

**The Right to a Fair Trial in the Context of  
Counter-Terrorism:  
The use and suppression of sensitive information  
in Australia and the United Kingdom**

**Johannes Krebs**

Magister iuris, LL.M

**ANU College of Law,  
The Australian National University**

A thesis submitted for the degree of Doctor of Philosophy of  
The Australian National University

August 2016

### Statement of originality

This thesis contains no material, which has been previously submitted or accepted for a degree or diploma in any university or other institution. To the best of my knowledge, the thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

A handwritten signature in blue ink, appearing to read 'Johannes Krebs', is written over a horizontal dashed line.

Johannes Krebs

## Abstract

In the recent fight against terrorism Western liberal democracies have significantly expanded pre-emptive measures, such as inchoate and preparatory offences or control orders. As these measures rely increasingly on the use of sensitive information, their application poses a dilemma. On the one hand, sensitive information may be necessary as evidence in an open court to justify the coercive measure or demonstrate the innocence of the suspect. On the other hand, states are reluctant to disclose such information where there is a risk to national security, preferring either to suppress the information or to use it in secret. Such practices, however, may seriously violate the principle of fairness - and its attached individual right to a fair trial - a principle sitting not only at the core of the criminal justice system, but also forming part of the rule of law and democracy itself. The thesis poses the questions of what limitations are acceptable to the right to a fair trial, and what safeguards are necessary when states allow the suppression or use of sensitive information in criminal and related proceedings.

The thesis is therefore concerned with finding an appropriate judicial methodology for addressing the dilemma in court. It argues that without a proper process (often generally described as balancing), minimum standards of fairness are more likely to be lowered due to security pressures. Principles, however, which emphasise the right to a fair trial and require justifications for any limitation in the interest of national security are capable of retaining higher standards. Hence the thesis suggests that while *what is fair* must be decided in the particular circumstances, *what needs to be taken into consideration* in order to achieve fairness can be defined.

By comparing the case law from Australia and the United Kingdom, the thesis then offers an in-depths analyses of various degrees of balancing and principles when dealing with sensitive information, as well as the dynamics and interaction that accompany the two approaches between the branches of government. The two countries are particularly suitable for such an enquiry as they share a legal heritage, but have diverged increasingly over the last decades in how to protect human rights. While the thesis generally favours a principled approach as now predominantly applied in the UK, it does not simply propose a legal transplant for Australia, which so far has rejected any legislation including principles. Rather the comparison points out the reasons why Australian judges behave differently and challenges the Australian Parliament to amend the relevant legislation in accordance with its own values in order to retain high standards of fair trial protection in proceedings dealing with sensitive information.

## Acknowledgements

This thesis has been generously funded by scholarships of The Australian National University and the Australian Government. Furthermore, I would like to acknowledge the former National Europe Centre at the ANU, the Institut d'Études Politiques de Paris, St Hilda College at Oxford University, The Oñati International Institute for the Sociology of Law and in particular the ANU Kiloa Coastal Campus for their support during my visits.

My thanks go first and foremost to my supervisor and mentor, Professor Simon Bronitt, who inspired, encouraged and supported my PhD and by doing so introduced me to a new world. Furthermore, I would like to thank my panel members Professor Peter Bailey and Professor Hilary Charlesworth for patiently listening to my ideas and providing me with their valuable feedback. Particular thanks go to Dr Ryan Goss, who joined the panel at a relatively late stage, but provided me with invaluable academic and moral support during the most challenge phase of the PhD.

I am also grateful to the friendly professional staff down the corridor at the ANU College of Law for their ongoing support and to my brilliant 'crim' colleagues Wendy Kukukies-Smith, Miriam Gani and Mark Nolan for introducing me to the great experience of teaching as well as their personal support and friendship.

Furthermore, I also would like to thank my PhD colleagues from the John Yencken outpost, Justine Poon, Glen Wright and Michelle Worthington for endless conversations, discussions – accompanied by the same amount of teas and coffees - and for outstanding friendships. They helped me enormously on of my intellectual journey, while having a lot of fun.

Writing this PhD would not have been possible without my wonderful Canberra friends, who supported me like family being far away from home. Special thanks are due to Saskia, Christian and Thea, Guy, Josh, Kate, Isabela, and Maca and Matthew. I am equally grateful to Christoph and Stefan back in Austria for retaining strong friendships despite the distance and time difference.

And finally to my family, without their support all of this would not have been possible, thank you!

## Table of contents

Statement of originality	ii
Abstract	iii
Acknowledgements	v
Table of contents	vii
Abbreviation	xii
List of graphs and tables	xiii

<b>1. Introduction</b>	<b>1</b>
1.1. Setting the scene: developments in the context of counter-terrorism	1
1.2. Research question	5
1.3. Comparative case study: Australia and the United Kingdom	12
1.4. Thesis outline	16

### Part I.

<b>2. The right to a fair trial: function, scope and nature</b>	<b>19</b>
2.1. Fairness as an individual right and a collective public interest	22
2.1.1. Fairness as a protection of human dignity	22
2.1.2. Fairness as a means to secure other rights	27
2.1.3. The role of fairness in promoting legitimacy in the criminal process	31
2.1.4. The role of fairness in promoting citizen compliance with the justice system	37
2.1.5. Conclusion	40
2.2. The principle of fairness in legal theory and the law	41
2.2.1. Fairness as a value	41
2.2.2. Fairness as a legal principle	46
2.2.3. Fairness as a legal rule	50
2.3. Applying fairness as a constitutional principle	58

<b>3. The protection of sensitive information and the associated risks of disclosure</b>	<b>63</b>
3.1. Pre-crime and counter-terrorism	65
3.2. Intelligence in counter-terrorism proceedings	71
3.2.1. Intelligence versus evidence	72
3.2.1.1. Open justice versus secrecy	73
3.2.1.2. Minimum standards of accuracy	76
3.2.1.3. Politicisation	80
3.2.2. Summary	83
3.3. Amending the law of evidence	85
3.3.1. The court and uncertain evidence	87
3.3.2. The rules of evidence and procedural fairness	90
3.4. Conclusion	93
<b>4. Balancing liberty and security?</b>	<b>95</b>
4.1. Liberty versus security: methodologies for a fair balance	98
4.1.1. The metaphor of balancing	98
4.1.2. A critique of balancing	101
4.1.3. Proportionality: a fair and more sophisticated way of balancing	109
4.2. National security and the need for due deference	116
4.2.1. Defining deference: two models	118
4.2.2. Deference in national security cases	123
4.2.3. Deference as a defining characteristic of the relationship between the branches of government	127
4.2.4. Judicial determination of deference	135
4.3. The right to a fair trial and the public interest	136
4.3.1. Limitations of the right to a fair trial under the ECHR	138
4.3.1.1. Anonymous and absent witnesses	141
4.3.1.2. Suppression of documents	146
4.3.1.3. Non-disclosure in administrative procedures	154
4.3.2. A minimum standard of fairness	157
4.4. Guiding principles for non-disclosure decision of judges	164



## **Part II.**

<b>5. Comparing Australia and the United Kingdom</b>	169
5.1. An introduction to the UK	169
5.1.1. The right to a fair trial in the UK	169
5.1.2. Counter-terrorism measures in the UK	173
5.2. An introduction to Australia	179
5.2.1. The right to a fair trial in Australia	179
5.2.2. Counter-terrorism measure in Australia	185
5.3. Conclusion	191
<b>6. Sensitive information in criminal proceedings</b>	193
6.1. General disclosure duties of the prosecution	198
6.1.1. Disclosure duties of the prosecution in the United Kingdom	200
6.1.2. Disclosure duties of the prosecution in the Australia	203
6.1.3. Comparative observations	204
6.2. Suppression of sensitive information	206
6.2.1. Police informers, crown privilege and public interest immunity	207
6.2.2. Public interest immunities in criminal proceedings in the UK	211
6.2.2.1. The roots of PII in civil proceedings	211
6.2.2.2. Applying PII in criminal case	212
6.2.2.3. The Strasbourg cases law and <i>R v H and C</i>	217
6.2.3. Suppression of sensitive information in Australia	223
6.2.3.1. PII in criminal proceedings and the <i>Evidence Act 1995 (Cth)</i>	224
6.2.3.2. <i>National Security Information Act 2004 (Cth)</i>	233
6.2.3.3. Evaluating the NSIA – a success or failure?	249
6.2.4. Comparative observations	251
6.3. The partial use of sensitive information in criminal procedures	253
6.3.1. The use of edited evidence in the United Kingdom	255

6.3.1.1. Edited documents	255
6.3.1.2. Anonymous witnesses	256
6.3.2. The use of edited evidence in Australia	264
6.3.2.1. Edited evidence under the NSIA 2004	264
6.3.2.2. Anonymous witnesses under the common law	267
6.3.3. Comparative observations	269
6.4. Comparative aspects and between Australia and the United Kingdom	273
<b>7. Sensitive information in quasi-criminal proceedings</b>	<b>281</b>
7.1. General aspects of control orders	286
7.2. Secret evidence in control order and TPIM hearings in the UK	294
7.2.1. The irreducible minimum of information	298
7.2.2. The use of special advocates and their effectiveness	304
7.2.3. Rules of evidence in closed hearings	308
7.2.4. Judicial level of scrutiny	311
7.2.5. Conclusion	313
7.3. Secret evidence in Australian control order hearings	315
7.3.1. The use and suppression of sensitive information in CO proceedings	316
7.3.2. Serious crime legislation and the use of criminal intelligence in state courts	326
7.3.3. Conclusion	335
7.4. Comparative observations	338
<b>8. The Future of disclosure of sensitive information in Australia     and the United Kingdom</b>	<b>343</b>
8.1. General comparative observations	343
8.2. Propositions for the improvement of non-disclosure regimes	349
8.2.1. Political realities of security and the principle of fairness	349
8.2.2. Consequences for a non-disclosure regime	352
8.2.3. Questions of security and questions of fairness in non-disclosure decisions	359

8.2.4. Safeguards for the individual to maintain an equality of arms	363
8.2.4.1. Special advocates	364
8.2.4.2. Jury instructions and ‘loophole reports’	368
8.2.4.3. Limited use of edited information	369
8.2.4.4. Conclusion	371
<b>9. Conclusion: sensitive information and the right to a fair trial</b>	<b>373</b>
<b>10. References</b>	<b>377</b>

## Abbreviations

ACHR	<i>American Convention on Human Rights 1969</i>
AFP	Australian Federal Police
ASIO	Australian Security and Intelligence Organisation
CA	Court of Appeal
CLC	Common law constitutionalism
CO	Control order
COAG	Council of Australian Governments
COPIIM	Criminal Organisation Public Interest Monitor
ECHR	<i>European Convention on Human Rights 1950</i>
ECtHR	European Court of Human Rights
HRA	<i>Human Rights Act 1998 (UK)</i>
IACtHR	Inter-American Court of Human Rights
ICCPR	<i>International Covenant on Civil and Political Rights 1966</i>
INSLM	Independent National Security Legislation Monitor
iCO	Interim control order
JCHR	Joint Committee of Human Rights
MI5	Military Intelligence, Section 5 (UK)
MI6	Military Intelligence, Section 6 (UK)
NSIA	<i>National Security Information Act 2004 (Cth)</i>
PII	Public interest immunity
PTA	<i>Prevention of Terrorism Act (2005)</i>
RFT	Right to a fair trial
RoL	Rule of law
SIAC	Special Immigration Appeals Commission
TPIM	Terrorism Prevention and Investigation Measures
UDHR	<i>Universal Declaration of Human Rights 1948</i>
UK	United Kingdom

## **List of figures and tables**

Table 4.1: procedural reasons for art 6 violations in trials suppression information

Figure 6.1: overview Chapter 6

Figure 6.2: chain of relevant disclosure questions in *R v H and C*

Table 7.1: comparison of control order regimes in Australia and the UK



*The price of liberty is eternal vigilance.*

- Thomas Jefferson<sup>1</sup>

*He who knows only his side of the case knows little of that.*

- John Stuart Mill<sup>2</sup>

## Introduction (Chapter 1)

### 1.1 Setting the scene: developments in the context of counter-terrorism

“The first responsibility of government in a democratic society is owed to the public. It is to protect and safeguard the lives of its citizens.”<sup>3</sup> This duty, described by Lord Hope in the landmark case of *AF (No 3)*, is crucial for the functioning of a liberal society. In recent times, in which many people feel increasingly insecure, this duty has even been interpreted as a positive right to security.<sup>4</sup> However, this emphasis deflects from the fact that security is not an end in itself. Rather it is a means to guarantee the *liberties* of people.<sup>5</sup> From such a standpoint security is subsidiary to liberty. At the same time, particular threats to the safety of a society may require concessions from its liberties.<sup>6</sup>

---

<sup>1</sup> Although this quote is frequently attributed to Thomas Jefferson, it is actually not confirmed.

<sup>2</sup> *On liberty* (Longman, Roberts and Green, 1869) II.23.

<sup>3</sup> *Secretary of State for the Home Department v AF & Another (No 3)* [2009] UKHL 28 (10 June 2009) [76] (Lord Hope).

<sup>4</sup> Sandra Fredman, “The positive right to security” in Benjamin Goold and Liora Lazarus (eds), *Security and human rights* (Hart Publishing, 2007) 307; see also Liora Lazarus, “The right to security” in Rowan Cruft, S M Liao and Massimo Renzo (eds), *Philosophical foundations of human rights* (Oxford University Press, 2015) 423.

<sup>5</sup> Lucia Zedner, “Seeking security by eroding rights: the side-stepping of due process” in Benjamin Goold and Liora Lazarus (eds), *Security and human rights* (Hart Publishing, 2007) 257, 258.

<sup>6</sup> In political theory the trade-off between security and liberty can be traced back to Hobbes and Locke. See Fredman, above n 4, 309.

How much liberty should be sacrificed for security in a liberal democracy is a matter of vivid debate.

While far from new, this debate has gained momentum since the 9/11 attacks in New York and Washington, and throughout the so-called ‘war on terror’.<sup>7</sup> Mass casualty attacks, such as the ones in Bali, Madrid, London, Sydney or Paris did not only demonstrate that there is an increased threat from radical jihadist terrorism in Western states,<sup>8</sup> but also transported the message that anyone can fall victim to an attack while travelling on a train, partying in a nightclub or simply sitting at one’s desk at work – in short doing things we all do every day. This perception, both objective and subjective,<sup>9</sup> of our vulnerability to terrorism has had an impact on our understanding of security and

---

<sup>7</sup> See for example Nancy Baker, “National Security versus civil liberties” (2003) 33(3) *Presidential Studies Quarterly* 547-567; Ed Bates, “Anti-terrorism control orders: liberty and security still in the balance” (2009) 29(1) *Legal Studies* 99-126; Simon Bronitt, “Balancing security and liberty: critical perspectives on terrorism law reform” in Miriam Gani and Penelope Mathew (eds), *Fresh perspectives on the war on terror* (ANU EPress, 2008) 65-83; Alexandra Chirinos, “Finding the balance between liberty and security: the Lord’s decision on Britain’s *Terrorism Act* (2005) 18 *Harvard Human Rights Journal* 265-276; David Cole, “Their liberties, our security: democracy and double standards” (2003) 31 *International Journal of Legal Information* 290-311; Oren Gross, “Security vs. liberty: an imbalanced balance” (2009, Legal Studies Research Paper Series, No 09-42, University of Minnesota); Oliver Lepsius, “Liberty, security and terrorism: the legal position in Germany” (2004) 5(5) *German Law Journal* 435-460; David Luban, “Eight fallacies about liberty and security” in Richard Wilson (ed), *Human rights in the ‘War on Terror’*” (Cambridge University Press, 2005) 242-257; Andrew Lynch and George Williams, *What price security? Taking stock of Australia’s anti-terror laws* (UNSW Press, 2006); John Podesta, “More secrets less security” in Richard Leone and Greg Anrig (eds), *Liberty under attack: reclaiming our freedom in an age of terror* (Public affairs, 2007) 87-104; Posner and Vermeule, *Terror in the balance: security, liberty, and the courts* (Oxford University Press, 2007); Geoffrey Stone, “National security v. civil liberties” (2007) 95 *California Law Review* 2203-2212; Jeremy Waldron, “Security and liberty: the image of balance” (2003) 11(2) *Journal of Political Philosophy* 191-210.

<sup>8</sup> There has been debate about how to refer to this kind of terrorism. As the attacks in question are mainly justified by defending Islam - although a version of Islam that would be considered as ‘inauthentic’ by most Muslims - the label of ‘Islamic terrorism’ has emerged. Not surprisingly this runs the risk of falsely equating Islam with terrorism, which is why the more neutral, but meaningless label of ‘new terrorism’ has been used. See for example Robert Cornall, “The effectiveness of criminal laws on terrorism” in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (The Federation Press, 2007) 50. In order to be more precise and still avoid the word ‘Islam’, the thesis refers to the phenomenon as ‘radical jihadist terrorism’ (RJT). Although Jihad can equally have multiple meanings, the radical Jihad expresses at the most a fight against non-believers, *ie* non-Muslims. For further discussion Steven Greer, “Human rights and the struggle against terrorism in the United Kingdom”, (2008) 2 *European Human Rights Law Review* 163,165; John Strawson, “Islam and the politics of terrorism: aspects of the British experience” in Miriam Gani and Penelope Mathew (eds), *Fresh perspectives on the war on terror* (ANU EPress, 2008) 9.

<sup>9</sup> This subjective perception does not have to be accurate. See Luban, above n 7, 247.



thus its relationship with liberty. Or as Tony Blair famously said after the 7/7 bombings, “[t]he rules of the game have changed.”<sup>10</sup>

Most of the terror attacks mentioned above were swiftly followed by a raft of security legislation, introducing or widening the powers of the police and other security agencies. The emergence of international terror networks, which have benefited from the parallel development of modern forms of communication, as well as the instantaneous reporting of terror attacks, put pressure on governments to increase their capabilities to identify potential terrorists, detect and disrupt plots and thus prevent attacks from happening in the first place.<sup>11</sup> In order to address these concerns, many states have introduced extended inchoate terrorist offences as well administrative preventive detention regimes. Such a strategy requires more surveillance, monitoring, profiling, and data analysis – ie work that is traditionally associated with intelligence agencies.<sup>12</sup> Not surprisingly, while intended to guarantee the safety of the citizens, many of these preventive measures either intentionally or unintentionally also limit the liberties of individuals.

Within this context the thesis deals with an issue that is emblematic of the tension between security and liberty: the use and suppression of sensitive information in criminal proceedings (typically but not limited to trials involving terrorism offences) and other administrative proceedings termed ‘quasi-criminal proceedings’. For the

---

<sup>10</sup> Blair Tony (PM’s press conference, 5 August 2005, National Archives).

<sup>11</sup> See Secretary of State for the Home Department, “CONTEST: the United Kingdom’s strategy for countering terrorism” (Cm 8123, July 2011); and Council of Australian Governments, “Australia’s counter-terrorism strategy: strengthening our resilience” (2015).

<sup>12</sup> For example, between 2003 and 2006 the budget of the Australian Security and Intelligence Organisation (ASIO) increased from AUD 75 million to AUD 233 million. See Anthony Whealy, “Difficulty in obtaining a fair trial in terrorism cases” (2007) 81 *Alternative Law Journal* 743, 757. In the UK the intelligence budget has also doubled to over 2 billion BPS in the ten years after 9/11. See Richard Norton-Taylor and Nick Hopkins, “How the shock of 9/11 made MI5 stronger” (The Guardian, 8 September 2011). In the US the intelligence budget has doubled between 2001 and 2013 to over 50 billion US\$ a year. See Ewan MacAskill and Jonathan Watts, “US intelligence spending has doubled since 9/11, top secret budget reveals” (The Guardian, 30 August 2013).

purposes of this thesis, proceedings are ‘quasi-criminal’, which, while technically administrative, permit the state to impose coercive measures against particular individuals.<sup>13</sup> These administrative measures can be highly coercive, including measures restricting personal liberty. Consequently, they have been criticised for enabling the state to engage in ‘forum shopping’ to avoid the usual due process safeguards entrenched in the criminal trials.<sup>14</sup> For this reason, this thesis pays equal attention to quasi-criminal proceedings as criminal proceedings.

Due to the emphasis on prevention in counter-terrorism and the ever-increasing reliance on the international cooperation between security agencies, authorities are increasingly forced to work with sensitive information during investigations and rely on such information as a basis for coercive counter-terrorism measures. The secrecy not only protects undercover personnel, covert investigations methods and strategies, it also ensures the future flow of information from various sources, such as foreign security agencies and informers. While secrecy is often vital to the successful continuation of counter-terrorism efforts, once sensitive information has relevance in the course of legal proceedings, a conflict with other fundamental interests arises. The extent of conflict may vary depending on the degree of disclosure of the sensitive information. In some cases, sensitive information is fully suppressed and not available to the defence despite potential relevance for its case.<sup>15</sup> In other cases, the sensitive information is either used *ex parte* or in an edited version,<sup>16</sup> potentially disadvantaging the defendant’s ability to challenge the evidence. All of these cases pose a **dilemma**: either the sensitive

---

<sup>13</sup> In quasi-criminal proceedings coercive measures are justified in the name of prevention, rather than being punitive. Governments have argued that this distinction allows the application of lower fair trial standards. The term is further defined in the Introduction of Chapter 7.

<sup>14</sup> See for example Zedner, above n 5, 257; Helen Fenwick and Gavin Phillipson, “Covert derogations and judicial deference: redefining liberty and due process rights in counter-terrorism law and beyond” (2011) 56(4) *McGill Law Journal* 863.

<sup>15</sup> The term defence is used in this context for an individual threatened with coercive measures irrespective of whether part of criminal or quasi-criminal proceedings.

<sup>16</sup> The term ‘edited evidence’ is further discussed and defined in the Introduction of Chapter 6.

information is disclosed in the interest of fairness, but may pose a risk to national security; or the information remains suppressed (used or unused), but may jeopardise the fairness of the proceedings. States have amended their rules of evidence to accommodate this challenge. The question however remains how these rules impact on the right to a fair trial (RFT) and the principle of adversarial justice?<sup>17</sup>

As indicated above, the focus of the thesis is the period post 9/11. But neither terrorism,<sup>18</sup> preventative measures within the field of criminal justice<sup>19</sup> nor the use and suppression of sensitive information<sup>20</sup> are novel. Many of the developments relevant to the current legal situation preceded 2001 and thus will be examined as part of the historical context. Nonetheless, counter-terrorism efforts post 9/11 have intensified the issues and in many instances established principles in relation to fairness have been put to the test by counter-terrorism and security legislation, which often seems to prioritise security over fairness.

## 1.2 Research question

The main question of the thesis is: What are the limitations and safeguards required by the principle of fairness when using or suppressing sensitive information (in the public interest) in criminal and quasi-criminal proceedings? This raises a subsidiary question:

---

<sup>17</sup> Within the European context the term ‘equality of arms’ is equally used for these issues. For the general requirements and content of the equality of arms see for example Joseph Jacob, *Civil justice in the age of human rights* (Ashgate, 2007) 105 and Mark Janis, Richard Kay and Anthony Bradley, *European human rights law: text and materials* (Oxford University Press, 3<sup>rd</sup> ed, 2008) 792. The concept of equality of arms is not universally accepted in Australia due to the connotation with the *European Convention on Human Rights*. However, when mentioned in the general discussion of this thesis it is used interchangeably with the principle of adversarial justice.

<sup>18</sup> Louise Richardson, *What terrorists want* (Random House, 2007) 21.

<sup>19</sup> Andrew Ashworth and Lucia Zedner, *Preventive justice* (Oxford University Press, 2014).

<sup>20</sup> For example in relation to police informers see, Henry Mares, “Balancing public interest and a fair trial in police informer privilege: a critical Australian perspective” (2002) 6 *International Journal of Evidence and Proof* 94.

How should fair trial standards be protected in criminal and quasi-criminal proceedings that allow the use or suppression of sensitive information?

How to answer these questions depends heavily on our understanding of the principle of fairness. Although there is near universal commitment to fairness in modern legal systems – after all who would argue for unfair trials?<sup>21</sup> – such commitments often consist of general statements. Describing how fairness is applied to a specific context, and how it relates to or qualifies other rights and interests is more challenging, and establishing agreement is difficult. This gap between universal support for fairness and the vagueness of its application in national security contexts has generated much debate about the interpretation of fairness and the methodologies of applying it. Such debates are not limited to politicians, but also concern law-makers, judges and academics.

Defining fairness in legal proceedings is difficult, because fairness is multifaceted and operates on multiple levels. What is commonly referred to as the RFT is an umbrella term, covering a bundle of principles, privileges, rights and rules, such as the presumption of innocence, the burden of proof, the right to be informed of any charges and to know the basis of the allegations, the right to be heard, and the right to counsel – to name some particularly relevant for this thesis. Rules that impact upon the fairness of proceedings range from the pre-trial stage all the way to the final appeal. What these norms all share is the objective of guaranteeing a fair trial. However, despite their interconnection, these norms all have their own unique history, developed through case law within both national and international courts. None of these fair trial guarantees is absolute in itself, meaning limitations upon one norm does not necessarily invalidate the fairness of an entire trial.

---

<sup>21</sup> For example Patrick Robinson, “The right to a fair trial in international law with specific reference to the work of the ICTY” (2009) 3 *Publicist* 1.

## Introduction

Another challenge for understanding fairness is distinguishing between procedural and substantive forms of fairness. The former requires a court to ensure the judicial process follows all appropriate legal rules (which are set out by the legislature or developed by the courts under the common law), while the latter substantive form of fairness requires sufficient consideration to be given to an individual's rights and liberties. Attention to the interests of substantive fairness may require the court to derogate from the mandated procedures, potentially leading courts to act differently from the will of parliament.

Without a clear mandate, it is difficult for judges to guarantee the application of substantive fairness, unless the overall fairness of the trial is violated to such an extent that it constitutes a miscarriage of justice. Finally, fairness depends on the perspective of an individual litigant, as well as the courts, which, being constituted as courts of justice, have the inherent power to protect their own integrity as a judicial institution.

The position of fairness within the legal framework of a liberal democracy presents a further ambiguity. Fairness is considered as a defining principle of the rule of law. Not only is RFT recognised in all international human rights treaties,<sup>22</sup> but is also given legal standing in domestic statutes and constitutions. However, which aspect is protected and to what degree often requires extensive interpretation by treaty bodies, courts and tribunals.<sup>23</sup>

Thus, the large number of components determining the fairness of a trial makes it difficult to reconcile each of them with other legitimate interests, such as protecting

---

<sup>22</sup> For dualist systems, such as Australia and the UK, the extent to which the common law and statutes should be interpreted in light of these international obligations generally remains controversial. See below at 2.2.3 for the distinction between dualist and monist countries and Chapter 5 for the application in relation to UK and Australia. Most importantly in the UK, the introduction of *Human Rights Act 1998* (UK) has removed much controversy in the field of human rights, as it allows not only the direct application of the *European Convention on Human Rights* (ECHR), but also requires UK courts to consider the case law of the European Court of Human Rights.

<sup>23</sup> The discussion of whether aspects of the RFT are included in Chapter III of the *Australian Constitution* is exemplary. See below at 6.2.3.

national security. It is this complexity, which causes concern that under security pressures the legislatures and the courts only provide for proceedings ‘as fair as possible/practical in the circumstances’.

This thesis will not attempt to philosophically define what is fair and what is not, as what actually is fair depends upon the particular context. Rather the thesis aims at capturing the character of the RFT by reviewing the varying methodologies applied to assessing fairness in cases where it conflicts with the interests of national security. It examines whether particular methodologies support or weaken our commitment to fundamental legal values necessary for a fair and open legal process, such as clarity, transparency, consistency and legitimacy. While the values of clarity, transparency and consistency seem self-explanatory for strengthening the position of the defence, the value of legitimacy is more complex. For the purpose of this thesis, a legitimate process should be understood as one that supports its own underlying values, such as fairness and justice. The term ‘legitimacy’ is therefore used in this thesis in a moral-philosophical rather than strictly legal sense.<sup>24</sup> in order to promote legitimacy, fairness is not only applied ‘according to law’. A fair process must be objectively and in substance fair and striving for such an end.<sup>25</sup> This can be a difficult task for both lawmakers and judges. But the significance becomes obvious, when it is understood that fairness underpins the state’s ability to justify the use of coercive force and democracy itself.<sup>26</sup>

A number of recurrent themes appear in the thesis. The first theme is the relationship between the branches of government, particularly between the executive and the

---

<sup>24</sup> Legal legitimacy often only refers to ‘being within the realm of the law’ or ‘according to authority’.

<sup>25</sup> A process can be lawful, but nonetheless illegitimate and unfair. See for example, *Dietrich v The Queen* (1992) 177 CLR 292, 362 (Gaudron J) discussed below at 2.2.2.

<sup>26</sup> The issue of legitimacy will be further discussed below at 2.1.3.

judiciary, and how this impacts on safeguarding the RFT. As the focus of the thesis is on sensitive information in legal proceedings, the relationship is mainly described from the position of judges and is influenced by the questions of how judges understand their role in government within a liberal democracy? And how much responsibility do they claim or defer to the executive? The second theme concerns the position of individuals in legal proceedings who are reliant on sensitive information to defend themselves or are limited in their ability to challenge sensitive evidence. Hence, the focus is the importance of the principle of adversariness in ensuring the fairness of the proceedings. Finally, the third theme addresses the tension between a flexible approach to fairness and the application of set principles. Although the analogy is not fully adequate, this could also be described as a common law approach versus a bill of rights approach.

All of these themes are heavily influenced by the general human rights framework applicable in a particular country. Thus in order to get a better insight into the requirements of fairness, the thesis uses a comparative approach, including case studies from Australia<sup>27</sup> and the United Kingdom (UK).<sup>28</sup> It analyses how the dilemma has been addressed in these jurisdictions. To what extent do these approaches reflect the character and importance of the principle of a fair trial?<sup>29</sup>

---

<sup>27</sup> Australia has eight state and territory jurisdictions and one federal jurisdiction. While criminal law is a competence of the state, as it is not listed in s 51 of the Australian Constitution, in relation to counter-terrorism the states have transferred their powers to the Commonwealth. Hence, the references will be to the Commonwealth jurisdiction unless otherwise indicated.

<sup>28</sup> While the UK also consists of different jurisdictions, UK counter-terrorism legislation generally applies to all of them; see for example *Terrorism Act 2000* (UK), s 130. The same is true for the *Human Rights Act 1998* (UK). In legal areas where there are differences between the jurisdictions, such as procedural matters, the main references are made to the jurisdiction of England and Wales unless otherwise mentioned. While there will be no discussion on Scotland, multiple references will be made to Northern Ireland due to its extensive history in the field of counter-terrorism.

<sup>29</sup> Some references will be also made to other jurisdictions, such as Canada, the US or Israel, where examples help to clarify or illustrate the argument. However, these jurisdictions will not be discussed in any detail due to general differences in approaching counter-terrorism or human rights.

There is no shortage of criticism of the impact of counter-terrorism legislation on various aspects of fairness within the general human rights literature.<sup>30</sup> Some of these contributions have also addressed the issue of disclosure. However, what is often missing in the analysis is a discussion of why fairness should be protected in a particular instance, based on what rationales, rules or principles and to what extent? Particularly in Australia, some critics have claimed a more proportionate approach is necessary, although they generally stop short of explaining what a more sophisticated approach looks like in practice, what principles it should be based on and whether the current legal framework potentially supports such an approach?<sup>31</sup> This thesis offers a deeper analysis and answers to these questions. It will trace the underlying values and functions of fairness that are at stake and explain why fairness is increasingly under threat in the war on terror. Applying comparative methodologies, it will demonstrate why a principled approach is advantageous for retaining minimum standards over time. To address these aspects comprehensively the thesis draws heavily from Professor Andrew Ashworth's general work on fairness,<sup>32</sup> in particular his argument that the RFT cannot be balanced away by other interests in the context of the *European Convention*

---

<sup>30</sup> See for example Stefan Sottiaux, *Terrorism and the Limitation of Rights: the ECHR and the US Constitution* (Hart Publishing, 2008) Chapter 7; Ben Emmerson *et al*, *Human Rights and Criminal Justice* (Sweet and Maxwell, 3<sup>rd</sup> ed, 2012) Chapter 10; Geoffrey Robertson, "Fair trials for terrorists?" in Richard Wilson (ed), *Human rights in the 'War on Terror'* (Cambridge University Press, 2005) 169; Dyzenhaus and Thwaites, "Legality and emergency: the judiciary in a time of terror" Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 9; David Dyzenhaus, "Cycles of legality in emergency times" (2007) 18 *Public Law Review* 165; Ed Bates, above n 7, 99.

<sup>31</sup> See for example Nicola McGarrity and Edward Santow, "Anti-terrorism laws: balancing national security and a fair hearing" in Victor Ramraj *et al* (eds), *Global anti-terrorism law and policy* (Cambridge University Press, 2<sup>nd</sup> ed, 2012) 122; Patrick Emerton, "Paving the way for conviction without evidence: a disturbing trend in Australia's 'anti-terrorism' laws" (2004) 4(2) *Queensland University of Technology Law Journal* 129; Whealy, above n 12, 743.

<sup>32</sup> See in particular Andrew Ashworth, *Human rights, serious crime and criminal procedure* (The Hamlyn Lectures, Sweet and Maxwell, 2002); Andrew Ashworth, "Security, terrorism and the value of human rights" in Benjamin Goold and Liora Lazarus (eds), *Security and human rights* (Hart Publishing, 2007) 203; Andrew Ashworth, "Crime, community and creeping consequentialism" (1996) Apr *Criminal Law Review* 220.



*on Human Rights* (ECHR)<sup>33</sup> is crucial. While there are some general monographs on disclosure,<sup>34</sup> these do not have a focus on national security or consider preventive measures outside the criminal law. Again, the thesis will be able to expand previous research to a new arena in which security interests are often claimed to be paramount.

Hence, the thesis presents a fresh perspective to the area of fair trials in the context of national security. Through the analysis of a modern understanding of the rule of law, the concept of checks and balances and international human rights law, the thesis will deduce relevant criteria, which should underpin and guide a trial when dealing with sensitive information in order to be considered fair. Through the cases studies in Part II, the thesis further exposes in which instances the law allows the rhetoric around fairness to cover limitations to RFT and where the law is conducive to achieving fair outcomes.

There are two more clarifications in relation to the purpose and scope of the thesis: one is that the thesis does not address the principle of open justice specifically. Although related,<sup>35</sup> open justice entails that justice needs to be seen to be done, making the public another instrument for controlling the fairness of proceedings. While this aspect is important, it does not directly impact on the standing of the defendant when limited.

Proceedings that are closed to the public for national security reasons do not necessarily exclude the defendant, who is still able to access and challenge all the information.<sup>36</sup>

Second, it must be pointed out that the thesis does not consider states of emergencies

---

<sup>33</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 *United Nations Treaty Series* 222 (entered into force 3 September 1953).

<sup>34</sup> In the UK, see in particular the very comprehensive work of David Corker and Stephen Parkinson, *Disclosure in criminal proceedings* (Oxford University Press, 2009) and John Niblett, *Disclosure in criminal proceedings* (Blackstone Press, 1997).

<sup>35</sup> See Ian Dennis, "The right to confront a witness: meanings, myths and human rights" (2010) 4 *Criminal Law Review* 255, 260.

<sup>36</sup> Nonetheless, the issue of open justice has equally caused much controversy in the context of national security in both the UK and Australia and some intersections are obvious. See for example *Re Guardian News and Media Ltd and others* [2016] EWCA Crim 11 (9 February 2016); *Lodhi v R* [2006] NSWCCA 101 (4 April 2006).

that threaten the life of the nation and therefore justify the derogation of rights.<sup>37</sup> In fact the thesis is set out in particular to enquire how security challenges impact on the ‘regular’ criminal justice and legal system and the general principles of law.<sup>38</sup>

### 1.3 Comparative case study: Australia and the United Kingdom

There is a general tendency to present comparative perspectives through legal encyclopaedia or handbooks, providing descriptive inventories of national law and powers,<sup>39</sup> leaving the reader to draw her own conclusions. In the field of counter-terrorism, comparing particular approaches and measures is increasingly used as a method. However, many terrorism scholars have examined national legal systems, such as the UK and Australia, without reflecting too deeply about whether a comparison in this particular field is valid, or indeed will generate useful insights.<sup>40</sup> Given that there is a lot of scepticism about this type of comparative research,<sup>41</sup> a few remarks on that topic can be made to provide justification for the comparisons drawn in this thesis.

---

<sup>37</sup> The term “derogation” is used here - and throughout the thesis – in a strictly technical sense within the meaning of art 15 ECHR and art 4 ICCPR, ie the deviation from treaty obligations under defined circumstances by a state party. For a comment on art 15 ECHR see further Alistair Mowbray, *Cases and Material on the European Convention on Human Rights* (Oxford University Press, 2<sup>nd</sup> ed, 2007) 835 and Claire Ovey and Robin White, *Jacobs and White: the European Convention on Human Rights* (Oxford University Press, 4<sup>th</sup> ed, 2006) 439. For a comment on art 4 ICCPR see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (Engel, 2<sup>nd</sup> ed, 2005) 83.

<sup>38</sup> Although the UK claimed a state of emergency after the 9/11 attacks and derogated from art 5 ECHR (the right to liberty), it withdrew its derogation in 2005 after the House of Lords declared it incompatible with the Convention in *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004). See Joint Committee on Human Rights, “Counter-terrorism policy and human rights (seventeenth Report): Bringing human rights back in” (16<sup>th</sup> Report of Session 2009-10, HC 111, 25 March 2010) 9.

<sup>39</sup> See for example K J Heller and M D Dubber (eds), *The handbook of comparative criminal law* (Stanford University Press, 2011).

<sup>40</sup> The option of policy transfer is simply assumed and in the case of Australia and the UK it happens on a regular basis.

