

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

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

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

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

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

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

Limitations on open justice

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

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

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

77 Bosland and Bagnall, above n 72, 674.

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

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

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

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

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

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

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

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

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

81 *Ibid* 520 [8].

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

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

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

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

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

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

General powers of the courts

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

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

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

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

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

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

88 *Ibid* s 37AE.

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

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

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

National security

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

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

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

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

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

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

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

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

⁹¹ *Criminal Code* s 93.2(1).

⁹² Emphasis added.

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

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

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

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

Witness protection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Other laws

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

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

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

Right to obtain and adduce evidence and confront witnesses

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

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

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

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

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

fair trial¹⁰⁷ and full disclosure has been called a ‘golden rule’.¹⁰⁸ An accused also has a right to adduce other evidence in support of their defence.

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

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

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

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

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

Limitations

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

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

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

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

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

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

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

112 *Ibid.*

Hearsay evidence

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

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

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

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

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

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

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

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

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

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

118 Henning and Hunter, above n 116, 347.

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

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

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

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

Vulnerable witnesses

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

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

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

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

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

121 Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2014) 107–8.
122 Ibid 109.
123 *Crimes Act 1914* (Cth) pt IAD div 3. Concerning the Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013 (Cth), the Human Rights Committee said: ‘The committee appreciates that this is intended to protect vulnerable witnesses and does not limit the ability of the defendant’s legal representative from testing evidence. However, the committee is concerned that if a person is not legally represented this provision may limit the defendant’s ability to effectively examine the witnesses against them’: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Eighth Report of 2013* (June 2013) 5.
124 Women’s Legal Services Australia, *Submission 5*. Recommendations about the cross-examination of complainants in sexual assault proceedings have been made in previous inquiries: Productivity Commission, *Access to Justice Arrangements* (2014) rec 24.2; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) recs 18–3, 27–1, 27–2, 27–3. See further, Phoebe Bowden, Terese Henning and David Plater, ‘Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?’ (2014) 37 *Melbourne University Law Review* 539. Access to justice for persons with disability is discussed in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 7.

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

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

Evidentiary certificates

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

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

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

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

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

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

126 Ibid.

127 Ibid.

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

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

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

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

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

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

Public interest immunity and national security information

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

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

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

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

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

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

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

134 Uniform Evidence Acts s 130(1).

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

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

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

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

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

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

8.110 The Councils for Civil Liberties also criticised the provision, preferring the balancing test in the Uniform Evidence Acts s 130.¹⁴³

135 Ibid s 130(5)(b).

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

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

138 Ibid 31(7)(b).

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

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

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

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

143 Councils for Civil Liberties, *Submission 142*.

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

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

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

Secret evidence

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

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

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

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

145 Ibid.

146 Ibid.

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

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

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

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

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

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

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

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

Privileges

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

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

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

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

152 Ibid 140.

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

154 J Gans, *Submission 2*.

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

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

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

158 J Gans, *Submission 2*.

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

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

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

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

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

160 Uniform Evidence Acts ss 118–120, 127.

161 J Gans, *Submission 2*.

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

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

164 *Ibid.*

165 *Ibid.*

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

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

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

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

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

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

172 *Ibid.*

173 Roberts and Zuckerman, above n 168, 238.

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

8.125 An exception to the privilege has been recognised in Canada¹⁷⁵ and New Zealand. Section 67(2) of the *Evidence Act 2006* (NZ) makes an exception for communications or information where ‘the Judge is of the opinion that evidence of the communication or information is necessary to enable the defendant in a criminal proceeding to present an effective defence’.

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

Right to a lawyer

8.127 A defendant’s right to a lawyer does not have a particularly long history. People accused of a felony had no right to be represented by a lawyer at their trial until 1836.¹⁷⁶ Moisisdis explains that ‘English criminal procedure for centuries stood for the principle that an accused charged with a felony should not be represented by counsel’.¹⁷⁷ The truth, it was thought, might be hidden behind the ‘artificial defence’ of a lawyer—better for the court to hear the accused speak for themselves and judge their manner and countenance.¹⁷⁸ Therefore, up until the late 18th century, defendants would typically respond to accusations in person.¹⁷⁹

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

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

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

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

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

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

177 Moisisdis, above n 13, 10.

178 *Ibid* 9.

179 *Ibid* 10.

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

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

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

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

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

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

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

Laws that limit legal representation

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

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

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

181 *Ibid.*

182 *Ibid* [1].

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

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

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

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

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

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

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

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

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

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

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

187 *Ibid* s 39(5).

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

189 Law Council of Australia, *Submission 75*.

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

Legal aid and access to justice

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

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

8.144 Access to justice has been the subject of many reports, in Australia and elsewhere, including recent reports by the Attorney-General’s Department¹⁹⁶ and the Productivity Commission.¹⁹⁷ The Law Council suggested that an ‘in-depth inquiry into the consequences of denials of legal assistance’ still needs to be conducted.¹⁹⁸

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

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

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

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

194 Law Council of Australia, *Submission 75*.

195 Law Council of Australia, *Submission 140*.

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

197 Productivity Commission, above n 124.

198 Law Council of Australia, *Submission 140*.

Appeal from acquittal

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

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

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

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

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

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

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

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

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

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

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

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

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

8.150 Bills of rights and human rights statutes prohibit laws that permit an appeal from an acquittal in the United States,²¹⁰ Canada²¹¹ and New Zealand.²¹² The prohibition is also recognised in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).²¹³

Laws that allow an appeal from an acquittal

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

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

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

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

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

210 *United States Constitution* amend V.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.156 Where fresh and truly compelling evidence of guilt emerges—perhaps, for example, from DNA evidence²²³—a new trial may seem particularly justified, not only to the victims of the particular crime, but also to the broader community.

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

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

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

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

Other laws

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

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

224 J Gans, *Submission 2*.

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

226 *Ibid* [4.35].

227 *Ibid* [4.30]–[4.36].

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

229 Civil Liberties Australia, *Submission 94*.

Trial by jury

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

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

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

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

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

Torture evidence from other countries

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

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

230 *Australian Constitution* s 80.

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

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

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

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

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

Civil penalty provisions that should be criminal

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

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

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

8.173 The Parliamentary Joint Committee on Human Rights has discussed whether civil penalty provisions should instead be characterised as criminal offences in the context of a range of bills²³⁸ and has published a valuable guidance note on this topic.²³⁹

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

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

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

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

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

237 Law Council of Australia, *Submission 75*.

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

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

Conclusion

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

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

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

9. Burden of Proof

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Summary

9.1 In criminal trials, the prosecution bears the burden of proof. This has been called ‘the golden thread of English criminal law’¹ and, in Australia, ‘a cardinal principle of our system of justice’.² The High Court of Australia observed in 2014 that

[o]ur system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person.³

1 *Woolmington v DPP* [1935] AC 462, 481–2 (Viscount Sankey). This statement was affirmed in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 501 (Mason CJ and Toohey J). See also JD Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [7085]; Glanville Williams, *The Proof of Guilt* (Stevens & Sons, 3rd ed, 1963) 184–5.

2 *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ). See also *Momcilovic v The Queen* (2011) 245 CLR 1, [44] (French CJ). See also Heydon, above n 1, [7085]; Williams, above n 1, 871; Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 71.

9.2 This principle and the related principle that guilt must be proved beyond reasonable doubt are fundamental to the presumption of innocence.⁴ Reversing the burden of proof may be justified in some circumstances, including where the reversal relates to an exception to criminal responsibility, or to an issue that is peculiarly within the knowledge of the accused.

