to a fair trial is 'perhaps the best established example of a presumption that is appropriately characterised as part of a common law bill of rights'.[53]

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

International law

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

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

Bills of rights

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

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

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

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

53 Spigelman, above n 26, 25.

54 Ibid.

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

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

Human Rights and Responsibilities Act 2006 (Vic) and the *Human Rights Act 2004* (ACT).[57]

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

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

Justifications for limits on fair trial rights

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

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

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

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

58 *United States Constitution* amend VI.

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

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

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

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

63 J Gans, *Submission 2*.

64 Ibid 2.

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

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

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

8.51 This reflects a proportionality analysis.[67] 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'.[68] Dennis cites examples of proportionality reasoning in English courts in relation to the privilege against self-incrimination,[69] the presumption of innocence,[70] and legal professional privilege.[71]

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

Open justice

8.53 Open justice is one of the fundamental attributes of a fair trial.[72] That the administration of justice must take place in open court is a 'fundamental rule of the common law'.[73] 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'.[74]

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

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

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

68 Dennis, above n 62, 346.

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

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

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

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

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

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