<sup>41</sup> See for example Jonathan Hill, “Comparative Law, law reform and legal theory” (1989) 9(1) *Oxford Journal of Legal Studies* 101; Alan Watson, “Legal change: sources of law and legal culture” (1983) 131 *University of Pennsylvania Law Review* 1121; Christopher McCrudden, “Judicial Comparativism and human rights” in Esin Örucü and David Nelken (eds), *Comparative Law: a handbook* (Hart Publishing, 2007) 371; Otto Kahn-Freund, “On uses and misuses of comparative law” (1974) 37(1) *Modern Law Review* 1.

It has been pointed out that comparing countries from the same legal family<sup>42</sup> offers little added value.<sup>43</sup> While similarities provide a necessary starting point of a comparison,<sup>44</sup> assuming the UK and Australia offer little differences of significance is erroneous, as this thesis will demonstrate.<sup>45</sup> Recent legal histories have shown that British colonies never received an exact version of English law. Rather, “English laws were either ignored or selectively adopted to meet local societal needs”.<sup>46</sup> Especially in relation to policing powers and criminalisation, colonial systems have tended to support broad intrusive state action over the traditional rights or liberties of the subject.

In order to fully understand a particular legal problem, it is also necessary to consider the significance of local ‘culture’.<sup>47</sup> This, in particular, expresses itself through history.<sup>48</sup> Questions such as, how was a particular problem handled over time, are there any previous experiences or events that had an impact on this development, or are there any related problems that might explain a particular approach, might help to identify certain trends or value judgments. Thus all separate systems will distinguish themselves through their own national culture.

---

<sup>42</sup> See generally Konrad Zweigert and Heinz Kötz, *Introduction to comparative law* (translated by Tony Weir, Clarendon Press, 3<sup>rd</sup> ed, 1998) 41-42.

<sup>43</sup> Alan Watson, *Legal transplants: an approach to comparative law* (Scottish Academic Press, 1974) 5-6.

<sup>44</sup> See in particular Harold Gutteridge, *Comparative law* (1946).

<sup>45</sup> Comparative law is mainly about similarities and differences. Whether there is a focus on the one or the other is much defined by the object of the thesis and at the same time based of criticism. See Gerhard Dannemann, “Comparative law: a study of similarities or differences?” in Mathias Reiman and Reinhard Zimmerman (eds), *The Oxford handbook of comparative law* (Oxford University Press, 2008) 383, 385, see also David Nelken, “Defining and using the concept of legal culture” in Esin Örüçü and David Nelken (eds), *Comparative Law: a handbook* (Hart Publishing, 2007) 109, 123.

<sup>46</sup> Stephen Bottomley and Simon Bronitt, *Law in Context* (The Federation Press, 3<sup>rd</sup> ed, 2006) 395. The example given there is the very different approach to the indigenous populations of the United States, Australia and New Zealand.

<sup>47</sup> See Nelken, above n 45, 109; George Fletcher, “Comparative law as a subversive discipline” (1998) 46 *American Journal of Comparative Law* 683, 691; Zweigert and Kötz, above n 42, 36; Roger Cotterrell, “Comparative law and legal culture” in Mathias Reiman and Reinhard Zimmerman (eds), *The Oxford handbook of comparative law* (Oxford University Press, 2008) 709, 711.

<sup>48</sup> Watson considers comparative law simply as a branch of legal history. See Watson, above n 43, 6.

Despite these expected differences, a comparison within the same legal family makes findings easier to apply and avoids the criticism of hybrid systems as creating legal incoherence.<sup>49</sup>

It is also important to recognise the limitation of comparative law: comparative research does not necessarily lead to direct propositions of reform. While learning about different ways to solve a problem, comparative research primarily identifies ‘sore spots’ of one system by looking at another system.<sup>50</sup> In particular, “comparative law can reveal – more vividly than the study of a single system – the relationship between law and political and moral values”.<sup>51</sup> Hence, the thesis is not concerned with judging which jurisdiction has the *better* human rights regime, but with assessing particular qualities - strengths and weakness - they possess in relation to reconciling the competing interests in protecting the RTF and national security.

### *Australia and the United Kingdom*

Australia and UK are part of the same common law legal family. But while they share a legal heritage, they have significantly diverged from each other in the way they protect human rights. Australia exemplifies a traditional common law model, strongly committed to parliamentary sovereignty, and without a comprehensive legislative or entrenched constitutional bill of rights. The UK increasingly represents a hybrid-model substituting and combining the common law with a more structural approach stemming

---

<sup>49</sup> Arguably such criticism is overstated anyway. Hybrid legal systems can also be beneficial as the competition creates efficiency. David Nelken, “Comparative law and comparative legal studies”, in Esin Öricü and David Nelken (eds), *Comparative Law: a handbook* (Hart Publishing, 2007) 3, 7. It can also be easily underestimated in how far we already deal with hybrid systems, internationally as well as domestically.

<sup>50</sup> Peter Gill, “‘Knowing the self, knowing the other’: comparative analysis of security intelligence” in Loch Johnson (ed), *Handbook of intelligence studies* (Routledge, 2009) 82, 83.

<sup>51</sup> Hill, above n 41, 114. See also Watson, above n 43, 7: “comparative law is about the nature of law, and especially about the nature of legal development”.

from its *Human Rights Act 1998* (UK) (HRA), which gives national effect to its obligations under the ECHR. Within these models the courts not only apply different approaches to deal with the disclosure dilemma, but measures enacted by the respective Parliaments are also now scrutinised against different constitutional settings.

What makes the comparison also useful and interesting is the fact that some policy transfer has occurred from the UK to Australia on counter-terrorism measures.<sup>52</sup> For example, Australia has adopted the British system of control orders with some modifications.<sup>53</sup> This poses the question whether in the course of this policy transfer enough consideration has been paid to the human rights framework in which the measures operate? And, given the fact that some of the adopted measures have been subsequently changed in the UK following human rights challenges, the question arises whether Australia should similarly take these reforms into consideration? In other words, while Australia has adopted a particular “program” in order to reach a similar “policy goal”, it is not clear whether it has at the same time also adopted the “ideologies, ideas and attitudes and negative lessons”.<sup>54</sup>

Exploring the themes above, the comparative case studies will identify which approach is applied to determine the fairness of the trial? How do the different branches of government interact with each other? What is the role of the judge? And what are the

---

<sup>52</sup> In the field of political sciences the term “policy transfer” is used as methodology to evaluate the adoption of policies in one state from another. See David Dolowitz and David Marsh, “Learning from abroad: the role of policy transfer in contemporary policy-making” (2000) 13(1) *Governance* 5; David Dolowitz and David Marsh, “The future of policy transfer research” (2012) 10(3) *Political Studies Review* 339; Karen Mossberger and Harold Wolman, “Policy transfer as a form of prospective policy evaluation (2003) 63(4) *Public Administration Review* 428; John Hudson and Bo-Young Kim, “Policy transfer using the ‘gold standard’: exploring policy tourism in practice” (2014) 42(4) *Policy & Politics* 495.

<sup>53</sup> See below at Chapter 7.

<sup>54</sup> David Dolowitz and David Marsh, “Learning from abroad: the role of policy transfer in contemporary policy-making” (2000) 13(1) *Governance* 5, 12. There is a debate in the literature, what policy transfer actually entails and when it constitutes a failure. See for example Oliver James and Martin Lodge, “The limitations of ‘policy transfer’ and ‘lesson drawing’ for public policy research (2003) 1(2) *Political Studies Review* 179.

mechanisms available to the defendant to assert a claim that the RFT has been infringed?

#### 1.4 Thesis outline

The structure of the thesis broadly follows the structure of this introduction. Part I looks at the issues from a more theoretical point of view. In **Chapter 2**, I characterise the RFT as a constitutional principle, with importance not only to the individual within a trial and for claiming rights, but also as public interest. As such the RFT is crucial for justifying coercive action and for fostering social cohesion. This Chapter argues that such an understanding of the RFT must be reflected in any disclosure regime. **Chapter 3** focuses on the risks associated with the use of untested evidence by looking at the type of information regularly suppressed in the interest of national security. This in particular puts an emphasis on the importance of adversarial justice. **Chapter 4** evaluates several methodologies for resolving conflicts of interests over the use and suppression of sensitive information. Taking a normative approach, the analysis is drawn from the case law of the ECtHR. The ECtHR's focus on review of procedure, rather than substantive appeal, makes it possible to deduce several principles important for the protection of the RFT.

Part II of the thesis covers the case studies. An introductory chapter (**Chapter 5**) sets up the case studies by discussing the human rights frameworks in Australia and the UK, as well as the relevant major developments in counter-terrorism. It is followed by an analysis of sensitive information in criminal proceedings (**Chapter 6**) and quasi-criminal proceedings, which focuses on control orders (**Chapter 7**) in Australia and the UK. A distinction emerges between the two types of proceedings with the latter

## Introduction

applying lower fair trial standards, which are more permissive of the limited use of secret evidence. **Chapter 8** offers a general comparison and analysis between the approaches in Australia and the UK, and provides some proposition for law reform.

The thesis is based on the premises that while *what is fair* cannot be resolved in abstract, *what needs to be considered to determine fairness in a specific context* can be established. It will conclude that in order to do justice to the importance and character of the RFT in a field where stakes are high, non-disclosure decisions should be guided by principles, which must be considered by all branches of government, namely, the Executive, Legislature and the Courts. Applying such a methodology enables the safeguard of long-term fair trial standards against erosion from security pressures.





## Part I.

### **Chapter 2: The right to a fair trial: function, scope and nature**

A strong legal commitment to the right to a fair trial (RFT) is expressed variously in international human rights treaties, domestic statutes, as well as the common law.

However, none of these statements are absolute. Fairness always remains a qualified aspiration because of other interests of equal or higher importance to society.<sup>1</sup> While recognition of this plurality of interests and the need to adjudicate conflicts between them is part of all liberal societies, it is important to know exactly what is at stake when placing constraints upon the RFT. Unfortunately, because threats to national security often seem daunting,<sup>2</sup> the danger arises that fairness comes to be seen as a luxury that can no longer be afforded to the concerned individual. Such a view is not only short-sighted, as it neglects the immediate consequences for a society, but also simply wrong, because it threatens the very foundations of our legal systems.

The present Chapter demonstrates the importance of fairness by describing its function within Western liberal democracy. The full grasp of fairness requires not reducing it to an individual rights (or set of rights), but to recognise it as well as a principle serving the public interest, which ensures legitimacy in legal processes. Furthermore, by looking at the sources of fairness, it becomes obvious that the principle of fairness is

---

<sup>1</sup> For a full characterisation see below at 4.3.1.

<sup>2</sup> David Luban, "Eight fallacies about liberty and security" in Richard Wilson, *Human rights in the 'War on Terror'*" (Cambridge University Press, 2005) 242, 247.

implicit in some of the most significant aspects of public law theory, ie defining the relationship between the state and its people, such as the concept of democracy, the rule of law (RoL) and fundamental common law rules. Taken collectively, these aspects demonstrate that fairness should be recognised as a constitutional principle.

It is generally accepted that the courts should refuse to apply laws, which explicitly abrogate fairness to prevent miscarriages of justice. Thus a claim for ‘fairness’ as a constitutional principle is not overly controversial. Nonetheless, it is still necessary to explicate this claim, as it arguably has consequences for defining the scope and content of fairness, which lacks a clear consensus. Hence, in the conclusion the Chapter makes general claims in relation to the treatment of fairness by law, which will create the basis for advancing the thesis argument for a need of principled approach to fairness.

It is noteworthy that there are differences in terminology surrounding fairness as an individual rights and in the public interest. Whereas the RFT is generally considered as an individual right, the term ‘principle of fairness’ is often preferred to emphasise the broader public interest in ensuring fairness in legal processes.<sup>3</sup> This dichotomy is particularly present in common law systems, where the principle of fairness dictates that trials must be fair to protect integrity of the court (and prevent abuse of its process), rather than fairness being conceived only as an individual right. As such the term ‘principle of fairness’ more closely resembles ‘fair trial according to law’ or procedural fairness, which preference regard for parliamentary supremacy.

By arguing - as this Chapter does - that fairness may be conceived as both an individual right and collective public interest, neither the term ‘RFT’ nor ‘principle of fairness’ accurately express the full scope of fairness. The thesis predominately uses the term

---

<sup>3</sup> See James Jacob Spigelman, “The truth can cost too much: the principle of a fair trial” (2004) 78 *Australian Law Journal* 29.

‘RFT’, as it is the preferred term in human rights literature. Apart from the following Sections, where the different aspects are discussed, differences in fairness terminology (whether conceived as a principle, right or interest) is not greatly significant for the purposes of the thesis.<sup>4</sup>

---

<sup>4</sup> In *Dietrich* the majority accepted the description RFT even under the common law as “convenient, and not unduly misleading”. *Dietrich v The Queen* (1992) 177 CLR 292, 299 (Mason CJ and McHugh J).

## 2.1 Fairness as an individual right and a collective public interest.

The RFT is generally portrayed as an individual right. Particularly, when fairness is in conflict with security interests, which are considered as public interests. While the RFT is certainly important for the individual involved, this characterisation neglects the broader function of fairness in also serving the public interest. This section emphasises the various functions of fairness, which together characterise fairness *both* as an individual right and a collective public interest.

### 2.1.1 Fairness as a protection of human dignity

Since the end of Second World War human dignity has been considered as a prominent theoretical foundation of human rights.<sup>5</sup> An individual should be treated with respect and dignity without exception. As the state exercises significant power over an individual during a criminal trial, with potentially huge consequences for personal freedom and property, the principle of fairness is crucial in guaranteeing the human dignity of the individual concerned.

As a reaction to the cruelties of the Nazi-regime, human dignity was not only a cornerstone in the drafting of the new German Constitution,<sup>6</sup> but also played a key role in the establishment of the United Nations. In the Preamble to its key human rights

---

<sup>5</sup> See generally Aharon Barak, *Human dignity: the constitutional value and the constitutional right* (Cambridge University Press, 2015); Christopher McCrudden (ed), *Understanding human dignity* (Oxford University Press, 2013); Jeremy Waldron, “Is dignity the foundation of human rights?” in Cruft, Liao and Renzo (eds), *Philosophical foundations of human rights* (Oxford University Press, 2015) 117; Christopher McCrudden, “Human dignity and judicial interpretation of human rights” (2008) 19(4) *The European Journal of International Law* 655.

<sup>6</sup> In Germany human dignity has a very pronounced role. Due to arts 1 and 79(3) German Basic Law (*Grundgesetz*), it cannot be balanced against any other constitutional right, nor can the guarantee be amended or abolished by any democratic majority in Parliament. Such a ‘legalisation’, which gives the German Federal Constitutional Court (*Bundersverfassungsgericht*) the power to basically remove anything from the political agenda once it finds a violation of human dignity, has been criticised. The powers given to the Court represented the enormous distrust in the political actors after the failing of the Weimar Republic and the Nazi-regime. See Christoph Möllers, “Democracy and human dignity: limits of a moralized conception of rights in German constitutional law” (2009) 42(2) *Israel Law Review* 416.

document, the Universal Declaration of Human Rights 1948 (UDHR), states recognised that “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>7</sup> The Preamble to the *International Covenant on Civil and Political Rights* (ICCPR) is even more explicit.<sup>8</sup> After referring to the principles proclaimed in the Charter of the United Nations and largely replicating the Preamble of the UDHR, it recognises that “*these rights* [set out in the Covenant] *derive from the inherent dignity of the human person*”.<sup>9</sup> Apart from Germany, a number of countries, such as Canada,<sup>10</sup> South Africa,<sup>11</sup> Israel,<sup>12</sup> Sweden,<sup>13</sup> and Ireland,<sup>14</sup> have also introduced the concept of human dignity in their domestic constitutions.<sup>15</sup> While, human dignity has not traditionally played a role in English constitutionalism,<sup>16</sup> the idea is not entirely alien to the Anglo-Saxon tradition and finds some expression in case law as well as legislation.<sup>17</sup>

---

<sup>7</sup> The UDHR further holds that “the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.” Art 1 UDHR then elaborates: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

<sup>8</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 *United Nations Treaty Series* 171 (entered into force 23 March 1976).

<sup>9</sup> Emphasis added.

<sup>10</sup> *Canadian Charter of Rights and Freedoms* (1982), interpreted from s 15 (Equality Rights).

<sup>11</sup> *Constitution of the Republic of South Africa* (1996), s 1 lists human dignity as a founding value of the stage; s 10 expressly list a right to human dignity.

<sup>12</sup> *Declaration of the Establishment of the State of Israel 1948; Basic Law: Human Dignity and Liberty* (1992), s 2.

<sup>13</sup> *Constitution of Sweden* (1974), art 2.

<sup>14</sup> *Preamble to the Constitution of Ireland* (1937).

<sup>15</sup> For a more comprehensive overview on the use of human dignity in international and domestic context see McCrudden (2008), above n 5, 664-75.

<sup>16</sup> Möllers, above n 6, 421.

<sup>17</sup> See for example *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 605 (Baroness Hale); *R v Secretary of State for Work and Pensions, ex parte Carson* [2005] 1 AC 173, 190 (Lord Walker); *Environment Protection Authority v Caltex* (1993) 178 CLR 477, 545 (McHugh J); *Rochfort v Trade Practices Commission* (1982) 153 CLR 134, 150 (Murphy J). See also Simon Bronitt, “The common law and human dignity: Australian perspectives” in Jürgen Bröhmer (ed) *The German Constitution turns 60: Basic Law and Commonwealth Constitution - German and Australian Perspectives* (Peter Lang, 2011) 77.

This widespread reliance on human dignity - particularly in international treaties - has been attributed to human dignity being the lowest common denominator of the general theoretical foundation of liberalism. Its ideological roots in liberal philosophy emphasise not only the aspect of personal liberty, but also the autonomy of the individual. As McCrudden noted, the concept turns out to be vague enough to be compatible with a range of other religious and ideological views as well as tangible enough to be accepted without the requirement of further explanation.<sup>18</sup>

With its increasing prominence within human rights instruments and post-war constitutions, the range of literature on its meaning and use has grown significantly.<sup>19</sup>

One can now claim a minimum consensus that “each human being possesses an intrinsic worth that should be respected, that some forms of conduct are inconsistent with respect for this intrinsic worth, and that the state exists for the individual not vice versa”.<sup>20</sup> However, when these broad moral ideas are turned into concrete laws, controversies do readily occur. This is particularly the case when judges are required to protect a *right* to dignity. To avoid controversy, the right to dignity is often exercised in combination with other rights, such as the RFT or right to life.<sup>21</sup>

This thesis does not advocate for the creation of legal obligations based on human dignity, but rather presents human dignity as a philosophical concept that is generative of other specific rights, such as the RFT. As a consequence, a denial of a fair trial also constitutes a violation of the human dignity of the person.

---

<sup>18</sup> McCrudden (2008), above n 5, 677-78.

<sup>19</sup> For a discussion of various interpretations of human dignity see Stephen Riley, “Human dignity: comparative and conceptual debates” (2010) 6(02) *International Journal of Law in Context* 117.

<sup>20</sup> McCrudden (2008), above n 5, 723; see also *ibid*, 679 and Conor O’Mahony, “There is no such thing as a right to dignity” (2012) 10(2) *International Journal of Constitutional Law* 551.

<sup>21</sup> For the use of the right to dignity in Germany, see Möllers, above n 6, 423-25.

The concept of human dignity in the context to human rights is generally linked to the moral philosophy of Immanuel Kant, who famously expressed the maxim that individuals should always be treated as ends in themselves and not as means to an end.<sup>22</sup>

In an attempt to offer a modern interpretation Waldron stated:

“Dignity is the status of a person predicated on the fact that she is recognised as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her; it assumes she is capable of giving and entitled to give an account of herself (and of the way in which she is regulating her actions and organising her life), an account that others are to pay attention to; and it means finally that she has the wherewithal to demand that her agency and her presence among us as a human being be taken seriously and accommodated in the lives of others, in others’ attitudes and actions towards her, and in social life generally.”<sup>23</sup>

Due to these attributes, a person deserves to be treated respectfully. Any actions by the state limiting the respect accorded to a person would constitute a violation of the person’s dignity.

The argument here is that the RFT relates to the concept of human dignity, because the state is setting the ‘ground rules’ or legal procedural framework for dealing with individuals in any legal proceeding.<sup>24</sup> Regarding the autonomous status of a person, one can distinguish between two types of autonomy: (1) active autonomy, ie the freedom to participate, and (2) passive autonomy, ie the freedom not to participate, such as the right to silence. Both aspects are important for accepting an individual as a “competent”

---

<sup>22</sup> Immanuel Kant, *Groundwork for the metaphysics of morals* (Yale University Press, translated by Allen Wood, 2002).

<sup>23</sup> Jeremy Waldron, “How law protects dignity” (2012) 71(1) *Cambridge Law Journal* 200, 202.

<sup>24</sup> *Ibid*, 208 and 212.

participant in the trial, which qualifies the person as a subject, rather than treating him/her as an object.<sup>25</sup>

As procedural rules define the relationship between the state and the individual, guaranteeing dignity through these rules becomes a cornerstone of liberal democracy itself.<sup>26</sup> Ashworth characterised this relationship as such:

“The state is invested with far-reaching powers of investigation, prosecution, trial and sentencing, but in a democratic society it is expected to exercise these powers according to certain standards that show respect for the dignity and autonomy of each individual.”<sup>27</sup>

While only few legal decisions discussed in this thesis are directly based on arguments from human dignity, its influence is nevertheless apparent in some cases. For example, in the Australian terrorism trial of *Benbrika*, for example, the trial judge accepted the defence evidence that the treatment of the defendants in a high-security prison and the daily routine of transport and strip-searches would impact on the defendants’ mental health and thus on their ability to participate properly in the trial.<sup>28</sup> Regarding the security procedures as unfair, the judge set a deadline to stay the trial indefinitely unless a list of alterations to the defendants’ treatment – set out by the judge – were met.

---

<sup>25</sup> Markus Dubber, “The criminal trial and the legitimation of punishment” in Anthony Duff *et al* (eds.), *The trial on trial (Volume 1): truth and due process* (Hart Publishing, 2004) 85, 92-93.

<sup>26</sup> See Ronald Dworkin, *Justice for hedgehogs* (Harvard University Press, 2011) 379; Möllers, above n 6, 427; Josiah Ober, “Democracy’s dignity” (2012) 106(4) *American Political Science Review* 827.

<sup>27</sup> Andrew Ashworth, “Four threats to the presumption of innocence” (2006) 10 *International Journal of Evidence & Proof* 241, 249; see also Ian Dennis, “The right to confront a witness: meanings, myths and human rights” (2010) 4 *Criminal Law Review* 255, 260.

<sup>28</sup> *R v Benbrika & Ors* (No 20) [2008] VSC 80 (20 March 2008). It has been suggested that this ruling is an example of the capacity of the common law, albeit implicitly, to provide high levels of protection for the right to human dignity: Bronitt, above n 17, 77.



### 2.1.2 Fairness as a means to secure other rights

Procedural rights and fair trials also allow the defendant to secure other interests or protect rights. The fairness of the trial is therefore an important condition to determine whether such other interests are justified or rights legitimately exist. In this sense, the principle of fairness correlates directly to the interest/right in question. An obvious example is the use of legal process to vindicate the right to physical liberty (*habeas corpus*). Hence, fair proceedings are important to secure any right guaranteed by a legal system.

In the context of counter-terrorism, suspects may have a number of their (human) rights violated or denied, which may be corrected through instituting legal proceedings. These may include the right against discrimination (missing out on employment opportunities after being labelled a terrorist suspect),<sup>29</sup> freedom of speech (laws proscribing sedition and hate speech), freedom of religion (closure of mosques), or the right to a family life (when suspects are deported).<sup>30</sup>

One topic that has generated significant controversy in the United States, United Kingdom (UK) and Australia is the use of information gained through intrusive or ‘enhanced’ interrogation techniques and possibly even torture. The right not to be subjected to torture has been invoked in UK compensation cases against the Government.<sup>31</sup>

The link between the RFT and the vindication of these other rights is drawn, because under normal circumstances fair trial rights are protected separately. The significance

---

<sup>29</sup> See for example *Home Office v Tariq* [2011] UKSC 35 (13 July 2011).

<sup>30</sup> See for example *YM v Secretary of State for the Home Department* [2014] EWCA Civ 1292 (10 December 2014).

<sup>31</sup> See for example *R (on the application of Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65 (10 February 2010). See also Andrew Ashworth, *Human rights, serious crime and criminal procedure* (The Hamlyn Lectures, Sweet and Maxwell, 2002) 35-36.

and importance of this relationship, however, has been discussed in situations of public emergency, when trial rights can legitimately be derogated from, but other rights are absolutely protected from restriction under international law, such as the right not to be subjected to torture or inhuman or degrading treatment.

Thus it can be argued that certain aspects of the right to a fair trial, which are necessary for the protection of other non-derogable rights, must also be regarded as absolute, even though these aspects of the RFT are not explicitly listed in international human rights treaties. Without these corresponding judicial guarantees, non-derogable rights would be mere “empty shells”.<sup>32</sup> The connection stems from the inherent character of human rights treaties and is necessary for its effectiveness. Although the exact content is far from clear, the right of *habeas corpus*, as well as certain minimum conditions of justice and due process, have to be included.

This approach has been championed by the *American Convention on Human Rights* (ACHR)<sup>33</sup> and its oversight body, the Inter-American Court of Human Rights (IACtHR).<sup>34</sup> Although art 8 ACHR, which protects the right to a fair trial, is not listed as non-derogable under art 27 (2) ACHR, this article includes as absolute “the judicial guarantees essential for the protection of such [non-derogable] rights”. The wording obviously leaves room for interpretation, but it expresses clearly that there are corresponding procedural rights to the substantive rights protected from suspension in times of public emergency.<sup>35</sup> In two famous Advisory Opinions,<sup>36</sup> the IACtHR

---

<sup>32</sup> Andreas Zimmermann, “The right to a fair trial in situations of emergency and the question of emergency courts” in David Weisbrodt and Rüdiger Wolfrum (eds), *The right to a fair trial* (Springer, 1997) 747, 754.

<sup>33</sup> *American Convention on Human Rights*, opened for signature 21 November 1969, 1144 *United Nations Treaty Series* 123 (entered into force 18 July 1978).

<sup>34</sup> For general aspects see Juliane Kokott, “The Inter-American system for the protection of human rights” in David Weisbrodt and Rüdiger Wolfrum (eds), *The right to a fair trial* (Springer, 1997) 133.

<sup>35</sup> These are art 3 (Right to Juridical Personality), art 4 (Right to Life), art 5 (Right to Humane Treatment), art 6 (Freedom from Slavery), art 9 (Freedom from *Ex Post Facto* Laws), art 12 (Freedom of

elaborated on the scope and meaning of the phrase. The first one was on request of the Inter-American Commission on Human Rights and was related specifically to the protection of the writs of *habeas corpus* (art 7(6)) and *amparo* (art 25 (1)) during emergency situations.<sup>37</sup> Although both articles are not mentioned in art 27(2) ACHR explicitly, the question was whether they are part of the ‘essential judicial guarantees’.

The IACtHR first referred to the imperative in art 29 ACHR not to interpret any provision as restricting rights to a greater extent than is provided for, or as precluding rights that are inherent in representative democracy and thus to interpret all provisions in ‘good faith’;<sup>38</sup> and furthermore to the fact that the essential judicial remedies are those “that will effectively guarantee the full exercise of the rights and freedoms protected by [art 27(2)] and whose denial or restriction would endanger their full enjoyment”.<sup>39</sup>

In relation to *amparo* the IACtHR recognises that it can be applied to all rights of the Convention, hence also to those considered as non-derogable.<sup>40</sup> It further argued that

“*habeas corpus* performs a vital role in ensuring that a person’s life and physical integrity are respected, in preventing his disappearance or the keeping of his

---

Conscience and Religion), art 17 (Rights of the Family), art 18 (Right to a Name), art 19 (Rights of the Child), art 20 (Right to Nationality), and art 23 (Right to Participate in Government).

<sup>36</sup> Inter-American Court of Human Rights, “Habeas corpus in emergency situations” (Advisory Opinion OC-8/87 of 30 January 1987) and Inter-American Court of Human Rights, “Judicial guarantees in states of emergencies” (Advisory Opinion OC-9/87 of 6 October 1987).

<sup>37</sup> Art 25 (1) reads: “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.” The relationship between *amparo* and *habeas corpus* is not entirely clear. They can be seen as separate instruments or the latter can be understood as part of the former. See Inter-American Court of Human Rights, “Habeas corpus in emergency situations” (Advisory Opinion OC-8/87 of 30 January 1987) at [34]-[35]. Either way during emergencies they are complementary and both essential to protect against arbitrary deprivation of liberty.

<sup>38</sup> Inter-American Court of Human Rights, “Habeas corpus in emergency situations” (Advisory Opinion OC-8/87 of 30 January 1987) [15].

<sup>39</sup> *Ibid*, [29].

<sup>40</sup> *Ibid*, [32].

whereabouts secret and in protecting him against torture or other cruel, inhumane or degrading punishment or treatment.”<sup>41</sup>

Following from this, both *habeas corpus* and *amparo* are essential to guarantee other rights including those deemed as non-derogable.<sup>42</sup>

The IACtHR even went further, arguing that during an emergency the suspension of particular guarantees does not imply the temporary suspension of the RoL and disrespect of the principle of legality “by which [governments] are bound at all times”.<sup>43</sup> Whereas the intensity of legal restraints may differ in times of public emergencies, legality can never be reduced to the point where a government acquires absolute powers. The IACtHR emphasised that “there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law”;<sup>44</sup> and consequently, judicial oversight is ‘in order’ in a system governed by the RoL and that the writs of *habeas corpus* and *amparo* “serve, moreover, to preserve legality in a democratic society”.<sup>45</sup>

As this Opinion was targeted specifically at *habeas corpus* and *amparo*, it still left uncertainty in relation to art 8 ACHR, which was then addressed by a further Opinion requested by the Government of Uruguay.<sup>46</sup> The Opinion was largely based on the previous one. It stated that the writ of *amparo*, which guarantees a simple and prompt remedy, also incorporated the principle of effectiveness into the Convention. Thus art 25(1) ACHR is violated if there is no remedy or the one existent is illusory, which has to be decided according to the specific circumstances. In times of emergency this cannot be ignored, and “essential judicial guarantees” in art 27(2) ACHR have to be understood

---

<sup>41</sup> *Ibid*, [35].

<sup>42</sup> *Ibid*, [42].

<sup>43</sup> *Ibid*, [24].

<sup>44</sup> *Ibid*..

<sup>45</sup> *Ibid*, [40] and [42].

<sup>46</sup> Inter-American Court of Human Rights, “Judicial guarantees in states of emergencies” (Advisory Opinion OC-9/87 of 6 October 1987).

in this manner.<sup>47</sup> Art 8 ACHR contains procedural measures that, if observed, should guarantee such an effective and appropriate remedy. In its totality it expresses the concept of due process that is applicable during emergencies to the extent needed to fully enjoy the protection of the rights listed as non-derogable.<sup>48</sup>

Equally, the IACtHR embraced the principles included in Article 8 as necessary to preserve democracy and the RoL.<sup>49</sup>

Notwithstanding the above clarifications, it has been argued that the content and scope of the judicial guarantees of art 27(2) ACHR remain unclear, since the IACtHR did not provide an exhaustive list of minimum guarantees.<sup>50</sup> The Court maintained that the determination of unfairness is contextual and always depends on the facts of the specific case.<sup>51</sup> So far the ECtHR has not adopted the IACtHR's approach, despite some additional endorsement by the Human Rights Committee – the treaty body for the ICCPR – in its General Comment 29.<sup>52</sup>

These developments indicate the important relationship between fair trial rights and the enjoyment of other rights.

### 2.1.3 The role of fairness in promoting legitimacy in the criminal process

It is widely agreed that (at least one of) the purpose(s) of the criminal trial is to discover whether the charges laid on the defendant are true, in the sense of being sufficient to

---

<sup>47</sup> *Ibid*, [23]-[25].

<sup>48</sup> *Ibid*, [27]-[29].

<sup>49</sup> *Ibid*, [34]-[38].

<sup>50</sup> Stanislav Chernichenko and William Treat, "The right to a fair trial: Current recognition and measures necessary for its strengthening" (Final report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1994/24, 3 June 1994) [135].

<sup>51</sup> Inter-American Court of Human Rights, "Judicial guarantees in states of emergencies" (Advisory Opinion OC-9/87 of 6 October 1987) [40]. See also below at 4.3.1.

<sup>52</sup> See Human Rights Committee, *General Comment No 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) [15] and [16].

justify a guilty verdict in relation to the particular offences charged.<sup>53</sup> Hence, procedure is heavily geared towards promoting the finding of this legal truth. In particular the law of evidence is predominantly justified this way.<sup>54</sup>

The criminal trial is not however an autonomous exercise. Rather it forms part of how the state - as a liberal democracy - is organised.<sup>55</sup> Through its function of declaring conviction and determining punishment, the court imposes pain and suffering upon the defendant.<sup>56</sup> This potential coercive limit on liberty, applied against the will of that person, requires justification in order to be legitimate.<sup>57</sup> In other words, the verdict contains a moral aspect, which will only be respected within the community if the process is characterised by certain qualities. One of them is the principle of fairness. Although a factually inaccurate verdict can never be legitimate, “a factually accurate conviction may not be legitimate because it lacks moral authority”.<sup>58</sup> This would occur, for example, in cases where the evidence of guilt has been obtained by investigative methods, which disclose serious police illegality. In many legal systems the trial judge may exclude the evidence in the public interest, however compelling, reliable and incriminating it would be otherwise.<sup>59</sup>

---

<sup>53</sup> Cf Ho Hock Lai, “Liberalism and the criminal trial” (2010) 32 *Sydney Law Review* 243, 246 who argued that it is not for the court to find the truth about an offence as such. This is the duty of the police. If they are not convinced that the charges are true, the case should never make it to the court.

<sup>54</sup> See for a general discussion Heike Jung, “Nothing but the truth? Some facts, impressions and confessions about truth in criminal procedure” in Anthony Duff *et al* (eds.), *The trial on trial (Volume 1): truth and due process* (Hart Publishing, 2004) 147.

<sup>55</sup> Ho described the courts as an “institution of the liberal state” as well as “a liberal institution of the state”. See Ho, above n 53, 243.

<sup>56</sup> Antony Duff, *Trials and punishments* (Cambridge University Press, 1991) 1. For the connection of the trial and punishment see also Dubber, above n 25, 85.

<sup>57</sup> See Dennis, above n 27, 259, who refers to Ronald Dworkin that “in a liberal democratic states individuals have a special moral right against the moral harm involved in wrongful convictions”. For the understanding of legitimacy for the purposes of the thesis see above at 1.2.

<sup>58</sup> Ian Dennis, “Reconstructing the law of criminal evidence” (1989) *Current Legal Problems* 21, 35.

<sup>59</sup> See for example *Bunning v Cross* (1978) 141 CLR 54 (14 June 1978).

This clearly builds on the idea of treating the individual with respect and dignity.<sup>60</sup> But the focus here is different. The legitimacy of the outcome (namely the verdict) is relevant for the society and needs to be justified to the society as it defines the relationship between the state – acting through its institutions - and the individual.<sup>61</sup>

*A normative theory of the criminal trial*

Traditionally, theorists have focused on particular aspects of the trial, for example, the law of evidence, rather than developing normative theories of the criminal trial as a whole.<sup>62</sup> The aspect of legitimacy as a moral condition in the criminal trial as a whole has been particularly emphasised in the work of Professor Antony Duff.<sup>63</sup> His key claim is that a trial cannot solely be explained or justified by the search for truth. Given the importance of this aspect for the thesis, it is worth looking at the project in detail, as it best explains the role of fairness between the individual and the state.

Since the mid-1980s, Duff has argued for justifying punishment through “values which are intrinsic to the proper nature of the criminal law and the criminal process”.<sup>64</sup> This aspirational and normative account is based predominantly, but not exclusively, on

---

<sup>60</sup> See above at 2.1.1.

<sup>61</sup> This also includes how norms and procedures are perceived by the concerned individuals and the public at large, as discussed in the following Section, below at 2.1.4.

<sup>62</sup> Anthony Duff *et al*, *The trial on trial (Volume 3): towards a normative theory of the criminal trial* (Hart Publishing, 2007) 4.

<sup>63</sup> Duff first set out this argument in his monograph *Trials and punishments* first published in 1986, which he later elaborated in a co-authored book with Lindsay Farmer, Sandra Marshall and Victor Tadros, *The trial on trial (Volume 3): towards a normative theory of the criminal trial* (Hart Publishing, 2007); the book followed the edited Volumes 1 and 2 by the authors collecting essays from two workshops around the trial on trial project in 2003 and a three year research project funded by the Art and Humanities Research Council.

<sup>64</sup> Duff, above n 56, 10.

Kant's proposition that persons, including defendants, have to be accepted as autonomous moral agents.<sup>65</sup> Duff claims:

“that the law must make a moral demand on the allegiance and obedience of the citizen as a rational agent; that a criminal trial must therefore accord the defendant the status of a rational moral agent who is called to answer a charge of wrong-doing; and that we can usefully see the criminal trial and its verdict as a formal or institutional analogue of a moral process of criticism and blame.”<sup>66</sup>

Hence, there is link between the moral blame of a defendant, in the sense of accepting his/her wrong-doing, and the moral standards that are applied to judge the criminal behaviour, as the latter are justifications for the condemnation should the defendant refuse to accept the moral blame.<sup>67</sup> Both aspects are part of the same coherent criminal law system.<sup>68</sup>

Being – and accepting to be - a member of a community creates rights, responsibilities and obligations, which are necessary for the proper functioning of the community and enforced by the institutions of that community.<sup>69</sup> The criminal law defines some of these obligations in terms of refraining from particular behaviour. Once an offence is laid, the defendant - as a member of the community - has the responsibility to answer the charges.<sup>70</sup> By doing so the defendant also recognises the court as a legitimate authority to assess the charges against him/her.<sup>71</sup> Responsibility is therefore a necessary condition for liability.<sup>72</sup> The defendant can only be persuaded to take responsibility

---

<sup>65</sup> *Ibid*, 6, 102; see also above at 2.1.1.