9.3 This Inquiry has focused on the burden of proof in criminal, rather than civil, law, and considers examples of criminal laws that reverse the legal burden of proof. Reversals of the onus of proof in civil matters that may be considered criminal in nature are also briefly discussed.

9.4 A number of Commonwealth laws reverse the legal burden of proof on some elements of a criminal offence and may be seen as interfering with the principle that a person is presumed innocent until proved guilty according to law.

9.5 Reversal of the legal burden of proof on an issue essential to culpability in an offence arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.

9.6 Further review of the reversals of the legal burden of proof in these laws may be warranted. Laws that may merit further review include deeming provisions in relation to the requisite intention or belief for serious drug offences, and directors' liability for taxation offences committed by a corporation. Any such review should consider whether placing an evidential rather than legal burden on the defendant would be sufficient to balance the presumption of innocence with the legitimate objectives pursued by these laws.

9.7 There can be a blurring of distinctions between criminal and civil penalties, such that some civil laws may effectively be criminal in nature. Reversals of the burden of proof in such laws merit careful scrutiny.

A common law principle

9.8 The presumption of innocence has been recognised since 'at latest, the early 19th Century'.⁵ In 1935, the House of Lords said the presumption of innocence principle was so ironclad that 'no attempt to whittle it down can be entertained'.⁶ In 2005, the House of Lords said that the underlying rationale for the presumption of innocence is that to place the burden of proof on a defendant is 'repugnant to ordinary notions of fairness'.⁷

3 *Lee v The Queen* [2014] HCA 20 (21 May 2014) [32]. See also *X7 v Australian Crime Commission* (2013) 248 CLR 92, [46] (French CJ and Crennan J), [100]–[102] (Hayne and Bell JJ), [159] (Kiefel J); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

4 In *Momcilovic v The Queen* (2011), French CJ said: 'The presumption of innocence has not generally been regarded in Australia as logically distinct from the requirement that the prosecution must prove the guilt of an accused person beyond reasonable doubt': *Momcilovic v The Queen* (2011) 245 CLR 1, [54].

5 *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [9] (Lord Bingham).

6 *Woolmington v DPP* [1935] AC 462, [7].

7 *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [9] (Lord Bingham).

9.9 Professor Andrew Ashworth has expanded on the rationale for the presumption of innocence:

the presumption is inherent in a proper relationship between State and citizen, because there is a considerable imbalance of resources between the State and the defendant, because the trial system is known to be fallible, and, above all, because conviction and punishment constitute official censure of a citizen for certain conduct and respect for individual dignity and autonomy requires that proper measures are taken to ensure that such censure does not fall on the innocent.⁸

9.10 In the High Court of Australia, French CJ called the presumption of innocence ‘an important incident of the liberty of the subject’.⁹

9.11 However, the principle that the accused does not bear a legal burden of proof has not been treated as unqualified. The legal burden of proving the defence of insanity rests on the party that raises it. Additionally, Parliament may reverse the onus of proof.¹⁰ In 2014, the High Court noted that

[i]t has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof.¹¹

Legal and evidential burdens

9.12 There is a distinction between a legal and an evidential burden of proof. These terms are defined in sch 1 of the *Criminal Code Act 1995 (Cth) (Criminal Code)*:

legal burden, in relation to a matter, means the burden of proving the existence of the matter.¹²

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.¹³

9.13 Generally, the prosecution will bear both the legal and evidential burdens of proof.¹⁴ However, an offence may be drafted so that the accused bears either the

8 Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 *International Journal of Evidence and Proof* 241, 251.
9 *Momicilovic v The Queen* (2011) 245 CLR 1, [44].
10 In *Woolmington v DPP*, Viscount Sankey noted that that the ‘golden thread’ of the burden of proof lying with the prosecution was subject to an exception for proof of insanity as well as ‘any statutory exception’: *Woolmington v DPP* [1935] AC 462, 481.
11 *Kuczborski v Queensland* [2014] HCA 46 [240] (Crennan, Kiefel, Gageler and Keane JJ). The majority of the High Court was relying on the decision in *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 12, 17–18. See also *Attorney General’s Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [9] (Lord Bingham).
12 *Criminal Code* s 13.1(3). The legal burden is sometimes called the persuasive burden. *Cross on Evidence* describes the legal burden as ‘the obligation of a party to meet the requirement of a rule of law that a fact in issue must be proved (or disproved) either by a preponderance of the evidence or beyond reasonable doubt, as the case may be’: Heydon, above n 1, [7010].
13 *Criminal Code* s 13.3(6). *Cross on Evidence* states that the evidential burden is ‘the obligation to show, if called upon to do so, that there is sufficient evidence to raise the existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation’: Heydon, above n 1, [7015].
14 Where the prosecution bears the legal burden, the standard of proof is beyond reasonable doubt, unless another standard of proof is specified: *Criminal Code* s 13.2.

evidential or legal burden, or both, on some issues.¹⁵ Lord Hope in the House of Lords has explained what it means for the accused to bear either the legal or evidential burden of proof on an issue:

A ‘persuasive’ [legal] burden of proof requires the accused to prove, on a balance of probabilities, a fact which is essential to the determination of his guilt or innocence. It reverses the burden of proof by removing it from the prosecution and transferring it to the accused. An ‘evidential’ burden requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The prosecution does not need to lead any evidence about it, so the accused needs to do this if he wishes to put the point in issue. But if it is put in issue, the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt about his guilt.¹⁶

9.14 The placement of the burden of proof may also be expressed in the language of a ‘presumption’. A presumption that a matter exists unless the contrary is proved places a legal burden on the defendant.¹⁷ A defendant must rebut such a presumption on the balance of probabilities.

9.15 The *Guide to Framing Commonwealth Offences* states that ‘placing a legal burden of proof on a defendant should be kept to a minimum’.¹⁸ This principle is also reflected in the *Criminal Code*, which provides that, where the law imposes a burden of proof on the defendant, it is an evidential burden, unless the law expresses otherwise.¹⁹

9.16 This chapter is concerned with laws that reverse the legal burden of proof, rather than the evidential burden of proof. In other jurisdictions, an evidential burden of proof is not generally considered to offend the presumption of innocence.²⁰ For example, in *R v DPP; Ex parte Kebilene*, Lord Hope said:

Statutory presumptions which place an ‘evidential’ burden on the accused, requiring the accused to do no more than raise a reasonable doubt on the matter with which they deal, do not breach the presumption of innocence.²¹

9.17 Accordingly, this Inquiry has not considered whether particular reversals of the evidential burden of proof are justified. However, Professor Jeremy Gans submitted

15 Where the defendant bears the legal burden, the standard of proof is the balance of probabilities: *Ibid* s 13.5.

16 *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 378–79.

17 *Criminal Code* s 13.4(c). In *Telstra Corporation Ltd v Phone Directories Company Pty Ltd*, Perram J commented on the meaning of unless the contrary is ‘established’, stating: ‘That word does not refer to an attempt at proof, or the presence of prima facie evidence; rather, it refers to a fact as having been proven “on the balance of probabilities”’: *Telstra Corporation Limited v Phone Directories Company Pty Ltd* (2010) 194 FCR 142, [122].

18 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 51.

19 *Criminal Code* ss 13.3(1), 13.4. Section 13.4 provides that a defendant will only bear a legal burden if the law expressly specifies that the burden of proof is a legal burden; or requires the defendant to prove the matter; or creates a presumption that the matter exists unless the contrary is proved.