<sup>66</sup> *Ibid*, 75.

<sup>67</sup> *Ibid*, 74.

<sup>68</sup> *Ibid*, 8.

<sup>69</sup> Duff *et al*, above n 62, 140.

<sup>70</sup> *Ibid*, 127-28, 140.

<sup>71</sup> *Ibid*, 146.

<sup>72</sup> *Ibid*, 130.



when treated and respected as a responsible agent.<sup>73</sup> Accepting the defendant as an autonomous agent further defines his/her standing during the trial.

Duff and his colleagues therefore understand the trial as a communicative process between the accused and the public with rights and responsibilities on both sides.<sup>74</sup> In his earlier work Duff stated:

“For just as the law itself must be justified *to* those on whom it is binding, so too a criminal verdict must be justified *to* the defendant on whom it is passed. The aim of a criminal trial is not merely to reach an accurate judgement *on* the defendant’s past conduct: it is to communicate and justify that judgment – to demonstrate its justice – *to* him and to others.”<sup>75</sup>

The counterpart of a state’s obligations to justify its actions in seeking to punish the defendant, is the defendant’s right to participate,<sup>76</sup> and equally to “call the state and its officials to account”.<sup>77</sup> Legitimacy is lacking if the defendant had no chance to properly rebut the charges put on him/her.<sup>78</sup> In order to do so basic rights have to be afforded to the defendant, commonly expressed in the RFT. Hence, limitations to the defendant’s participation in the trial, including the non-disclosure of relevant information, which impairs rebuttal of the charges, may seriously impair the legitimacy of the trial.

Importantly, in this theory, the individual has a moral status *within* that legal system and “the common good is the good of a community of rational agents”.<sup>79</sup> Consequently, institutions of a community, which were created to protect and promote values of that

---

<sup>73</sup> *Ibid*, 138.

<sup>74</sup> *Ibid*, 3.

<sup>75</sup> Duff, above n 56, 115 (emphasis in original).

<sup>76</sup> However, as part of the defendants’ passive autonomy they cannot be forced. See Dubber, above n 25, 92-93.

<sup>77</sup> Duff *et al*, above n 62, 96.

<sup>78</sup> *Ibid*, 127.

<sup>79</sup> Duff, above n 56, 98.

community, also need to respect the very same values in the pursuit of their task.<sup>80</sup>

Fairness, as one of these values, is therefore also not only for the benefit of the individual, but equally contributes to the proper purpose of the trial.

### *Contribution to the law of evidence*

Duff's theoretical framework has had an impact on the theory of the law of evidence. For example, it has informed academic debates over the availability of judicial remedies (exclusion or stay of proceedings) in cases where the evidence, though otherwise contributing to the finding of the truth, was obtained improperly or illegally through means such as torture or entrapment.<sup>81</sup> Countering a consequentialist approach based on the balancing of interests, Duff's work has shaped a principle of integrity. The question of how to remedy for improperly obtained evidence becomes crucially important in national security cases, where in the absence of disclosure, it is difficult to determine the precise circumstances (including the propriety of investigative methods) used to gather the evidence. Apart from questions concerning the accuracy of the information, there may be issues of its propriety, which puts a question mark over its integrity.<sup>82</sup>

Failure to address these legitimacy concerns poses a risk of corrupting the criminal process, creating a slippery slope that will change how the state interacts with its citizens. This constitutes a dangerous development in a liberal democratic society. The presumption of innocence, as a legal and political statement, demands that a person can only be treated as criminal after being convicted through a process which is both fair *and* legal. Undermining the proper treatment of defendants damages the presumption of

---

<sup>80</sup> *Ibid.*

<sup>81</sup> Mike Redmayne, "Theorizing the criminal trial" (2009) 12(2) *New Criminal Law Review* 287, 302. Cases such as *R v Looseley* [2001] UKHL 53 (25 October 2001) or *Ridgeway v The Queen* (1995) 184 CLR 19 (19 April 1995).

<sup>82</sup> See further Dennis, above n 27, 258; Dennis, above n 57, 38.

innocence and endangers the integrity of the institutions of the liberal state.

#### 2.1.4 The role of fairness in promoting citizen compliance with the justice system

The fairness of any proceedings, including those before judges, not only has an impact on the individual involved, but also on other people within the society, particularly but not exclusively those, who *associate* with the individual involved in the proceedings.<sup>83</sup>

In other words, procedural unfairness can have consequences in how far members of the public will cooperate with authorities in the future and whether they consider institutions as legitimate in general. In extreme cases this can even lead to social unrest or radicalisation amongst the associated community.<sup>84</sup> Governments want to avoid such backlashes given that the cooperation of the community is crucial in the fight against terrorism.<sup>85</sup>

Research on procedural fairness dates back to the 1970s, when Thibaut and Walker assessed the nature of procedural justice in legal decision-making through social-psychological methods.<sup>86</sup> Although their approach has been primarily applied in researching interactions between citizens and police, recent findings from the police environment may have implications for unfairness experienced within court processes,

---

<sup>83</sup> Adrian Cherney and Kristina Murphy, "Policing terrorism with procedural justice: the role of police legitimacy and law legitimacy" (2013) 46(3) *Australian and New Zealand Journal of Criminology* 403, 405-406. Studies also indicate that people react to injustice even if it does not directly concern their ethnic group or community. See Tom Tyler and Kristina Murphy, "Procedural justice, police legitimacy and cooperation with the police: a new paradigm for policing" (CEPS Briefing Paper, May 2011) 4.

<sup>84</sup> Examples can be found in Northern Ireland during the troubles. See for example Louise Richardson, "Britain and the IRA", in Robert Art and Louise Richardson (eds), *Democracy and counter-terrorism: lessons from the past* (United States Institute of Peace Press, 2007) 63, 85-87. In the current context see Waleed Aly, "Axioms of aggression: counter-terrorism and counter-productivity in Australia" (2008) 33(1) *Alternative Law Journal* 20.

<sup>85</sup> See for example Department of Prime Minister and Cabinet, "Counter-Terrorism White Paper: Securing Australia – Protecting our Community" (2010) 67. The White Paper does not mention the Muslim community as such. It rather refers to "families and friends of those vulnerable to violent extremism".

<sup>86</sup> John Thibaut and Laurens Walker, *Procedural justice: a psychological analysis* (L. Erlbaum Associates, 1975).

given the basic criteria for procedural justice were originally derived from research on legal proceedings.<sup>87</sup>

Thibaut and Walker identified two main aspects of how individuals can influence a procedure: process control and decision control.<sup>88</sup> Another influential study by Leventhal distinguishes six indicators of procedural justice: consistency, representation, ability to suppress bias (impartiality), decision quality (accuracy), correctability and ethicality.<sup>89</sup> Somewhat surprisingly, the criteria of the two studies do not overlap significantly apart from the criteria of representation,<sup>90</sup> which relates to a certain extent to both process control and decision control.<sup>91</sup>

These criteria used in social-psychological studies can be translated into the language of legal rights. They can be particularly found in the right of the defendant to participate, the principle of equality of arms, the right to an independent and impartial court, the presumption of innocence, and the right to appeal and review. Given that all these rights are part of the current legal systems in question, the lesson may be simply not to neglect these rights without risking dissatisfaction amongst associating members of the public. Nonetheless, given that these rights are also in conflict with other interests, the question remains how to protect them sufficiently to avoid counter-productive effects.<sup>92</sup>

---

<sup>87</sup> What might differ are some of the criteria, as different processes emphasise different aspects of procedural justice. See Tom Tyler, "What is procedural justice?: criteria used by citizens to assess the fairness of legal procedures" (1988) 22(1) *Law & Society Review* 103, 107. Nonetheless the causal link between the experience of unfairness and the consequences mentioned above would be arguably very similar.

<sup>88</sup> Thibaut and Walker, above n 86.

<sup>89</sup> Gerald Leventhal, "What should be done with equity theory?" in Kenneth Gergen, Martin Greenberg and Richard Willis (eds) *Social Exchange: Advances in Theory and Research* (1980) as discussed and cited in Tyler, above n 87, 104-110.

<sup>90</sup> Tyler, above n 87, 105.

<sup>91</sup> Although it is not clear in how far these categories really match. See *ibid*, 105. While representation takes up an important position, Tyler also adds that it is "but one of a number of concerns that define fair process. See *ibid*, 129.

<sup>92</sup> For the issue of balancing interests see below Chapter 4.

In a study analysing the cooperation of Muslim Americans in counter-terrorism policing, it was found that procedural fairness of police activities was a crucial factor determining perceptions of legitimacy and willingness to comply for the participants of the study.<sup>93</sup>

Other aspects that were expected to have featured similarly strong, such as “the severity of terrorist threats”, “police effectiveness”, and even “religiosity, cultural differences, and political background”, were of only little significance.<sup>94</sup>

Subsequent studies on the importance of procedural justice and legitimacy have come to similar results.<sup>95</sup> Hence, it is the rational perception of differential treatment and the failure to provide reasons for that treatment, rather than the association of religion, ie being Muslim, that reduces cooperation.<sup>96</sup> Equally it seems deterrence (through threats of more severe punishment) has little benefit for promoting cooperation with the police. In Northern Ireland, for example, severe coercive measures were usually followed by increased acts of Irish Republican Army (IRA) violence and resistance to the legitimacy of British rule.<sup>97</sup>

In sum, social-psychological studies indicate that the “vicarious experience”<sup>98</sup> of procedural unfairness by members of the public leads to a higher risk of terrorism due to a reduction of cooperation with the police. Furthermore, there is a likely risk that a lack of fairness in counter-terrorism procedures damages the legitimacy of the courts as

---

<sup>93</sup> Tom Tyler, Stephen Schulhofer and Aziz Huq, “Legitimacy and deterrence effects in counterterrorism policing: a study of Muslim Americans” (2010) 44(2) *Law & Society Review* 365, 368-69 and 385-86. Cooperation in the study included a range of activities from reporting crimes to assisting in counter-terrorism investigations.

<sup>94</sup> *Ibid.*

<sup>95</sup> See Aziz Huq, Tom Tyler and Stephen Schulhofer, “Mechanisms for eliciting cooperation in counterterrorism policing: evidence from the United Kingdom” (2011) 8(4) *Journal of Empirical Legal Studies* 728; Cherney and Murphy, above n 83, 403.

<sup>96</sup> Tyler, Schulhofer and Huq, above n 93, 386.

<sup>97</sup> Garry Lafree, Laura Dugan and Raven Korte, “The impact of British counterterrorist strategies on political violence in Northern Ireland: comparing deterrence and backlash models” (2009) 47(1) *Criminology* 17. See also Colm Campbell and Ita Connolly, “Making war on terror? Global lessons from Northern Ireland” (2006) 69 *Modern Law Review* 935.

<sup>98</sup> A term used by Kristina Murphy in this context.

perceived by members of the public. Most people might not have much experience with the courts, but counter-terrorism cases are widely publicised. Unfairness and miscarriages of justice might be taken as a *pars pro toto* by many people. The series of flawed terrorism cases in the UK during the 1980s serve as a good example.<sup>99</sup>

Another important but more general lesson from social psychology is that people are rational when it comes to counter-terrorism measures. Muslim citizens are not automatically opposed to intrusive measures, provided that they are perceived as fair. It follows that procedures must aim at avoiding crude consequentialism, in the sense of privileging the pursuit of convictions over respect for fundamental rights.

### 2.1.5 Conclusion

The four aspects discussed in this Section, which traversed theoretical as well as practical considerations, combine to present a diverse picture of fairness. It demonstrated the importance of fairness, not only for the individual, but also for society at large. The Section establishes that the degree of commitment to fairness characterises the relationship between the state and its citizens: upholding fairness in the legal proceedings respects the defendant as an autonomous participant in the trial process, and the need for the state to justify coercive measures that may follow from that process.

---

<sup>99</sup> For a discussion of these cases see for example John Niblett, *Disclosure in criminal proceedings* (Blackstone Press, 1997) Chapter 3. See also below at 6.1.

## 2.2 The principle of fairness in legal theory and the law

Fairness is a fundamental concept shaping our modern understanding of liberal democracies and arguably intrinsic to law itself. Consequently, fairness in the law has featured prominently in public law theory and within the jurisprudence surrounding legal norms, and the relationship between values, principles and rules in particular. This cornerstone function of fairness shows that the RFT should be understood as a constitutional principle.

### 2.2.1 Fairness as a value

The basic principle of a democracy is that the people elect its government. However, a modern understanding of a liberal democracy transcends this basic description.<sup>100</sup> Lord Steyn, for example, stated *ex curiae*:

“The democratic ideal involves two strands. First, the people entrust power to the government in accordance with the principle of majority rule. The second is that in a democracy there must be an effective and fair means of achieving practical justice through law between individuals and between the state and individuals.”<sup>101</sup>

The second strand Lord Steyn refers to is the judiciary’s task of solving conflicts between individuals, and individuals and the state. This relates not only to the interpretation of the rules expressed by the majority, but also concerns the application of

---

<sup>100</sup> Rather, a purely majoritarian rule is often described as the rule by the mob. On why a simple majoritarian rule is undemocratic, see for example Christopher Eisgruber, *Constitutional self-government* (Harvard University Press, 2001); Christopher Eisgruber, “Dimensions of democracy” (2003) 71 *Fordham Law Review* 1723.

<sup>101</sup> Lord Steyn, “Democracy through law” (2002 Robin Cooke Lecture, New Zealand Centre for Public Law, Occasional Paper No 12, 18 September 2002) 2; see also Ahron Barak, *The judge in a democracy* (Princeton University Press, 2006) 24-26.

the ground rules of a democracy, which can also limit the power of the majority.<sup>102</sup> This limitation on majority rule is justified for a number of reasons. First, it is assumed that all individuals are equal within a democracy, not only in having an equal say in the polls, but also that everyone has equal rights and freedoms. Some protection of individual fundamental rights is necessary to prevent these rights and freedoms being suppressed by the majority.<sup>103</sup> Second, in a democracy it is assumed that the government only holds power for the people as a trustee,<sup>104</sup> and thus must administer all powers for the benefit of the people.<sup>105</sup> Without such a requirement there would be tyranny.<sup>106</sup> While the scope of such a benefit will always cause controversy, there must be a branch to decide over conflicting interests, such as the use of coercive state power. Courts need to be involved both in determining whether the exercise of the power is justified and/or once it has been exercised whether it has been done so properly.<sup>107</sup> In *R v Looseley*, Lord Nicholls described the role of the courts as being to protect citizens from the state abusing its coercive powers:

“Every court has an inherent power and duty to prevent abuse of its process.

This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state.

[...] That would be a misuse of state power, and an abuse of the process of the

---

<sup>102</sup> These principles are also often protected by super-majoritarian amendment rules or even assumed to be unchangeable without a revolution.

<sup>103</sup> Rights must be understood here in its basis sense as legal claims of an individual, not as an aspirational claim. For a view that courts should not be able to interfere with Parliament *cf* Jeremy Waldron, “A right-based critique of constitutional rights” (1993) 13 *Oxford Journal of Legal Studies* 18.

<sup>104</sup> John Laws, “Beyond rights” (2003) 23(2) *Oxford Journal of Legal Studies* 265, 271; see also Guillermo O'Donnell, “The quality of democracy: why the rule of law matters” (2004) 15(4) *Journal of Democracy* 32, 38.

<sup>105</sup> O'Donnell, above n 104, 38.

<sup>106</sup> Laws, above n 104, 272.

<sup>107</sup> Barak, above n 101, 56.



courts. [...] The role of the courts is to stand between the state and its citizens and make sure this does not happen.”<sup>108</sup>

Finally, some judicial protections must be in place to protect democracy itself.<sup>109</sup> This can also include the protection of rights, which are considered crucial for the proper functioning of the democracy.<sup>110</sup>

Hence, in order to exercise the function of “achieving practical justice” in a democracy, as Lord Steyn put it, the courts themselves need to assume certain characteristics, such as independence and impartiality. And these characteristics in turn require to the courts to act fairly.

So while it can be argued that democracy automatically entails particular values and respect for rights,<sup>111</sup> others have distinguished more clearly between ‘democracy’, conceived as a majority rule, and ‘the constitution’ of a state, which determines the basic values of the state and regulates the relationship between the ruler and the ruled.<sup>112</sup> If so, the vindication of such basic rights and values is something that necessarily precedes democracy. As the English judge, Lord Justice Laws, observed extra-curially,

---

<sup>108</sup> *R v Looseley* [2001] UKHL 53 (25 October 2001) [1] (Lord Nicholls). In Australia see for example *R v Davison* (1954) 90 CLR 353, 380-381 (Kitto J).

<sup>109</sup> There is certainly no agreement on a definition of democracy and on how far judges can actually go in order to defend democracy. Ahron Barak recognises that there is a ‘spectrum’ between majority rule and what he calls a rule of values. But he concludes that there is a minimum of both types of rules without a regime cannot be considered democratic. See Barak, above n 101, 26. Hence, some came up with definitions such as ‘defensive democracy’ and ‘militant democracy’ that particularly emphasise the duty of the judges to defend democratic values and the rule of law. See also John Laws, “The good constitution” (Sir David Williams Lecture, Cambridge, 4 May 2012).

<sup>110</sup> O'Donnell, above n 104, 33.

<sup>111</sup> As modern democracy emerged together with the ideas of liberalism, these concepts are closely connected. “Democracy without civil liberties, the rule of law, or constitutionalism is not, in fact, democracy, but instead most likely rule of the mob by politically manipulative elites. The same can probably be expected of a democracy in which the citizenry lacks effective legal restraints on executive emergency action.” William Scheuerman, “Survey article: emergency powers and the rule of law after 9/11” (2006) 14(1) *Journal of Political Philosophy* 61, 74; see also Ho, above n 53, 243.

<sup>112</sup> This definition is borrowed from Laws, above n 109, 1; see also Lord Hailsham, *The dilemma of democracy: diagnosis and prescription* (Collins, 1978) 34.

the constitution is therefore logically prior to democracy,<sup>113</sup> and its quality is determined (separately) by consideration of the competing values of the parliamentary supremacy (the morality of government) and constitutional supremacy (the morality of law).<sup>114</sup> The role of fairness within the courts is therefore the same, but rather than stemming from democracy itself, according to Lord Justice Laws, is based on the “good constitution”.<sup>115</sup>

The relationship between fairness in general and the separation of power within a democracy has been recognised by the High Court in Australia in a number of cases.<sup>116</sup>

Lacking a bill of rights, Chapter III of the Australian Constitution - which vests judicial power within the High Court and thus establishes a separation of powers<sup>117</sup> – implies that courts cannot act in a manner inconsistent with the essential character of a court.<sup>118</sup>

While this may seem tautological, it infers that the court must act impartial and fairly.<sup>119</sup>

Justice Gaudron has made one of the strongest statements to this effect in the High Court decision of *Dietrich*:

---

<sup>113</sup> Without such values democracy can turn out as the tyranny of the majority, see John Laws, “Law and democracy” (1995) Spring *Public Law* 72.

<sup>114</sup> Laws, above n 109.

<sup>115</sup> John Laws, “The constitution: morals and rights” (1996) Winter *Public Law* 622, 623. See also for example Philip Joseph, “The demise of ultra vires: a reply to Christopher Forsyth and Linda Whittle” (2002) 8(2) *Canterbury Law Review* 463, 471.

<sup>116</sup> See for example *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607 (Deane J); *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1, 26; *Dietrich v The Queen* (1992) 177 CLR 292, 362 (Gaudron J); *Nicholas v The Queen* (1998) 193 CLR 173, 185 (Brennan CJ), 208 (Gaudron J), 226 (McHugh J). See C5.

<sup>117</sup> For the significance of the separation of powers as a feature of democracy in Australia see Haig Patapan, *Judging democracy: the new politics of the High Court of Australia* (Cambridge University Press, 2000) 171.

<sup>118</sup> *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

<sup>119</sup> see also Michael McHugh, “Does Chapter III of the Constitution protect substantive as well as procedural rights?” (2001) 21 *Australian Bar Review* 235; Wendy Lacey, “Inherent jurisdiction, judicial power and implied guarantees under Chapter III of the Constitution” (2003) 31 *Federal Law Review* 57; Fiona Wheeler, “The doctrine of separation of powers and constitutionally entrenched due process in Australia” (1997) 23 *Monash University Law Review* 248; Fiona Wheeler, “Due process judicial power and Chapter III in the new High Court” (2004) 32(2) *Federal Law Review* 205.

“The fundamental requirement that a trial be fair is entrenched in the Commonwealth Constitution by Ch. III's implicit requirement that judicial power be exercised in accordance with the judicial process.”<sup>120</sup>

These statements were not adopted by the majority in that case, though in the subsequent High Court decision of *Leeth Deane and Toohey JJ* stressed that Chapter III not only vests judicial power in the judiciary, but that the relevant provisions also “dictate and control the manner of its exercise. They are not concerned with mere labels or superficialities. They are concerned with matters of substance”.<sup>121</sup> Although no further decision has sought to draw a RFT implication from Chapter III, its constitutional significance has been accepted<sup>122</sup> as protecting some procedural rights.<sup>123</sup>

All the concepts and principles discussed above in the context of Chapter III are complex, and likely to generate significant controversy when examined in detail.<sup>124</sup>

While it is beyond the scope of this thesis to outline these issues in detail, it is sufficient to state that once it is accepted that judges have a democratic duty to solve conflicts between individual and the state, ensuring fairness becomes a crucial task for judges in the conduct of their proceedings. Although fairness may be better described as a value in this context, given the level of abstraction, it arguably has constitutional significance in the sense that it is important in a democracy to define the relationship between the

---

<sup>120</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 362 (Gaudron J); see also 326, (Deane J).

<sup>121</sup> *Leeth v Commonwealth* (1992) 174 CLR 455, 486-87.

<sup>122</sup> *Roberts v Blass* (2002) 212 CLR 1, 55 (Kirby J); James Jacob Spigelman stated: “The dominant view now appears to be that some form of protection of procedural rights is inherent in Ch III, although there is no clear majority decision to that effect”: Spigelman, above n 3, 32; the High Courts has also never accepted a free standing RFT: see *Lodhi v Regina* [2007] NSWCCA 360 (20 December 2007) [74] (Spigelman CJ). For more detail see below at 6.2.3. and 7.3.

<sup>123</sup> McHugh, above n 119, 237; James Stellios, *The federal judiciary: Chapter III of the Constitution* (LexisNexi Butterworths, 2010) 304; Winterton discussed that judicial power should include substantial rights, as they would be difficult to declare them without relying on political philosophy. George Winterton, “The separation of judicial power as an implied bill of rights” in Geoffrey Lindell (ed), *Future directions in Australian constitutional law* (Federation Press, 1994) 185, 207. See also Lacey, above n 119, 60.

<sup>124</sup> For a detailed analysis of Chapter III of the Australian Constitution see Stellios, above n 123.

rulers and ruled. As the role of the courts is commonly defined by law and their behaviour is shaped by judicial understandings of the RoL, fairness is often described as a legal principle.

### 2.2.2 Fairness as a legal principle

It is commonly accepted that the RoL is a fundamental principle of the Australian and British legal system. The RoL is even considered as having a constitutional quality or status,<sup>125</sup> though its meaning and scope is much debated and contested.<sup>126</sup> As Brian Tamanaha, a leading scholar in the field, has observed, “everyone is for it, but have contrasting convictions about what it is”.<sup>127</sup>

The question is how much substance the RoL provides for the judges when they interpret legislation. According to AV Dicey, in his seminal writings on the topic in the 19<sup>th</sup> century, there are two key constitutional principles: parliamentary sovereignty and the RoL.<sup>128</sup> The orthodox view is that the former is the dominant one, but the latter has to be observed when exercising the former. Whether this can actually constrain Parliament or simply gives guidance is thus controversial.

From a positivist tradition the RoL is presented as a political ideal rather than a legal principle.<sup>129</sup> Once the RoL is perceived as a political aspiration, it can at times be outweighed by other ideals. Hence, despite the fact that Parliament is bound by the RoL,

---

<sup>125</sup> Section 1 of the *Constitutional Reform Act 2005* [UK] refers to the rule of law as a constitutional principle.

<sup>126</sup> Jonathan Rose, “The rule of law in the Western world: an overview” (2004) 35(4) *Journal of Social Philosophy* 457

<sup>127</sup> Brian Tamanaha, *On the rule of law: history, politics, theory* (Cambridge University Press, 2004) 3. Apart from these dogmatic debates, the phrase has also suffered from misuse. For example, in the Latin American context the rhetoric of promoting the rule of law has been exploited in order to foster authoritarian ideologies. See O'Donnell, above n 104, 45.

<sup>128</sup> Jeffrey Jowell, “The rule of law and its underlying values” in Jeffrey Jowell and Dawn Oliver (eds), *The changing constitution* (Oxford University Press, 7<sup>th</sup> ed, 2011) 11.

<sup>129</sup> Jeffrey Goldsworthy, “Legislative sovereignty and the rule of law” in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical essays on human rights* (2001) 61.

it is up to its members to define it. Jeffrey Goldsworthy summarised this conception of the RoL as follows,

“while the rule of law is more than the rule of the law, it must be less than the rule of good law. A conception of the rule of law that incorporated every political virtue, properly weighted and balances, would be useless for practical purposes.”<sup>130</sup>

As such, the RoL is value neutral as much as democracy can be reduced to majoritarian rule. Equality and rights must therefore be enacted in order to be applied by the courts.<sup>131</sup> All the RoL has to do is to make sure the law is “capable of guiding the behaviour of its subjects”.<sup>132</sup> From such a point of view, fairness - as an important part of the RoL - has to be reduced to ‘procedural fairness’. However, this view is not universally shared, with some judges doubting that such a procedural conception of fairness is sufficient. In *Dietrich*, Gaudron J famously recognised that:

“The expression ‘fair trial according to law’ is not a tautology. In most cases a trial is fair if conducted according to law, and unfair if not. If our legal processes were perfect that would be so in every case. But the law recognizes that sometimes, despite the best efforts of all concerned, a trial may be unfair even though conducted strictly in accordance with law.”<sup>133</sup>

Based on such an understanding, the significance of the RoL as a substantive principle is gaining ground in academic circles.<sup>134</sup> Dyzenhaus, in the course of his “rule of law project”, argues that AV Dicey has been misinterpreted in relation to the representation

---

<sup>130</sup> *Ibid*, 65.

<sup>131</sup> Tamanaha, above n 127, 27.

<sup>132</sup> Goldsworthy, above n 129, 66 (referring to Joseph Raz’s work).

<sup>133</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 362 (Gaudron J).

<sup>134</sup> Jowell, above n 128, 12; for this trend see below common law constitutionalism.

of the two principles of parliamentary supremacy and the RoL. According to Dyzenhaus, there are indications that even Dicey regarded the principles as equals.<sup>135</sup>

Judges have also become increasingly critical about legislation limiting individual rights. Lord Bingham, one of the most distinguished and influential judges of his generation,<sup>136</sup> dedicated the Sixth Sir David Williams Lecture to the RoL.<sup>137</sup> Lord Bingham suggested that the core of the RoL involved the following,

“[t]hat all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publically and prospectively promulgated and publically administered in the courts.”<sup>138</sup>

Lord Bingham was aware that his definition would need “exception and qualification”, but insisted that any deviation from the principles involved would call for “close consideration and clear *justification*”.<sup>139</sup> For more guidance, he identified sub-rules included within the RoL, one of which is that “adjudicative procedures provided by the state should be fair”.<sup>140</sup> The word ‘should’ indicates that the concept is normative and that it may not always be absolute. Lord Bingham elaborated on the attributes of fairness, which in addition to the requirement that the adjudicator be independent and impartial, requires that,

“a matter should not be finally decided against any party until he has had an *opportunity to be heard*; that a person potentially subject to any liability or

---

<sup>135</sup> David Dyzenhaus, *The constitution of law: legality in a time of emergency* (Cambridge University Press, 2006) 54-58; David Dyzenhaus, “*Schmitt v Dicey: are states of emergency inside or outside the legal order?*” (2006) 27(5) *Cardozo Law Review* 2005, 2031.

<sup>136</sup> Lord Bingham, *Lives of the law: selected essays and speeches 2000-2010* (Oxford University Press, 2011) v (introduction by Jeffrey Jowell).

<sup>137</sup> Lord Bingham, “The rule of law” (2007) 66(1) *Cambridge Law Journal* 67.

<sup>138</sup> *Ibid*, 69.

<sup>139</sup> *Ibid* (emphasis added). The need for justification should be an indication that when in conflict with other interests, rule of law principles cannot be simply balanced away. It would need positive evidence that deviation is necessary and would otherwise have significant negative consequences.

<sup>140</sup> *Ibid*, 80.

penalty should be adequately informed of what is said against him; that the accuser should make *adequate disclosure* of material helpful to the other party or damaging to itself; that where the interests of a party cannot be adequately protected without the benefit of professional help which the party cannot afford, public assistance should so far as practicable be afforded; that a party accused should have an adequate opportunity to prepare his answer to what is said against him; and that the innocence of a defendant charged with criminal conduct should be presumed until guilt is proved.”<sup>141</sup>

His inclusion of the right to be heard, the necessity of disclosure, as well as providing adequate, opportunity to answer charges are important for the purposes of this thesis.<sup>142</sup>

In this context Lord Bingham also criticised the increasingly used method of dealing with certain issues outside the “strictly criminal sphere” in order to avoid disclosure to anyone other than the decision maker.<sup>143</sup>

Taking up such an important aspect of the RoL, fairness itself should be recognised as constitutional. While as a principle there may be wide agreement for such constitutionality, there will certainly be less agreement in relation to the scope and details as set out by the description of Lord Bingham.

The implication of a constitutional status would make it harder for parliament, politically, to abrogate the RFT in the interests of national security. It may also ‘tip the balance’ for the courts who may be called upon to weigh and balance, and sometimes even choose, between countervailing interests.

---

<sup>141</sup> *Ibid*, 80-81. (emphasis added)

<sup>142</sup> Lord Bingham also stated other sub-rules, which are related to the right to a fair trial but are of a more general nature. They include that government agents ought to exercise their powers in good faith (*ibid*, 78) and according to law (*ibid*, 72); see also Jowell, above n 128, 20-22.

<sup>143</sup> Lord Bingham, above n 137, 81.

### 2.2.3 Fairness as a legal rule

Based on the principles described above, several aspects of the RFT have found their ways into legal sources, ranging from international human rights treaties to domestic statutes and rules developed under the common law. As a complete overview of the legal sources relating to fairness is beyond the scope of this thesis, and those sources relevant specifically to the rules of disclosure in Australia and the UK will be discussed in Part 2, only a few general remarks will be made here supporting the characterisation of the RFT as a constitutional principle.

#### *Fairness under International law*

All major international human rights instruments cover rights relating to the fairness of the trial. Particularly relevant are the two main human rights treaties: the ICCPR and the ECHR.<sup>144</sup> Although art 14 ICCPR and art 6 ECHR are central for the protecting the RFT,<sup>145</sup> other articles must be taken into consideration to understand the protection in its entirety.<sup>146</sup> Furthermore, articles governing limitations and derogations of these rights can gain significance,<sup>147</sup> as the RFT is generally not considered to be an absolute right under those instruments. But while derogations are permissible during declared periods of “public emergencies threatening the life of the nation”, any derogation must

---

<sup>144</sup> Despite the focus on these two treaties, others can gain relevance, as the international courts tend to acknowledge and influence each other.

<sup>145</sup> For commentary on art 14 ICCPR see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (Engel, 2<sup>nd</sup> ed, 2005) 302 and David Weissbrodt, *The right to a fair trial under the UDHR and the ICCPR* (Martinus Nijhoff, 2001); for commentary on art 6 ECHR see Alistair Mowbray, *Cases and Material on the European Convention on Human Rights* (Oxford University Press, 2<sup>nd</sup> ed, 2007) 341 and Claire Ovey and Robin White, *Jacobs and White: the European Convention on Human Rights* (Oxford University Press, 4<sup>th</sup> ed, 2006) 158.

<sup>146</sup> The protection from arbitrary and delayed detention (art 9 ICCPR; art 5 ECHR), from torture and cruel, inhuman and degrading treatment (art 7 ICCPR; art 3 ECHR), the prohibition of retrospective criminal laws (art 15 ICCPR; art 7 ECHR), and the right to an effective remedy (art 2 ICCPR; art 13 ECHR) all complement the art 14 ICCPR and art 6 ECHR.

<sup>147</sup> Arts 4 and 5 ICCPR and arts 15 and 18 ECHR



be strictly necessary.<sup>148</sup> Hence, there is also the general understanding that a full derogation of due process during emergencies would not be justified in any case.<sup>149</sup>

The relevance of international law in both Australia and the UK is limited as both countries are considered to be *dualist* rather than *monist*.<sup>150</sup> Dualism means that international and domestic law are regarded as two separate systems of law, and that in order to be enforced by the national courts, obligations under international law must first be enacted through domestic legislation.<sup>151</sup> Hence, not only is it within the hands of the national parliament to decide what status a rule has within that jurisdiction, but the international norm can also be subject to local interpretation or modification after it has been enacted into domestic law. The dualist limitation is however softened to some extent by a common law presumption for courts to interpret ambiguous legislation in line with the country's international obligations.<sup>152</sup>

#### *Fairness under the common law*

Without question, a majority of the attributes considered today to be essential to the RFT has been developed under the common law. These include important innovations such as the presumption of innocence,<sup>153</sup> the rule against double jeopardy,<sup>154</sup> and the

---

<sup>148</sup> Art 15 ECHR. See *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004) [121]-[133] (Lord Hope).

<sup>149</sup> Jaime Oraá, *Human rights in states of emergency in international law* (Oxford University Press, 1992) 88-90.

<sup>150</sup> Given the introduction of the HRA in the UK, which incorporated most of the ECHR into the UK legal system, the dualist approach lost most of its significance in relation to human rights. For more details see C5.

<sup>151</sup> See Malcolm Shaw, *International law* (Cambridge University Press, 5<sup>th</sup> ed, 2003) 122. This is in contrast to *monist* countries, where international law is directly applicable and does not have to be enacted as domestic law.

<sup>152</sup> For example *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 (Gummow and Hayne JJ); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

<sup>153</sup> *Woolmington v DPP* (1935) AC 462 (23 May 1935).

<sup>154</sup> *Cullen v The King* [1949] SCR 658 (9 May 1949).

rules in relation to hearsay and anonymous witness<sup>155</sup>. Although the common law has lost much of its importance in the modern law of evidence and procedure, due to codification and consolidation legislation, the common law remains crucial for the purposes of this thesis.<sup>156</sup> This concerns in particular the inherent common law power of judges to stay proceedings in order to avoid a miscarriage of justice. Put simply:

“The central thesis of the administration of criminal justice is the entitlement of an accused person to a fair trial and wherever this is not met there will be a miscarriage of justice.”<sup>157</sup>

However, despite such an “entitlement”, the common law approach to fairness does not focus on the rights of the individual, but rather on the integrity of the court and the fairness of the procedures as such. In *Dietrich* the majority held that,

“the accused’s right to a fair trial is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial, for no person can enforce a right to be tried by the State.”<sup>158</sup>

Hence, the RFT ensures the trial itself must not be unfair, rather than providing an individual accused with specific rights (such as the right to legal representation).

However, as the majority conceded, “it is convenient, and not unduly misleading, to refer to an accused’s positive right to a fair trial”.<sup>159</sup> The approach of the High Court in

*Dietrich* coheres with the common law’s general attitude to rights. As all governmental

---

<sup>155</sup> *R v Davis* [2008] 1 AC 11281, 1137.

<sup>156</sup> References are predominately made to Australian cases. While in the UK the HRA serves now as the primary source for the RFT, in Australia the common law is still relevant to much larger extent. However, the RFT recognised as a constitutional law even before the introduction of the HRA: see for example *R v Brown (Winston)* (1994) 1 WLR 1599, 1606.

<sup>157</sup> *McKinney v The Queen* (1991) 171 CLR 468, 478; see also *R v Horseferry Road Magistrates Court, ex parte Bennett* [1994] 1 AC 42, 68 (Lord Oliver).

<sup>158</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 299 (Mason CJ and McHugh J).

<sup>159</sup> *Ibid.*

action should be based on law, individual liberty is residual – it is the result of the residue of liberty remaining when what has been expressively prohibited by law is taken into account. As Doyle and Wells explained, “[o]ur thinking does not proceed from rights to results – rather, our rights are the result.”<sup>160</sup>

The consequences for judicial decision-making become clear when examining the relationship between abuse of process and fairness. In *Dietrich*, Brennan J clarified that “[a]lthough unfairness is a characteristic of an abuse of process, not every case of unfairness amount to an abuse of process”.<sup>161</sup> This stems from the fact that “courts cannot, by declaring a novel rule of the common law, create a justification for refusing to exercise their jurisdiction”.<sup>162</sup> In other words courts cannot stay proceedings where there is no abuse of process. In this respect, distinguished constitutional scholar, Zines commented that,

“[w]hile the Court has continued to affirm that Chapter III restricts the power of Parliament to interfere with due process in the courts, it has left open the question of what common law rules are essential to the judicial process and which can be modified or changed by Parliament.”<sup>163</sup>

Apart from the tensions between Parliament and the courts over what is fundamental, another reason for refusing to lay down specific rules can be found in the inherent functioning of the common law. Spigelman J observed *ex curiae* that the fair trial principle emerged through the common law method of induction.<sup>164</sup> It is a paramount

---

<sup>160</sup> John Doyle and Belinda Wells, “How far can the common law go towards protecting human rights” in Philip Alston (ed), *Promoting human rights through bill of rights: comparative perspectives* (Clarendon Press, 1999) 17.

<sup>161</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 342. Although this statement was made in dissent, it is still the predominate view within the Australian judiciary.

<sup>162</sup> *Ibid.*

<sup>163</sup> Leslie Zines, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008) 274.