20 Ian Dennis, ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ [2005] *Criminal Law Review* 901, 904.

21 *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 379. See also Dennis, above n 20, 904.

that placing an evidential burden on an accused can be problematic, ‘especially where the reversal applies to a key culpability element of a serious criminal offence’.²²

Essential elements of offence

9.18 It is possible to distinguish between the defining elements of an offence (its physical and mental—or ‘fault’²³—elements) and an exception, exemption, excuse, qualification or justification to it (often referred to as defences).²⁴ Such defences include, for example, self-defence or duress.

9.19 Generally, the prosecution bears the legal burden of proving the defining elements of an offence, as well as the absence of any defence. However, the accused will generally bear an evidential burden of proof in relation to defences. This is reflected in s 13.3(3) of the *Criminal Code*, which provides:

A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

9.20 Part 2.3 of the *Criminal Code* contains the generally available defences, and s 13.3(2) of the *Criminal Code* provides that the defendant bears the evidential burden of those defences.

Protections from statutory encroachment

Australian Constitution

9.21 The *Australian Constitution* does not expressly protect the principle that the burden of proof in a criminal trial should be borne by the prosecution. The text and structure of Ch III of the *Constitution* implies that Parliament cannot make a law which ‘requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power’.²⁵

9.22 It has been held that Commonwealth laws which reverse the traditional onus of proof on some elements of an offence do not contravene Ch III of the *Constitution*.²⁶

22 J Gans, *Submission 2*. The Corporations Committee of the Business Law Section of the Law Council of Australia also contended that ‘reversing the evidential burden of proof to place the burden on the accused can and does bear significant consequences’: Corporations Committee, Business Law Section, Law Council of Australia, *Submission 124*. See also 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) 37.

23 *Criminal Code* pt 2.2 div 5.

24 Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 464. Jeremy Gans has noted that ‘[t]he term defences, while ubiquitous in criminal law, is imprecise’: Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2012) 287. The distinction between defining elements and defences can be difficult to draw: see, eg, Glanville Williams, ‘Offences and Defences’ (1982) 2 *Legal Studies* 233, 256. This is considered further below when discussing justifications for reversing the burden of proof.

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

26 *Nicholas v The Queen* (1998) 193 CLR 173, [152]–[156].

However, a presumption that has the effect of usurping judicial power would be constitutionally invalid.²⁷ Brennan CJ provided an example of such a law in *Nicholas v The Queen*: ‘If a court could be directed by the legislature to find that an accused, being found in possession of stolen goods, had stolen them, the legislature would have reduced the judicial function of fact finding to the merest formality’.²⁸

9.23 As French CJ explained in *International Finance Trust Company Ltd v New South Wales Crime Commission*,²⁹ the Parliament cannot direct courts exercising federal jurisdiction as to the outcome of the exercise of that jurisdiction. Further, in *International Finance*, this principle was applied by French CJ, Gummow, Heydon, and Bell JJ, as an aspect of the *Kable* doctrine,³⁰ to the exercise of non-federal jurisdiction.

9.24 It has been suggested that the principle that the prosecution bear the burden of proof is implicit in any constitutional protection of fair trial rights.³¹ An important feature of the Australian criminal justice system, according to Kirby J in *Carr v Western Australia*, is that ‘[v]alid legislation apart, it is usually essential to the proper conduct of a criminal trial that the prosecution prove the guilt of the accused and do so by admissible evidence’.³² Kirby J further observed that this feature of the criminal justice system is ‘deeply embedded in the procedures of criminal justice in Australia, inherited from England. It may even be implied in the assumption about fair trial in the federal *Constitution*’.³³

Principle of legality

9.25 The principle of legality provides some protection for the principle that the prosecution should bear the burden of proof in criminal proceedings.³⁴ In *Momcilovic v The Queen (Momcilovic)*, French CJ held that

[t]he principle of legality will afford ... [the presumption of innocence] such protection, in the interpretation of statutes which may affect it, as the language of the statute will allow. A statute, which on one construction would encroach upon the presumption of innocence, is to be construed, if an alternative construction be available, so as to avoid or mitigate that encroachment. On that basis, a statute which

27 Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 202–204.

28 *Nicholas v The Queen* (1998) 193 CLR 173, [24]. In the same case, Gummow J stated that a law that deemed to exist, or to have been proved to the satisfaction of the tribunal of fact, any ultimate fact, being an element of the offences with which the accused is charged ... might well usurp the constitutionally mandated exercise of the judicial power for the determination of criminal guilt’: [156].

29 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, [49]–[55].

30 *Kable v DPP (NSW)* (1996) 189 CLR 51. In *Kable*, the High Court held that state parliaments may not confer functions on state courts incompatible with the exercise of federal judicial power under Ch III of the *Constitution*.

31 The right to a fair trial is considered in detail in Ch 8.

32 *Carr v Western Australia* (2007) 232 CLR 138, [103].

33 *Ibid* [104]. See further, Anthony Gray, ‘Constitutionally Protecting the Presumption of Innocence’ (2012) 31 *University of Tasmania Law Review* 132; *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J), 362 (Gaudron J); Fiona Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’ (1997) 23 *Monash University Law Review* 248, 248.

34 The principle of legality is discussed more generally in Ch 2.

could be construed as imposing either a legal burden or an evidential burden upon an accused person in criminal proceedings will ordinarily be construed as imposing the evidential burden.³⁵

9.26 However, the principle cannot be used to override the clear and unequivocal language of a section. It does not ‘constrain legislative power’.³⁶

9.27 *Momcilovic* concerned the construction of s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), which deemed a person to be in possession of a substance based upon occupancy of premises in which drugs are present, unless the person satisfies the court to the contrary. The question in *Momcilovic* was whether s 5 imposed a legal burden or an evidentiary burden on the defendant.

9.28 In *Momcilovic*, the High Court confirmed that the section placed a legal burden on the accused.³⁷ French CJ remarked that ‘[o]n their face the words of the section defeat any attempt by applying common law principles of interpretation to read down the legal burden thus created’.³⁸

International law

9.29 The *International Covenant on Civil and Political Rights* (ICCPR) protects the presumption of innocence:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.³⁹

9.30 The protection of the presumption of innocence is provided in the same terms in art 11.1 of the *Universal Declaration of Human Rights*.⁴⁰

9.31 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.⁴¹ However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.⁴²

Bills of rights

9.32 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms.⁴³ The Fifth and 14th Amendments to the *United States Constitution* guarantee a right not to be deprived of life, liberty or

35 *Momcilovic v The Queen* (2011) 245 CLR 1, [44] (French CJ).

36 *Ibid* [43] (French CJ). See also *Ibid* [512] (Crennan and Kiefel JJ).

37 *Momcilovic v The Queen* (2011) 245 CLR 1, [56] (French CJ), [466]–[468] (Heydon J), [512], [581] (Crennan and Kiefel JJ), [665]–[666], [670] (Bell J).

38 *Ibid* [56].

39 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.2.

40 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

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

42 *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.

43 The protection provided by bills of rights and human rights statutes is discussed more generally in Ch 2.

property without due process of law⁴⁴ and have been interpreted by the US Supreme Court as including a presumption of innocence.⁴⁵

9.33 The *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right to be presumed innocent until proved guilty.⁴⁶ The *New Zealand Bill of Rights Act 1990* (NZ) contains a similar provision.⁴⁷

9.34 In Australia, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) both provide that a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.⁴⁸

9.35 The English common law has long stressed the ‘duty of the prosecution to prove the prisoner’s guilt’⁴⁹—indeed, this has been described as the ‘governing principle of English criminal law’.⁵⁰ Additionally, since its enactment, the *Human Rights Act 1998* (UK) requires that, so far as it is possible, legislation must be read and given effect in a way that is compatible with the *European Convention for the Protection of Human Rights and Fundamental Freedoms*—including the protection of the presumption of innocence in art 6(2).⁵¹ It has been noted that this has ‘had a major impact on the law relating to the burden of proof’.⁵²

Justifications for reversing legal burden

9.36 The following section discusses some of the principles and criteria that may be applied to determine whether a criminal law that reverses the legal burden of proof may be justified.⁵³

Proportionality

9.37 As discussed in Chapter 2, proportionality is, generally speaking, the accepted test in international law for justifying most limitations on rights. The Parliamentary Joint Committee on Human Rights (Human Rights Committee) has noted that offences that reverse the burden of proof are likely to be ‘compatible with the presumption of innocence where they are ... reasonable, necessary and proportionate in pursuit of a

44 *United States Constitution* amend V, XIV.

45 *Re Winship* [1970] 397 US 358 (1970).

46 *Canada Act 1982 c 11 s 11(d)*.

47 *New Zealand Bill of Rights Act 1990* (NZ) s 25(c).

48 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1); *Human Rights Act 2004* (ACT) s 22(1).

49 *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey LC).

50 *Attorney General’s Reference No 4 of 2002*; *Sheldrake v DPP* [2005] 1 AC 264, [3] (Lord Bingham).

51 *Human Rights Act 1998* (UK) c 42, s 3(1). UK jurisprudence on the presumption of innocence is discussed further below.

52 Richard Glover and Peter Murphy, *Murphy on Evidence* (OUP Oxford, 2013) 11.

53 Some submissions to the Inquiry considered there to be no circumstances under which a reversal of the burden of proof was justified: Pirate Party Australia, *Submission 53*; Australian Institute of Company Directors, *Submission 42*; ADJ Consultancy Services, *Submission 37*; J Mulokas, *Submission 10*.

legitimate objective’.⁵⁴ Some stakeholders expressly endorsed proportionality as a means of assessing justifications for reversals of the burden of proof.⁵⁵

9.38 In other jurisdictions, it is accepted that a reversal of the burden of proof may be justified in some circumstances. The approach of the European Court of Human Rights to reverse onus provisions is set out in *Salabiaku v France*:

Presumptions of fact and law operate in every legal system. Clearly, the [*European Convention*] does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law.

... Article 6(2) [of the *European Convention*] does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.⁵⁶

9.39 In the House of Lords, Lord Bingham summarised the proportionality test as it can be applied to the reversals of the burden of proof:

the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption.⁵⁷

9.40 Lord Bingham observed that such a test is context-specific, stating that ‘[t]he justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case’.⁵⁸

9.41 A number of considerations may be relevant to evaluating whether a reversal of the burden of proof satisfies a proportionality test.

Where not an essential element of the offence

9.42 It is commonly acknowledged that shifting a legal onus onto the accused with respect to an element of an offence that is essential to culpability is a significant

54 Parliamentary Joint Committee on Human Rights, ‘Offence Provisions, Civil Penalties and Human Rights’ (Guidance Note No 2, Parliament of Australia, 2014) 2.
55 Law Council of Australia, *Submission 75*; UNSW Law Society, *Submission 19*.
56 *Salabiaku v France* [1988] ECHR 19 [28]. In *Salabiaku*, the Court found that a French customs law that deemed a person in possession of contraband goods liable for an offence remained within ‘reasonable limits’ because the defence of force majeure remained available to the applicant: *Ibid* [29]–[30].
57 *Attorney General’s Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [21]. In this conjoined appeal, the House of Lords considered reversals of the legal burden in relation to an offence of being in charge of a motor car in a public place while over the drink-drive limit contrary to s 5(1)(b) of the *Road Traffic Act 1988* (UK); and an offence concerning membership of a proscribed organisation under s 11(1) of the *Terrorism Act 2000* (UK).
58 *Ibid*.

encroachment on the presumption of innocence.⁵⁹ Shifting the burden of proof on such an issue involves the possibility of unfair conviction. In the Supreme Court of Canada, Dickson CJC said that

[i]f an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.⁶⁰

9.43 Where a defendant bears the legal burden of proof on an issue essential to culpability, the result may be ‘seriously unfair, since a conviction might rest on conduct which was not in any way blameworthy’.⁶¹

9.44 In contrast, it may be more readily justifiable to shift the burden of proof on issues that are ‘optional exceptions to criminal responsibility’.⁶²

9.45 Distinguishing between an issue that is central to culpability for an offence and optional exceptions to it can be difficult. Such distinctions are not always resolved by whether the issue is cast as a defining element of an offence or a defence to it. In the House of Lords, Lord Steyn noted that

[t]he distinction between constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary. After all, it is sometimes simply a matter of which drafting technique is adopted: a true constituent element can be removed from the definition of the crime and cast as a defensive issue whereas any definition of an offence can be reformulated so as to include all possible defences within it. It is necessary to concentrate not on technicalities and niceties of language but rather on matters of substance.⁶³

9.46 The *Guide to Framing Commonwealth Offences* recognises this difficulty. It states that placing the burden of proof on the defendant by creating a defence is more readily justified if the matter in question is not central to the question of culpability for the offence.⁶⁴

9.47 Gans suggests that defences such as reasonable excuse or due diligence are examples of optional exceptions to an otherwise fully defined offence. In such cases, a shift in the burden of proof is ‘clearly justifiable’.⁶⁵

9.48 In *R v Lambert (Lambert)*, the imposition of a legal burden on the accused to prove that he did not know that a package in his possession contained controlled drugs

59 See, eg, David Hamer, ‘The Presumption of Innocence and Reverse Burdens: A Balancing Act’ (2007) 66 *The Cambridge Law Journal* 142, 151–155; Kuan Chung Ong, ‘Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights’ (2013) 32 *University of Tasmania Law Review* 248, 262–63; Dennis, above n 20, 919; Ashworth, above n 8, 258–59; J Gans, *Submission 2*.

60 *R v Whyte* (1988) 51 DLR 4th 481, 493.

61 *Attorney General’s Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [26] (Lord Bingham).

62 J Gans, *Submission 2*.

63 *R v Lambert* [2002] 2 AC 545, [35].

64 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 50.

65 J Gans, *Submission 2*.

was considered to shift the burden on an essential element of the offence—it was an issue ‘directly bearing on the moral blameworthiness of the accused’.⁶⁶

9.49 In that case, Lord Steyn observed:

in a prosecution for possession of controlled drugs with intent to supply, although the prosecution must establish that prohibited drugs were in the possession of the defendant, and that he or she knew that the package contained something, the accused must prove on a balance of probabilities that he did not know that the package contained controlled drugs. If the jury is in doubt on this issue, they must convict him. This may occur when an accused adduces sufficient evidence to raise a doubt about his guilt but the jury is not convinced on a balance of probabilities that his account is true. *Indeed it obliges the court to convict if the version of the accused is as likely to be true as not.*⁶⁷

9.50 Professor Ian Dennis suggests that an exception to a principle that the defendant should not bear the burden of proof on an issue going to culpability—or ‘moral blameworthiness’—exists where the risk has been voluntarily assumed:

individuals who voluntarily participate in a regulated activity from which they intend to derive benefit accept the associated burden. This burden is the risk that they may have to account for any apparent wrongdoing in the course of that activity, even where the liability involves an adverse moral evaluation of their conduct. ... An analogy might be made with the duties to account that are frequently placed on office-holders in various legal contexts, such as the conduct of corporate enterprises.⁶⁸

Seriousness

9.51 The seriousness of a crime, it is sometimes suggested, justifies placing a legal burden of proof on the accused. However, this argument has also been criticised. Calling this the ‘ubiquity and ugliness argument’, Sachs J of the South African Constitutional Court in *State v Coetzee* said:

There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become ... The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption ... the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.⁶⁹

9.52 In the UK, the seriousness of the problem addressed by the offence has been routinely considered as one factor in assessing whether a reversal of the burden of proof is a proportionate response. However, the House of Lords has not routinely considered a reversal of the burden of proof to be appropriate where the consequences of an offence are serious.