<sup>164</sup> Spigelman, above n 3, 29.

feature of the common law that every case is judged, and relevant rule determined, by reference to its particular facts. The identification of principles in the common law emerge only by the same decisions in similar cases over long periods of time.<sup>165</sup> As a consequence a common law principle is never paramount; it is the particular precedent, expressing the binding legal rule that is applied, distinguished or simply ignored through a process of desuetude. This analytical method based on induction guarantees the common law its high degree of flexibility.<sup>166</sup>

Why courts should be allowed to interfere with the will of Parliament has been also a matter of debate within public law theory. In the last decade, common law constitutionalism (CLC) has emerged as a new theoretical framework proclaiming the constitutionality of settled rules and principles stemming from the common law.<sup>167</sup>

Based on the strength of the common law to create rational rules, which also represent society's fundamental values, CLC requires lawmakers and the executive to act in line with certain 'fundamental' common law principles. The courts can review the compliance and thus CLC challenges absolute parliamentary supremacy. This does not question the legitimacy of statutes and the fact that the legislator can override the common law more generally, provided that it does not form part of the constitutional fabric.<sup>168</sup>

---

<sup>165</sup> *Ibid*, 29-30.

<sup>166</sup> *Ibid*, 30: "It is continually adapted to new and changing circumstance."

<sup>167</sup> For a comprehensive general overview see Thomas Poole, "Back to the future? Unearthing the theory of common law constitutionalism" (2003) 23(3) *Oxford Journal of Legal Studies* 435.

<sup>168</sup> Cooke P (as he was then) in *Fraser v State Services Commission* [1984] 1 NZLR 116, 121: some common law rights which go "so deep that even Parliament cannot be accepted but he courts to have destroyed them". See also Doyle and Wells, above n 160, 64; T R S Allan, "Text, context and constitution: the common law as public reason" in Douglas Edlin (ed), *Common law theory* (Cambridge University Press, 2007) 185.

CLC draws its legitimacy primarily from the quality of the common law process, both in terms of its development and substance.<sup>169</sup> This stems from the fact that common law judges not only state a rule and outcome, but also seek to explain and justify its decisions based on reason.<sup>170</sup> The role of reason has a venerable pedigree - distinguished jurist, Sir Edward Coke, famously argued in the 17<sup>th</sup> century (ultimately unsuccessfully) for a form of common law supremacy over statute in *Doctor Bonham's Case*: “for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void”.<sup>171</sup>

Drawing on such pedigree, CLC continues to gain some degree of acceptance in the UK.<sup>172</sup> Indeed, some aspects of CLC are not entirely foreign to Australia. Dixon CJ wrote *ex curiae* that the common law was the “ultimate constitutional foundation” including the Australian (written) Constitution.<sup>173</sup> If accepted, CLC is a powerful tool for promoting higher levels of rights protection within a system lacking any constitutional bill of rights. But it has to be stated clearly that CLC is not in line with the Australian judicial tradition of deference to parliament, in which judges are reluctant

---

<sup>169</sup> Arguments of that sort often refer back as far as to Aristotle and Cicero. See Tamanaha, above n 127, 7. cf Tom Campbell, “Emergency strategies for prescriptive legal positivists: anti-terrorist law and legal theory”, in Victor Ramraj (ed), *Emergencies and the limits of legality* (Cambridge University Press, 2008) 221.

<sup>170</sup> Douglas Edlin, “Introduction” in Douglas Edlin (ed), *Common law theory* (Cambridge University Press, 2007) 1, 3. Although there is actually no legal obligation for common law judges to provide reasons for their decision, the convention is well established: see *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 (30 April 2002) [15].

<sup>171</sup> (1610) 8 Co Rep 113b at 118a; although at the time the courts generally did not accept the opinion.

<sup>172</sup> For example *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 (22 February 2002 [71] (Lord Laws).

<sup>173</sup> Sir Owen Dixon, “The common law as an ultimate constitutional framework” in his *Jesting Pilate* (Law Book Co, 1965) 203 as cited in Jeffrey Goldsworthy, “The myth of the common law constitution” in Douglas Edlin (ed), *Common law theory* (Cambridge University Press, 2007) 205.

to apply general and abstract principles to limit or confine unambiguous commands of the legislature.<sup>174</sup>

This discussion shows that the common law will intervene in cases where unfairness not only disadvantages the defendant, but is considered sufficiently serious to threaten the integrity of the judicial process. While the judges recognise Parliament's supremacy in relation to regulating the judicial process, there is a 'gap' in which serious unfairness to the defendant may occur. However, judges may not be prepared to characterise this 'legislatively approved' unfairness as an abuse of process.

#### *Fairness under domestic statutes*

The overview of legal sources of fairness so far clearly indicates the recognition of fairness as a general principle of law. However the substance or content of this principle requires further elaboration. Enacting specific provisions in domestic statutes is arguably the most effective means of giving effect to the general principle of fairness. Statutes regulating the judicial process have the advantages of defining the scope of protection more clearly and regulating its application in more detail. Furthermore, the relationship of these fairness rules to other rules are easier to determine: for example, although particular methods of gathering evidence may be unfair and presumptively inadmissible, legislation may grant a residual discretion to admit the evidence in the interests of justice. Apart from general human rights statutes, as has been introduced in the UK with the HRA, other rules in relation to fairness are common with the law of evidence and general procedures.

---

<sup>174</sup> For a more critical analysis of common law constitutionalism see Thomas Poole, "Constitutional exceptionalism and the common law", (2009) 7(2) *International Journal of Constitutional Law* 247, 263-69.

While specific fairness rules often provide clearer guidance for the judge, they can also be easily amended by parliament. Particularly in times of crisis, exceptions may be introduced without necessarily considering how the reforms relate to the wider principles involved. The impact of counter-terrorism legislation on the RFT certainly falls into this category. The tensions involved will be at the core of the discussion in Part 2 of the thesis.

### 2.3 Applying fairness as a constitutional principle

In the UK there is a lively debate of whether the *Human Rights Act 1998* (UK) (HRA) has created a “new British constitution”.<sup>175</sup> It is argued that, when passing the legislation, Parliament intentionally attributed the power to judges to review all governmental action in accordance with the HRA, interpret any legislation in line with the Act, and make declarations of incompatibility once violations occurs.<sup>176</sup> Hence, while Parliament gave up some of its sovereignty, it still can ignore declarations of incompatibility, thus leaving the traditional notion of parliamentary supremacy intact.<sup>177</sup> And, as the legislation is not entrenched, parliament may repeal the HRA at any time!

While the HRA includes the RFT, even under the common law the principle of fairness had been regarded as constitutional.<sup>178</sup> In Australia, lacking a bill of rights, general principles as discussed in this Chapter retain greater significance.<sup>179</sup>

The discussion in this Chapter has not only portrayed fairness as crucial part of the fabric of a liberal democracy, but also as integral part of the RoL. These characterisations strongly suggest that the principle of fairness must be regarded as constitutional. In other words, an entitlement of citizens to be treated with fairness is characteristic of the relationship between the rulers and the ruled in a liberal democracy governed by the RoL. While it is important to clarify this status as a base to build on further arguments, the constitutionality of fairness as a *principle* may not be highly

---

<sup>175</sup> See Vernon Bogdanor, *The new British Constitution* (Hart Publishing, 2009). See below at 5.1.1.

<sup>176</sup> *Ibid*, 59-62.

<sup>177</sup> See for example *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 132 (Lord Hoffmann).

<sup>178</sup> *R v Brown (Winston)* (1994) 1 WLR 1599, 1606.

<sup>179</sup> See below at 5.2.1.



controversial. This is also indicated by its inclusion in international human rights catalogues<sup>180</sup> as well as accepted as being ‘fundamental’ under the common law.

However, while fairness as a general principle may enjoy the status of constitutionality, the rules which are often associated with the RFT, such as the right to participate in the trial, to confront witnesses or retain a lawyer of one’s own choosing, are not included. While it can be said that these rules are critically important for the fairness of the trial, the RFT is not absolute and not every limitation on these rights would necessarily render the trial process unfair. These specific rules may be better described as aspirations of a complete RFT. Hence, in reality it may appear that the principles fairness is rather a principle guiding politics than one that is constitutionally binding. Such a view is however misguided, as this Chapter has demonstrated.

Defining a more substantive (and comprehensive) version of RFT is still problematic for a number of reasons. One recurring argument of critics of a substantive RoL or CLC, rather than procedural version, is that while agreement can be easily found at the level of general principles, filling these principles with substance through judicial development inevitably courts controversy. This is why elaboration of specific substantive rights should be left to Parliament. Furthermore, in order to allow for the development of the RFT through precedent under the common law requires the flexibility to adjust to the circumstances of the particular case. But most importantly, certain aspects of the RFT can conflict with other legitimate interests or rights, such as national security.

What can be concluded at this stage is that accepting that fairness has (to some degree) a constitutional foundation adds a particular value, weight and significance to the

---

<sup>180</sup> In most countries, international treaties can be applied directly by the courts and take precedent over regular statutes. See Shaw, above n 151, 122.

principle,<sup>181</sup> which surpasses mere rhetoric. This concession to its ‘constitutional’ quality has a number of implications for the application of the specific RFT rules (even if not absolute), as well as the overall approach to fairness:

- First, in recognising a constitutional principle of fairness the courts must apply the same methodology for protecting, and resolving conflicts with other constitutionally protected rights and interests.
- Secondly, at all times, respect for the RFT must be maximised, and any limitation to the RFT must be justified.
- Thirdly, as a constitutional principle, the duty to ensure fairness is not only a matter for the courts, but must apply to other branches of government, including parliament and the executive.

These implications will be crucial for building my overall argument of the importance of fairness principles in the remaining parts of the thesis.

This Chapter has discussed the various rationales behind the RFT, revealing that its importance transcends the interest of individual accused, and extends equally to the collective public interest: not only is fairness crucial for individuals standing trial as responsible autonomous agents and a means to secure other rights, it also supports the broader public interest by securing the legitimacy of state coercion (at the pre-trial, trial and sentencing phases) and upholding public confidence in the courts and legal process more generally. While these various aspects explain why fairness is reflected in such a broad range of legal sources, it is equally a reminder for government officials, lawmakers and judges to consider when seeking to impose limits on fairness in the interest of national security.

---

<sup>181</sup> Lord Steyn, above n 101, 12.

This Chapter has reviewed the history and role of the fairness as a legal principle within liberal democracies and as an attribute of the RoL. The principle has been shaped by the common law, which has conceptualised fairness as a vital ingredient in protecting the integrity of the judiciary and maintaining public confidence in the legal process. This explains why fairness under the common law has traditionally focused on procedural rights. This can be contrasted with post war human rights instruments, which have tended to emphasise the importance of fairness, conceived as a right of the individual that has become the object of state action.

But in order to assert fairness as a starting point in assessing a conflict between competing interests, the specific interest has to be accepted as a right in the first place. Fundamentally, fairness will only be a legal right where it is granted to individuals along with an effective remedy to enforce it. With its focus on protecting the integrity of the court, the common law does not provide specific rights or remedies to individuals – which is commonly accepted as part of the RFT under international law. The only remedy is the general power of the court to prevent the abuse of its processes (the abuse of process doctrine), which triggers, at the discretion of the court, a stay of proceedings.

This analysis demonstrates the importance of clarifying what is meant by fairness in a particular circumstance and, in practical terms, what aspects of fairness can and cannot be enforced. This also explains the common criticism that while there is much rhetoric around the fundamental importance of fairness, the principle readily gives way to other compelling interests, such as the needs to control crime or protect national security.<sup>182</sup>

---

<sup>182</sup> See for example Doreen McBarnet, *Conviction: law, the state and the construction of justice* (Macmillan Press, 1984). Even in the case law the RFT has been described as absolute (see for example *Dyer v Watson* [2002] UKPC D1 (29 January 2002) [73] (Lord Hope)), but then added limitations nonetheless.

A final observation relates to the *means* of protecting fairness. It is well established that courts have a duty to protect fairness in legal processes by virtue of their constitution as courts of justice within a liberal democracy. That said, precision of legislation rather than rhetoric of the common law provides a better mechanism for giving effect to the principle of fairness in specific contexts. Unlike the common law, specific legislation avoids the inevitable conflict over which organ of government has paramount authority, since the legislature can clarify (with greater precision and certainty) both the scope, content and limits of fairness in counter terrorism cases. This approach also fits better into the legal tradition, evident in the UK and Australia that maintains a strong commitment to parliamentary supremacy. But in the absence of such legislation fully recognising fairness as a constitutional principle, the courts have to step up whenever fairness is degraded to mere rhetoric.

## **Chapter 3: The protection of sensitive information and the associated risks of disclosure**

Since terrorist attacks are capable of causing many deaths and destroying property, as well as causing fear and panic in the community, governments generally aim to prevent attacks before they occur. The policy preference for preventive measures has spawned a range of new criminal terrorist offences targeting preparatory and supporting conduct. Parliaments have also introduced executive measures authorising coercive measures against terrorism suspects. These measures are usually restricted in duration, but are available without the state having to prove the commission of, or even attempt to commit, an actual terrorist offence. These developments have effected both the investigation methods used by police and security forces, and the evidence used and arguments made in counter-terrorism proceedings. In particular, in order to intervene before offences occur authorities increasingly rely on ‘intelligence’, being material gathered through clandestine methods, rather than evidence. The main purpose of intelligence is to guide law enforcement investigations rather than as evidence in open court.

This Chapter examines these developments, analysing their impact on the rules of evidence. While the law arguably had to adjust to the post 9/11 security environment, the Chapter argues that the use of ‘intelligence-type’ information as evidence bears inherent risks to fair trial standards. The term ‘intelligence-type evidence’, for the purposes of this thesis, refers to information that meets the thresholds of admissibility, according to the (modified) rules of evidence applied to the particular proceedings,

though in basic character being closer to ‘intelligence’ than ‘evidence’ as traditionally understood.<sup>1</sup>

Identifying some of the differences between ideal-types of evidence and intelligence reveals the distinct aims, priorities and values that underpin intelligence methodologies. These methodologies are generally not conducive to fairness when the gathered information is used by the state in legal proceedings. From the perspective of fairness it is logical that tendered evidence should be open to scrutiny and challenge when doubt exists about its quality. Instead, given the need for secrecy about sensitive intelligence-based information the state typically seeks to prevent the defence from gaining access to that material and thus from challenging it.

The research in this Chapter supports the thesis argument: understanding the risks stemming from the use of intelligence-type evidence in counter-terrorism proceedings is important for the process of non-disclosure decisions in both criminal and quasi-criminal proceedings.<sup>2</sup> In particular, it can contribute to answering the question of what safeguards are required in order to avoid unfairness to the defendant.

But to start with, the next Section examines the growth of intelligence post 9/11, and the legal trend toward earlier intervention (in ‘pre-crime’ societies) that blur traditionally distinct categories of evidence and intelligence.

---

<sup>1</sup> The term will be further discussed below at 3.2.

<sup>2</sup> An associated issue is the question of whether special proceedings, with lowered standards of fairness, even fulfill the requirements of the principle of legality, ie that the law is clear and predictable and framed in such a way that it can be subjected to judicial review. However, an enquiry into the issues is beyond the scope of this thesis. For a discussion of the principle and its application to counter terrorism law, see David Dyzenhaus, *The constitution of law: legality in a time of emergency* (Cambridge University Press, 2006); “The compulsion of legality” in Victor Ramraj (ed), *Emergencies and the limits of legality* (Cambridge University Press, 2008) 33; David Dyzenhaus, “Cycles of legality in emergency times” (2007) 18 *Public Law Review* 165.

### 3.1 Pre-crime and counter-terrorism

This Section traces the increased use and suppression of sensitive information in terrorism proceedings, and how this trend has increased conflicts with the right to a fair trial (RFT). This trend must first be placed in the wider context of developments of counter-terrorism measures and offences post-9/11.

Since 9/11 the main policy goal in countering terrorism in Australia and the UK has been to concentrate proactively on the prevention of terrorism, rather than merely facilitating its prosecution following the commission of terrorist attacks. Given the devastating effects of terrorist attacks, and the likely death of the perpetrators during attacks, the prioritisation of prevention is not surprising. Consequently, the focus of the police and security forces has therefore shifted from ‘post-crime’ (the point *after* the attack has been committed), which is the predominant approach within criminal justice, to ‘pre-crime’ (the point *before* the anticipated attack).<sup>3</sup>

This shift to pre-crime has changed the understanding and approach to security in general. Lucia Zedner, one of the leading scholars in researching the phenomenon of prevention within the field of criminal justice, explained:

“Security is less about reacting to, controlling or prosecuting crime than addressing the conditions precedent to it. The logic of security dictates earlier and earlier interventions to reduce opportunity, to target harden and to increase surveillance even before the commission of crime is a distant prospect.”<sup>4</sup>

---

<sup>3</sup> This concept and term “pre-crime” first appeared in the 1956 sci-fi short story, *The Minority Report* by P.K. Dick. The story inspired the 2002 Hollywood movie of the same title starring Tom Cruise in which a specialist ‘Precrime’ Division’, drawing on intel from mutants, seeks to arrest suspects prior to any infliction of public harm. *Minority Report* (Directed by Steven Spielberg, Twentieth Century Fox Film Corporation *et al*, 2002).

<sup>4</sup> Lucia Zedner, “Pre-crime and post-criminology” (2007) 11(2) *Theoretical Criminology* 261, 265.

In order to pursue such a strategy, risk assessments have become a central tool in fighting crime and terrorism.<sup>5</sup> Security agencies therefore identify risks and assess the likelihood and degree of a future harm. Assessments not only direct investigations, but also can become the basis for preventive measures in order to avoid anticipated harm.<sup>6</sup>

In some instances policies may go even further in their effort to prevent crime, driven by the principle of *precaution*,<sup>7</sup> which aims at protecting the population from situations where irreversible damage is suspected notwithstanding the uncertainty about the precise level of threat.<sup>8</sup> This approach reflects what Donald Rumsfeld famously described as dealing with “unknown unknowns”.<sup>9</sup> Measures that are based on the precautionary principle include mass data collection and profiling of larger groups suspected of engaging in particular harmful behaviour. Data stemming from such methods can then again be used to develop other risk assessments.<sup>10</sup>

---

<sup>5</sup> Lucia Zedner, *Security* (Routledge, 2009) 78; Lucia Zedner, “Neither safe nor sound: the perils and possibilities of risk” (2006) 48(3) *Canadian Journal of Criminology and Criminal Justice* 423, 424.

<sup>6</sup> In this regard the term “prevention” may be misleading as it already has a defined meaning within the field of criminology. There, it refers to measures “which reduce opportunities for the commission of crimes or address the broader context in which people commit crimes through social and environmental strategies.” (Angus McCullough and Sharon Pickering, “Counter-terrorism: the law and policing of pre-emption”, in Nicola McGarrrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (Routledge, 2010) 13,15.) Hence, prevention in this sense does not use coercive or punitive measures. However, in the context of counter-terrorism states often go further and authorise surveillance, interference or disruption and even preventive detention in cases, where the actual threat has not yet materialised. McCulloch and Pickering therefore suggest that the term “pre-emption” is more appropriate. (*Ibid*, 13) This term, which they borrow from the theory of international relations and international law, describes an anticipatory self-defence, which does include direct action. See for example Anthony Anghie, “The war on terror and Iraq in historical perspective” (2005) 43(1)(2) *Osgoode Hall Law Journal* 45. But given the widespread inaccuracy, the thesis will equally use the terms interchangeably.

<sup>7</sup> This concept originated in the context of environmental damage; see Stephen Gardiner, “A core precautionary principle” (2006) 14(1) *Journal of Political Philosophy* 33.

<sup>8</sup> Lucia Zedner, “Fixing the future? The pre-emptive turn in criminal justice” in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating deviance: the redirection of criminalisation and the futures of criminal law* (Hart Publishing, 2009) 35, 44; Zedner (2009), above n 5, 83.

<sup>9</sup> Department of Defense news briefing on February 12, 2002. The transcripts has since been removed from the website. The comment made reference to the fact that there are things we know that we know and things we know that we do not know.

<sup>10</sup> A distinction can be drawn between risk management, which can be driven by the precautionary principle, and risk assessment, which aims at using objective criteria for its predictions. See Zedner (2006), above n 5, 423.



Crime prevention has always been part of traditional police strategies and thus pre-crime measures are not entirely new within the field of criminal justice. On the one hand, there are long standing offences within the criminal law that target actions pre-dating the commission of the ‘actual crime’. They include the inchoate offences of conspiracy, incitement and attempt,<sup>11</sup> as well as certain forms of complicity, such as counselling and procuring. More recently, administrative measures have appeared in various areas of the law to prevent future harms. One prominent example is the regime to detain sex offenders, who have served a sentence, but are still considered to be a danger to the community.<sup>12</sup> While development towards pre-crime did not start with the 9/11 attacks, it is undisputable that counter-terrorism has contributed enormously to this development further enhancing pre-crime measures.

In order to prevent terrorist attacks, states have introduced a wide range of offences penalising preliminary, preparatory or supporting actions not falling within the scope of traditional inchoate offences.<sup>13</sup> Worth mentioning are property offences, such as owning or possessing certain items regularly used for attacks;<sup>14</sup> financing and supporting offences;<sup>15</sup> training offences;<sup>16</sup> and status offences penalising membership or

---

<sup>11</sup> Simon Bronitt and Bernadette McSherry, *Principles of criminal law* (Thomas Reuters, 3<sup>rd</sup> ed, 2010) 443.

<sup>12</sup> For example *Sexual Offences Act 2002* (UK), s 104; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 13; for a comprehensive discussion about preventive measures in the UK see Ashworth and Zedner, *Preventive justice* (Oxford University Press, 2014).

<sup>13</sup> Bernadette McSherry, “Expanding the boundaries of inchoate crimes: the growing reliance on preparatory offences” in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating deviance: the redirection of criminalisation and the futures of criminal law* (Hart Publishing, 2009) 141.

<sup>14</sup> For example *Terrorism Act 2000* (UK), s 57(1) (Possession for terrorism purposes); *Criminal Code Act 1995* (Cth), s 101.4 (Possessing things connected with terrorist acts).

<sup>15</sup> For example *Terrorism Act 2000* (UK), s 16 (Use and possession); *Terrorism Act 2006* (UK), s 5 (Preparation of terrorist acts); *Criminal Code Act 1995* (Cth), s 101.6 (Other acts done in preparation for, or planning, terrorist act); *Criminal Code Act 1995* (Cth), s 102.6 (Getting fund to, from or for a terrorist organisation); *Criminal Code Act 1995* (Cth), s 103.1 (Financing terrorism).

<sup>16</sup> For example *Terrorism Act 2000* (UK), s 54(5) (Weapons training); *Terrorism Act 2006* (UK), s 6 (Training for terrorism); *Criminal Code* (Cth), s 101.2 (Providing or receiving training connected with terrorist act).

association with proscribed groups.<sup>17</sup> Even parking in a restricted area can amount to a criminal offence.<sup>18</sup> Many of these offences criminalise acts below the traditional ‘attempt’ threshold, namely conduct that is “more than merely preparatory” for the commission of the full offence.<sup>19</sup> Another difference is that pre-crime offences need not be linked to a particular attack in the future. For example the offence *Preparation of terrorist acts* in the United Kingdom (UK) expressively states:

“It is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally.”<sup>20</sup>

This type of criminal offence is clearly distinguishable from ordinary complicity liability, where liability is derivative, being dependent on the conviction of the primary offender and requiring actual knowledge of the essential matters of the particular offence.<sup>21</sup> Pre-crime offences may even criminalise actions beyond the standard conspiracy offence.<sup>22</sup> The *actus reus* for conspiracy offences must surpass the negotiation stage and often, in many common law jurisdictions, requires proof of an ‘overt act’ following agreement by the accused to act unlawfully.<sup>23</sup> It has even been noted that inchoate liability may apply to these ‘pre-crime’ terrorist offences, leading to the prospect of a “pre-pre-crime offence”!<sup>24</sup>

Another distinctive feature is that the mental element (*mens rea*) becomes less relevant in pre-crime offences. A number of these offences impose strict liability and provide the

---

<sup>17</sup> For example *Terrorism Act 2000* (UK), s 11 (Membership); *Criminal Code Act 1995* (Cth), s 102.3 (Membership of a terrorist organisation).

<sup>18</sup> *Terrorism Act 2000* (UK), s 51.

<sup>19</sup> *Britten v Alpogut* [1987] VR 929, 938; see also Bronitt and McSherry, above n 11, 446.

<sup>20</sup> *Terrorism Act 2006* (UK), s 5(2); see also *Criminal Code Act 1995* (Cth), s 101.6(2)(b).

<sup>21</sup> *Giorgianni v The Queen* (1985) 156 CLR 473 (18 April 1985).

<sup>22</sup> *Mulcahy v The Queen* (1868) LR 3 HL 306 (10 July 1868): conspiracy requires an agreement between two or more people to commit an unlawful act and the intention to commit that act.

<sup>23</sup> For example *Criminal Code Act 1995* (Cth), s 11.5(2)(c).

<sup>24</sup> McCulloch and Pickering, above n 6, 19.

defendant with limited defences with which to contest liability.<sup>25</sup> Hence, the blameworthiness is largely inherent in the act itself, with innocence being a matter to be established by the defence by proving, typically on the balance of probabilities, a valid and available defence.<sup>26</sup>

Pre-crime measures are not limited to offences. Executive pre-crime measures in counter-terrorism, such as terrorism control orders or preventative detention orders, have also exceeded previous measures.<sup>27</sup> In very general terms, such orders can restrict the liberties of the individual, who are assessed as having engaged previously, or are at risk of engaging, in terrorist activities. In relation to this determination, the issuing authority has to engage in a risk assessment of the individual being involved in terrorism, and also whether the proposed order is capable of preventing an attack. This is to some extent different to the above-mentioned restrictions on sex offenders. There, the court not only makes an assessment of ‘dangerousness’, which is a psychological evaluation aiming at predicting a person’s future behaviour on the basis of an individual’s past behaviour, they also require a previous criminal conviction.<sup>28</sup>

The developments described in this Section explain why the shift to pre-crime has an impact on the investigation methods of such offences and measures and consequently on the type of evidence increasingly used in counter-terrorism proceedings. This includes the use of sensitive information, not only as direct evidence relevant to the matter in issue, but also as circumstantial evidence. The significance of sensitive

---

<sup>25</sup> For example For example *Terrorism Act 2000* (UK), s 57(1)(2)

<sup>26</sup> However, as this reverse burden of proof impacts on the presumption of innocence, the English courts have interpreted the standard of proof for the defence as only raising a doubt before the burden returns to the prosecution to rebut the defence beyond reasonable doubt. See for example *Attorney General's Reference No 4 of 2002* [2004] UKHL 43 (14 October 2004).

<sup>27</sup> So for a more detailed description and discussion on these measures see Chapter 7.

<sup>28</sup> See Zedner, above n 8, 38-39; for a discussion on the Australian sex offender regimes see Patrick Keyzer and Bernadette McSherry, “The preventative detention of sex offenders: law and practice” (2015) 38(2) *University of New South Wales Law Journal* 792. While intelligence analysts are also using psychological markers in the suspect’s past behavior, if such information is available, their methods are much broader. See below at 3.2.

information, although only providing circumstantial evidence, is apparent from the examination of the use of sensitive information in the *Lodhi* case, discussed in the next section.

### 3.2 Intelligence in counter-terrorism proceedings.

The further removed pre-crime measures (criminal offences and administrative measures) are from an anticipated attack, the harder it is for the prosecution to present persuasive evidence that actions that may appear generally innocent are actually terrorism-related. For example, in *Lodhi*, the accused, an architect, was charged *inter alia* with being in the possession of two maps of the Sydney electricity supply system.<sup>29</sup> While possession of such documents by an architect, in isolation, would not be suspicious, the prosecution built its case on circumstantial evidence, including ASIO evidence that linked Lodhi to the French terrorist Willie Brigitte, in order to prove that his possession of these documents were indeed part of terrorist plot.<sup>30</sup>

In order to get information capable of predicting developments and assessing risks, the police increasingly rely on methods and strategies traditionally associated with the work of intelligence agencies, such as wire-tapping, surveillance, data analysis, and the exchange of information with foreign intelligence agencies.<sup>31</sup> For these purposes, the police have introduced or developed their own intelligence units.<sup>32</sup> These so-called “special branches” also represent a further institutional melding.<sup>33</sup> Much of the information generated is also often referred to as criminal intelligence, and is protected

---

<sup>29</sup> *R v Lodhi* [2006] NSWSC 691 (23 August 2006).

<sup>30</sup> For further discussion see McSherry, above n 13, 143.

<sup>31</sup> For a historical overview of such methods see Zedner, above n 8, 35.

<sup>32</sup> Clive Walker, “Intelligence and anti-terrorism legislation in the United Kingdom” (2005) 44 *Crime, Law & Social Change* 387. See also Jean-Paul Brodeur, “High and low policing in post-9/11 times” (2007) 1(1) *Policing* 25; Clive Walker, “The pursuit of terrorism with intelligence” in Jon Moran and Mark Phythian (eds), *Intelligence, security and policing post-9/11: the UK's response to the 'war on terror'* (Palgrave Macmillan, 2008) 54. However, this tactic is not limited to counter-terrorism. See Jerry Ratcliffe, *Intelligence-led policing* (Willan Publishing, 2008).

<sup>33</sup> While these “special branches” were originally established to increase cooperation with the intelligence community, the intelligence culture seems to have spilled over to such an extent that they are now themselves often removed from the rest of the police force. See Nina Cope, “Intelligence led policing or policing led intelligence?” (2004) 44 *British Journal of Criminology* 188. However, this study into intelligence-led policing has been made in 2004 and improvements are likely to be expected. See also Kent Roach. “The eroding distinction between intelligence and evidence in terrorism investigation” in McGarrity *et al* (eds.), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (2010) 56-59.

in a similar fashion and for the same reasons as the work of the national security intelligence agencies.<sup>34</sup>

Hence, it can be said that pre-crime measures regularly rely on sensitive information. However, admitting such intelligence into counter-terrorism proceedings can have an adverse impact on the fairness of the proceedings. To understand the consequences Kent Roach suggested comparing ‘ideal-type evidence’ and ‘ideal-type intelligence’.<sup>35</sup> Such an enquiry can reveal the values choices associated with the different types of information and thus allow conclusions in relation to the risks of that value in a trial. The following section will further examine the differences between intelligence and evidence that may pose a risk to the RFT, particularly in cases where intelligence is not properly scrutinised through an adversarial process.

### 3.2.1 Intelligence versus evidence

The term ‘intelligence’ can be understood both as a process and a product where one leads to the other.<sup>36</sup> As a process, intelligence in the national security realm has been defined as what “states do in secret to support their efforts to mitigate, influence, or merely understand other nations (or various enemies) that could harm them”.<sup>37</sup> To do so intelligence agencies are traditionally tasked with monitoring and collecting information for the purpose of risk assessments, which is intelligence as a product. While the

---

<sup>34</sup> Exemplary is the Australian statutory definition of criminal intelligence in relation to serious crime orders in a number of Australian jurisdictions: see *Serious and Organised Crime (Control) Act 2008* (SA), s 3 (definition); *Criminal Organisation Act 2009* (Qld), s 59; *Liquor Licensing Act 1997* (SA), s 4; *Crimes (Criminal Organisations Control) Act 2009* (NSW), s 3. The definition has been developed under the Counsel of Australian Governments (COAG) in relation to the restriction of particular firearms. For further discussion and the definition of criminal intelligence below at 7.3.2.

<sup>35</sup> Kent Roach. “The eroding distinction between intelligence and evidence in terrorism investigation” in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (2010) 48, 50.

<sup>36</sup> For all the meanings of intelligence see Loch Johnson, “Introduction” in Loch Johnson (ed), *Handbook of intelligence studies* (Routledge, 2009) 1, 1-5.

<sup>37</sup> Michael Warner, “Sources and methods for the study of intelligence” in Loch Johnson (ed), *Handbook of intelligence studies* (Routledge, 2009) 17; see also Johnson, above n 36, 1.

definition above suggests that intelligence agencies concentrate on foreign threats, they also operate domestically to identify subversive elements within their own populations.<sup>38</sup> However, importantly for this thesis, the process and product of intelligence were never intended for prosecuting individuals. Rather intelligence assessments would be communicated to the government or other law enforcement agencies to develop security policies.<sup>39</sup> While only indirectly relevant to the argument of the thesis, it should be mentioned briefly that in the post 9/11 environment the collection and secret use of intelligence within these agencies has equally increased to a worrying extent. The lack of proper overview of these uses has opened up another area of potential human rights abuses as prominently evidenced by the leaks of Edward Snowden.<sup>40</sup>

When comparing the ideal-type of evidence and the ideal-type of intelligence, differences become apparent in three main aspects. They concern secrecy, quality and their relation to politics. The thesis will now examine each of these aspects in turn.

### 3.2.1.1 Open justice versus Secrecy

Legal proceedings are generally guided by the principle of open justice, which requires, as famously been described by Lord Hewart CJ, that “justice should not only be done, but should manifestly and undoubtedly be seen to be done”.<sup>41</sup> Hence, any evidence to be relied upon should be presented in open court.

---

<sup>38</sup> This concerned in particular the political left. See for example Frank Cain, “Australian intelligence organisations and the law: a brief history” (2004) 27(2) *University of New South Wales Law Journal* 296.

<sup>39</sup> See for example ASIO Act 1979, s 17 has an advisory role.

<sup>40</sup> See David Anderson QC, “A question of trust” (Report of the Investigatory Powers Review by the Independent Reviewer of Terrorism Legislation, June 2015); Royal United Services Institute, “A democratic licence to operate” (Report of the Independent Surveillance Review, July 2015).

<sup>41</sup> *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, 259; see generally Joseph Jaconelli, *Open justice: a critique of the public trial* (Oxford University Press, 2002).

This is contrasted by the tendency for intelligence (both processes and products) to remain secret. Secrecy is important for two sets of reasons: one is political, the other practical. As intelligence is used to shape policies and divert resources, governments prefer this information be kept out of the public eye. The exchange of information with foreign agencies, regularly accompanied with the mutual assurance from one government to another not to disclose the information involved, provides another political dimension for secrecy.<sup>42</sup> When states do not abide to their commitments they run the risk of damaging their sources and good relations with allies. Furthermore, there are practical reasons for secrecy: the disclosure of intelligence may endanger operatives and other human sources, such as informers, and may reveal the methods of intelligence collection and tactics used.

The value of maintaining informational secrecy within the intelligence community is best indicated by the ‘mosaic theory’. This theory assumes that a “scrap of information which, in itself, might seem to have no bearing on national security may, when put together with other information, assume a vital significance”.<sup>43</sup> Hence, this theory, which informs agency approaches to information gathering and management, runs a high risk of over-classification.

The prevailing culture of intelligence is that information need only be disclosed on a ‘need-to-know’ basis, ie to disclose only as much information as strictly necessary for any particular (agency-approved) purpose. In order to keep sources secret, agencies are even in the habit of destroying raw intelligence once a report has been written.<sup>44</sup>

---

<sup>42</sup> Roach, above n 35, 60.

<sup>43</sup> *Church of Scientology v Woodward* (1982) 154 CLR 25, 51; *Watson v AWB Limited (No 2)* [2009] FCA 1047 (17 September 2009) [33]; *Secretary of State for the Home Department v AF and others* [2008] EWCA Civ 1148 (17 October 2008) [24]: “the closed material is comprised of a mosaic of information drawn in various combinations, depending on the particular case, from a variety of sources such as (1) intercept evidence, (2) covert surveillance evidence and (3) agent reporting”.

<sup>44</sup> Roach, above n 35, 50.



Intelligence which is retained otherwise is protected by classifying the information and penalising any form of unauthorised disclosure of such ‘official secrets’.<sup>45</sup>

Although there is no question about the need to keep some information secret, the extensive classification of information has been criticised as having negative effects. Most prominently the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights pointed out that the secrecy stemming from the increased use of intelligence gathering, storing and sharing “can sometimes be no more than a cloak to avoid proper accountability”.<sup>46</sup> In the UK, special advocates involved in control order procedures have criticised the over-classification of information, claiming that there was hardly any case in which they were involved where additional information was not requested and subsequently disclosed in the course of the proceedings.<sup>47</sup>

In the US context, Podesta has argued that the high level of secrecy robs the public of important information regarding the nature of current security threats and what to do if they materialise.<sup>48</sup> Further, the tendency to keep information secret “to be on the safe side” creates a vast amount of secret information that is hard to analyse or administer, or indeed protect from unauthorised disclosure.<sup>49</sup> He therefore suggests that governments should rather adopt clear guidelines for classification and declassification and thus limit the range of information that needs to be kept from the public eye for justifiable reasons.

---

<sup>45</sup> The system only grants limited access to persons with the appropriate security clearance, and under the modern law, such security clearances may need to be first obtained for lawyers and court personnel in order to participate. See below at 6.2.3.2 and 7.2.2.

<sup>46</sup> International Commission of Jurists, *Assessing damage, urging action: executive summary* (Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, 2009) 10.

<sup>47</sup> Martin Chamberlain, “Special advocates and procedural fairness in closed proceedings” (2009) 28(3) *Civil Justice Quarterly* 314, 320. See also below at 7.2.2.

<sup>48</sup> John Podesta, “More secrets less security” in Richard Leone and Greg Anrig (eds), *Liberty under attack: reclaiming our freedom in an age of terror* (Public affairs, 2007) 87, 94-97.

<sup>49</sup> See below the comments in relation to the 9/11 Report.

This would allow the agencies to be more efficient in terms of keeping information secret and enable greater data-sharing between agencies.<sup>50</sup>

Secrecy around intelligence-type information may create a number of fair trial issues. Finding the right approach might be difficult, but there is a strong indication that more information is deemed classified than is actually necessary.<sup>51</sup>

### 3.2.1.2 Minimum standards of accuracy

All information obtained by state officials in the course of crime prevention or investigation is done so in order to determine whether or not a suspected ‘fact’ is likely to exist. One of the main differences between intelligence and evidence is that the latter information, in order to be admissible to legal proceedings before a court of law, should comply with the rules of evidence. The purpose of these rules is to improve the quality and accuracy of the process of gathering evidence and thus of the evidence itself.<sup>52</sup> The police, as the main actor for gathering evidence, should consider these legal criteria, and many of the rules are reflected in the police guidelines and codes of practice. A prominent example is the requirement that arrested persons are given police caution (relating to their legal rights, including the right to remain silent) before being interviewed.