66 *R v Lambert* [2002] 2 AC 545, [35].

67 *Ibid* [38] (emphasis in original).

68 Dennis, above n 20, 920.

69 *State v Coetzee* [1997] 2 LRC 593 [220] at 677.

9.53 For example, in *Lambert*, the imposition of a legal burden of proof on the accused to prove that he did not know that a package in his possession contained controlled drugs was not considered a proportionate response to the ‘notorious social evil’ of drug trafficking.⁷⁰

9.54 In *Sheldrake v DPP*, a legal burden on the accused to show that there was no likelihood of driving with an excess of alcohol was not considered disproportionate, given the legitimate objective of ‘prevention of death, injury and damage caused by unfit drivers’.⁷¹

9.55 In the conjoined appeal of *Attorney General’s Reference No 4 of 2002*, despite the public interest in preventing terrorism, the House of Lords did not consider it justified to impose a legal burden on the accused to prove that an organisation was not a proscribed organisation on the date he became a member or began to profess being a member of that organisation, and that he had not taken part in the activities of the organisation at any time while it was proscribed.⁷²

9.56 In *R v Williams (Orette)*, the legal burden of proof on the defendant in a firearms offence to show that he did not know, and had no reason to suspect, that an imitation firearm was convertible to a useable firearm was considered justified, with one of the reasons for this being the seriousness of firearm offences and the need to protect the public.⁷³

9.57 Alternatively, where the offence is one where the penalty is not severe, it may be more readily justifiable to shift the burden of proof on an issue. Examples might include ‘regulatory offences whose primary purpose is the efficient operation of matters within the public sphere, such as transport, traffic, manufacturing, environmental protection, control of domestic animals and consumer relations’.⁷⁴ Associate Professor David Hamer has argued that such regulations play an important role in safeguarding the public interest: ‘While the breach of regulations often carries the potential for extensive and severe harm, the penalties are often fairly minor’.⁷⁵ However, the penalty for regulatory offences is not always minor, with conviction for some carrying ‘moral opprobrium and the possibility of a prison sentence’.⁷⁶

Difficulties of proof

9.58 Reversing the onus of proof is sometimes said to be justified where it is particularly difficult for a prosecution to meet a legal burden.⁷⁷

70 *R v Lambert* [2002] 2 AC 545, [17] (Lord Slynn); [41]–[42] (Lord Steyn); [84], [91], [94] (Lord Hope); [156]–[157] (Lord Clyde).

71 *Attorney General’s Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [41] (Lord Bingham).

72 *Ibid* [51] (Lord Bingham).

73 *R v Williams (Orette)* [2013] 1 WLR 1200.

74 Chung Ong, above n 59, 256.

75 Hamer, above n 59, 166.

76 *Ibid* 149.

77 *Williamson v Ah On* (1926) 39 CLR 95, 113 (Isaacs J).

9.59 However, as the *Guide to Framing Commonwealth Offences* notes,

[t]he fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant. If an element of the offence is difficult for the prosecution to prove, imposing a burden of proof on the defendant in respect of that element may place the defendant in a position in which he or she would also find it difficult to produce the information needed to avoid conviction. This would generally be unjust.⁷⁸

9.60 The Institute of Public Affairs submitted that difficulties associated with proof are not a sufficient justification for a reversal of the burden of proof, stating that ‘[t]he common law legal system is ideal not for the ease with which it allows for prosecutions, but for the protections it offers against an overbearing state’.⁷⁹

9.61 Nonetheless, it may be considered justifiable to reverse the onus of proof on an issue that is ‘peculiarly within the knowledge’ of the accused. Such was the case in *R v Turner*, where the burden of proving that the defendant had the necessary qualification to kill game was considered to be peculiarly within the knowledge of the accused.⁸⁰ A number of submissions considered that a reversal of the burden of proof may be justified in circumstances where peculiar knowledge resides with the defendant.⁸¹

9.62 The Consumer Action Law Centre submitted that, in corporate misconduct matters, the requisite knowledge and evidence ‘invariably exists within the corporate entity, so therefore it is appropriate that any burden of proof be reversed to that party’.⁸² Jobwatch submitted that it may be appropriate to reverse the burden of proof ‘if it is particularly difficult to prove a case due to an imbalance of resources that favours the defendant’.⁸³

9.63 Hamer has noted extraordinary proof imbalances are more likely to exist in the case of regulatory offences, and that reverse persuasive burdens ‘provide a practical way for the regulator to manage the cost of prosecutions’.⁸⁴

Laws that reverse the legal burden

9.64 This section identifies a number of Commonwealth laws that place a legal burden on the defendant in respect of particular issues. Offences that reverse the legal burden of proof on an issue essential to culpability arguably provide the greatest interference with the presumption of innocence, and their necessity requires the strongest justification. Such laws, including deeming provisions in relation to serious drug offences, and directors’ liability for taxation offences, may warrant further review. Any such review should consider whether placing an evidential rather than

78 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 50.
79 Institute of Public Affairs, *Submission 49*.
80 *R v Turner* (1816) 5 M&S 206.
81 Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; The Tax Institute, *Submission 68*; Jobwatch, *Submission 46*; Australian Council of Trade Unions, *Submission 44*; Consumer Action Law Centre, *Submission 35*; UNSW Law Society, *Submission 19*.
82 Consumer Action Law Centre, *Submission 35*.
83 Jobwatch, *Submission 46*.
84 Hamer, above n 59, 166.

legal burden on the defendant would be sufficient to balance the presumption of innocence with the legitimate objectives pursued by these laws.

Criminal Code

9.65 There are a number of provisions in the *Criminal Code* that place a legal burden on the defendant. These include terrorism offences, drug offences, child sex offences, and offences relating to unmarked plastic explosives.

Terrorism offences

9.66 Some terrorism offences impose a legal burden on the defendant. For the offence of membership of a terrorist organisation, it is a defence to prove that the defendant took reasonable steps to cease to be a member of a terrorist organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.⁸⁵

9.67 Section 102.6 creates the offence of getting funds to, from, or for a terrorist organisation. A person will not commit an offence if they prove that the funds were received solely for the purpose of the provision of legal representation for a person in proceedings relating to terrorist organisation offences, or assisting the organisation to comply with Australian law.⁸⁶ The Law Council of Australia (Law Council) submitted that it was unclear why the defendant should bear the legal and not the evidential burden on this issue, observing that ‘the justification for the departure is unclear in this case and may be unjustified’.⁸⁷

9.68 A review of counter-terrorism legislation by the Council of Australian Governments (COAG) recommended that ‘the legal burden in the note in subsection 102.6(3) be reduced to an evidential one’.⁸⁸ This recommendation echoed similar recommendations made in 2006 by the Security Legislation Review Committee and the Parliamentary Joint Committee on Intelligence and Security.⁸⁹

Drug offences

9.69 The *Criminal Code* contains a series of deeming provisions in relation to the fault elements for a number of drug offences. For example, when the defendant is found to be dealing with a threshold ‘trafficable’ quantity of a controlled drug, the person is deemed or presumed to have the requisite intention or belief to have been

85 *Criminal Code* s 102.3(2).

86 *Ibid* s 102.6(3).

87 Law Council of Australia, *Submission 75*. See also J Gans, *Submission 2*.

88 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 28.

89 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (December 2006) 77; Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), 120.

either: trafficking in a substance;⁹⁰ cultivating a plant for a commercial purpose;⁹¹ or manufacturing a substance for a commercial purpose.⁹²

9.70 The legal onus lies on the defendant to defeat these presumptions—that is, the defendant must prove, on the balance of probabilities, that they did not have the requisite intention or belief for the offence.

9.71 The drug offences in the *Criminal Code* were introduced in 2005,⁹³ and were based on the Model Criminal Code, developed by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC) after nationwide consultation.⁹⁴

9.72 However, the MCCOC did not recommend that presumptions placing the legal burden on the defendant be included in the *Criminal Code*. The MCCOC instead recommended that the defendant bear only an evidential burden in relation to the requisite intention. In making its recommendation, the Committee considered that

[t]he task of the prosecution is eased to the extent that guilt is presumed in the absence of evidence to the contrary. But testimony from the accused, other evidence or circumstances inconsistent with the inference of intent to traffic in the drug, will displace the presumption and require the prosecution to prove guilt beyond reasonable doubt.⁹⁵

9.73 It considered that a presumption placing an evidential burden on the defendant was an appropriate compromise between the needs of effective law enforcement and the presumption of innocence. The MCCOC observed:

Compromises which weaken or abandon the principle that individuals are innocent until proved guilty require compelling justification when the consequences of conviction are severely punitive, as they are in the trafficking offences ... Though acceptance of the need for trafficable quantity presumptions involves a compromise, it is a compromise which preserves the principle that the prosecution must prove guilt whenever there is evidence which contradicts the presumption. There are compelling reasons against further dilution of the rule that individuals accused of crime are innocent until they are proved to be guilty.⁹⁶

9.74 The Law Council supported a review of the reversal of the burden of proof in these laws. Commentators have noted that such presumptions are ‘unique relative to

90 *Criminal Code* s 302.5.
91 *Ibid* s 303.7.
92 *Ibid* s 305.6. A similar set of deeming provisions operates in relation to offences involving precursors: *Ibid* div 306.
93 *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth).
94 Explanatory Memorandum, *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005*; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 6 Serious Drug Offences* (1998).
95 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 6 Serious Drug Offences* (1998) 81.
96 *Ibid* 82–5.

most other drug trafficking threshold systems across the world, where deemed supply laws are explicitly avoided’.⁹⁷

9.75 One justification for the reversal of the burden of proof in these offences is the difficulties of proof faced by the prosecution. The Commonwealth Director of Public Prosecutions has stated that, without the reversal of the burden of proof on this issue, ‘the prosecution would face formidable difficulty in securing convictions’.⁹⁸

9.76 Heydon J in *Momcilovic* commented on the placement of the legal burden of proof on the defendant in relation to possession in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). He noted that, while ‘unpalatable’, such placement facilitates

proof of possession much more than a simple placement of the evidential burden on the accused would. It increases the likelihood of the accused entering the witness box more than a reverse evidential burden would. That is because there is a radical difference between the two burdens. A legal burden of proof on the accused requires the accused to disprove possession on a preponderance of probabilities. An evidential burden of proof on the accused requires only a showing that there is sufficient evidence to raise an issue as to the non-existence of possession. The legal burden of proving something which the accused is best placed to prove like non-possession is much more likely to influence the accused to testify than an evidential burden, capable of being met by pointing to some piece of evidence tendered by other means and perhaps by the prosecution.⁹⁹

9.77 Such provisions have also been justified ‘under goals of delivering proportionality and effective responses to those who inflict widespread suffering—drug traffickers’.¹⁰⁰ However, the proportionality of this response has been questioned:

the drug users who find themselves at the margins of the drug trafficking thresholds are most likely to be the more marginalised users (eg more unemployed and socially disadvantaged) ... which reduces their capacity to successfully prevent an unjust sanction. ... [I]t is known that an ‘unjustified conviction for dealing will often impose social and individual harms which far exceed the harm associated with the drug in question’.¹⁰¹

Child sex offences outside Australia

9.78 The defendant bears a legal burden in relation to a number of defences to sexual offences against children outside Australia.¹⁰² Section 272.9(5) imposes a legal burden on a defendant to prove that they did not intend to derive gratification from a child

97 Caitlin Hughes et al, ‘Australian Threshold Quantities for “Drug Trafficking”: Are They Placing Drug Users at Risk of Unjustified Sanction?’ (Trends and Issues in Crime and Criminal Justice No 467, Australian Institute of Criminology, 2014) 2.
98 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005*, (August 2005) 21.
99 *Momcilovic v The Queen* (2011) 245 CLR 1, [467].
100 Hughes et al, above n 97, 6.
101 Ibid 5 (quoting Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, ‘Model Criminal Code Chapter 6 Serious Drug Offences’ (Report, 1998)).
102 *Criminal Code* ss 272.9–272.10, 272.13, 272.16–272.17.

being present during sexual activity. The Law Council submitted, in relation to this offence, that

[t]he gravity of the subject matter of the offence, coupled with the serious penalty it attracts, could have very serious consequences for a person charged with this offence. In such circumstances, it may not be appropriate that the only recourse available to a defendant is to discharge a legal burden.¹⁰³

Plastic explosives

9.79 The *Criminal Code* creates a number of offences in relation to trafficking in,¹⁰⁴ importing or exporting,¹⁰⁵ manufacturing¹⁰⁶ or possessing¹⁰⁷ unmarked plastic explosives. If no detection agent (a marking requirement for plastic explosives)¹⁰⁸ is detected in a sample of an explosive when tested, a legal burden lies on the defendant to disprove that the plastic explosive breaches a marking requirement.¹⁰⁹

9.80 A legal burden is also placed on the defendant to establish a defence to charges relating to unmarked plastic explosives, including that he or she had no reasonable grounds for suspecting that the plastic explosive breached that marking requirement.¹¹⁰

Taxation

9.81 The *Taxation Administration Act 1953* (Cth) contains a number of provisions that reverse the burden of proof. The legal burden lies on the defendant to establish defences to the charges of making false or misleading statements,¹¹¹ and incorrectly keeping records.¹¹²

9.82 Additionally, s 8Y provides that when a corporation commits a taxation offence, a person who is concerned in, or takes part in, the management of a corporation shall be deemed to have committed the taxation offence. It is a defence to prove that the person did not aid, abet, counsel or procure the act or omission of the corporation concerned, and was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the corporation. The legal burden lies on the defendant to establish this defence.¹¹³

9.83 The Australian Institute of Company Directors (AICD) expressed concern about s 8Y of the *Taxation Administration Act*, arguing that the legal burden on the defendant should be removed and ‘the normal principles of justice and fairness that apply to all other citizens prosecuted for criminal offences’ restored.¹¹⁴

103 Law Council of Australia, *Submission 75*.
104 *Criminal Code* s 72.12.
105 *Ibid* s 72.13.
106 *Ibid* s 72.14.
107 *Ibid* s 72.15.
108 *Ibid* s 72.33(2).
109 *Ibid* s 72.35.
110 *Ibid* s 72.16(1).
111 *Taxation Administration Act 1953* (Cth) s 8K.
112 *Ibid* s 8L.
113 *Ibid* s 8Y(2).
114 Australian Institute of Company Directors, *Submission 42*.