Intelligence on the other hand, since it is not gathered to be adduced in a legal proceeding, is not subject to this body of law. While it is still subject to the rule of law, which imposes some minimal restriction on state action through the operation of human rights, such as the right to liberty and the freedom from torture, the principle does not

---

<sup>50</sup> Podesta, above n 48, 103-104.

<sup>51</sup> See also Ann Beeson, “The secrecy trump” in Richard Leone and Greg Anrig (eds), *Liberty under attack: reclaiming our freedom in an age of terror* (Public affairs, 2007) 235 (in the US context).

<sup>52</sup> Jeremy Gans and Andrew Palmer, *Australian principles of evidence* (Cavendish Publishing Ltd, 2<sup>nd</sup> ed, 2004) 1.

effectively regulate state action, particularly when agencies are operating abroad.<sup>53</sup> If intelligence stems from foreign sources, it will sometimes be impossible to test the accuracy of the information.<sup>54</sup> Thus, information obtained by illegal, improper or unethical methods, while not being admissible as evidence in a court of law, can still be provide intelligence relevant to the process of risk assessment.<sup>55</sup>

Another aspect of procedural rules that have an impact on the accuracy of the information stems from the role and effect of independent scrutiny. Evidence is presented in an open court and challenged by the defence, often with the help of expert witnesses. Ultimately, it will be evaluated as being true or false, reliable or unreliable, by an independent fact-finder (either a jury or magistrate) and can only be relied upon where it meets the relevant standard of proof.<sup>56</sup> Again, intelligence is also not subject to such an independent process of evaluation. In particular intelligence officers are themselves assumed to be the experts. While there is some internal governmental oversight in order to avoid an abuse of power,<sup>57</sup> given the need for secrecy, intelligence agencies have not viewed such oversight as a priority.<sup>58</sup> This has improved to a certain extent in recent decades through the use of specialist monitors and the subjection of

---

<sup>53</sup> See for example the interviews in *Thomas* conducted by AFP and ASIO officers in Pakistan, but which were ultimately deemed inadmissible due to a non-compliance with Australian law: *R v Thomas* [2006] VSCA 165 (18 August 2006); see generally Brian Forst, *Terrorism, Crime and Public Policy* (Cambridge University Press, 2009) 368.

<sup>54</sup> The International Commission of Jurists raised some concern about the sharing of information. Although vital for the prevention of attacks, “[t]he Panel was informed that [the trend of sharing intelligence between countries] often results in government action being taken on the basis of unsubstantiated intelligence (sometimes gathered by dubious or unlawful methods), and that many abuses have been documented”. See International Commission of Jurists, *Assessing damage, urging action: executive summary* (Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, 2009) 10.

<sup>55</sup> Roach, above n 35, 53.

<sup>56</sup> In criminal proceedings the standard of proof is ‘beyond reasonable doubt’ and in civil proceedings ‘the balance of probabilities’.

<sup>57</sup> For risks stemming from a lack of oversight see Andrea Wright, “Casting a light into the shadows: why security intelligence requires democratic control, oversight and review”, in Nicole LaViolette and Craig Forcese (eds), *The human rights of anti-terrorism* (Irvin Law, 2008) 327, 329-331; McCulloch and Pickering, above n 6, 22; Ian Leigh, “The accountability of security and intelligence agencies” in Loch Johnson (ed), *Handbook of intelligence studies* (Routledge, 2009) 67; Daniel Baldino (ed), *Democratic oversight of intelligence services* (Federation Press, 2010).

<sup>58</sup> Leigh, above n 57, 67.

intelligence agencies to independent supervision by parliamentary committees.<sup>59</sup> The extent to which this system operates effectively as a safeguard against abuse remains controversial.

Lack of accuracy of any kind of information – whether evidence or intelligence - is a good reason for limiting its use. However, the critique developed in this Section must be understood in line with the particular purposes and methods of intelligence. Intelligence work is essentially ‘forward looking’ in the sense that it aims to identify future risks and trends. For this purpose, complete accuracy of information is not necessarily a high priority. As the mosaic theory dictates, individual pieces of information form only one of a multitude of sources relevant to a risk assessment and/or development of security strategies. As a result, none of them are required to reach the criminal standard of beyond reasonable doubt. Some pre-crime measures did not even require the civil standard of proof, the balance of probabilities. For example, in the first generation of control orders in the UK measures could be based merely on the reasonable suspicion of the Minister.<sup>60</sup> In the light of the principle of precaution as outlined above, the general approach taken is that the greater the suspected irreversible damage (despite any uncertainty about the threat), the more prepared governments are to rely on less reliable information in order to shed light on the particular threat or even to act.

Some of the methodologies applied to gain intelligence can also lower the level of information accuracy. As noted above, significant amounts of intelligence is created by “bringing a vast body of information, often meaningless in isolation, together in the hope of discerning links and underlying patterns that, over time, create a meaningful

---

<sup>59</sup> See for example Ian Carnell and Neville Bryan, “Watching the watchers: how the Inspector-General of Intelligence and Security helps safeguard the rule of law” (speech at the *Safeguarding Australia 2005* Conference, Canberra, July 2005).

<sup>60</sup> *Prevention of Terrorism Act 2005* (UK), s 2(1).

picture”.<sup>61</sup> Information stems from the surveillance of individuals; monitoring bank accounts and credit cards; telecommunication interception of live and stored communications, such as e-mails; uses of covert surveillance devices, exchange of data with other organisations; use of informers and covert operations to infiltrate groups; acquisition and analysis of other personal information such as criminal, financial, health, travel, professional and family records; monitoring movement including the tagging of cars and motorcycles; and the surveillance of passengers lists from planes and ferries; and monitoring access to health facilities. Much of this information does not disclose criminal behaviour *per se*, particularly when it concerns the monitoring of politically subversive activities. Intelligence also links open sources, such as newspaper articles or statistics, with information that is intended to be secret.<sup>62</sup> This process creates what has been described as “information with value-added analysis”.<sup>63</sup> Thus, intelligence as a product is by its nature “‘patchy’ and ‘circumstantial’ information about perhaps remote risks to national security.”<sup>64</sup>

In this respect new technologies of surveillance, as well as new techniques of analysis, are both a blessing and a curse. On the one hand, they allow the access to new sources of information and increase the amount of available information. This in turn widens the scope of intelligence work. On the other hand, this ‘success’ has also created new challenges, as the sheer amount of information generated by agencies becomes increasingly difficult to manage. Intelligence agencies are challenged by distinguishing real information (signals) from distracting information (noise).<sup>65</sup> The vast amount of low level intelligence may even lead to a ‘white-out’ effect meaning that the valuable

---

<sup>61</sup> Angus McCullough and Sharon Pickering, “Pre-crime and counter-terrorism: imagining future crime in the ‘war on terror’” (2009) 49 *British Journal of Criminology* 628, 634.

<sup>62</sup> Johnson, above n 36, 2.

<sup>63</sup> Walker (2005), above n 32, 409.

<sup>64</sup> Roach, above n 35, 48 (footnotes omitted).

<sup>65</sup> Wesley Wark, “Introduction: ‘learning to live with intelligence’” (2003) 18(4) *Intelligence and National Security* 1, 3.

information is obscured by the less valuable information.<sup>66</sup> It has been argued that even the 9/11 attacks partly fell victim of this effect. The subsequent investigations have shown that there was a lot of relevant information known to the intelligence community about the hijackers and their plot, but agencies were unable to connect the information.<sup>67</sup> Despite the justified criticism, which has already been addressed in the US by creating a Director of National Intelligence,<sup>68</sup> it is important not to forget that forward-looking intelligence work is always handicapped by the fact that agents do not precisely know for what they are looking.<sup>69</sup>

### 3.2.1.3 Politicisation

The final aspect that distinguishes between ideal-types of evidence and intelligence, is their relationship to, and dependency upon, politics. While there is no doubt that there is politics in many areas of criminal justice (particularly in relation to ‘law and order’ politics), intelligence traditionally maintains close ties to politics and more specifically to the interests of the government of the day. Again this can be easily explained by its purpose of informing public policies. However, there is a particular risk of politicisation within intelligence work, ie, the risk that intelligence agencies selectively gather and interpret information in order to ‘fit’ policy or political objectives of the current government.<sup>70</sup> The Central Intelligence Agency (CIA) even defines politicisation of

---

<sup>66</sup> McCulloch and Pickering, above n 6,16.

<sup>67</sup> Other aspect concerned the lack of communication between the various US intelligence agencies at the time. See Podesta, above n 48, 93; Forst, above n 53, 368. For a similar discussion in relation to UK terror attacks see Mark Phythian, “In the shadow of 9/11: security, intelligence and terrorism in the United Kingdom” in Jon Moran and Mark Phythian (eds), *Intelligence, security and policing post-9/11: the UK's response to the 'war on terror'* (Palgrave Macmillan, 2008) 32; James Wirtz, “Déjà vu? Comparing Pearl Harbor and September 11” (2002) 24(3) *Harvard International Review* 73; Melvin Goodman, “9/11: the failure of strategic intelligence” (2003) 18(4) *Intelligence and National Security* 59.

<sup>68</sup> *Intelligence Reform and Terrorism Prevention Act 2004* (US), s 102.

<sup>69</sup> David Luban, “Eight fallacies about liberty and security” in Richard Wilson, *Human rights in the 'War on Terror'*” (Cambridge University Press, 2005) 242, 247.

<sup>70</sup> Leigh, above n 57, 68; Walker (2005), above n 32, 390; Wright, above n 57, 331.

intelligence as the “unprofessional manipulation of information and judgment by intelligence officers to please what those officers perceive to be policy makers’ preferences”.<sup>71</sup> The secrecy around intelligence work, combined with limited official scrutiny, makes intelligence to a certain degree susceptible to such a risk of politicisation.

*A priori* it is not clear whether politicisation is a negative occurrence or a process of prioritisation of finite intelligence resources in which elected governments have a legitimate role in determining the type and scale of response to these threats. The reality is that intelligence agencies work closely with policy makers and senior government officials, who to some extent depend on each other. On the one hand governments need the information from such agencies to keep their policies informed, on the other hand agencies orientate themselves to what is needed in order to stay relevant.<sup>72</sup> Hence, while politicisation can distort the intelligence process, it is questionable whether it can be entirely avoided.

Apart from fixing policy priorities for security agencies, politicisation can also occur on very subtle levels and to an inconspicuous degree, partly due to the increasing amount of information available. Selecting information, therefore, can subconsciously be influenced by perceived governmental priorities. As Wesley Wark put it:

“As the mass of raw intelligence grows, it spawns worrisome problems for intelligence warning, analytical failures, and politicisation and manipulation of data and assessments by decision-makers. If ‘cherry picking’ has to be the norm inside

---

For an example how this issue has impacted on policing in the *Haneef* case see McCulloch and Pickering, above n 6, 21.

<sup>71</sup> Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, 2005, Report to the President of the United States, 31 March at 188 as cited in Michael Wesley, “The politicisation of intelligence” in Daniel Baldino (ed.), *Democratic oversight of intelligence services* (2010) 187.

<sup>72</sup> Wesley, above n 71, 199.

intelligence communities, because of informational plenty, what resistance can there be to cherry picking of the intelligence product by political decision-makers intent on confirming pre-conceptions and finding support for policies determined on grounds other than that of intelligence judgements?”<sup>73</sup>

Selecting pieces of information from a pool of available options is not something totally alien to the criminal justice process. McConville, Sanders and Leng suggest that cases are essentially constructed and that once the police have made up their minds about the guilt of a suspect the process of case construction is used to hide or highlight evidentiary shortcomings.<sup>74</sup> Although the process evolves and the case is reassessed at each stage, evidence is added or removed to fit the construction, rather than prepare an objective picture.<sup>75</sup> According to the authors, “courts do little more than endorse constructions according to the quality of workmanship, the combativeness of the defence lawyer and the hand of Fate”.<sup>76</sup> What is important to point out is that the case construction theory is not meant as a critique of policing methods,<sup>77</sup> and any discretion used by the police should always be exercised in accordance with the law.<sup>78</sup>

While the theory could be used in any criminal justice system “the adversary system [...] makes case construction a particularly partial and partisan process”.<sup>79</sup> But if a trial is then necessary to assess the construction of the case, then equality of arms and other fair trial guarantees are crucial tools for testing the validity of the charges.

If McConville, Sanders and Leng are right and case construction is a socio-legal phenomenon it would certainly also apply to the construction of pre-crime measures.

---

<sup>73</sup> Wark, above n 65, 3.

<sup>74</sup> Mike McConville, Andrew Sanders and Roger Leng, *The case for the prosecution* (Routledge, 1991).

<sup>75</sup> *Ibid*, 12.

<sup>76</sup> *Ibid*, 172.

<sup>77</sup> *Ibid*, 11.

<sup>78</sup> *Ibid*, 18.

<sup>79</sup> *Ibid*, 11



But if intelligence-type evidence is used, which is a selection of a much wider pool of available information, and if the use of sensitive information or edited evidence necessitates some limitations to the adversarial process, there must be some concern with regards to the quality of the proceedings in the sense of accuracy and ultimately fairness.

### 3.2.2 Summary

This comparison shows that ideal-type intelligence values fairness to a lesser extent than ideal-type evidence. Apart from the fact that the sensitivity of intelligence often does not permit disclosure and thus adversarial scrutiny, it also does not aim for the highest possible standard of accuracy customarily expected in the criminal justice system. Furthermore, the fact that intelligence often consists of synthesising and interpreting fragments of information from a vast pool - which may be represented as a process of construction - suggests that intelligence will rarely constitute the 'best evidence' available in legal proceedings, capable of realising the paramount rationale of the rules of evidence, namely finding the truth.<sup>80</sup> It is worth noting again that the comparison in this Section only concerns the ideal-types of intelligence and evidence. Hence, not all of the issues flagged here automatically apply in counter-terrorism proceedings. But being aware of these distinct characteristics may be crucial when dealing with information that is only scrutinised in a limited fashion or not all in an adversarial proceeding.<sup>81</sup>

---

<sup>80</sup> See above at 2.1.3.

<sup>81</sup> This is true for both cases where information is used in whole or in part, and where information is tested in non-disclosure proceedings in terms of its relevance for the trial.

While there is scope for improvement in intelligence as a discipline and profession,<sup>82</sup> it must be also mentioned in this respect that intelligence agencies have already started to adjust to the increased demands imposed by higher ‘evidential’ standards.<sup>83</sup> The UK’s lead security agency, MI5, for example, states on its website:

“Our officers, working closely with members of law enforcement agencies, ensure that operations are properly co-ordinated with a view to the possible use of the resulting intelligence as evidence in court.”<sup>84</sup>

Roach is also optimistic that the next generation of police and intelligence officers will be more suited to deal with and evaluate different types of information.<sup>85</sup>

---

<sup>82</sup> Clive Walker, “The pursuit of terrorism with intelligence” in Jon Moran and Mark Phythian (eds), *Intelligence, security and policing post-9/11: the UK's response to the 'war on terror'* (Palgrave Macmillan, 2008) 54, 74; Walker (2005), above n 32, 409-10.

<sup>83</sup> See for example HM Government, "Consolidated guidance to intelligence officers and service personnel on the detention and interviewing of detainees overseas, and on the passing and receipt of intelligence relating to detainees" (London, July 2010) and Mark Waller, “Report of the Intelligence Services Commissioner for 2015” (HC 459, July 2016) 40-45.

<sup>84</sup> MI5 website: [www.mi5.gov.uk/evidence-and-disclosure](http://www.mi5.gov.uk/evidence-and-disclosure).

<sup>85</sup> Roach, above n 35, 62.

### 3.3 Amending the law of evidence

Any information that meets the conditions imposed by the law of evidence, ie is relevant and admissible in a trial, must be considered evidence. Arguably, this should provide for a clear distinction between evidence and intelligence. However, as noted above, the lines between these two categories have become increasingly blurred for a number of reasons.

First, the convergence between evidence and intelligence may be viewed as a consequence of the trend towards ‘pre-crime’ measures, which demand state intervention at earlier stages of terrorist activity.<sup>86</sup> Secondly, the rules of evidence themselves have been amended to adapt to particular security needs, departing from the traditional evidential rules in order to facilitate the admissibility of information generated by intelligence methods. The most obvious example is the reforms enacted to facilitate the use of secret information in designated administrative proceedings.<sup>87</sup> Even in standard criminal proceedings the scope of admissibility of sensitive documents has been extended through the use of anonymous witness statements or redacted versions and summaries.<sup>88</sup> The longstanding refusal to admit information obtained through telecommunications interception as evidence in the UK still prevails.<sup>89</sup> In Australia, however, there is increasing pressure to adopt this practice, as federal legislation already authorises the admission of information obtained through interception as evidence in a range of legal proceedings, including terrorism proceedings.<sup>90</sup> These examples will be discussed in detail within the case studies of Part 2 of the thesis.

---

<sup>86</sup> See generally *Ibid*, 48; Zedner (2009), above n 5, 117.

<sup>87</sup> See below at Chapter 7.

<sup>88</sup> See below at 6.3.

<sup>89</sup> *Regulation of Investigatory Powers Act 2000* (UK), s 17; with the exceptions of s 18, which includes Terrorism Prevention and Investigation Measures, but not any criminal proceedings.

<sup>90</sup> Despite the general exclusion of the use of intercept evidence in legal proceedings in s 63(1)(b) *Telecommunications (Interception and Access) Act 1979* (Cth), it does not apply to except proceedings

The third reason for this convergence is that the type of information commonly used as evidence in counter-terrorism proceedings has changed, with heavy reliance upon both circumstantial evidence and selective evidence, ie evidence where some parts are disclosed while other parts suppressed. Circumstantial evidence may now also be admitted in place of stronger direct evidence, that cannot be disclosed, or form part of an intelligence product stemming from covert methods described above. In the absence of direct evidence, jurors and judges must discharge their duties drawing on an extensive body of circumstantial evidence, which increases the complexity and length of trials. In *Lodhi*, Whealy J pointed out:

“As I understand the Crown case, there will be a considerable body of circumstantial evidence providing a substantial background to the evidence relating to the accused’s alleged collection and making of documents and the doing of acts, which are said to be in preparation for a terrorist act.”<sup>91</sup>

The expectation that decision-makers must accept the interpretation of such circumstantial evidence presented by the prosecution by simply ‘joining the dots’ can be misleading and potentially create miscarriages of justice.<sup>92</sup> The secrecy and potential unreliability of intelligence-type evidence, combined with complex processes of ‘case construction’ in counter-terrorism trials based on circumstantial evidence, raises questions about the adverse impact upon the fairness of the trial and the position of the judge in general. The impact on the judicial office and individual judges will be examined in the next Section.

---

(s74), which include the divs 104 and 105 *Criminal Code Act 1995* (Cth), dealing with terrorism offences (s 5B(1)(bb)(bc)).

<sup>91</sup> *R v Lodhi* [2005] NSWSC 1377 (23 December 2005) [13]. See also for example *Benbrika & Ors v The Queen* [2010] VSCA 281 (25 October 2010) [6].

<sup>92</sup> McCulloch and Pickering, above n 61, 634.

### 3.3.1 The court and uncertain evidence:

As mentioned above, the rules of evidence are important tools for promoting the reliability of evidence. If a particular category of information is presumed to be unreliable (for example, confessions obtained as a result of torture), the law rules that it is inadmissible. Presumptions may be rebuttable: for example, information gained from hearsay may be inadmissible unless otherwise there is proof of its reliability.<sup>93</sup>

Another way of dealing with potentially unreliable categories of information is to deem them admissible, though require fact-finders (typically the jury) to be warned of the dangers associated with those categories of evidence.<sup>94</sup> However, it is debateable whether jurors are always in the position to adjudge the probative value of the information after being warned, or whether it would be better to exclude the information as a whole.<sup>95</sup> Arguably such a situation occurs when intelligence-type evidence is adduced in an amended or summarised form. While it certainly depends on the type of information, the thesis argues below that in national security cases jurors are placed in a difficult position, where they rather have to choose between the lingering doubt generated by the incomplete information adduced, or simply assuming that there is more information of an incriminating nature that cannot be disclosed.<sup>96</sup>

Although accuracy is an important objective of the law of evidence, it must also accommodate other interests, such as the protection of national security and often requires adjustment in order to reflect these various interests.<sup>97</sup> An example of such adjustment is the modifications to the right to silence in the UK, which permits drawing adverse inferences of guilt from a suspect's silence in the face of official questioning

---

<sup>93</sup> On the issue of hearsay see below at 6.3.

<sup>94</sup> Simon Bronitt, "Preface" in Gabriele Bammer (ed), *Dealing with uncertainties in policing serious crime* (ANU EPress, 2010) ix; Gans and Palmer, above n 52, 6.

<sup>95</sup> Gans and Palmer, above n 52, 7-8.

<sup>96</sup> See the discussion below at 6.2.3.3.

<sup>97</sup> Gans and Palmer, above n 52, 2.

under particular circumstances. Introduced first in Northern Ireland, as a counter-terrorism measure, this modification to the right to silence has been extended to all criminal proceedings, and since 1994, has applied throughout the UK.<sup>98</sup> Similar reform in Australia has been rejected as an unnecessary and serious departure from a long standing right and inconsistent with the principle of fairness.<sup>99</sup>

Under the common law, judges have discretion to exclude evidence in cases where the prejudicial effect outweighs the probative value.<sup>100</sup> In general, probative value is a question of fact and thus has to be decided by the fact-finder. Admissibility, on the other hand, is a question of law and has to be decided by the judge. Thus, it is unclear in how far a judge can take reliability into account when determining the probative value of some information. According to the dictionary section of the *Evidence Act 1995* (Cth), “probative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue”. McHugh J held in *Papakosmas* that reliability has to be considered when determining the probative value.<sup>101</sup> This view is controversial. Others argue that the probative value can only be assessed once the evidence is accepted as admissible. Judges therefore have no discretion to exclude evidence on the basis of unreliability.<sup>102</sup> Despite this debate, it is clear that the law of evidence aims at high standards of reliability and credibility.

Another area where admissibility could be controversial is in relation to evidence that is tainted by illegality. For example, while police may obtain evidence illegally by

---

<sup>98</sup> See *Criminal Evidence (Northern Ireland) Order 1988* (UK), ss 3-6 and *Criminal Justice and Public Order Act 1994* (UK), ss 34-38.

<sup>99</sup> That said, the strict prohibition at common law on drawing adverse inferences from silence has been modified by legislation in NSW in 2013, a reform that has provoked significant controversy: see Victor Chu, “Tinkering with the right to silence: the *Evidence Amendment (Evidence of Silence) Act 2013* (NSW)” (2013) 17 *University of Western Sydney Law Review* 25-40.

<sup>100</sup> *R v Christie* [1914] AC 545, 559-560. Since then this rule has found its way into statutory regulations. See *Police and Criminal Evidence Act 1984* (UK), s 78 and *Evidence Act 1995* (Cth), s135.

<sup>101</sup> *Papakosmas v The Queen* (1999) 169 CLR 297, 323.

<sup>102</sup> See for example *Adam v The Queen* (2001) 207 CLR 96; *Rozens v Beljajev* [1995] 1 VR 533 (14 November 1994).

overstepping their powers, the evidence may still be both highly reliable and incriminating. This could be the case when an illegal search discovers a large amount of drugs in the suspect's home. It may be difficult to justify the exclusion of this evidence, which is significantly probative of guilt, where the breach of the law by police involves only a minor violation of a regulation.<sup>103</sup> Given that what is a minor violation, and what is not, can only be decided in the particular circumstance, leading evidence scholar, Ian Dennis argues that exclusion of evidence should be based on a discretionary power vested in the judges rather than the basis for a mandatory exclusionary rule.<sup>104</sup> While in national security cases, judicial discretion seems desirable for the reasons identified by Dennis, there is a danger that the judges in balancing these interests will favour the needs of security over legality, removing any incentive for security forces to act within their legal boundaries.<sup>105</sup>

Finally, there is the question of whether judges are in the position to correctly evaluate evidence in relation to national security risks and whether it is even legitimate for judges to do so rather than placing this task in the hands of elected public officials (Ministers) responsible directly to the people through parliament. These questions will be returned to on a number of occasions throughout the rest of the thesis.

The above discussion underscores that the judge holds a key position in determining the admissibility of evidence. If judges are expected to fulfil the same duties when dealing with 'intelligence-type' evidence, the question arises whether any adjustment to the proceedings may be necessary both in interests of fairness and national security. The next section examines to what extent amendments to the rules of evidence impact upon

---

<sup>103</sup> T R S Allan, "The concept of fair trial", in Elspeth Attwooll and David Goldberg (eds), *Criminal Justice* (Franz Steiner Verlag, 1995) 27, 30.

<sup>104</sup> Ian Dennis, "Reconstructing the law of criminal evidence" (1989) *Current Legal Problems* 21, 29. This is also the approach taken in the US.

<sup>105</sup> Kerri Mellifont, *Fruit of the poisonous tree: evidence derived from illegal or improperly obtained evidence* (Federation Press, 2010).

or adversely affect procedural fairness.

### 3.3.2 The rules of evidence and procedural fairness

Amending the law in order to accommodate the use of intelligence-type evidence may promote compliance with the rules of evidence. The effect of such reform is that the use of ‘intelligence-type’ evidence now also *appears* to comply with the basic requirements of procedural fairness, as defined by legislation, even though such reforms were motivated entirely by security concerns. In this way, it may be argued that ‘due process is for crime control’.<sup>106</sup>

This insight, that ‘due process is for crime control’, was first offered by Doreen McBarnet, in her empirical study of the UK criminal justice system.<sup>107</sup> She posed the question of why there were so many convictions notwithstanding the pervasive rhetoric of due process protection in the courts?<sup>108</sup> McBarnet’s radical research suggested that there is a general and pervasive misperception that the law – and in particular of procedural law (due process) - includes all necessary features to protect the rights of a defendant. Rather, in her view, due process, upon closer empirical scrutiny, often favours the interests of crime control, in particular the main actors in the field of criminal justice – the police and prosecution. Often what looks like discretion favourable to the accused, actually operates in the interests of the state. Thus, the police

---

<sup>106</sup> Doreen McBarnet, *Conviction: law, the state and the construction of justice* (Macmillan Press, 1984) 156. The dichotomy between due process and crime control has been introduced by Herbert Packer in ‘Two models of the criminal process (1964) 113(1) *University of Pennsylvania Law Review* 1.

<sup>107</sup> McBarnet, above n 106.

<sup>108</sup> *Ibid*, 2-3. Of course there is the option that only the best cases are brought to the courts, but this neglects the way cases are constructed. A case is a particular version put forward by the police and the prosecution of what happened. Whenever the defendant rejects this version and pleads not guilty, a contest emerges. At least in theory this means that there has to be a good chance that the prosecution is not able to prove beyond reasonable doubt that the offence has been committed in that way.



and prosecution do not need to bend, break or circumvent the law to promote crime control, they simply need to apply it!

While McBarnet's study dates back to the early 1980s, her insights are still relevant and have offered scholars another lens for critically examining both investigative and judicial practices.<sup>109</sup> McBarnet's thesis reminds us of the importance of developing a deeper appreciation of the procedural context of law, testing the rhetoric of due process and legality through empirical research, and adopting a sceptical approach as to whether safeguards that purportedly promote fairness and respect for the rule of law in fact deliver on their liberal promise. Distinguishing between the rhetoric and substantive effect of the law is important in practice, since as McBarnet observed, "one can observe defendants losing their case precisely because they are arguing on the basis of the rhetoric rather than the law."<sup>110</sup>

The structure of criminal law, combined with terrorism related moral panics, prioritises the interests of crime control (security) over due process (fairness).<sup>111</sup> Judges have a dual role: they must decide questions of substantive law, while at the same time have to question the legality of the investigative methods used by the state. Sometime these roles can be contradictory and, as we shall explore in the next Chapter, may lead to conflicts between the courts and other branches of government.

The amendments to the rules of evidence also make it difficult - if not impossible - to clearly demarcate between 'intelligence-type' evidence and other types of evidence.

And while it cannot be said that any convergence of evidence and intelligence

---

<sup>109</sup> McBarnet's work has been influential in informing the comparative study of the law governing policing in the UK and Australia: David Dixon, *The law in policing: legal regulation and police practices* (Clarendon Press, 1997).

<sup>110</sup> McBarnet, above n 106, 159

<sup>111</sup> *Ibid*, 157.

necessarily leads to an unfair trial,<sup>112</sup> some additional measures are needed. This thesis supports both a culture of justification between the branches of government,<sup>113</sup> as well as institutional support to the judges,<sup>114</sup> whenever the means to test the credibility and reliability of the evidence is obstructed by a need to secrecy in order to protect sensitive information.

---

<sup>112</sup> *Van Mechelen and others v the Netherlands* [ECtHR] applications nos 21363/93, 21364/93, 21427/93 and 22056/93 (23 April 1997) [50].

<sup>113</sup> For a detailed discussion on the “culture of justification” see below at 4.2.3.

<sup>114</sup> See below at 8.2.2 and 8.2.4.1.

### 3.4 Conclusion

The trend in counter-terrorism away from conventional reactive criminal investigations towards proactive pre-crime measures has altered investigation methods, as well as the way terrorism cases are argued in court. The emphasis in pre-crime measures upon risks assessment and using broad preparatory and inchoate terrorism offences leads to a greater reliance on more intelligence-type evidence, with cases often based on circumstantial rather than direct evidence.

This review of the differing values underlying ideal-types of intelligence and evidence reveals that the former values fairness to a much lesser degree than the latter. Given the origins and purpose of intelligence, this is neither surprising nor necessarily undesirable since intelligence processes and products (as originally conceived) were never intended for use in legal proceedings. However, where intelligence ‘crosses the line’ and is used to direct the course of police investigations, construct the case for the prosecution and, in some instances, to justify a range of pre-crime measures, it poses some serious risks. While many types of evidence pose risks in particular proceedings and contexts, this Chapter argues that intelligence-type evidence warrants a higher level of scrutiny, and that the particular risks of unfairness associated with its use in terrorism proceedings must be taken into consideration when developing or assessing non-disclosure regimes.

Intelligence agencies have started to make important adjustments to their mandate to accommodate the new evidential role for intelligence in the criminal justice system. For example, in 2011 ASIO’s mandate was broadened to allow the cooperation with a law enforcement agency.<sup>115</sup> While such developments are reassuring, some risks to the RFT are inherent in the task of assessing and predicting security threats. In particular, the risk of inaccuracy - stemming both from the process of producing intelligence-type evidence

---

<sup>115</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 19A(1)(d).

as well as the extensive use of circumstantial evidence – can only be addressed through retention of, and respect for, the principles of adversarial justice and the equality of arms. Hence, the position of the defendant will be a key indicator in the case studies in Part 2 of the thesis.

Finally, this Chapter has demonstrated that recent amendments to the rules of evidence are placing judges in a challenging and conflicted position: the judicial impetus to comply with lawful procedures – the main guarantee for due process or procedural fairness – may actually circumvent, in the pursuit of crime control, the ‘obstacle course’ of due process.<sup>116</sup> When parliament deprioritises fairness within the law, it becomes much harder for judges to maintain their traditional commitment to it when discharging their roles. In other words, if the internal structure of the law promotes crime control (or national security), substantive fairness is drawn into direct conflict with the procedural conception of fairness defined by the legislature. This challenge for judges and its impact upon the relationship between the branches of government, will be further discussed in the following Chapter.

---

<sup>116</sup> This imagery of due process as an ‘obstacle course’ placed in the way of the ‘assembly line’ of crime control was applied in Herbert Packer’s seminal article, “Two models of the criminal process (1964) 113(1) *University of Pennsylvania Law Review* 1, 13.

## Chapter 4: Balancing liberty and security?

In assessing non-disclosure requests covering sensitive information from the government, the trial judge is faced with a conflict between interests. On the one hand, sensitive information needs to be protected to avoid harm to the state and the community. On the other hand, defendants may require access to that information to defend themselves properly in criminal procedures. In administrative proceedings, the suppressed information may even constitute the basis of the public official's decision, which is difficult or impossible to challenge without access to the suppressed material.<sup>1</sup> While in some cases, the risks and interests at stake in non-disclosure applications are clearly apparent, in others they are not, which creates even greater challenges to the actors involved (namely the defence, prosecution, government lawyers and the judges).

This Chapter discusses processes and methods used to resolve the conflict between the interests above and the relative weight of these competing interests. While some of the discussion can inform the legal approaches to conflicts between individual liberty and security generally, the Chapter particularly emphasises the specific requirements of the right to a fair trial (RFT).

Court review can interfere with security assessments made by the government, which raises questions on the limits of judicial power. To answer them, some reflections on how the different branches of government (executive, legislature and judiciary) interact with each other generally are necessary. This Chapter briefly highlights two aspects of

---

<sup>1</sup> See below at Chapter 7 on the use of secret evidence in control order proceedings.

the separation of powers, which, while seemingly contradictory, reflect a modern understanding of responsible government.

The first aspect of the separation of powers is that systems of responsible government rest on the importance of ‘checks and balances’. As pointed out above, there is a constitutional duty on the courts to defend individuals against arbitrary and improper behaviour of any state official.<sup>2</sup> Simply deferring to the security decisions of the government would nullify or limit an important safeguard for individual rights.<sup>3</sup> In constitutional theory the orthodox view of parliamentary supremacy is that courts should always enforce an (validly) enacted statute by Parliament, including any powers given to Ministers.<sup>4</sup> Because of the absence of a constitutional bill of rights or system of ‘checks and balances’ that effectively limits parliamentary supremacy in the United Kingdom (UK), Lord Hailsham famously characterised the Westminster system as “an elected dictatorship”.<sup>5</sup> As this Chapter will demonstrate, judicial and political attitudes have changed in recent decades in both Australia and the UK. Nonetheless the topic of the proper limits of judicial power within a democracy - and in particular how judges perceive their own role constitutionally - is an ongoing debate. And, as this thesis reveals, the topic is never more controversial than in the context of disclosure of sensitive information in legal proceedings in a climate of serious security threats.

The second aspect of separation of powers is that decisions cannot (and should not) be fairly made by a single branch of government. There needs to be some cooperation between the organs of government, with recognition of their respective responsibilities.

---

<sup>2</sup> See above at 2.3.

<sup>3</sup> It should be pointed out that given the strong influence the executive has over the legislature in the Westminster system, the term ‘government’ includes both of these branches, unless specified otherwise. See Lord Brown, “The unaccountability of judges: surely their strength not their weakness” in Christopher Forsyth *et al* (eds), *Effective judicial review: a cornerstone of good governance* (Oxford University Press, 2010) 208.

<sup>4</sup> Lord Hailsham, *The dilemma of democracy: diagnosis and prescription* (Collins, 1978) 125.

<sup>5</sup> *Ibid*, 126.

Thus, each branch has responsibility for ensuring fairness in decision-making and should reflect upon this concern. To promote fairness in such decisions, legislation is required that reminds decision-makers of this duty and require sufficient justification of any restrictions imposed on fairness. Of course, there may well be reasonable disagreement on what is fair in a specific case, but as long as each of the branches is working towards the same aim, any tension should simply be part of a robust deliberative process that characterises an effective justice system in a liberal democracy.<sup>6</sup>

The Chapter concludes the first Part of the thesis in providing a theoretical basis for the case studies that follow in Part 2. It closes by identifying a number of key guiding principles for non-disclosure decisions, which also take the constitutionality of the RFT (Chapter 2) and the inherent risks of using intelligence-type evidence (Chapter 3) into consideration.

---

<sup>6</sup> See David Feldman, “Human rights, terrorism and risk: the roles of politicians and judges” (2006) Summer *Public Law* 364, 383.

## 4.1 - Liberty versus security: methodologies for a fair balance

### 4.1.1 - The metaphor of balancing

The metaphor of ‘balancing’ has been used widely by courts, politicians and academics, when dealing with competing interests or arguments such as the tension between liberty and security. Its appeal stems not only from its wide applicability and the general belief that “we all share a common intuitive grasp of, or at least are in agreement about, what the metaphor of balancing interests entails”.<sup>7</sup> Hence, while balancing appears to be a concrete task, it leaves the decision-maker a wide margin of discretion.

In the field of criminal justice, it has been argued for a long time that the system seeks to accommodate liberty (due process) and security (crime control) through the method of balancing. The traditional model, outlined by Herbert Packer in the 1960s, presents the two concepts of due process and crime control as being in a hydraulic relationship, with liberty being sacrificed for a gain in security (and vice versa).<sup>8</sup>

Since 9/11, it has been argued that a *new* balance must be struck between liberty and security reflecting the increased threat of terrorism. The proponents of such an approach are numerous, particularly amongst politicians. For example, the former Commonwealth Attorney-General, the Hon Philip Ruddock, addressing a forum on terrorism and the rule of law, stated that

“there is an appropriate balance between the preservation of national security and human rights, which is reflected in the range of safeguards that apply to control orders, preventative detention orders and ASIO questioning and detention.

---

<sup>7</sup> Vincent Luizzi, “Balancing of interests in courts” (1980) 20 *Jurimetrics Journal* 373.

<sup>8</sup> The debate within the field of criminal justice has been stimulated by the work of Herbert Packer in the 1960s. See Herbert Packer, “Two models of the criminal process” (1964) 113(1) *University of Pennsylvania Law Review* 1; Herbert Packer, *The limits of the criminal sanction* (Stanford University Press, 1968). For an overview of lessons from the field of criminal justice for the fight against terror see Lucia Zedner, “Securing liberty in the face of terror: reflections from criminal justice” (2005) 32(4) *Journal of Law and Society* 507.