9.84 Provisions imposing personal liability for corporate fault may encourage greater transparency in management process, and improve accountability and performance standards of corporate officers. Such provisions ensure that ‘human agents of prohibited conduct will ... face the legal ramifications of their acts and will not be able to abuse or hide behind the corporate structure’.¹¹⁵

9.85 In 2009, COAG agreed to a set of principles relating to personal liability for corporate fault and developed guidelines for their application.¹¹⁶ The Principles stated that provisions that place an evidential or legal onus on a director to establish a defence that the director is not liable for corporate fault (for example, a defence to show that reasonable steps were taken to avoid committing the contravention) ‘must be supported by rigorous and transparent analysis and assessment, so as to clearly demonstrate why it is considered that such a provision is justified from a public policy perspective’.¹¹⁷ Relevant considerations for justification include where:

- there is a serious risk of potential significant public harm resulting from the offence;
- the size and nature of the penalties indicate a very serious offence; and
- the offence is a core element of the relevant regulatory regime.¹¹⁸

9.86 The onus of proof on defendants in s 8Y of the *Taxation Administration Act* was not amended in the legislative response to the COAG principles, the *Personal Liability for Corporate Fault Reform Act 2012* (Cth). Explanatory notes accompanying the Exposure Draft of the proposed amendments elaborated on this decision:

the Government has taken into account a range of factors outlined in the COAG guidelines, including the magnitude of harm that the offending conduct would likely cause, the effectiveness of corporate penalties in preventing this conduct and the availability of evidence to the prosecution and the director.

Section 8Y provides a defence to directors who can show, on the balance of probabilities, that they were not involved in the company’s offending. As such, section 8Y operates, in substance, as an accessorial liability provision. It would not be feasible to shift the burden and require the prosecution to prove a director’s involvement in the company’s offence, especially as such information could be peculiarly within the knowledge of the director.

As a matter of practicality a director would be in a significantly better position to be able to adduce evidence that shows they were not involved in the company’s offending rather than explicitly require the prosecution to establish their involvement.

The ATO relies on section 8Y to prosecute those directors who repeatedly and seriously neglect their company’s tax obligations. If the ATO is unable to prosecute

115 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003) 310.

116 Council of Australian Governments, *Personal Liability for Corporate Fault—Guidelines for Applying the COAG Principles* (2012).

117 Ibid.

118 Ibid.

these individuals, it could significantly undermine the public’s confidence in the fairness of the tax system and the ATO’s ability to enforce the law.¹¹⁹

9.87 The AICD submitted that the ‘retention of this provision has not been sufficiently justified pursuant to the COAG approach. Further, and more importantly, no justification has been provided as to why it is appropriate to undermine the Rule of Law by deciding to retain this provision’.¹²⁰ The Corporations Committee of the Business Law Section of the Law Council strongly endorsed the AICD’s submission.¹²¹ The Law Council also supported review.¹²²

Copyright

9.88 The *Copyright Act 1968* (Cth) contains a number of criminal offences in relation to copyright infringement.¹²³

9.89 The Act creates a presumption in relation to proof of subsistence and ownership of copyright, providing that statements contained on the labels, marks, certificates or chain of ownership documents are presumed to be as stated, unless the contrary is established.¹²⁴ It also includes presumptions relating to computer programs,¹²⁵ sound recordings¹²⁶ and films.¹²⁷

9.90 The presumptions relating to criminal offences in the *Copyright Act* were introduced by the *Copyright Amendment Act 2006* (Cth). Provisions in the *Copyright Act* that provided that statements made on certificates and other documents were admissible in a prosecution as ‘prima facie evidence’ of the facts so stated were amended by the 2006 Act, and new presumptions relating to films and computer programs added.¹²⁸

9.91 The Explanatory Memorandum stated that amendments were intended to ‘strengthen’ the presumptions in the Act, and to ‘assist copyright owners and reduce costs in the litigation process’.¹²⁹ It also stated that the aim was to introduce consistency with other, civil, presumptions in the Act. The Australian Digital Alliance and the Australian Libraries Copyright Committee submitted that presumptions in the context of criminal cases

circumvent a key safeguard in our justice system: that the onus is on the prosecutor or plaintiff to prove the liability of the accused or defendant to the relevant standard of proof. This principle is a key protection against unjustified incursions on personal liberty. It is troubling that the reason given for the introduction of some of the

119 Explanatory Document, Personal Liability for Corporate Fault Reform Bill 2012—Tranche 3 (2012) 3.
120 Australian Institute of Company Directors, *Submission 42*. See also Australian Institute of Company Directors, *Submission 105*.
121 Corporations Committee, Business Law Section, Law Council of Australia, *Submission 124*.
122 Law Council of Australia, *Submission 140*.
123 *Copyright Act 1968* (Cth) pt V div 5.
124 *Ibid* s 132A.
125 *Ibid* s 132AAA.
126 *Ibid* s 132B.
127 *Ibid* s 132C.
128 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth).
129 *Ibid*.

presumptions was ‘to assist copyright owners in the litigation process’. Provisions which make criminal liability for copyright infringement easier to prove act as deterrents to the use of copyright material, conceivably leading to self-censorship of what may very well be a legal use of material in given case. The result is a net loss of creative expression.¹³⁰

9.92 Commenting on similarly worded presumptions relating to civil copyright infringement proceedings, Luke Pallaras observed that

in some instances, a shift in the evidential burden may be sufficient to fulfil the policy goals of the presumption; but in other cases only a shift in the legal burden would suffice. For instance, where the purpose of a presumption is to prevent time and delay caused by establishing issues that are probabilistically likely to be the case (such as copyright subsisting in an alleged work, or the plaintiff’s ownership of copyright), only a shift in the evidential burden appears justified.¹³¹

9.93 In contrast, the Commonwealth Director of Public Prosecutions supported a reversal of the legal burden, submitting to an inquiry into the amending Bill that the ‘presumption recognises that copyright is a highly technical area and marshalling the evidence necessary to prosecute matters is a difficult and lengthy process’.¹³²

9.94 The *Guide to Framing Commonwealth Offences* states that ‘presumptions have a similar effect to defences, and are only appropriate in certain circumstances’.¹³³ The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) has stated that presumptions should be kept to a minimum and justification for them provided in the Explanatory Memorandum.¹³⁴

Other laws

9.95 A number of other laws reverse the legal burden of proof. For example, the defendant bears a legal burden to establish defences to a number of offences in the *Migration Act 1958* (Cth). For the offence of arranging a marriage between other persons to assist a person to obtain permanent residence, it is a defence if the defendant proves they believed on reasonable grounds that the marriage would result in a genuine and continuing marital relationship.¹³⁵

9.96 Under the *Great Barrier Reef Marine Park Act 1975* (Cth) the defendant bears the legal burden of proving that entry into a compulsory pilotage area was unavoidable.¹³⁶ For the offence of an unauthorised vessel entering an area to be

130 Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission 61*.

131 Luke Pallaras, ‘Falling between Two Stools: Presumptions under the *Copyright Act 1968* (Cth)’ (2010) 21 *Australian Intellectual Property Journal* 100, 104.

132 Commonwealth Director of Public Prosecutions, Submission No 53 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Copyright Amendment Bill 2006*, 2006.

133 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 53.

134 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest*, No 3 of 2010, 10 March 2010, 14.

135 *Migration Act 1958* (Cth) s 240(3). See also ss 219, 229(5)–(6), 232(2)–(3).