However, I would make the point that these matters are not static: the protection must be commensurate with the risk, at all times.”<sup>9</sup>

This need for ‘balancing’ post-9/11 was extensively discussed in the media,<sup>10</sup> as well as debated in academic writing. In Australia and the UK, for example, Golder and Williams continue to advocate for a balancing model,<sup>11</sup> while in the United States, Posner and Vermeule have prominently argued that both security and liberty are valuable goods, which stand in such an inverse relation to each other that neither can be maximised without an impact on the other.<sup>12</sup> Given the limited resources, governments must spread the goods in an optimal way from a social point of view, meaning to maximise welfare for all.<sup>13</sup> A simple cost-benefit analysis suggests that a rational and well-motivated government, when facing a terrorist threat, would trade off (individual) liberty against (collective) security, “because the value gained from the increase in security will exceed the value lost from the decrease in liberty”.<sup>14</sup>

---

<sup>9</sup> Philip Ruddock, “Law as a preventative weapon against terrorism” in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 3, 6; see also Philip Ruddock, “The Commonwealth response to September 11: the rule of law and national security” (Speech, National Forum in the War on Terrorism and the Rule of Law, New South Wales Parliament House, 10 November 2003) [25]-[26].

<sup>10</sup> See for example Editorial, “Balancing security and liberty” (The Australian, 14 June 2013).

<sup>11</sup> Ben Golder and George Williams, “Balancing national security and human rights: assessing the legal response of common law nations to the threat of terrorism” (2006) 8(1) *Journal of Comparative Policy Analysis* 43. Although Williams acknowledged the difficulties associated with the balancing metaphor, he claimed that it helps to engage the public in difficult discussions about public policy. Clarified in a personal email from George Williams to Christopher Michaelsen, 15 May 2005, as cited in Christopher Michaelsen, “Balancing civil liberties against national security? A critique of counterterrorism rhetoric” (2006) 29 *University of New South Wales Law Journal* 1, 20.

<sup>12</sup> Eric Posner and Adrian Vermeule, *Terror in the balance: security, liberty, and the courts* (Oxford University Press, 2007) 22 and 28; cf Jeremy Waldron, “Security and liberty: the image of balance” (2003) 11(2) *Journal of Political Philosophy* 191, 195.

<sup>13</sup> Eric Posner and Adrian Vermeule, “Emergencies and democratic failure”, (2006) 92(6) *Virginia Law Review* 1091, 1098-99.

<sup>14</sup> *Ibid*, 1099. In this sense ‘rational’ means that “the government makes no systematic errors in its empirical estimates and causal theories when assessing the likely effects of increase or decrease in security and liberty”; and ‘well-motivated’ refers to a government that “acts so as to maximise the welfare of all persons properly included in the social welfare function”: see Posner and Vermeule, above n 12, 29-30.

While balancing features extensively in discussions about terrorism responses, it is not always clear who should be tasked with undertaking this balancing exercise.<sup>15</sup>

Politicians (within both the executive and the legislature) often imply that striking the right balance is a matter exclusively for the government, namely the executive working with the legislature.<sup>16</sup> It is assumed that these two organs of government enjoy the democratic legitimacy to translate values into law and have access to relevant expertise. This position, though, fails to acknowledge the role of the courts and the traditional mandate of the judiciary to maintain a balance between the state and the citizen. Hence, new terrorism legislation and executive decisions may cause difficulties for the judiciary once this ‘new balance’ is drawn into conflict with accepted general principles protecting individual liberties, such as the RFT.

As a tool for resolving conflicts between competing interests, the concept of ‘balancing’ projects an aura of moderation, precision and objectivity. However, as scholars have pointed out, balancing as a process for guiding decision-making often lacks content and over-simplifies complex questions.

For the purposes of this thesis, balancing refers to a process that does not include any specific rules on how much weight to attach to the interests involved – for example to prioritise security over liberty or vice versa. Rather, balancing simply confers discretion to the decision-maker and identifies the range of interests in play. This can lead to confusion, such as when judges or politicians refer to balancing as a synonym for other

---

<sup>15</sup> The tension between the branches will be further discussed below at 4.2.

<sup>16</sup> In Australia see, for example, Attorney General’s Department, “Equipping Australia against emerging and evolving threats” (Discussion paper, July 2012) 23. This approach was not been altered under the Labour Government between 2007 and 2013. See Department of Prime Minister and Cabinet, “Counter-Terrorism White Paper: Securing Australia – Protecting our Community” (2010). Similar views have been expressed in the UK and the US: see James Brokenshire, “National security and civil liberties: getting the balance right” (Speech to National Security Summit at Queen Elizabeth Conference Centre, London, 3 July 2013); In a speech President Obama also declared, “in the years to come, we will have to keep working hard to strike the appropriate balance between our need for security and preserving those freedoms that make us who we are”: see “Remarks by the President at the National Defense University” (Speech at the National Defense Force University, Fort McNair, Washington, D.C., 23 May 2013).

methodologies, such as proportionality, which actually *do* include such rules of prioritising one interest over another.<sup>17</sup> The pervasive use of balancing in legal thought,<sup>18</sup> and the extensive acknowledgement of its limitations, is discussed in the next section.

#### 4.1.2 - A critique of balancing

*Does less liberty actually mean more security?*

Despite the assumption of a hydraulic relationship, or a ‘zero-sum’ game, between security and liberty, the question is whether reductions of individual liberty actually produce the security gains typically foreshadowed by government.<sup>19</sup> Given that rights and interests are being traded, resulting in the demonstrable infringement of individual liberty, empirical evidence of the security pay-off should be required to justify this limitation – both from the individuals affected, as well as from a public policy priority attached to ‘evidence-based’ reform.<sup>20</sup> Jeremy Waldron has argued, for example, that lowering due process rights might effectively lead to an easier conviction. However, the prospect of conviction and punishment may have limited general deterrent effect on potential terrorists, and any intended security benefit in relation to this aspect might be low.<sup>21</sup> Commentators have even pointed out that enhancing the protection of liberty (due process) may offer significant equally beneficial outcomes from a security (crime

---

<sup>17</sup> In particular the term ‘balancing’ is often used synonymously for what will be described below as proportionality in the narrow sense; see below at 4.1.3.

<sup>18</sup> It even has been claimed that Ronald Dworkin’s theory of law entails some sort of a balancing test: “The shielded-interest theory holds only that utilitarian justifications must have sufficient weight to overcome rights, and it is consistent with balancing tests. In a sense, the theory *is* a balancing test.” Paul Yowell, “Critical examination of Dworkin’s theory of rights” (2007) 52 *American Journal of Jurisprudence* 93, 98.

<sup>19</sup> *cf* Simon Bronitt, “Constitutional rhetoric v criminal justice realities: unbalanced responses to terrorism?” (2003) 14 *Public Law Review* 76, 80.

<sup>20</sup> See Andrew Ashworth, “Security, terrorism and the value of human rights”, in Benjamin Goold and Liora Lazarus (eds), *Security and human rights* (Hart Publishing, 2007) 203, 208-209.

<sup>21</sup> Waldron, above n 12, 209-10; see also above at 2.1.4 for counterproductive effects of trials that are perceived as unfair.

control) standpoint.<sup>22</sup> Admittedly, these ‘win-win’ situations are difficult to achieve, but their existence certainly indicates a deficiency in traditional way in which the balance of liberty versus security is represented.

Furthermore, the lack of evidence that limitations on individual rights are justified also exposes alternative motivations for security legislation. At times, the primary function of security legislation is to offer comfort or reassurance to the general population, and be seen as responding to the calls that ‘something needs to be done’. Any actual security gain is subsidiary to that reassurance offered by the expanded powers of the state. The Australian preventative detention and control order regimes have often been criticised for this symbolic quality.<sup>23</sup> There is no doubt that such measures may have a positive effect on the psyche of the nation, which explains the great pressure on politicians to act accordingly.<sup>24</sup> Nonetheless, it seems unacceptable that some people (often minority and marginalised groups) must give up ‘real’ liberties in order to satisfy the needs of the majority for a sense of security that may be ‘fake’ or at least offer non-verifiable gains in security. Hence, from a moral perspective such symbolic legislation seems highly questionable.<sup>25</sup>

At times, policy interests for different areas can align and push governments into passing tougher security legislation. For example, in Australia it has been argued that the federal government has overemphasised the connection between terrorism and

---

<sup>22</sup> For example, Bronitt points to the example that law enforcement agencies have benefitted from the introduction of compulsory taping of police interviews, which equally protects suspects and prevents false allegations of police impropriety by suspects: Simon Bronitt, “Balancing security and liberty: critical perspectives on terrorism law reform” in Miriam Gani and Penelope Mathew (eds), *Fresh perspectives on the War on Terror* (ANU E Press, 2008) 65, 70.

<sup>23</sup> See for example Bret Walker, “Independent National Security Legislation Monitor’s Declassified Annual Report” (20 December 2012) 4, 44.

<sup>24</sup> Bronitt, above n 22, 68-69.

<sup>25</sup> Waldron, above n 12, 209; Joint Committee on Human Rights, “Prevention of Terrorism Bill” (10<sup>th</sup> Report of Session 2004-05, HC 334, 4 March 2005) [16].

asylum seekers to justify new immigration regulations.<sup>26</sup> Further, the enormous financial amounts involved result in ‘behind closed doors’ lobbying in the capital cities by security agencies and the private security industry. In the decade after 9/11, the US spent, cumulatively, over a trillion USD on homeland security, with a significant portion directed to the private sector.<sup>27</sup> In Australia the number has been estimated at AUD 16.7 billion.<sup>28</sup>

Finally, there is an additional security paradox: while certain measures can increase security in relation to terrorism threats, they can at the same time decrease the security of citizens in relation to potential abuse. As a state expands its powers, it also tends to lower its standards for checks and balances, which in turn increases the possibility for abuses of powers and miscarriages of justice.<sup>29</sup>

It is important to remind ourselves that the history of human rights tells the story of a struggle of individuals against the (sometimes oppressive) state.<sup>30</sup> Ironically, the original use of the word *terror*, in the context of the French Jacobin regime, referred to the state violence directed against its own citizens!<sup>31</sup> Hence, whereas people, who live in more or less functioning liberal democracies, may have greater trust in the state today, we have to bear in mind that one set of securities is often traded against another. In addition, even powers that were originally meant to fight terrorism may also spill over into other areas of law enforcement, and become ‘normalised’ as part of the regular security set-up. For example, after the right to silence was abrogated in Northern

---

<sup>26</sup> Angus McCullough and Sharon Pickering, “Counter-terrorism: the law and policing of pre-emption”, in Nicola McGarrrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (Routledge, 2010) 13, 17.

<sup>27</sup> John Mueller and Mark Steward, *Terror, security, and money: balancing the risks, benefits, and costs of homeland security* (Oxford University Press, 2011) 1.

<sup>28</sup> Bernard Keane, “The winners from the war on terror” (Crikey, 17 June 2011).

<sup>29</sup> Waldron, above n 12, 205.

<sup>30</sup> Stephen Bottomley and Simon Bronitt, *Law in context* (Federation Press, 3<sup>rd</sup> ed, 2006) 21.

<sup>31</sup> Ben Golder and George Williams, “What is ‘terrorism’? Problems of legal definition” (2004) 27 *University of New South Wales Law Journal* 270; Jonathan Weinberger, “Defining terror” (2003) *Winter/Spring Seton Hall Journal of Diplomacy and International Relations* 65.

Ireland, the limitation was then implemented throughout the rest of the UK.<sup>32</sup> In Australia, the use of counter-terrorism measures in the fight against organised crime, targeting outlaw motorcycle gangs, is just another example of extraordinary measures leaking into the mainstream criminal justice system.<sup>33</sup>

*What are the interests involved and how can we determine their relative weight?*

The metaphor of balancing implies that the two opposing interests - security versus liberty - can be clearly defined. For the purposes of the thesis, this balancing process pits non-disclosure in the interest of national security against disclosure in the interest of a defendant's fair trial. This view seems overly simplistic. The 'public interest' cannot be reduced to one singular public interest.<sup>34</sup> Rather, there will always be multiple public interests at work. Without question, safety and security of the population is an important public interest, but having fair and just criminal proceedings is equally a public interest.<sup>35</sup> And a defendant - enjoying the presumption of innocence until proven guilty - as a member of the society might equally have an interest in protecting national security.

---

<sup>32</sup> The right to silence has been effectively abolished in Northern Ireland by the introduction of the *Criminal Evidence (Northern Ireland) Order 1988* (UK), which allows adverse inferences to be drawn from the silence of the accused under particular circumstances. These provisions were then adopted under *Criminal Justice and Public Order Act 1994* (UK), ss 34-38, which not only expended the geographical scope to England and Wales, but also took a measure considered necessary in the particular context of Northern Ireland into a general and thus permanent setting.

<sup>33</sup> See Simon Bronitt, "Ten years on: critical perspectives on terrorism law reform in Australia" (CEPS Public Lecture, Griffith University, 9 September 2011) 21; Andrew Lynch, "Terrorists and bikies: the constitutional licence for laws of control" (2009) 34(4) *Alternative Law Journal* 237, 239; Nicola McGarrity and George Williams, "When extraordinary measures become normal: pre-emption in counter-terrorism and other laws" in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (Routledge, 2010) 131. See below at 7.3.2.

<sup>34</sup> Ian Dennis, "Reconstructing the law of criminal evidence" (1989) *Current Legal Problems* 21, 30-31; Andrew Ashworth, *Human rights, serious crime and criminal procedure* (Sweet & Maxwell, 2002) 70.

<sup>35</sup> See above at 2.1; Some judges also recognise the fact that there are multiple public interests at work: see for example *Conway v Rimmer* [1968] AC 910, 940 (Lord Reid), which was also referred to positively in *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs CJ).

Even if interests could be expressed in a simple binary way, the question of how to determine the relative weight remains? This is easier to answer in cases where the public interest aligns with another individual right, such as the protection of the identity of a witness, or police or security personnel deployed undercover. Defining the weight of more general security risks, particularly when applying the mosaic theory,<sup>36</sup> is considerably more difficult.<sup>37</sup> In either case, we are dealing with risks and therefore with probabilities. Defining and understanding risks requires expertise and is not an exact science. It has been demonstrated in psychological research that risks are regularly overestimated and competing interests underestimated.<sup>38</sup> Furthermore, the risk analysis is often not communicated publicly in detail due to security reasons, which inhibits proper public discourse. Most of the population only knows or assumes that there is a ‘great risk’.<sup>39</sup> This in turn can put pressure on politicians, who often feel the need to favour security in order to retain popularity with the electorate.<sup>40</sup> In such cases the ‘public interest’ becomes a mere reflection of a political climate perceived by the politicians in charge.

Even assuming that the relative weight of interests can be determined with reasonable precision, discrepancies remain on two levels when they are compared. On the one hand, collective interests are balanced against individual interests, and on the other hand, known and certain interests are weighed against future interests of uncertain

---

<sup>36</sup> See above at 3.2.1.1. *Watson v AWB Limited (No 2)* [2009] FCA 1047 (17 September 2009) [33].

<sup>37</sup> Zedner, above n 8, 512-13.

<sup>38</sup> See for example David Luban, “Eight fallacies about liberty and security”, in Richard Wilson (ed), *Human rights in the ‘war on terror’* (Cambridge University Press, 2005) 242, 247; Lucia Zedner, “Neither safe nor sound: the perils and possibilities of risk” (2006) 48(3) *Canadian Journal of Criminology and Criminal Justice* 423, 426.

<sup>39</sup> In *Bersinic*, Connolly J pointed to the front pages of newspapers to establish the high risk of terrorism: *R v Bersinic* [2007] ACTSC 46 (6 July 2007) [6].

<sup>40</sup> Brian Forst, *Terrorism, Crime and Public Policy* (Cambridge University Press, 2009) 323; see also Alison Brysk, “National insecurity and human rights”, in Alison Brysk and Gershon Shafir (eds), *National insecurity and human rights: democracies debate counterterrorism* (University of California Press, 2007) 1; Philip Thomas, “September 11<sup>th</sup> and good governance”, (2002) 53 *Northern Ireland Legal Quarterly* 366, 368.

extent.<sup>41</sup> In the context of open justice, Spigelman J regarded these opposing interests as incommensurable. He used the comparison of “asking whether one object is longer than another object is heavy”.<sup>42</sup> Equally Ian Dennis stated that “[i]ndividual rights and public interests in truth-finding do not seem to be commensurable values which can be meaningfully ‘balanced’. The effort to do so simply produces an unsatisfactory theory which makes life difficult”.<sup>43</sup>

Finally, even defining the particular interests is not as straightforward as it often seems. Imprecision stems from the fact that some of the negative consequences caused by security measures are not equally distributed within the general population. Waldron stresses that there needs to be greater accuracy in identifying the interests being balanced: it is not merely security versus liberty, but rather the interests of the majority in their security versus the interests of the minority in relation to their liberty.<sup>44</sup> The latter group tend to be drawn from particular segments of the population or those populations that have become suspect - both groups being most in need of human rights protection. Hence, the cost of security is not spread equitably across the community, but externalised to parts of the population that lack political power (being a minority) or the means to lobby against such security measures.<sup>45</sup>

### *Sloppy reasoning and the danger of consequentialism*

As the critique outlined above suggest, there is a general danger that balancing leads to

---

<sup>41</sup> Zedner, above n 8, 516.

<sup>42</sup> The Honourable James Jacob Spigelman, “The principle of open justice: a comparative perspective” (2006) 29(2) *University of New South Wales Law Journal* 147, 158.

<sup>43</sup> Dennis, above n 34, 31.

<sup>44</sup> Waldron, above n 12, 201.

<sup>45</sup> This phenomenon is also described as a democratic failure. See for example David Cole, “Their liberties, our security: democracy and double standards”, (2003) 31 *International Journal of Legal Information* 290; Luban, above n 38, 243. Waldron, above n 12, 203. For an opposing view see Posner and Vermeule, above n 13, 1091.



“sloppy reasoning”.<sup>46</sup> Decision-makers are at risk of undertaking – consciously or unconsciously - a weighing exercise according to their personal preferences or subjective value. Judges have been exposed to the criticism of whether the balancing process places constraints on governmental decisions by reference to community values or the public interest,<sup>47</sup> or defers to the needs of the executive, thereby avoiding difficult questions.

The lack of structure in balancing processes may also open doors to consequentialism. The proposition that ‘ends justify the means’ is commonly based on the philosophy of utilitarianism. According to Jeremy Bentham, any measure could be justified as long as it brings the greatest benefit to the greatest number of people.<sup>48</sup> In the calculus of utility, the positive consequences that flow to the majority from enhanced security outweigh negative consequences for the minority whose reduction in liberty is perceived as a less significant cost or burden. As a result, policy decisions are all too often in favour of utility rather than equal distribution of costs and benefits.<sup>49</sup> The most controversial manifestation of pure consequentialism in counter-terrorism is the proposal for ‘torture warrants’ that would legalise torture by state officials if done for the purpose of preventing serious terrorist attacks.<sup>50</sup>

---

<sup>46</sup> Andrew Ashworth, “Crime, community and creeping consequentialism” (1996) 4 *Criminal Law Review* 220, 229.

<sup>47</sup> J D Heydon, “Judicial activism and the death of the rule of law” (2003) 23 *Australian Bar Review* 110.

<sup>48</sup> For brief discussion on utilitarianism in law see Bottomley and Bronitt, above n 30, 45.

<sup>49</sup> Waldron, above n 12, 201-3.

<sup>50</sup> Such warrants would lawfully permit torture provided the executive could persuade a judge there were reasonable grounds to believe that the torture would yield critical information necessary to prevent a serious attack. See Alan Dershowitz, *Why terrorism works: understanding the threat, responding to the challenge* (Yale University Press, 2002); Alan Dershowitz, “The torture warrant: a response to Professor Strauss” (2003) 48 *New York Law School Law Review* 275. Such proposals, however, depart from longstanding opposition to torture in both international and domestic law: See for example John Kleinig, “Ticking bomb and torture warrants” (2005) 10(2) *Deakin Law Review* 614; Desmond Manderson, “Another modest proposal: in defence of the prohibition against torture”, in Miriam Gani and Penelope Mathew (eds), *Fresh perspectives on the War on Terror* (ANU E Press, 2008) 27.

The concept of human rights is however inherently anti-consequentialist and non-utilitarian. Ronald Dworkin in his classic book, *Taking rights seriously*, argued that rights should gain priority over other interests, in particular those of the community - in Dworkin's terms, individual rights should trump the collective/public interest.<sup>51</sup> An enforceable right against the state and other individuals would lose its meaning if it ceased to have effect as soon as it imposed burdens or inconvenience upon the majority. Hence, in Dworkin's view, consequentialist claims undermine the very concept of individual rights.<sup>52</sup> Although the theory of rights as trumps is often equated with undemocratic non-majoritarian rule, Dworkin maintains that rights protection should be viewed as an expression of equality between individuals, who should enjoy the same rights on the same terms, and is therefore inherently democratic.<sup>53</sup> This theory however does not insist that individual rights are always absolute. Rather rights can – and shall - be limited under specific circumstances. Even Dworkin accepted some exceptions to his main claims.<sup>54</sup> At this point, it is enough to say that limitations on rights need to be properly justified, and cannot simply be balanced or traded away in the interest of the majority.<sup>55</sup>

In sum, the analysis in this Section leads to the conclusion that the method of balancing must be rejected. All of the aspects discussed relate in some way or another to a lack of clarity. But in particular the lack of process may promote personal preferences of the decision-maker and may lead to a 'creeping consequentialism'; and the missing requirement for justifying the limitation of rights creates the risk of watering down the standard of protection. These issues can be addressed to a certain extent by the concept

---

<sup>51</sup> Ronald Dworkin, *Taking rights seriously* (Duckworth, 1977).

<sup>52</sup> *Ibid*, 201; see also Ashworth, above n 34, 71.

<sup>53</sup> Dworkin, above n 51, 199; see also Ronald Dworkin, "The threat of patriotism" (2002) 49(3) *New York Review of Books* 44, 48.

<sup>54</sup> Dworkin, above n 51, 198. See discussion below.

<sup>55</sup> See Yowell, above n 18, 95 and 97.

of proportionality, which is examined in the next Section.

### 4.1.3 - Proportionality: a fair and more sophisticated way of balancing

Although balancing and proportionality are often used synonymously and interchangeably in colloquial language, once properly defined, one crucial difference emerges: the principle of proportionality contains rules on how to weigh the competing interests, which balancing does not. The principle of proportionality cannot avoid balancing entirely, in the sense that the decision-maker exercises discretion, but it seeks to organise the process in a way that supports policy-makers, authorities and judges in situations where the interests involved are complex or even seem to be incommensurable.<sup>56</sup> The application of proportionality does not make particular outcomes more predictable, but rather provides “a conceptual framework for defining the appropriate relationship between [human rights] and considerations that may justify their limitation in a democracy”.<sup>57</sup>

The principle of proportionality has its roots in the Prussian administrative courts, where it was developed to regulate police behaviour.<sup>58</sup> After the Second World War, it was adopted by the German *Bundesverfassungsgericht* (Federal Constitutional Court) to define permissible limitations of constitutional rights by regular statutes. Although the principle has no textual basis within the *Grundgesetz* (Basic Law), German judges simply justified its application as being part the rule of law itself.<sup>59</sup> Today it is well

---

<sup>56</sup> Comparing proportionality to the traditional grounds of review, Lord Steyn described the criteria as clearly “more precise and more sophisticated”. *R (on the application of Daly) v Secretary of State for The Home Department* [2001] UKHL 26 (23 May 2001) [27]; see also Dieter Grimm, “Proportionality in Canadian and German constitutional jurisprudence” (2007) 57 *University of Toronto Law Journal* 383, 396-97.

<sup>57</sup> Aharon Barak, “Human rights and their limitations: the role of proportionality” (Annual lecture in law and society, The Foundation for Law, Justice and Society, Oxford, 9 June 2009) 4.

<sup>58</sup> Grimm, above n 56, 384-85.

<sup>59</sup> *Ibid*, 385-86.

accepted as a principle of German constitutional law, and forms an integral part of a wider theory of constitutional rights.<sup>60</sup>

From its roots in Germany, the concept has spread considerably.<sup>61</sup> In particular it has been picked up by the European Court of Human Rights (ECtHR) to interpret the permissible limitations of those human rights, which recognise limitations provided these are prescribed by “law and [...] necessary in a democratic society”.<sup>62</sup> Furthermore, it has been adopted in common law jurisdictions such as Canada,<sup>63</sup> New Zealand<sup>64</sup> and Israel.<sup>65</sup> After a number of cases before the ECtHR concerning the level of appropriate judicial review in administrative law,<sup>66</sup> as well as the introduction of the *Human Rights Act 1998* (UK) (HRA), the principle of proportionality has now been equally accepted as a principle of public law in the UK.<sup>67</sup> However, there is still debate about what it entails.<sup>68</sup>

In Australia, there has been some limited use of proportionality in constitutional law.<sup>69</sup> However, as Justice Kiefel of the High Court observed *ex-curia*, “it has never achieved the status of a general legal principle having application to questions of legislative

---

<sup>60</sup> Robert Alexy, *A theory of constitutional rights* (Translation Julian Rivers, Oxford University Press, 2009).

<sup>61</sup> Moshe Cohen-Eliya and Iddo Porat, “Proportionality and the culture of justification” (2011) 59 *American Journal of Comparative Law* 463, 465.

<sup>62</sup> See arts 8-11 ECHR.

<sup>63</sup> See for example, *R v Oakes* [1986] 1 SCR 103 (28 February 1986).

<sup>64</sup> See for example, *Ministry of Transport v Noort* CA 369/91 [1992] 3 NZCA 51 (30 April 1992).

<sup>65</sup> See for example, *Beit Sourik Village Council v The Government of Israel* HCJ 2056/04 (2 May 2004).

For a very detailed description of the dispersion of the principle of proportionality see Aharon Barak, *Proportionality: constitutional rights and their limitations* (Cambridge University Press, 2012) Chapter 7.

<sup>66</sup> See in particular *Smith and Grady v the United Kingdom* [ECtHR] Applications nos 33985/96 and 33986/96 (27 September 1999) [138].

<sup>67</sup> *R (on the application of Daly) v Secretary of State for The Home Department* [2001] UKHL 26 (23 May 2001).

<sup>68</sup> See for example Mark Elliott, “Proportionality and deference: the importance of a structured approach”, in Christopher Forsyth *et al* (eds), *Effective judicial review: a cornerstone of good governance* (Oxford University Press, 2010) 264; Tom Hickman, “The substance and structure of proportionality” (2008) *Winter Public Law* 694.

<sup>69</sup> See for example *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (8 July 1997); *Cunliffe v The Commonwealth* (1994) 182 CLR 272; *Leask v The Commonwealth*; *Re Woolley* (2004) 225 CLR 1 (7 October 2004).

power”.<sup>70</sup> Similarly, as then Solicitor-General of the Commonwealth, Justin Gleeson SC has pointed out there are not many constitutional rights that would be open to a proportionality analysis.<sup>71</sup> In the few cases where proportionality had been discussed, the High Court did not agree on a particular test for a long time.<sup>72</sup> In the recent case of *McCloy* the majority of the High Court set out a proportionality test, which comes much closer to the German approach.<sup>73</sup> While this decision is some indication that proportionality is gaining increased acceptance in Australia, it is far from being a settled principle in constitutional rights adjudication. One important aspect here is that a proportionality analysis requires an accepted right to begin with. *McCloy* concerned freedom of speech and political communication, now an accepted implied constitutional right. At present the principle must be seen as being confined to that particular context. In relation to the separation of powers, which may be a basis for an implied RFT, McHugh J explicitly stated, “questions of proportionality cannot arise in the context of Ch[apter] III [of the Constitution]”, which regulates judicial power.<sup>74</sup> This is because a law that confers judicial power to a body other than a court is an infringement of the Chapter III. Being proportionate cannot heal such a violation.<sup>75</sup>

In terms of structure, the principle of proportionality can be split up into five steps or sub-rules:

- **first**, there has to be a *prima facie infringement of a protected right*;
- **second**, the policy objective of the measure must be *legitimate*, ie the purpose of the law must be compatible with the constitutional setting;

---

<sup>70</sup> Susan Kiefel, “Proportionality: a rule of reason” (2012) 23 *Public Law Review* 85, 86.

<sup>71</sup> Justin Gleeson, “Getting the balance right: proportionality and the Constitution” (Speech at the AGS Constitutional Law Forum, 22 November 2013) 4.

<sup>72</sup> *Ibid.*

<sup>73</sup> *McCloy v New South Wales* (2015) 89 ALJR 857, 862-863; see also Anne Towney, “Proportionality and the Constitution” (Speech, ALRC Freedom Symposium, University of Sydney, 8 October 2015).

<sup>74</sup> *Re Woolley* (2004) 225 CLR 1, 34.

<sup>75</sup> *Ibid.*

- **third**, the measure must be capable of achieving the policy objective – this is also known as a *rational connection* or *suitability*;
- **fourth**, the measure must be *necessary* in comparison with alternative hypothetical acts, which excludes inefficient measures; the step therefore aims at identifying the *least restrictive measure* (or *minimal intrusion*) to achieve the purpose of the law;
- **fifth**, the measure must be proportionate in the narrow sense (proportionality *stricto sensu*): this is a discretionary judgment by court that the benefit of the law outweighs the restriction on the particular right.

In this last step, balancing becomes again relevant in the form of a cost-benefit analysis. Therefore some of the criticism discussed above may apply. In particular it has been admitted that determining the relative benefits and the costs is still “neither scientific, nor precise”.<sup>76</sup> However, balancing *only* occurs at the final stage making it more targeted. It does not consider liberty versus security, but the marginal advantage of the public interest versus the marginal damage to the right caused by a particular measure.<sup>77</sup> Furthermore, the last two steps must be clearly distinguished. As Elliott summarised,

“whereas the necessity test is ultimately concerned with whether a given policy objective may be pursued *in a particular way*, the narrow proportionality test determines whether it may, given its impact on rights, be pursued *at all*.”<sup>78</sup>

The structure set out above however is not commonly agreed on. There are sometimes considerable differences in how the courts apply the principle of proportionality in

---

<sup>76</sup> Barak, above n 57, 7. Julian Rivers commented: “Our problem is not that the values are incommensurable, but that relative assessments can only be carried out in a rude manner.” Julian Rivers, “Proportionality and variable intensity of review” (2006) 65(1) *Cambridge Law Journal* 174, 201.

<sup>77</sup> Barak, above n 57, 8; see also Alexy, above n 60, 102-103.

<sup>78</sup> Elliott, above n 68, 267 (emphasis in original, footnote omitted).

particular contexts.<sup>79</sup> Most notably in the UK, the fourth and fifth steps are often conflated.<sup>80</sup> Some have even argued that the reason for the wide acceptance of proportionality is due to the fact that it can be used as an instrument of restrictive as well as progressive forms of judicial review.<sup>81</sup>

Julian Rivers has argued that differences in the formulations of proportionality stem from the differing attitudes judges have to their role in protecting rights.<sup>82</sup> In the common law world, judges understand themselves as protecting rights against the intrusions from the other branches of government. Accordingly there is a clear divide between rights on the one hand, and the public interest on the other. Rivers describes this attitude as “state-limiting” and proportionality has to be put into this context. In contrast, the continental European approach of proportionality is more open: it does not distinguish formally between rights and other interests. Further, the principle is applicable to all branches of government. According to the leading study by German scholar, Robert Alexy, rights are generally principles, representing values, which should “be realised to the greatest extent possible given the legal and factual possibilities”.<sup>83</sup> Objectives expressed in statutes often advance equally valuable principles. However, when it comes to a conflict between principles, one principle must ultimately prevail.

---

<sup>79</sup> For example, under German constitutional law there are only three tests (suitability, necessity and proportionality *stricto sensu*). This omits the first two steps, which may have more relevance in common law systems, where rights are not necessarily constitutional and Parliament is not guided by a constitution in terms of policy objectives. Also proportionality in the narrow sense presupposes a legitimate end, as there would be no gain otherwise. Aharon Barak proposes four steps in his book, *Proportionality: constitutional rights and their limitations* (Cambridge University Press, 2012) 3.

<sup>80</sup> See *de Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others (Antigua and Barbuda)* [1998] UKPC 30 (30 June 1998) [25]; which has been confirmed amongst others in *R (on the application of Daly) v Secretary of State for The Home Department* [2001] UKHL 26 (23 May 2001) [27] and *Huang v Secretary of State for the Home Department* [2007] UKHL 11 (21 March 2007) [19]. It is not even clear from these cases in how far the last step is considered at all. See Elliott, above n 68, 266.

<sup>81</sup> Ian Leigh, “The standard of judicial review after the Human Rights Act”, in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) 174, 182.

<sup>82</sup> Rivers, above n 76, 179-182.

<sup>83</sup> Alexy, above n 60, 47. Principles are distinguished from rules, which are not variable, but either fulfilled or not fulfilled. Any norm is either a principle or a rule. Some parts of a right can also be expressed a rule.

As both are relative, principles are not simply to be balanced against each other. Rather the question asked is under which conditions should the consideration of one principle precede the other, leading to an optimisation of *both* principles.<sup>84</sup> Inherent in this *law of competing principles* is the principle of proportionality.<sup>85</sup>

One could assume that rights are more strongly protected under a state-limiting approach to proportionality, but this is not necessarily the case. This is because in many systems the principle of parliamentary supremacy is also a privilege. As long as the public policy objective is legitimate and sufficiently important, and the measure is considered to be necessary to fulfil that objective, the courts are more reluctant to interfere in policy decisions that have received both a legislative and executive mandate.<sup>86</sup>

In the UK, Rivers analysed that balancing often happens earlier, and the fourth step is sometimes ignored entirely.<sup>87</sup> This comes much closer to what common law judges applied previously in English administrative law under the *Wednesbury* test of ‘unreasonableness’,<sup>88</sup> and is an expression of how judges still understand their relationship to the other branches.

While this overview is brief, it is important to recap at this stage that the structured approach to proportionality can guarantee that all critical aspects are considered and applied consistently in different cases. Proportionality operates to increase the clarity,

---

<sup>84</sup> *Ibid*, 50-54.

<sup>85</sup> *Ibid*, 66-69.

<sup>86</sup> Rivers, above n 76, 179-180.

<sup>87</sup> *Ibid*, 187-190: Rivers discusses in particular *A and others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004); see also for example *Smith & Others v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin) (3 May 2007) [50] (Williams J).

<sup>88</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1 (10 November 1947). Under the doctrine, UK courts would only set aside administrative decisions that were so unreasonable that no sensible authority would have decided in such a way. It demonstrates judicial restraint, as courts would not review the merits of a decision, as long as it did not amount to an abuse of power.



consistency, predictability, and thus legitimacy, of a decision. In the context of counter-terrorism, many commentators have argued for a proportionality approach in order to ensure high standards of human rights protection.<sup>89</sup>

---

<sup>89</sup> Feldman, above n 6, 364; Nicola McGarrity and Edward Santow, “Anti-terrorism laws: balancing national security and a fair hearing”, in Victor Ramraj *et al* (eds), *Global anti-terrorism law and policy* (Cambridge University Press, 2<sup>nd</sup> ed, 2012) 122, 150; Michaelson, above n 11, 20; Christopher Michaelson, “The proportionality principle, counter-terrorism and human rights: a German-Australian comparison” (2010) 1(2) *City University of Hong Kong Law Review* 19.

## 4.2 – National security and the need for due deference

Applying the proportionality principle to question of non-disclosure of information, judges need to address the question of whether its suppression is necessary and appropriate for achieving the stated aim, namely, to achieve increased public safety.

Furthermore, any cost imposed upon the defendant needs to be proportionate (in the narrow sense) to the benefit gained from non-disclosure. In all of these steps the judges will encounter complex questions of national security, including some sort of risk assessment. Given the complexity of security assessments and their lack of experience in evaluating security information, judges may have difficulties in mastering this task.

Avoiding the situation of making a wrong decision, which could cause serious damage to national security, judges have traditionally refrained from interfering with governmental measures taken in the interest of national security.<sup>90</sup> Ministers, supported by the public service and its expertise, claim to be best placed for making security assessments and deciding what is necessary to address effectively threats.<sup>91</sup> Posner and Vermeule have even described judges as “amateurs playing at security policy”,<sup>92</sup> convinced from a legal and political perspective that they should not interfere with executive decisions. In legal terms this zone, which is deemed to be beyond judicial competence, is often expressed in spatial metaphors, such as an area of discretion for the

---

<sup>90</sup> In the UK, famous cases such as *R v Halliday, ex parte Zadig* [1917] AC 260 (1 May 1917); *Liversidge v Anderson* [1942] AC 206 (3 November 1941); *Rehman v Secretary of State for the Home Department* [2001] UKHL 47 (11 October 2001) clearly express this attitude. In Australia see also for example *Al Kateb v Godwin* (2004) 219 CLR 562 (6 August 2004).

<sup>91</sup> “Deference is a rational response to uncertainty”: Aileen Kavanagh, “Deference or defiance? The limits of the judicial role in constitutional adjudication” in Grant Huscroft (ed), *Expounding the Constitution: essays in constitutional theory* (Cambridge University Press, 2008) 184, 186 and 208; cf Fiona De Londras and Fergal Davis, “Controlling the executive in times of terrorism: competing perspectives on effective oversight mechanisms” (2010) 30(1) *Oxford Journal of Legal Studies* 19.

<sup>92</sup> See Posner and Vermeule, above n 12, 31.

executive or non-justiciability.<sup>93</sup> As a consequence, in this zone judges simply defer to the primary decision-maker on questions such as risk assessment.

The recognition of a judicial exclusion zone in security cases, however, is at odds with the demands of a liberal-democratic state governed by the rule of law, which requires that all governmental action be reviewable under the law. By unconditionally deferring to the executive, judges surrender their duty to protect constitutionally protected rights, weakening not only the system of checks and balances, but also depriving individuals adversely affected by executive action of any review or recourse.<sup>94</sup>

There is a manifest tension between making sound national security decisions and the need for the protection of human rights. When applying a proportionality analysis to executive decision-making, the courts are resolving both legal and policy questions.