136 *Great Barrier Reef Marine Park Act 1975* (Cth) s 59H(1).

avoided under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), the defendant bears a legal burden to establish a defence of unforeseen emergency.¹³⁷

9.97 The *Work Health and Safety Act 2011* (Cth) prohibits a person from being subjected to discriminatory treatment for exercising a function or right under the legislation, such as serving as a health and safety representative or raising a concern about work health and safety.¹³⁸ The defendant bears the legal burden of proving that a prohibited reason was not the dominant reason for engaging in discriminatory conduct.¹³⁹ The placement of the burden of proof on the defendant on this issue has been justified on the basis that ‘it will often be extremely difficult, if not impossible, for the prosecution to prove that the person engaged in discriminatory conduct for a prohibited reason’.¹⁴⁰

Bail

9.98 The presumption of innocence may be understood in both a broad and narrow sense.¹⁴¹ The narrower sense of the presumption of innocence refers to the principle that the prosecution should bear the burden of proof of guilt,¹⁴² and has been the focus of this chapter.

9.99 In its broader sense, the presumption of innocence encompasses the criminal process more generally, including the notion that ‘pre-trial procedures should be conducted, so far as possible, *as if* the defendant were innocent’.¹⁴³ Procedures relating to bail engage the presumption of innocence in its wider sense.

9.100 The New South Wales Law Reform Commission has distinguished the use of the language of ‘presumption’ in the bail context from other criminal law contexts. It notes that ‘when the law speaks of a presumption, it is usually in relation to an issue of fact’. By contrast, presumptions relating to bail ‘do not concern proof of facts, but decision-making and the burden of persuasion’.¹⁴⁴

9.101 The Law Council submitted that Commonwealth laws that reverse the presumption in favour of bail ‘may undermine the presumption of innocence, as a key component of a fair trial’.¹⁴⁵ Legal Aid NSW argued that ‘a reversal of the presumption in favour of bail effectively removes an important check and balance on the power and decision-making capacity of law enforcement officers’.¹⁴⁶

137 *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s 619(9). See also sch 2A, cl 18; *Torres Strait Fisheries Act 1984* (Cth) ss 49(2), 49A(3); *Offshore Minerals Act 1994* (Cth) s 404(4).

138 *Work Health and Safety Act 2011* (Cth) ss 104, 105. See also s 107 which prohibits requesting, instructing, inducing, encouraging, authorising or assisting discriminatory conduct.

139 *Ibid* s 110.

140 Explanatory Memorandum, *Work Health and Safety Bill 2011* (Cth).

141 Ashworth notes that the scope and meaning of the presumption of innocence are ‘eminently contestable’: Ashworth, above n 8, 243.

142 *Ibid* 244.

143 *Ibid* 243.

144 NSW Law Reform Commission, *Bail*, Report 133 (2012).

145 Law Council of Australia, *Submission 75*.

146 Legal Aid NSW, *Submission 134*.

9.102 Examples of laws that reverse the presumption in favour of bail include s 15(6) of the *Extradition Act 1988* (Cth), which requires that special circumstances must be established before a person remanded under the *Extradition Act* can be granted bail; and s 15AA of the *Crimes Act 1914* (Cth), which reverses for terrorism offences the presumption in favour of bail.

9.103 In explaining the necessity for a presumption against bail in the *Extradition Act*, the Attorney-General's Department stated:

The current presumption against bail for persons sought for extradition is appropriate given the serious flight risk posed by the person in extradition matters, and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country. ... The removal or substantial qualification of the existing presumption (which has been a feature of Australia's extradition regime since the mid-1980s) may impede Australia's ability to meet our extradition treaty obligation to return the person to the requesting country to face criminal charges or serve a sentence.¹⁴⁷

9.104 The Independent National Security Legislation Monitor has noted that the application of the 'presumption against bail in terrorism trials to date demonstrates extreme unlikelihood of a person charged with a terrorism offence being released on bail (in almost all cases the accused will be detained for the protection of the community)'.¹⁴⁸

9.105 Reversing the presumption in favour of bail has been subject to criticism. In relation to the *Extradition Act*, the House of Representatives Standing Committee on Social Policy and Legal Affairs expressed its concern regarding the presumption against bail, and the justification for it:

The Committee does not doubt that bail is likely and rightly to be refused in the majority of extradition cases, and considers that this amendment will have little effect on the outcome of bail application in such cases. However, as a matter of principle, the Committee notes that it has not been convinced of the need for the Bill to prescribe a presumption either against or in favour of bail.¹⁴⁹

9.106 The Australian Human Rights Commission has identified the reversal of the presumption of bail for terrorism offences as a 'disproportionate interference with the right to liberty under art 9 of the ICCPR as well as the presumption of innocence under art 14(2) of the ICCPR'.¹⁵⁰

147 Attorney-General's Department, Submission No 7 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, 2011.

148 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 54.

149 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Advisory Report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011* (2011) 20.

150 Australian Human Rights Commission, Submission No 18 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010*, 6 May 2010.

Civil laws

9.107 In a civil claim, the burden of proof will generally lie on the plaintiff on all essential elements. As Walsh JA in *Currie v Dempsey* explained:

The burden of proof in the sense of establishing a case, lies on a plaintiff if the fact alleged ... is an essential element of his cause of action, eg, if its existence is a condition precedent to his right to maintain the action.¹⁵¹

9.108 A number of submissions discussed civil laws that place the burden of proof on some issues on the defendant.¹⁵² However, the ‘cardinal’,¹⁵³ common law principle examined in this chapter is that the prosecution should bear the onus of proof in criminal proceedings. Accordingly, this chapter has focused on criminal laws that reverse the legal burden of proof.

9.109 The distinction between civil and criminal proceedings may not always be clear. The ALRC’s 2003 report on civil and administrative penalties noted that the

traditional dichotomy between criminal and non-criminal procedures no longer accurately describes the modern position, if it ever did. The functions and purposes of civil, administrative and criminal penalties overlap in several respects. Even some procedural aspects, such as the different standards of proof for civil and criminal sanctions, are not always clearly distinguishable.¹⁵⁴

9.110 The Institute of Public Affairs observed that governments ‘increasingly regulate behaviour through the civil law, rather than the criminal law’.¹⁵⁵ Professor Anthony Gray has noted the existence of ‘a broader debate regarding the ongoing utility of such a distinction, whether there should be recognised a “third category” of proceedings that are properly neither civil nor criminal, and the essence of what is and should be considered to be a crime’.¹⁵⁶

9.111 Where there is such a blurring of distinctions between criminal and civil penalties, careful scrutiny of any reversals of the burden of proof is merited. The Human Rights Committee has noted that civil penalty provisions

may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as ‘criminal’ for the purpose of international human rights law. The term ‘criminal’ has an ‘autonomous’ meaning in human rights law. In

151 *Currie v Dempsey* (1967) 69 SR (NSW) 116, 125.

152 These are outlined in the Interim Report: Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Interim Report No 127 (2015) [11.95]–[11.102]. See also National Association of Community Legal Centres, *Submission 143*; Legal Aid NSW, *Submission 134*; FamilyVoice Australia, *Submission 122*; Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*; JobWatch, *Submission 115*; Adriana Orifici, Professor Beth Gaze and Associate Professor Anna Chapman, *Submission 86*.

153 *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ).

154 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003) 84.

155 Institute of Public Affairs, *Submission 49*.

156 Anthony Gray, ‘The Compatibility of Unexplained Wealth Provisions and Civil Forfeiture Regimes with *Kable*’ (2012) 12 *QUT Law and Justice Journal* 18, 19.