This Section explores the relationship between the executive and judiciary when reviewing decisions in general, and national security decisions in particular. There is increasing judicial and academic support for the position that outright non-justiciability is not acceptable. One solution for upholding higher standards of scrutiny, while also acknowledging the expertise of the executive in matters of security is the concept of ‘due deference’. Here judges may still defer to the executive, but the deference must be earned, with judges providing reasons for the degree and motivation of this deference. The scope of due deference, however, is still controversial. This is not surprising given that the scope of deference is closely connected with the dogmatic understanding of the

---

<sup>93</sup> See for example *Brown v Stott* [2003] 1 AC 681, 703(C), (Lord Bingham); *R (on the application of Begum) v Denbigh High School* [2006] UKHL 15 (22 March 2006) [63] (Lord Hoffmann); *Leghaei v Director-General of Security* [2007] FCAFC 37 (23 March 2007) [65].

<sup>94</sup> It is often recognised in retrospect that wartime measures have been extreme and that judges have neglected their duty to protect rights. At the same time, the dissenters are applauded in the aftermath. See for example David Dyzenhaus, “Cycles of legality in emergency times” (2007) 18 *Public Law Review* 165, 169; in the US context see David Cole, “Enemy Aliens” (2002) 54 *Stanford Law Review* 953, 993.

separation of powers, and thus the overall relationship between the branches of government.

The following Section will highlight these tensions by discussing two models of judicial deference in security cases, one advocated by Aileen Kavanagh, and the other by David Dyzenhaus. The two models can be distinguished not only by the role of the judges, but also by what is expected from primary decision-makers in justifying the decision, and in taking rights into account in the first place. The importance of the Section in relation to the Chapter is that it will identify the conditions that are crucial for judges to engage properly and meaningfully in a proportionality analysis.

#### 4.2.1 - Defining deference: two models

Aileen Kavanagh, who has written extensively on the topic, defines judicial deference as the process of “judges assign[ing] varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy”.<sup>95</sup> For Kavanagh deference is always a matter of degree, it is partial rather than absolute, and not determined by any subject matter.<sup>96</sup> These characteristics distinguish deference from abasement or non-justiciability, and make this approach even “compatible with an interventionist role for judges”.<sup>97</sup>

Kavanagh distinguishes between minimal and substantial deference.<sup>98</sup> The former category of minimal deference is not relevant for the purposes of this Section, as it represents a general acknowledgement of the legitimacy and authority of the primary

---

<sup>95</sup> Aileen Kavanagh, “Defending deference in public law and constitutional theory”(2010) 126(4) *Law Quarterly Review* 222, 223.

<sup>96</sup> *Ibid*, 223-226; see also Rivers, above n 76, 174.

<sup>97</sup> Kavanagh, above n 95, 248.

<sup>98</sup> Kavanagh, above n 91, 191.

decision-maker. According to Kavanagh minimal deference does not need to be earned by the executive, and cannot be dismissed without proper justification.<sup>99</sup> The more relevant category in the counter-terrorism context is substantial deference, which in Kavanagh's view, "has to be earned by the elected branches and is only warranted when the courts judge themselves suffer from particular institutional shortcomings with regard to the issue at hand".<sup>100</sup> This is done in two separate steps: first, the judge makes an institutional evaluation, in which he/she determines the degree of deference. In a separate process, the judge then engages in the substantive evaluation of the issue.<sup>101</sup> It is only at this stage that the context is added.

Criteria that may increase the degree of deference given are institutional, ie the degree of authority is intentionally delegated to that institution,<sup>102</sup> superior expertise in the subject area,<sup>103</sup> the degree of democratic legitimacy,<sup>104</sup> the degree of accountability of the primary decision-maker, alternative checks and balances, and efforts made to conduct a compatibility inquiry, which may involve consultation with stakeholders.

This can be contrasted with another model of deference, put forward by Dyzenhaus. He distinguishes two conceptions of deference: 'deference as submission' and 'deference as respect'. In relation to the latter, "[d]eference as respect requires judges to pay respectful attention to the reasons offered by the primary decision maker as justification

---

<sup>99</sup> *Ibid*, 191.

<sup>100</sup> *Ibid*, 192.

<sup>101</sup> *Ibid*, 190; Kavanagh, above n 95, 231; cf also T R S Allan, "Human rights and judicial review: a critique of 'due deference'" (2006) 65(3) *Cambridge Law Journal* 671, 675.

<sup>102</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 (22 February 2002) [85]; cf *R v British Broadcasting Corporation; ex parte ProLife Alliance* [2003] UKHL 23 (10 April 2003) [76] (Lord Hoffmann). See also Kavanagh, above n 91, 193.

<sup>103</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 (22 February 2002) [87] (Laws LJ); Jeffrey Jowell, "Judicial deference: servility, civility or institutional capacity?" (2003) *Winter Public Law* 592, 598; Kavanagh, above n 91, 194.

<sup>104</sup> The criterion of democratic legitimacy is controversial as it touches the very essence of the relationship between the branches. The issues involved will be discussed in detail below at 4.2.4.

for a particular decision”.<sup>105</sup> While taking both the process and the quality of the decision into account, the court decides for itself.<sup>106</sup> Where Dyzenhaus draws the line of what should be the task of the judge becomes obvious when looking at the other category of deference by submission:

“[S]ubmissive deference requires judges to submit to the intention of the legislature, on a positivist understanding of what constitutes that intention. If the legislature’s intention is to delegate authority to an official to interpret and implement a statutory mandate, this conception of deference transfers the submissive stance it requires from the legislature to the offices. Judges should defer to the primary decision maker’s decision, as long as the decision maker does not stray beyond the limits of his statutory authority, positivistically construed.”<sup>107</sup>

Within those parameters the court does not have to determine for itself, based on judicial reasoning, whether a right has been violated or not. Such interpretation creates an area of discretion based on a strict view of parliamentary supremacy, which denies the existence of constitutionally protected rights. Hence, whereas deference as respect requires adequate reasons from the primary decision maker, submissive deference does not pay attention to the quality of the reasoning or whether there are reasons provided at all.

It is now widely accepted within academia that creating areas of non-justiciability is inappropriate judicial behaviour and that judges are democratically authorised to review governmental decisions. In the UK there is a trend within the judiciary to support this

---

<sup>105</sup> David Dyzenhaus, “Deference, security and human rights” in Benjamin Goold and Liora Lazarus (eds), *Security and human rights* (Hart Publishing, 2007) 125, 131.

<sup>106</sup> See for example *Huang v Secretary of State for the Home Department* [2007] UKHL 11 (21 March 2007) [16]. There the Court considered the process as inappropriate as the appellate immigration authority (the Immigration Appeals Tribunal) did not take all aspects into account. As the primary decision maker it should have considered whether the Convention rights of the individual were violated.

<sup>107</sup> Dyzenhaus, above n 105, 131.

view.<sup>108</sup> In *A and others*, Lord Bingham defended the judges' function of interpreting and applying the law independently in a democracy underpinned by the rule of law.<sup>109</sup>

Lord Rodger added that any form of deference has its limits:

“Due deference does not mean abasement before those views [of the Government and Parliament], even in matters relating to national security [...]. The legitimacy of the courts' scrutiny role cannot be in doubt.”<sup>110</sup>

In *Roth*, Lord Brown (then sitting as Brown LJ in the Court of Appeal) held that:

"[T]he court's role under the Human Rights Act is as the guardian of human rights. It cannot abdicate this responsibility. If ultimately it judges the [anti-people smuggling] scheme to be quite simply unfair, then the features that make it so must inevitably breach the Convention."<sup>111</sup>

Hence, in order to fulfil the court's duty under both the HRA and the rule of law, in theory, there should be no area 'off limits' to judges.

In relation to Australia, it is worth emphasising that Lord Bingham's comments on the judicial legitimacy to engage in the interpretation and application of the law were not based on the HRA, but rather on the nature of the democratic state itself built on the rule of law. Although, the courts must observe the limitations of judicial authority, they

---

<sup>108</sup> In this respect “Lord Hoffmann's judgement in *Rehman* swims against the judicial tide: Kavanagh, above n 95, 242.

<sup>109</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004) [42].

<sup>110</sup> *Ibid*, [176].

<sup>111</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 (22 February 2002) [27].

cannot be entirely excluded from any area on the basis of the (purported) superior democratic legitimacy of the other branches of government.<sup>112</sup>

Despite increased acceptance of due deference,<sup>113</sup> in practice it is still difficult to determine how much scrutiny must be applied by the courts. In other words, at what point does ‘deference as respect’ turn into ‘deference as submission’. The difficulties will become particularly apparent in the discussion of national security cases below.

What is particularly dangerous is where judges purport that an area is justiciable, but effectively keep deferring to such an extent that any effective scrutiny for rights violations has been forfeited. Dyzenhaus, who dedicated much of his scholarship to this phenomenon – which he describes as “legal grey holes” - warns that such a shallow understanding of deference is no more than a smokescreen of submission.<sup>114</sup> For Dyzenhaus this is even worse than the proper acknowledgement by a judge of not engaging at all, as it suggests a commitment to legality where there is in fact none.

The two-step system towards determining deference, proposed by Kavanagh, supports the notion of legal grey holes. Having a separate process of evaluating institutional qualities, the court may neglect the substantial analysis that is supposed to follow. Put differently, where a court relies heavily on the inherent qualities of another branch and so neglects to review the persuasiveness of the reasoning behind the primary decision, deference becomes a substitute for legal analysis, or at least a short cut.<sup>115</sup> The court

---

<sup>112</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004) [42].

<sup>113</sup> See David Keene’s comment on *Roth*: “Principles of deference under the *Human Rights Act*” in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial reasoning under the Human Rights Act* (Cambridge University Press, 2007) 206.

<sup>114</sup> See David Dyzenhaus, *The constitution of law: legality in a time of emergency* (Cambridge University Press, 2006) 3.

<sup>115</sup> Allan, above n 101, 674-76. Allan is also concerned that the two step approach could introduce institutional aspects twice given that they are also “intrinsic” in the substantial evaluation. See T R S Allan, “Judicial deference and judicial review: legal doctrine and legal theory” (2011) 127(1) *Law Quarterly Review* 96, 99-100.



effectively gives up its neutrality and sacrifices necessary checks and balances on governmental authorities. In such cases deference would be tantamount to non-justiciability,<sup>116</sup> and due deference collapses into submission.

#### 4.2.2 - Deference in national security cases

The differences between the approaches to deference discussed in the previous section are particularly apparent in national security cases, where judges have been required to confront and assess security risks and disclosure of sensitive information. These cases reveal the executive's expectation of the judicial role in such contexts, and the risk that due deference collapses into deference as outright submission.

Analysing national security cases in the UK, Kavanagh undertook an institutional evaluation of why judges defer to the executive in such matters, identifying three reasons.<sup>117</sup> The first reason related to judicial awareness of the risk of *potentially* catastrophic consequences – leading judges to a ‘better safe than sorry’ approach; the second related to the courts’ lack of capability to predict risk, and the third related to the need to protect sensitive information. The latter two reasons obviously go to the heart of this thesis and one of its main questions, namely: how can judges engage in a proper risk assessment in cases where they are being denied necessary information relevant to the legal issue in issue.

---

<sup>116</sup> Allan, above n 101, 688-89.

<sup>117</sup> Kavanagh, above n 91, 208-209.

Kavanagh continues:

“[The] fact [of limited information] alone will (rightly) lead [the court] to pay more deference to the primary decision-maker because it will be less confident that it could arrive at a better decision than the primary decision-maker.”<sup>118</sup>

Without access to the relevant information or its own intelligence service, the court has no choice other than to defer to the authority that has access to the relevant information. Therefore, “deference is a rational response to uncertainty”.<sup>119</sup> Kavanagh also accepts that sometimes courts simply have to bow to political realities.<sup>120</sup> She concludes that in national security cases

“the court will only interfere with a governmental or legislative decision if it is clearly wrong, or there is a very strong reason to do so. In general, the greater the degree of uncertainty, the more judicial restraint may be required”.<sup>121</sup>

This approach to ‘due deference’ in these cases suggest there is a slippery slope along which deference collapses into submission. It seems that within this approach institutional evaluation trumps the substantive evaluation, as it is accepted that the substantive review of the merit of the security risk assessment is beyond judicial competence. It also creates a rule/exception situation in favour of deference, which is rather reminiscent of the *Wednesbury* approach to reasonableness.<sup>122</sup> Finally, any judicial reference to potentially catastrophic consequences, an assertion which is often accepted without clear proof, indicates an unwillingness to engage in substantive judicial review.

---

<sup>118</sup> *Ibid*, 208.

<sup>119</sup> *Ibid*, 208.

<sup>120</sup> *Ibid*, 205. Accepting such political realities might force judges to exercise self-constraint and therefore “non-merit reasons can sometimes defeat merit reasons in constitutional adjudication”.

<sup>121</sup> Kavanagh, above n 95, 235.

<sup>122</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1 (10 November 1947). See also above n 88.

Kavanagh finds support for her arguments above relating to deference in the *Belmarsh* case.<sup>123</sup> In the decision, the House of Lords rejected the idea of complete deference in national security cases. However, it applied different degrees of deference on the questions of whether (a) there was an emergency and (b) the measure was proportionate to that emergency. On the former question, where the House of Lords was unable to access the necessary information, it deferred to the Executive. The crucial statement in this respect came from Lord Scott, who remarked that without having seen any of the closed (classified) material, the Secretary of State should profit from “the benefit of the doubt”.<sup>124</sup> On the latter question, where information was made available to the court, the matter could be decided without deferring to the Executive.<sup>125</sup>

Critics of the decision argue that the need for plausible and convincing arguments to justify deference and non-disclosure apply equally to national security questions.<sup>126</sup> If substantive review or quality control of security risk assessments were the main objective, the lack of certainty about these matters would demand that the courts to refrain from forming a judgment. Rather than resort to deference borne from an institutional rationale (ie lack of competence), the judges should either demand the necessary information in order to make a substantive decision, or expressly acknowledge that they are not in a position to make any decision. Expertise, competence or legitimacy, alone or collectively, do not prevent abuse of power – only proper processes of review will do this. On the contrary, the approach to deference in *Belmarsh* creates an incentive for the Executive to expand its claims of secrecy, seeking

---

<sup>123</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004).

<sup>124</sup> *Ibid.*, [154].

<sup>125</sup> It should be pointed out that the court clearly found a violation of Article 5 ECHR as the Government was unable to provide a convincing explanation why indefinite detention was required for non-nationals, but not for nationals posing the same risk. Hence, the Court was not required to substantially engage in the decision of the Government.

<sup>126</sup> Allan, above n 101, 691.

more suppression of sensitive information simply in order to avoid legal scrutiny of the court, rather than for genuine security reasons!

*Belmarsh* suggests, on one reading, that judges are more willing to engage in review in national security cases, although the decision reveals there are some structural problems with the different degrees of deference. Dyzenhaus pointed out that the fact that the majority was prepared to defer though to various degrees - as outlined above – suggest doctrinal inconsistency.<sup>127</sup> In order for a court to apply the principle of proportionality to determine the question of an appropriate response, it must inevitably address the extent of the claimed state of emergency.<sup>128</sup> It is equally problematic that their Lordships did not label the first question as non-justiciable, but rather set the standard of review so low that requiring proper justification for the Government's decision seemed redundant.<sup>129</sup>

Adopting a stricter approach to deference, however, does not deny the significant difficulties judges face in such situations. Even where the state provides sufficient information, judges may struggle to determine the quality of the primary decision without expert assistance. In this respect Dyzenhaus suggested that substantive review may require institutional adjustments and legislative support. Otherwise, grey holes seem unavoidable and it would be unfair to blame judges for creating them. Here it is important to stress again that judges do not need to answer the question themselves, but simply be able to question the primary decision if necessary and thus allow for an effective system of checks and balances even in national security cases.

---

<sup>127</sup> Dyzenhaus, above n 105, 127.

<sup>128</sup> *Ibid*, 128.

<sup>129</sup> *Ibid*. The House of Lords referred to the approach in *Rehman: A and others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004) at [29].

### 4.2.3 - Deference as a defining characteristic of the relationship between the branches of government

It is worth taking a step back at this point and putting deference into a larger constitutional picture. The degree of judicial deference to the Executive often correlates to the theoretical beliefs underpinning the democratic system, particularly the interaction between the branches of government. In a system with a strong emphasis on parliamentary supremacy, courts must defer out of respect for the principle of popular sovereignty. On the other hand, where liberal constitutionalism is accepted as an aspect of democracy, ‘deference as submission’ has no legitimate space.<sup>130</sup> There is to some extent a sliding scale between non-justiciability and the legal obligation to engage in substantive review – even in national security cases – which arguably also corresponds with the national human rights culture and whether rights are protected constitutionally. But rather than adopt an idea of government, based on either parliamentary supremacy or liberal constitutionalism, there is a more conciliatory interpretation of this relationship.<sup>131</sup> Murray Hunt has termed this idea of government ‘democratic constitutionalism’:

“The conceptual neatness of sovereignty-derived thinking too readily seduces [English lawyers] into a conceptualisation of public law in terms of competing supremacies, which in fact bears little relation to the way in which public power is now dispersed and shared between several layers of constitutional actors, all of which profess an identical commitment to a set of values which can loosely be termed democratic constitutionalism.”<sup>132</sup>

---

<sup>130</sup> Dyzenhaus, above n 105, 138-9.

<sup>131</sup> *Ibid.*

<sup>132</sup> Murray Hunt, “Sovereignty’s blight: why contemporary public law needs the concept of ‘due deference’” in Nicholas Bamforth and Peter Leyland (eds), *Public law in a multi-layered constitution* (Hart Publishing, 2003) 337, 339.

This interpretation may fit better in an age of increased human rights consciousness and doubts regarding the integrity of politicians. Once all constitutional actors recognise that they are on equal footing and working towards the same goal of democratic constitutionalism, the prominent question becomes how this is achieved in any given context. This in turn should allow for more respect for their mutual responsibilities. Rather than looking at competing competences, the focus from a public interest perspective is how to achieve optimal decisions guaranteed by a functioning system of checks and balances.<sup>133</sup> In such a system “[n]either branch has legitimacy without the independent existence and functioning of the other. They are Siamese twins, separate personalities but joined at the hip”.<sup>134</sup>

There is also growing recognition from within the judiciary itself of the importance of enhancing its constitutional standing as a branch of government. In *Roth* it was held that “in its present state of evolution, the British system may be said to stand at an intermediate position between parliamentary supremacy and constitutional supremacy [...]”.<sup>135</sup> But rather than understanding this as a continuous process of legal evolution from the former to the latter, one should perceive the ‘settlement’ between the two as recognising the important roles played by both concepts.<sup>136</sup> The introduction of the HRA has facilitated such recognition in the UK, as Lord Brown held in *Roth*:

“Certainly [the case] raises questions as to the degree of deference owed by the courts to the legislature and executive in the means used to achieve social goals.

But judges nowadays have no alternative but to apply the Human Rights Act.

---

<sup>133</sup> See Dyzenhaus ‘rule-of-law’ project in Dyzenhaus, above n 114, 3.

<sup>134</sup> Philip Joseph, “The demise of ultra vires: a reply to Christopher Forsyth and Linda Whittle” (2002) 8(2) *Canterbury Law Review* 463, 478; see also Ahron Barak, *The judge in a democracy* (Princeton University Press, 2006) 36.

<sup>135</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 (22 February 2002) [71] (Lord Laws).

<sup>136</sup> Lord Irvine of Lairg, “The impact of the Human Rights Act: parliament, the courts and the executive” (2003) Summer *Public Law* 308, 310.

Constitutional danger exists no less in too little judicial activism as in too much.

There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts.”<sup>137</sup>

Despite the significant influence of the HRA in the UK, such a position is equally defensible in systems without explicit human rights legislation. The HRA did not completely change the behaviour of the judges in the UK, or their tendencies to defer (or not): “[English judges] have always had to decide cases in areas of political controversy. The Human Rights Act has ushered in only a difference of degree, not of kind”.<sup>138</sup> This stems from the claim that in the UK the English common law has long endorsed ideas of constitutional freedoms and liberties, and that the independent rights recognised under the *European Convention on Human Rights* (ECHR) cover similar ground to those protected under the common law.<sup>139</sup> Furthermore, Dyzenhaus has pointed out that, even for AV Dicey writing in the 19<sup>th</sup> century, the rule of law and the principle of legality were central to the unwritten common law constitution, and that in exceptional situations, could restrict Parliamentary sovereignty.<sup>140</sup>

Seeking this equilibrium, rather than allowing one branch of government to dominate others, has a number of consequences:

*First*, it recognises that every branch of government has its strength and weaknesses. In the context of this thesis, it is acknowledged that the executive possesses the expertise on national security issues, and that parliament bears the prime responsibility to make

---

<sup>137</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 (22 February 2002) [54].

<sup>138</sup> Lord Irvine, above n 136, 312.

<sup>139</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 (22 February 2002) [71] (Lord Laws); *R v A* [2001] UKHL 25 (17 May 2001) [51] (Lord Hope); *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) (18 February 2002) [62] (Lord Laws); see also Brice Dickson, *Human rights and the United Kingdom Supreme Court* (Oxford University Press, 2013) 20.

<sup>140</sup> Dyzenhaus, above n 114, 54-58; David Dyzenhaus, “*Schmitt v Dicey*: are states of emergency inside or outside the legal order?” (2006) 27(5) *Cardozo Law Review* 2005, 2031.

sure that security legislation does not impact excessively on individual liberties. On the other hand, it should be acknowledged that, notwithstanding its limited expertise in assessing security risks, the courts are better placed to assess violations of rights and the fundamental values of a liberal democracy.<sup>141</sup> Their qualities of independence, openness and the obligation to give reasons for their decisions, which can be scrutinised by any party, places the courts in a strong position to perform that task.<sup>142</sup>

*Second*, no branch of government has the exclusive responsibility for guaranteeing individual liberties, or more specifically, to determine the outcome of cases where liberty and security interests are in conflict. Rather, the branches are all part of the same system, upholding the same values and underpinned by the rule of law.<sup>143</sup> Each branch has specific and distinct constitutional duties and powers, which correspond with their respective strength and weaknesses. Therefore, questions of proportionality are a concern for both primary and the secondary decision-makers.<sup>144</sup> Such a shared responsibility is also reflected in the HRA, in so far as the courts may issue a declaration of incompatibility and the relevant Minister has a power of remedial action.<sup>145</sup>

A valid criticism relates to the inevitable controversy about the content and scope of these shared values and how to interpret them. Trevor Allan doubts that it is possible to define these values precisely through legislation, and speculates that they would be

---

<sup>141</sup> In the words of La Forest J in *RJR-MacDonald Inc v Attorney General of Canada* [1995] 3 SCR 199, 277, “Courts are specialists in the protection of liberty [...]” as cited by Lord Rogers in *A and others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004) [178]; see also *Beit Sourik Village Council v The Government of Israel* HCJ 2056/04 (2 May 2004) [48] (Barak P) (‘separation fence case’): “The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. This is his expertise. We examine whether this route’s harm to the local residents is proportionate. This is our expertise”.

<sup>142</sup> Lord Brown, above n 4, 208.

<sup>143</sup> Hunt, above n 132, 339; Dyzenhaus, above n 114, 7.

<sup>144</sup> Hunt, above n 132, 352.

<sup>145</sup> *Human Rights Act 1998* (UK), ss 4 and 10; see also below at 5.1.1.



“rather invoked as an aid to correct interpretation in particular circumstances”.<sup>146</sup> As a consequence, legislation cannot help with the judicial task of applying the values to the facts, which inevitably requires moral judgement.<sup>147</sup> It follows from this insight that, according to Allan, the system is characterised either by democratic positivism or liberal constitutionalism. Everything in between would be ‘unstable’.<sup>148</sup> This, however, position overlooks the fact that parliament may clarify over time the meaning of such values, including fairness, without necessarily usurping the proper judicial function of applying such values in the process of adjudicating particular disputes. Such a ‘conversation’ between the courts and legislature can be productive as long as it is based on rational legal and moral arguments, which also leads to the final point.

*Third*, acknowledging each other’s respective institutional competences also requires respecting each other’s decisions. At the same time, in order to earn that respect, decisions by the various branches of government must be adequately justified. Hence, the concept of due deference to the executive must include this additional requirement of justification. As Dyzenhaus argued,

“an effective principle of legality requires the institutions and legal culture that make deference possible. [...] And such a legal culture can only come into being and thrive, if all the institutions of legal order are committed to what I will call, following the late South African lawyer Etienne Mureinik, a ‘culture of justification’.”<sup>149</sup>

Lord Steyn shares this approach. *Ex curiae* he described the changes to the English legal system after the enactment of the HRA as follows:

---

<sup>146</sup> Allan, above n 101, 673.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*, 674.

<sup>149</sup> Dyzenhaus, above n 105, 137.

“Now there has been a decisive shift towards a rights based system. A legal culture of demanding justification for inroads on fundamental rights and freedoms now prevails.”<sup>150</sup>

A culture of justification is a necessary condition for any effective system of *post hoc* review of primary decision-makers. It also promotes dialogue between the branches of government.<sup>151</sup> On the other hand, systems, where no justification is required or given, imply that deference is determined simply through an institutional evaluation of which branch holds supremacy.<sup>152</sup>

As this section has explored, where fairness and security interests clash, there appears to be a dilemma. However, as long as the claims about security need not be empirically demonstrated, such a dilemma does actually not exist.<sup>153</sup> This is why a culture of justification is critical to the application of the principle of proportionality. In particular, the more serious the interference with a right is, the higher is the threshold requirement for evidence and thus the need for justification.<sup>154</sup>

#### *‘Checks and balances’ as a protector of liberty*

Characterising the relationship between the judicial, legislative and executive branches of government in terms of sharing responsibilities underpinned by a culture of justification, puts less emphasis on the concept of separation of powers, than on the concept of ‘checks and balances’. The concepts are closely related, but actually

---

<sup>150</sup> Lord Steyn, “Democracy through law” (Occasional Paper No 12, New Zealand Centre for Public Law, September 2002) 14.

<sup>151</sup> Barak, above n 57, 17.

<sup>152</sup> See Allan, above n 101, 676 and 682-683.

<sup>153</sup> Ashworth, above n 20, 208; in the context of police informers see Henry Mares, “Balancing public interest and a fair trial in police informer privilege: a critical Australian perspective” (2002) 6 *International Journal of Evidence and Proof* 94, 105.

<sup>154</sup> Alexy, above n 60, xxxv. A similar point has been made in the context of counter-terrorism: Bronitt, above n 22, 65.

distinct.<sup>155</sup> Whereas it is important to distinguish between the kinds of tasks attributed to the branches, it has been argued that the protection of liberties is best served by “prevent[ing] actors from conclusively determining the reach of their powers”, which is at the heart of ‘checks and balances’.<sup>156</sup>

Democracy depends upon controlling power through its dispersion.<sup>157</sup> ‘Checks and balances’ are a cardinal feature to avoid arbitrary and abusive governmental action by putting constraints on all actors. Lord Hailsham, in his critique of the Westminster system in the late 1970s, equally called for

“limit[ing] the unlimited powers of the legislature, partly by establishing a new system of checks and balances, partly by devolution, and partly by restricting the power of Parliament to infringe the rights of minorities and individuals.”<sup>158</sup>

Nonetheless, even if all these above propositions were accepted, it is arguable that when it comes to security-related decisions, courts are not well positioned or adapted to making such evaluations. In security situations, where decisions need to be made rapidly without details being revealed to the public, openness is dangerous and following a process of deliberation and procedure too slow.<sup>159</sup> This criticism is valid and should not be dismissed quickly. But abandoning ‘checks and balances’ entirely should not be the solution, and so far there is little evidence to support this position from those countries that have adopted a blanket exclusion of national security matters

---

<sup>155</sup> See James Stellios, *The federal judiciary: Chapter III of the Constitution* (LexisNexi Butterworths, 2010) 63.

<sup>156</sup> Laurenz Claus, “Montesquieu's mistakes and the true meaning of separation” (2005) 25(3) *Oxford Journal of Legal Studies* 419, 420. The founding fathers of the United States were more conscious of that fact and elevated the judiciary from the British system to a position where it would be able to check and put limits on the powers of parliament.

<sup>157</sup> See Haig Patapan, “Court’s conception of democracy” in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford companion to the High Court of Australia* (Oxford University Press, 2001) 201, 203.

<sup>158</sup> Lord Hailsham, above n 4, 132.

<sup>159</sup> Posner and Vermeule, above n 12, 31.

from judicial scrutiny. The preferred position must be to amend processes, procedures and institutions in a way they can achieve both ends. Judges need assistance in evaluating the risk to national security, if sensitive information were disclosed. This may even require what could be conceived as a violation of the separation of powers in a commitment to checks and balances.

Dyzenhaus calls for greater imagination to create appropriate institutional systems or amend their procedure to address current deficiencies in order to conduct meaningful review without jeopardising national security. To be successful, Dyzenhaus stresses the importance of adopting a common approach to security matters across all branches of government. Such an approach would involve the enactment of legislation that courts and key decision-makers can apply consistently, and that would minimise the risk of unjustified suppression of any important information to the defence.<sup>160</sup>

As this approach to assessing security issues potentially involves all branches, the process should be placed on a legislative footing. Input from the legislature in how to steer the behaviour of the other branches is vital. The articulation of the particular values and the respective roles in legislation, adds certainty in the application of the statutes, avoiding lengthy legal argument and delayed adjudication. The fact that it is entrenched in legislation also promotes legitimacy. Parliament should play the lead role in driving any institutional changes, as necessary and appropriate. In a system that is based on responsible government, the primary way of solving conflicts between liberty and security should be through political deliberation in parliament followed by

---

<sup>160</sup> Dyzenhaus, above n 114, 205-220. This is supported by Kent Roach, "Ordinary laws for emergencies and democratic derogation from rights" in Victor Ramraj (ed), *Emergencies and the limits of legality* (Cambridge University Press, 2008) 229, 256. Kavanagh also hints at a similar approach by mentioning specialist courts or install some other specialist design as a possibility to overcome judicial deficiencies. Aileen Kavanagh, "Constitutionalism, counterterrorism and the courts: changes in the British constitutional landscape (2011) 9(1) *International Journal of Constitutional Law* 172, 178.

legislative action.<sup>161</sup>

#### 4.2.4 - Judicial determination of deference

In sum, the competence of the judiciary to review governmental action as a means to protect guaranteed liberties of the individuals must be acknowledged, respected and even facilitated by the other branches. Consequently, any decision that is subject to judicial scrutiny must be justified to an extent that enables the courts to fulfil their constitutional duties. There will always be debate over where this line should be drawn between fairness and security, but it is submitted here that blindly deferring, on the sole ‘say-so’ of a primary decision-maker, is never good enough. Requiring the executive to offer justification to the courts and accept scrutiny by the courts will avoid the collapse of due deference into slavish submission. At the same time, it must be accepted that a court should never overrule a reasoned decision by a competent decision-making authority without convincing legal justification. This Chapter has proposed that decisions in security cases may be congruent with ‘deference as respect’ supported by a robust ‘culture of justification’. But there is danger that the term ‘deference’ is misunderstood as submission, an application which is misleading and should be avoided. Once a decision is accepted as being sufficiently justified by the appropriate authority, the court confidently should confirm the decision, rather than ‘defer’ to or submit to a ‘higher’ authority of the Executive in national security cases. The term *deference* should be reserved for any judicial act that includes a submissive element.

---

<sup>161</sup> See for example Tom Campbell “Human rights: a culture of controversy” (1999) 26 *Journal of Law and Society* 6. A similar argument has been made by Stribopoulos within the criminal justice debate of due process versus crime control. See James Stribopoulos, “Packer's blind spot: low visibility encounters and the limits of due process versus crime control” in François Tanguay-Renaud and James Stribopoulos (eds), *Rethinking criminal law theory* (Hart Publishing, 2012) 193, 196 and 216.

### 4.3 – The right to a fair trial and the public interest

As much as national security can cause challenges in the application of the principle of proportionality, the RFT also requires some additional analysis. Most human rights are not absolute in the sense that they may be subject to limits in the public interest. This type of limitation is part of all major international human rights treaties and even opponents of balancing accept some concessions may be required in ‘extra-ordinary’ circumstances. For example, Dworkin, whose language of rights as trumps initially gives the impression of an absolute position,<sup>162</sup> argued that limitations to rights are acceptable in the public interest when the cost to society “would be to a degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved”.<sup>163</sup> To illustrate such a case, Dworkin commented on the freedom of speech:

“Of course the Government may discriminate and may stop a man from exercising his right to speak when there is a clear and substantial risk that his speech will do great damage to the person or property of others, and no other means of preventing this are at hand [...]”<sup>164</sup>

It is also noteworthy that Dworkin did not distinguish between rights, thus rejecting the idea of a hierarchy of rights.<sup>165</sup> However, it is often argued that not all human rights carry the same weight. This can be due to the nature of the right as well as a varying importance, which it might acquire in a particular cultural setting. Hence, when limiting

---

<sup>162</sup> Joseph Raz commented on Dworkin that “[n]owhere does he say clearly and unambiguously anything more than that rights have some weight however little and may override some considerations which aren’t themselves rights”. Joseph Raz, “Professor Dworkin’s theory of rights,” (1978) 26 *Political Studies* 126, as cited in Yowell, above n 18, 98.

<sup>163</sup> Dworkin, above n 51, 200.

<sup>164</sup> *Ibid*, 204.

<sup>165</sup> *cf* Ashworth, above n 34, 74-77.

rights in the public interest attention must be paid to the specific right in question.<sup>166</sup> For example, the right not to be subject to torture is widely accepted as an absolute right that cannot be limited in the public interest. As already pointed out in Chapter 2, the RFT has a particular character, which also needs to be taken into consideration when in conflict with the public interest, which this Section will explore further.<sup>167</sup>

Understood as a hydraulic process, balancing security and fairness suggests that if one interest is substantially heavier, the other interest may be outweighed in its entirety. When it comes to the RFT, there are indications that such an approach is inappropriate. This is because although the RFT is not absolute, there may still be limitations on how far fairness can be restricted in the public interest. To demonstrate this characteristic, this Section will discuss the case law of the ECtHR in relation to non-disclosure. The cases are particularly instructive, as the ECtHR - with its approach of a 'fourth instance' - is not concerned with a particular procedure of the national courts, but with the application of principles in order to determine whether the decision-making procedure as a whole conforms with art 6 – meaning whether an adequate level of procedural justice has been afforded.<sup>168</sup> Furthermore the ECtHR case law, as noted above, is directly relevant to the UK through the passage of the HRA, and indirectly influencing the standards of international human rights law.<sup>169</sup>

---

<sup>166</sup> Barak, above n 57, 11.

<sup>167</sup> This is particularly obvious under the common law, where unfairness can be declared a miscarriage of justice and may lead to the temporary or full stay of proceedings.

<sup>168</sup> For example *Rowe and Davis v the United Kingdom* [ECtHR] Application no 28901/95 (16 February 2000) [62]; *Schenk v Switzerland* [ECtHR] Application no 10862/84 (12 July 1988) [46]; see also Claire Ovey and Robin White, *Jacobs and White: the European Convention on Human Rights* (Oxford University Press, 4<sup>th</sup> ed, 2006) 159.

<sup>169</sup> See for example Michael Kirby, "The Australian debt to the European Court of Human Rights" in Breitmoser *et al* (eds), *Human rights, democracy and the rule of law* (Dike, 2007) 391.

### 4.3.1 - Limitations of the right to a fair trial under the ECHR

Within the ECHR, art 6 holds a particular position straddling the categories of absolute and qualified rights. It is not listed under art 15 as a non-derogable (or absolute) right, which would mean that no limitations could be imposed even during a state of emergency.<sup>170</sup> Neither does the article contain any qualifying clause, such as expressly included in arts 8-11 ECHR, which permits imposing limitations provided they are “necessary in a democratic society in the interest of public safety and national security”. Although not expressly mentioned in the ECHR, imposing limitations on these qualified rights must still comply with the principle of proportionality.<sup>171</sup>

This particular position of the RFT between the two categories of absolute and qualified rights has been recognised by the UK Courts.<sup>172</sup> In *Dyer*, Lord Hope specifically distinguished the RFT from the set of expressly qualified rights in the ECHR by stating that “it can be taken to be a fundamental principle that, where rights are provided for expressly by the Convention, there is no room for implied restrictions on those rights”.<sup>173</sup> As a consequence of this decision, the RFT, as guaranteed in art 6(1), has been described as being ‘absolute’ in the sense that it “does not permit the application of any balancing exercise, and that the public interest can never be invoked to deny that right to anybody under any circumstances”.<sup>174</sup> An *a priori* question arises whether the

---

<sup>170</sup> These are arts 2, 3, 4(1), and 7 ECHR. However, the description as absolute may not be fully justified. Even those absolute rights suffer from relativism as people might disagree about the scope of the rights. For example, what constitutes torture or degrading treatment? Is hitting a child for educational purposes degrading? Does waterboarding constitute torture? Where is the line to coercive interrogation?

<sup>171</sup> Aron Ostrovsky, “What’s so funny about peace, love, and understanding? How the margin of appreciation doctrine preserves core human rights within cultural diversity and legitimises International Human Rights Tribunals” (2005) 1(1) *Hanse Law Review* 47, 50. See for example *Klass v Germany* [ECtHR] Application no 5029/71 (6 September 1978).

<sup>172</sup> See for example *Dyer v Watson* [2002] UKPC D1 (29 January 2002) [73] (Lord Hope).

<sup>173</sup> *Ibid*; *Dyer* concerned the right to a hearing within reasonable time. See also *Delcourt v Belgium* [ECtHR] Application no 2689/65 (17 January 1970) [25].

<sup>174</sup> *Dyer v Watson* [2002] UKPC D1 (29 January 2002) [73] (Lord Hope), also referring to *Brown v Stott* [2003] 1 AC 681, 719.



RFT can be limited *at all*, and whether the principle of proportionality, which plays such a prominent role in relation to qualified rights, has any scope for application?

Shortly after *Dyer*, the House of Lords gave further consideration to this question in *Brown v Stott*, one of first leading cases on art 6 after the introduction of the HRA, in which Lord Bingham, delivering the leading judgement in a unanimous House of Lords decision, held:

“The jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. [...] The court has also recognised the need for a *fair balance* between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention.”<sup>175</sup>

In other words, despite the apparent absolute character of the RFT, as expressed in the wording and structure of the ECHR and the early indications in *Dyer*, under the HRA, the components of the RFT can be balanced against the public interest. This is also where the principle of proportionality becomes relevant.<sup>176</sup>

Clearly *Dyer* was not a long-lived approach to the RFT. In *Roth*, the English Court of Appeal (CA) also rejected the term ‘absolute’ right in relation to art 6 as being misleading. As the requirements under each aspect of the RFT depend on the

---

<sup>175</sup> *Brown v Stott* [2003] 1 AC 681, 704 (emphasis added); see also *Dyer v Watson* [2002] UKPC D1 (29 January 2002) [74] (Lord Hope); *Home Office v Tariq* [2011] UKSC 35 (13 July 2011) [139]-[140] (Lord Dyson).

<sup>176</sup> *R v A* [2001] UKHL 25 (17 May 2001) [38] (Lord Steyn).

circumstances, there cannot be a uniform standard, which is what the term implies.<sup>177</sup>

Given that no further guidance from the text or structure of the ECHR itself, the ECtHR's case law is crucial for determining the scope of the RFT in relation to non-disclosure of information.

### *ECHR case law*

The ECtHR has decided an extensive number of cases on art 6, making it the most litigated right under the ECHR.<sup>178</sup> When it comes to limitations of the RFT in general, there are some inconsistencies in the approach taken by the ECtHR.<sup>179</sup> In particular, in several cases the ECtHR has indicated that a balancing approach is permissible.<sup>180</sup>

However, such a balancing approach appears to be an exception to the higher standard applied in the majority of cases by the Court.<sup>181</sup> Furthermore, particular aspects of art 6 are not obviously affected by such inconsistencies.<sup>182</sup> Understanding the Court's approach is aided by examining the cases on non-disclosure of information, as well as anonymous and absent witnesses.<sup>183</sup>

---

<sup>177</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 (22 February 2002) [84] (Lord Laws). As these remarks were made in the context of discussing the degree of deference that the courts are required to give to the other branches of government (see above at 4.2.1.), the CA also emphasised the special nature of the RFT describing it as “unqualified and cannot be abrogated”, which also clarifies that certain aspects are not entirely up for discussion. *Ibid.*

<sup>178</sup> Ovey and White, above n 168, 158.

<sup>179</sup> Ryan Goss, *Criminal fair trial rights* (Hart Publishing, 2014).

<sup>180</sup> *Salabiaku v France* [ECtHR] Application no 10519/83 (7 October 1988) [28], which concerned the presumption of innocence and the applicability of a presumption of fact combined with a reverse burden of proof.

<sup>181</sup> Ashworth, above n 34, 62; Andrew Ashworth, “Criminal proceedings after the *Human Rights Act*: the first year” (2001) November *Criminal Law Review* 855, 871.

<sup>182</sup> *Ibid.*, 872.

<sup>183</sup> Within this thesis both anonymous and absent witnesses are considered as edited evidence. See for the definition of edited evidence see below in the Introduction of Chapter 6.

### 4.3.1.1 Anonymous and absent witnesses

Cases based upon the evidence of an anonymous or absent witness not only concern the collective public interest to continue the trial, but also to a large extent the individual interests of that witness (who in some cases, may also be the victim of the accused's alleged offence) not to be subject to violence or distress. Despite this widened public interest, the ECtHR has equally applied a high standard of protection of the defendant's RFT.

The ECtHR takes a principled approach, stressing that,

“all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument [...] As a rule, these [Article 6] rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.”<sup>184</sup>

The right to confront one's accusers is certainly not absolute, but any restrictions on the right need to be limited and, as the ECtHR has held, “[the right] cannot be sacrificed to expediency”.<sup>185</sup> The process of determining whether such a limitation is permissible involve a number of considerations. First, the court must determine whether the restriction is strictly necessary. Difficulties in obtaining evidence in order to fight organised crime<sup>186</sup> or drug trafficking<sup>187</sup> do not in itself justify inroads into the right to confront a witness (unless sufficiently counterbalanced). Examining the law enforcement claim of the necessity of suppressing a witness' identity, there must be at

---

<sup>184</sup> *Kostovski v the Netherlands* [ECtHR] Application no 11454/85 (20 November 1989) [41]; see in particular art 6(3)(d).

<sup>185</sup> *Ibid.*, [44].

<sup>186</sup> *Ibid.*, [44].

<sup>187</sup> *Saïdi v France* [ECtHR] Application no 14647/89 (20 September 1993) [44].

least some degree of harm anticipated from disclosure in open court. In *Doorson* the reasons for the anonymity of the witnesses were considered sufficient, and not unreasonable. In that case, while the defendant had not directly threatened any of the witnesses, police records indicated that there was a real possibility that threats or retaliation would occur.<sup>188</sup> One witness had already been threatened by other drug dealers, and another witness had suffered retaliation for providing evidence in a previous similar case. In *Van Mechelen* the ECtHR held the explanation for why the defendant was not allowed to be present during the examination of the witnesses, who happened to be police officers, in an open court session was not satisfactory. Thus, ‘fear of retaliation’ was held not to be a sufficient ground for limiting the right of the accused to hear the evidence against him/her, and ECtHR found a violation of RFT.<sup>189</sup> Although fear of retaliation can be a reason for limiting the defendant’s right to confrontation, the court must be satisfied that the fear is based on objective grounds supported by evidence.<sup>190</sup> Police officers in particular, as ‘professional’ witnesses who are not a disinterested class of witnesses or victims, should only testify anonymously in exceptional circumstances. The ECtHR observed that although police officers deserve protection, they have a “duty of obedience to the State’s executive authorities and usually have links with the prosecution”.<sup>191</sup> However, the ECtHR has also accepted that the identity of an undercover officer may be withheld if disclosure would seriously threaten him/her future work.<sup>192</sup>

---

<sup>188</sup> *Doorson v. the Netherlands* [ECtHR] Application no 20524/92 (26 March 1996) [71].

<sup>189</sup> *Van Mechelen and others v the Netherlands* [ECtHR] applications nos 21363/93, 21364/93, 21427/93 and 22056/93 (23 April 1997) [58]-[60].

<sup>190</sup> *Al-Khawaja and Tahery v the United Kingdom* [ECtHR] Applications nos 26766/05 and 22228/06 (15 December 2011) [124].

<sup>191</sup> *Van Mechelen and others v the Netherlands* [ECtHR] applications nos 21363/93, 21364/93, 21427/93 and 22056/93 (23 April 1997) [56].

<sup>192</sup> *Ibid*, [57]; Committee of Ministers of the Council of Europe, *Recommendations No R (97) 13 concerning intimidation of witnesses and the rights of the defence* (10 September 1997) [11].

The ECtHR grants a wide discretion to national laws on whether a witness must be called or not.<sup>193</sup> Ashworth critically argued that assumptions about risk of retaliation alone should not permit anonymity, arguing instead that

“[o]nly where the risk is shown to be sufficiently imminent to be regarded as more probable than not to materialise, it is submitted, is there sufficient ground to consider even the minimal curtailment of Article 6 that *Doorson* permitted.”<sup>194</sup>

Ashworth observed that as long as the system continues to value the presumption of innocence, it is inappropriate to value the rights of a witness higher than the right of the accused to a fair trial.<sup>195</sup>

Some limitations are, however, permissible if the defendant’s RFT is sufficiently counterbalanced. Courts can implement adjustments to standard trial procedures to ensure the defendant can challenge the evidence and therefore ‘compensate’ for any limitations on the fair trial rights that would otherwise apply.

In *Doorson*, the defendant was excluded from a hearing during which the judge interviewed a witness, and was not informed about the witness’s identity. This limitation on his RFT was however, not considered a violation of art 6 because the judge knew the identity of the witness and the defence lawyer was present and also able to examine the witness.<sup>196</sup>

However, in a number of cases the ECtHR has found violations of art 6. In *Kostovski*, the only examining magistrate heard the witness without knowing the identity of the

---

<sup>193</sup> See for example *Vidal v Belgium* [ECtHR] Application no 12351/86 (22 April 1992) [33].

<sup>194</sup> Ashworth, above n 34, 80.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Doorson v the Netherlands* [ECtHR] Application no 20524/92 (26 March 1996) [73].

person, and without the defendant or defence advocate being present.<sup>197</sup> In *Windisch*, the witnesses were initially questioned in the pre-trial phase by police officers, who then testified during the trial. The ECtHR held that this procedure did not sufficiently counterbalance the limitations to the defendant's RFT under art 6.<sup>198</sup>

Different from the cases of *Windisch*<sup>199</sup> or *Saïdi*,<sup>200</sup> *Doorson* was held to be compliant with art 6, because there was additional corroborating evidence of guilt, in addition to the anonymous witness testimony. Crucially, these two aspects are cumulative requirements: corroboration does not replace counterbalancing. Rather the Court requires a conviction not to be "solely or to a decisive extent" based on a witness that the defendant was unable to question properly.<sup>201</sup>

Although this rule seemed to be well established, the Grand Chamber changed its approach slightly – without claiming that this would contradict earlier decisions<sup>202</sup> - after the UK Supreme Court took issue with the 'sole or decisive' rule in *Horncastle*,<sup>203</sup> and refused to follow the ECtHR's earlier line of authority case law. While these cases concerned absent rather than anonymous witness, the principles in question are identical.<sup>204</sup>

---

<sup>197</sup> *Kostovski v the Netherlands* [ECtHR] Application no 11454/85 (20 November 1989) [43].

<sup>198</sup> *Windisch v Austria* [ECtHR] Applications no 12489/86 (27 September 1990) [27]. In this case the witnesses were not even present at the alleged commission of the crime. The shortcomings were so profound that the Court did not engage in much analysis to come to the conclusion of a violation of art 6(3)(d).

<sup>199</sup> *Ibid*, [24].

<sup>200</sup> *Saïdi v France* [ECtHR] Application no 14647/89 (20 September 1993) [44].

<sup>201</sup> *Doorson v the Netherlands* [ECtHR] Application no 20524/92 (26 March 1996) [74]; see also *Luca v Italy* [ECtHR] Application no 33354/96 (27 February 2001) [40]; *Van Mechelen and others v the Netherlands* [ECtHR] applications nos 21363/93, 21364/93, 21427/93 and 22056/93 (23 April 1997) [55]; *Unterpertinger v Austria* [ECtHR] Application no 9120/80 (24 November 1986) [33].

<sup>202</sup> See *Al-Khawaja and Tahery v the United Kingdom* [ECtHR] Applications nos 26766/05 and 22228/06 (15 December 2011) [143].

<sup>203</sup> *R v Horncastle and Others* [2010] 2 AC 430 (9 December 2009).

<sup>204</sup> In *Al-Khawaja and Tahery v the United Kingdom* the ECtHR also made references to British cases that concerned anonymous witnesses. See *Al-Khawaja and Tahery v the United Kingdom* [ECtHR] Applications nos 26766/05 and 22228/06 (15 December 2011) [49].

In the joint cases of *Al-Khawaja and Tahery v the United Kingdom*, the ECtHR followed the UK approach and held that the sole or decisive rule is not absolute.<sup>205</sup> Rather a violation of art 6 can be avoided by sufficient counterbalancing through installing appropriate procedural safeguards. In particular, the Court needs to look for indications that the evidence seemed reliable despite the lack of actual cross-examination.<sup>206</sup> In *Al-Khawaja* the counterbalancing was considered sufficient, because apart from procedural safeguards supervised by the judge, the statement of a deceased witness had been considered reliable. The deceased had given a largely consistent account of events to both the police and two friends.<sup>207</sup> In contrast, the anonymous witness statement in *Tahery* was not considered demonstrably reliable. A fight had taken place and all persons present had been interviewed by the police. Originally no witnesses claimed to have seen the applicant stabbing the victim, however, two days later an anonymous witness testified to the contrary, which was not corroborated by any of the other witnesses. Furthermore, the applicant's theoretical opportunity to call witnesses to challenge the statement, as well as the judge's warning to the jury were not considered to be sufficient counterbalancing measures.<sup>208</sup>

The two dissenting Judges Sajó and Karakaş in *Al-Khawaja and Tahery v the United Kingdom* strongly criticised the new approach as departing from established case law and watering down the protection guaranteed in previous cases. In particular, the case opens the door for a 'holistic approach', with the courts assessing the overall impact on fairness and thus reverting to balancing. This eliminates the important requirement of mandating procedural counterbalancing to neutralise forensic disadvantage to the

---

<sup>205</sup> *Ibid.*, [147]. These cases are further discussed below at 6.3.1.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*, [155]-[158].

<sup>208</sup> *Ibid.*, [160]-[162].

defendant. Hence, a trial can be still held to be fair despite one fundamental aspect, the equality of arms/adversarial nature, being violated in its essence.<sup>209</sup>

As mentioned above, the ECtHR's role is not to assess the evidence itself or how it has been admitted, but rather to examine the circumstances under which it can be assessed.<sup>210</sup> Under current case law regarding the equality of arms, counterbalancing requires at least some opportunity for the defendant to address the issues (contained in the evidence of the witness) relied upon by the prosecution. This may happen at any stage of the trial or through a legal representative, which did not take place in *Al-Khawaja*. The Court has recognised the inherent dangers of the reliability of statements that have only been tested by one side.<sup>211</sup> Even additional enquiries about the value of such a statement will not negate the risk of unreliability.

#### 4.3.1.2 Suppression of documents

The ECHR does not contain an express right to disclosure of information held by the prosecution under art 6. However, the ECtHR has implied such a right from the principle of equality of arms.<sup>212</sup> In terms of potential limitations to that right, it adopted the approach as expressed in *Doorson*.<sup>213</sup> Hence, despite a general duty for the prosecution to disclose all relevant documents and not merely those which support the prosecution,<sup>214</sup> the right of the defendant to access these documents is not absolute.<sup>215</sup>

---

<sup>209</sup> *Ibid*, joint partly dissenting and partly concurring opinion of Judges Sajó and Karakaş.

<sup>210</sup> *Kostovski v the Netherlands* [ECtHR] Application no 11454/85 (20 November 1989) [39].

<sup>211</sup> *Ibid*, [42].

<sup>212</sup> *Rowe and Davis v the United Kingdom* [ECtHR] Application no 28901/95 (16 February 2000) [60];

*Jasper v the United Kingdom* [ECtHR] Application No. 27052/95 (16 February 2000) [51].

<sup>213</sup> *Rowe and Davis v the United Kingdom* [ECtHR] Application no 28901/95 (16 February 2000) [61] referring to *Doorson* at [70] that the right to disclosure is not absolute and at [72] that it must be strictly necessary and sufficiently counterbalanced by procedure.

<sup>214</sup> *Ibid*, [60]; *Edwards v the United Kingdom* [ECtHR] Application no 13071/87 (16 December 1992) [36].



Rather, public interests, such as national security, or other individual rights, must be “weighed against the rights of the accused”.<sup>216</sup> However, the term ‘weighed’ should not be misunderstood as an endorsement of the balancing model. The ECtHR clarified that any limitation must be also “strictly necessary” and “any difficulties caused to the defence [...] must be sufficiently counterbalanced by the procedures followed by the judicial authorities”.<sup>217</sup>

When it comes to the first criteria, the ECtHR applies a wide ‘margin of appreciation’ that is, the ECtHR does not perceive its role as deciding whether the suppression of information, in a particular case, was strictly necessary or not.<sup>218</sup> As the ECtHR held in *Rowe and Davis*:

“Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.”<sup>219</sup>

In doing so, one of the crucial aspects of the procedure is that the trial judge is in the best position to make an informed judgment on the grounds for non-disclosure as well as the impact on fairness of the procedures.

In *Rowe and Davis*, the prosecution withheld some relevant material from the defence, on grounds of sensitivity, without the knowledge of the court. The ECtHR held that keeping information secret from the court cannot satisfy the procedural standards

---

<sup>215</sup> *Rowe and Davis v the United Kingdom* [ECtHR] Application no 28901/95 (16 February 2000) [61]; *Jasper v the United Kingdom* [ECtHR] Application No. 27052/95 (16 February 2000) [51]; *Fitt v the United Kingdom* [ECtHR] Application No 29777/96 (16 February 2000) [45].

<sup>216</sup> *Ibid.*

<sup>217</sup> *Rowe and Davis v the United Kingdom* [ECtHR] Application no 28901/95 (16 February 2000) [61].

<sup>218</sup> *Ibid.*, [62].

<sup>219</sup> *Ibid.*

required by the Convention.<sup>220</sup> The procedure before the CA also could not remedy or counterbalance this unfairness for several reasons. First, the CA only examined the sensitive material *ex parte*, and secondly it had to rely on the trial's transcripts to determine its relevance. Only the trial judge, who had heard all the witnesses, would have been able to gauge the need for disclosure in order to guarantee the fairness of the trial.<sup>221</sup> The applicant to the ECtHR further claimed that the interests in conflict could be addressed through the appointment of a special advocate.<sup>222</sup> However, the ECtHR did not consider such an appointment as necessary, and concluded that the trial judge is in the best position to weigh the various interests.<sup>223</sup>

In the earlier case of *Edwards*, the ECtHR held that the unfairness of not disclosing relevant material to the trial judge or defendant had been remedied, as the defendant had been made aware of the existence of that information, and had the opportunity to raise concerns on appeal: in this case the CA was able to take the suppressed information into account when reviewing the safety of the conviction.<sup>224</sup> The ECtHR confirmed in subsequent judgments that in order to avoid a violation of art 6 in such cases, it is necessary for a defendant to have access to the previously suppressed information ahead of the appeal hearings in order to make submissions.<sup>225</sup> This can include disclosure of a detailed summary of the document in question.<sup>226</sup> Without such an opportunity, the

---

<sup>220</sup> *Ibid*, [63]; confirmed in *Dowsett v the United Kingdom* [ECtHR] Application no 39482/98 (24 June 2003) [44].

<sup>221</sup> *Rowe and Davis v the United Kingdom* [ECtHR] Application no 28901/95 (16 February 2000) [65]; *Dowsett v the United Kingdom* [ECtHR] Application no 39482/98 (24 June 2003) [47]-[50]; *Atlan v the United Kingdom* [ECtHR] Application no 36533/97 (19 June 2001) [45].

<sup>222</sup> *Rowe and Davis v the United Kingdom* [ECtHR] Application no. 28901/95 (16 February 2000) [55].

<sup>223</sup> *Ibid*, [58].

<sup>224</sup> *Edwards v the United Kingdom* [ECtHR] Application no 13071/87 (16 December 1992) [36]-[37].

<sup>225</sup> *JLJ, GMR and AKP v the United Kingdom* [ECtHR] Applications nos 29522/95, 30056/96 and 30574/96 (19 September 2000) [114]; *Dowsett v the United Kingdom* [ECtHR] Application no 39482/98 (24 June 2003) [46].

<sup>226</sup> *Botmeh and Alami v the United Kingdom* [ECtHR] Application no 15187/03 (7 June 2007) [43]-[44].

assessment of the suppressed information by the CA alone will not counterbalance the violation of art 6.<sup>227</sup>

*Rowe and Davis* was also distinguished from two other cases, *Jasper*<sup>228</sup> and *Fitt*.<sup>229</sup> In those cases, handed down on the same day, material was similarly withheld from the defendant. However, the judge, as well as the defence, were informed about the public interest immunity (PII)<sup>230</sup> claims to suppress information. This enabled the judge to be in control and gave the defence – at least in theory – the opportunity to make submissions.<sup>231</sup> Therefore these cases concentrated on whether the *ex parte* hearings offered sufficient safeguards to the defendant in order to comply with art 6. In *Jasper* the defence was told that there had been an application for non-disclosure, but was not advised of the category within which the information fell. In *Fitt*, the defence knew about the category of the information and was even provided with an edited summary of the document. In both cases the defence was invited to outline its case to assist the judge making a decision on the disclosure request. However, in *Jasper* the defence was not provided with the reasons for the judge's decision in favour of the prosecution's request.<sup>232</sup> By contrast, the defence in *Fitt* was provided with a summary of reasons by the trial judge.<sup>233</sup> By the narrowest majority (9:8) the ECtHR Court did not find a violation of the fair trial in either case. The Court argued that the defence was "kept informed and permitted to make submissions and participate in the [...] decision making process as far as possible without revealing to them the material".<sup>234</sup> Again the

---

<sup>227</sup> *Atlan v the United Kingdom* [ECtHR] Application no 36533/97 (19 June 2001) [45]-[46].

<sup>228</sup> *Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000).

<sup>229</sup> *Fitt v the United Kingdom* [ECtHR] Application no 29777/96 (16 February 2000).

<sup>230</sup> For the development of concept of PII see below at 6.2.1 and 6.2.2.

<sup>231</sup> *Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000) [55]; *Fitt v the United Kingdom* [ECtHR] Application no 29777/96 (16 February 2000) [48].

<sup>232</sup> *Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000) [54].

<sup>233</sup> *Fitt v the United Kingdom* [ECtHR] Application no 29777/96 (16 February 2000) [47].

<sup>234</sup> *Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000) [55]; see also *Fitt v the United Kingdom* [ECtHR] Application no 29777/96 (16 February 2000) [48].

ECtHR did not consider that the appointment of special advocate was necessary to ensure a fair trial.<sup>235</sup> Further, in both *Fitt* and *Jasper* the Court held that it was a crucial procedural safeguard that disclosure remained a matter for the judge to assess at all times.<sup>236</sup> The *ex parte* review by the CA has been considered as an additional safeguard.<sup>237</sup>

In *Edwards and Lewis* the ECtHR held that art 6 had been breached because the defendants were not informed about the nature of the evidence and the closed hearing did not meet the standards of an adversarial hearing.<sup>238</sup> The case was distinguished from its predecessors on the ground that the defendants argued that they had been subject to entrapment by police, and thus the indictment should have been stayed. If the entrapment had occurred, the defendant would have had a right to argue that the relevant evidence should have been excluded or the proceeding been stayed as it constituted an abuse of process.<sup>239</sup> Evidence on this question was only discussed in an *ex parte* hearing, in which the trial judge rejected the entrapment claim. Thus the PII claim related to material which formed the basis of an ‘issue of fact’, namely whether the defendants had been in fact entrapped. In such circumstances, the ECtHR held unanimously, the defendant, in order to avoid an infringing art 6, must be in a position to make submissions on the material.<sup>240</sup> This goes further than previous ECtHR

---

<sup>235</sup> *Ibid.*

<sup>236</sup> *Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000) [56]; *Fitt v the United Kingdom* [ECtHR] Application no 29777/96 (16 February 2000) [49].

<sup>237</sup> *Ibid.*

<sup>238</sup> *Edwards and Lewis v the United Kingdom* [ECtHR] Application nos 39647/98 and 40461/98 (22 July 2003). The UK Government originally appealed to the Grand Chamber of the ECtHR. Meanwhile the House of Lords decided the case of *R v H and C* [2004] 2 AC 134 (5 February 2004). Having the impression that the UK law was now sufficiently settled and that cases could be distinguished from *Edwards and Lewis*, the Government decided that they no longer wished pursue the referral to the Grand Chamber and accepted the simple endorsement of the first judgement. See *Edwards and Lewis v the United Kingdom* [ECtHR] Application nos 39647/98 and 40461/98 (27 October 2004).

<sup>239</sup> *Police and Criminal Evidence Act 1984* (UK), s 78; *Edwards and Lewis v the United Kingdom* [ECtHR] Application nos 39647/98 and 40461/98 (22 July 2003), at [29].

<sup>240</sup> *Edwards and Lewis v the United Kingdom* [ECtHR] Application nos 39647/98 and 40461/98 (22 July 2003), at [57]-[59].

decisions, which had held that a closed hearing would be legitimate provided the *trial judge* (rather than the defence) was in a position to evaluate, uphold or reject the prosecution's PII claim.

The ECtHR further indicated that appointing a special advocate could re-introduce an adversarial element – discussing the *Auld Report*, which had recommended the introduction of special advocate in PII hearings – but did not go as far as to say that it is necessary in all such cases.<sup>241</sup>

In *McKeown*, the sensitive information was only shown to a 'disclosure judge', unconnected with the proceeding, and not to the trial judge, who had only read a summary.<sup>242</sup> A disclosure judge was used because the case operated under the Northern Irish Diplock system, where the judge sits without a jury and therefore is also the trier of fact. Because of these circumstances, the applicant complained that – by contrast to the trial judges in *Jasper* and *Fitt* - the trial judge in *McKeown* was not in the position to monitor the need for disclosure throughout the trial, as the judge had not seen the documents itself. The disclosure judge, on the other hand, was not informed of the developments occurring during the trial. The ECtHR, however, placed the emphasis on the disclosure judge's ability to decide whether all relevant documents, including highly sensitive ones, had been disclosed in the first place.<sup>243</sup> The disclosure judge was again consulted by the trial judge for the question of whether a special advocate is necessary, giving the disclosure judge another opportunity to evaluate the relevance of the suppressed material.

---

<sup>241</sup> *Ibid*, [41]; see also Sir Robin Auld LJ, "A review of the criminal courts in England and Wales" (2001) Chapter 10, Paragraphs [194]-[197].

<sup>242</sup> *McKeown v the United Kingdom* [ECtHR] Application No 6684/05 (11 January 2011).

<sup>243</sup> *Ibid*, [52].

Although the ECtHR examines the particular requirements of art 6(3) when considering whether a defect has been sufficiently counterbalanced, the overall fairness of the process, which extends beyond the trial to include the appellant decision, is relevant.<sup>244</sup>

Generally, the ECtHR stresses - either to sufficiently counterbalance or avoid a violation in first place – that, first, the judge has to be in the position to make an informed judgement on the disclosure and thus the fairness of the trial, and second that that the defendant has to have at least some opportunity to make submissions on the PII claims. In cases where the material has also been withheld from the trial judge, only full - or virtually full - disclosure ordered by the CA will remedy the original unfairness.<sup>245</sup>

Furthermore, no material that has not been disclosed can form a part of the prosecution's case or be put before the jury.<sup>246</sup>

Table 4.1. below illustrates how violations of art 6 can be avoided. In all cases, where information had been withheld from both the defendant and the trial judge, a violation was only avoided by the disclosure of that information on appeal (*Edwards, IJL, GMR and AKP* and *Botmeh & Alami*). The Table also shows that some involvement of the defendant during the trial at first instance will be sufficient to uphold the fairness of the trial. The question of what level of involvement by the defendant (in the process) is necessary to avoid unfairness, both in first instance and on appeal - in other words, what is actually fair in this context - has not been answered by the ECtHR. The ECtHR has deferred this issue to the domestic courts, accepting that these courts are better placed make such judgments.

---

<sup>244</sup> *Edwards v the United Kingdom* [ECtHR] Application no 13071/87 (16 December 1992) [34]; *Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000) [55]; *Dowsett v the United Kingdom* [ECtHR] Application no 39482/98 (24 June 2003) [40]; *McKeown v the United Kingdom* [2011] Application No 6684/05 (11 January 2011) [44]; *Al-Khawaja and Tahery v the United Kingdom* [ECtHR] Applications nos 26766/05 and 22228/06 (15 December 2011) [118]; *Taxquet v Belgium* [ECtHR] Applications no 926/05 (16 November 2010) [84].

<sup>245</sup> *Botmeh and Alami v the United Kingdom* [ECtHR] Application no. 15187/03 (7 June 2007) [43]-[44].

<sup>246</sup> *Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000) [55].

CASE	TRIAL				APPEAL			OUTCOME
	Information suppressed and trial judge not informed	Information suppressed and trial judge informed & defence (not) informed <sup>247</sup>			No access to suppressed sensitive information	<i>Ex parte</i> examination of sensitive evidence	Disclosure of suppressed information	
<i>Edwards</i>	x						x	no
<i>Rowe and Davis</i>	x					x		yes
<i>Jasper</i>			x			x		no
<i>Fitt</i>		x			x			no
<i>Atlan</i>	x					x		yes
<i>IJL, GMR and AKP</i>	x						x	no
<i>Dowsett</i>	x				x			yes
<i>Edwards and Lewis</i>						x		yes
<i>Botmeh &amp; Alami</i>	x					(x) <sup>248</sup>	x	no
<i>McKeown</i>		x <sup>249</sup>			x			no

Table 4.1: procedural reasons for art 6 violations in trials suppression information

The narrow majority of one vote in *Jasper* and *Fitt*, makes the dissenting judges' opinions relevant. Seven out of the eight dissenting judges found that the *ex parte* procedure, as outlined above, violated the principles of adversarial proceedings and the equality of arms. They did not accept that being able to make submission would have had a real impact on the disclosure decision "as the defence were unaware of the nature of the matters they needed to address. It was purely a matter of chance whether they

<sup>247</sup> **Note:** In the second column, indicating when the judge has been informed about the information, three further distinctions have to be made: first, the defence is informed about the category of the evidence discussed in the *ex parte* hearing and therefore is able to make submissions; second, the defence is informed about the *ex parte* hearing, but not about the category as this would give away the evidence discussed; third, the defence is not even informed of the *ex parte* application, as the knowing about the hearing would reveal the evidence.

<sup>248</sup> In *Botmeh and Alami* the CA first held a disclosure hearing *ex parte* and then issued a summary of the material ahead of appeal hearings enabling the defence to make submissions on the issue.

<sup>249</sup> In this case only the disclosure judge had been informed.

made any relevant points”.<sup>250</sup> The fact that the trial judge was making the non-disclosure decisions, as well as monitoring the need for disclosure, could not sufficiently counterbalance the defect since the judge only received submissions from the prosecution.<sup>251</sup>

In *Edwards*, the two dissenting judges pointed out (although separately) that the CA should not have assumed that provision of the additional information would not have influenced the jury, indicating that the procedure before the appeal court did not remedy the original defect.<sup>252</sup> Judge Pettiti also took a principled approach arguing that any suppression of evidence during the trial would be a ground for quashing the verdict.<sup>253</sup>

#### 4.3.1.3 Non-disclosure in administrative procedures

The RFT in art 6(1) applies both to criminal and civil proceedings, while arts 6(2) and (3) deal with fairness requirements exclusively related to criminal charges. However, the ECtHR has implied requirements of the equality of arms listed in the sub-s (2) and (3) to also apply in civil proceedings as part of the essence of the RFT. Consistent with the approach in criminal proceedings, a violation of one of these requirements does not automatically constitute a violation of art 6. Reflecting the well-established distinction between criminal and civil standards of proof, the ECtHR also accepts that lower standards of proof are acceptable in civil procedures.<sup>254</sup>

---

<sup>250</sup> *Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000), dissenting opinions of Judges Palm, Fischbach, Vajić, Thomassen, Tsatsa-Nikolovska and Traja; Judge Hedigan in agreement; see also *Fitt v the United Kingdom* [ECtHR] Application no 29777/96 (16 February 2000), dissenting opinions of Judges Palm, Fischbach, Vajić, Thomassen, Tsatsa-Nikolovska and Traja; Judge Hedigan in agreement.

<sup>251</sup> *Ibid*, referring to *Doorson*.

<sup>252</sup> *Edwards v the United Kingdom* [ECtHR] Application no 13071/87 (16 December 1992) dissenting opinions of Judge Pettiti and Judge De Meyer.

<sup>253</sup> *Ibid*, dissenting opinion of Judge Pettiti.

<sup>254</sup> *Dombo Beheer BV v the Netherlands* [ECtHR] Application no 14448/88 (27 October 1993) [32]; *A and others v the United Kingdom* [ECtHR] Application no 3455/05 (19 February 2009) [203].



The use of civil proceedings to deal with or prevent serious crime has become an issue in the context of counter-terrorism. Governments enjoy a wide discretion of how to characterise their procedures under domestic, which Zedner notes creates the danger of ‘jurisprudential context-shopping’.<sup>255</sup> Given the differences in due process protection for persons subject to civil and criminal proceedings, particularly the standard of proof, the criteria for characterising civil and criminal processes becomes important. In order to apply the same standard across all member states, as well as to avoid misuse of jurisdiction, the ECtHR has developed an autonomous meaning for the classification of proceedings.<sup>256</sup> Although the starting criteria is always the classification under domestic law, the court additionally takes into account “the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and the severity”.<sup>257</sup> This approach should avoid the circumvention of the usual high standards of due process for criminal trials by the state simply by labelling a particular procedure to be civil/administrative rather than criminal.<sup>258</sup>

To determine the nature and purpose of the proceedings in question, the ECtHR considers the extent to which it is punitive rather than preventative.<sup>259</sup> For example, in the cases of administrative (indefinite) detention based on a reasonable suspicion of the relevant Minister, where lower standards of the art 6 guarantees may be accepted, the ECtHR, nevertheless has applied a similar formula. Because such measures may lead to lengthy periods of detention, involving the deprivation of liberty, the Court held that the

---

<sup>255</sup> Lucia Zedner, “Seeking security by eroding rights: the side-stepping of due process” in Benjamin Gold and Liora Lazarus (eds), *Security and human rights* (Hart Publishing, 2007) 257, 265.

<sup>256</sup> *Engel and others v the Netherlands* [ECtHR] Application no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (8 June 1976) [81]; see also Ovey and White, above n 168, 159-160.

<sup>257</sup> *Welch v the United Kingdom* [ECtHR] Application no 17440/90 (9 February 1995) [28]. In *Welch*, the confiscation of drugs was classified as a punitive as well as a protective and therefore considered a ‘penalty’.

<sup>258</sup> See also Zedner, above n 255, 266.

<sup>259</sup> *Ibbotson v the United Kingdom* [ECtHR] Application no 40146/98 (21 October 1998).

guarantee of art 5(4), which entitles detainees to obtain judicial review of the lawfulness of the detention, “must import substantially the same fair trial guarantees as Article 6 § 1 in its criminal aspect”.<sup>260</sup> Although there is a wider scope for the use of secret evidence in such proceedings, the ECtHR still urges the national governments to provide the detainee with as much information as possible:

“Where full disclosure was not possible, Article 5 § 4 required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.”<sup>261</sup>

Counterbalancing is necessary in this case to permit the effective challenge of the Minister basis - the reasonable belief or suspicion – supporting detention. Additionally, the ECtHR held that any detention based on solely or decisively on closed material would not be sufficient to satisfy the requirements of art 5(4).<sup>262</sup>

In *A and others* the relevant information was suppressed, similarly to *Edwards and Lewis* discussed above. A criminal proceeding which relies on closed information to determine the guilt of a defendant will constitute a violation of art 6. But within an administrative proceeding, appropriate counterbalancing measures may be able to remedy this defect. Although, neither the defendants nor their representatives were provided access to the sensitive information, a number of special advocates were entitled to view the material on behalf of the defendants.<sup>263</sup> Under those measures, the special advocates could make submissions seeking further disclosure, as well to the substance of the case. The ECtHR held that, as with criminal proceedings, the judge (in this case a member of the Special Immigration Appeals Commission (SIAC)) would be

---

<sup>260</sup> *A and others v the United Kingdom* [ECtHR] Application no 3455/05 (19 February 2009) [217].

<sup>261</sup> *Ibid*, [218].

<sup>262</sup> *Ibid*, [220].

<sup>263</sup> *Ibid*, [215]

in the best position to ensure that “no material was unnecessarily withheld from the detainee” and thus needs to be in control of what is or is not disclosed.<sup>264</sup> One of the shortcomings of the special advocate system is that once the special advocates have seen the suppressed information, they are unable to contact the defendants for further instructions.<sup>265</sup> The ECtHR held that a special advocate system would indeed be a measure capable of counterbalancing the disadvantages facing the defendants, as long as enough information was disclosed to enable them to instruct the special advocate effectively in the first place. Although this was considered to be the case in *A and others*, the Court clarified that

“[w]here [...] the open material consisted purely of general assertions and SIAC’s decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.”<sup>266</sup>

It is important to emphasise that while secret evidence can never be the basis of a criminal conviction, it may be the basis of an administrative decision as long as some safeguards are in place. The main question remains, what measures are required to adequately counterbalance the disadvantage suffered by the individual when he or she is excluded from accessing the suppressed information? Again, this needs to be answered by the trial judge in each case.

#### **4.3.2 - A minimum standard of fairness**

In sum, when it comes to the suppression of information, the ECtHR has adopted a broadly consistent approach: the RFT can only be limited where it is strictly necessary;

---

<sup>264</sup> *Ibid*, [219].

<sup>265</sup> For a more detailed discussion of special advocates see below at 7.2.2 and 8.2.4.1.

<sup>266</sup> *A and others v the United Kingdom* [ECtHR] Application no 3455/05 (19 February 2009) [220].

any disadvantage to the defendant must be sufficiently counterbalanced by appropriate procedures; and a conviction cannot be solely, or to a decisive extent, based on the suppressed information. Although some restrictions are permissible to a certain extent, the ECtHR does not apply the conventional principle of proportionality to resolving the matter. As Ashworth noted, the ECtHR has been quite vigilant in upholding the fair trial rights of the defence in assessing the merit of such restrictions:

“[T]here is a significant difference between allowing limited restrictions on a right and holding that any restriction that can be said to be proportionate to public interest considerations is permissible. What is noticeable about the relevant decisions is that they emphasise that the essence of the right must be preserved, even where limited restrictions are allowed.<sup>267</sup>

This approach has also been described as ‘proportionality *sui generis*’ protecting the essence of the right.<sup>268</sup> Nonetheless, there is some overlap between these approaches, in particular the requirement for evidence to show that the restriction to the RTF was “strictly necessary”.<sup>269</sup> The two approaches also share the overall objective of maximising the right in question and put restrictions on the limitation according to particular principles.

The proportionality *sui generis* principle, which serves to protect the ‘essence’ of the RTF at all times, has two main requirements: first, that the judge remains in control and therefore in the position to detect any defect of the procedure; and, secondly, that the defendant has at least some opportunity to be actively involved in challenging the suppression (of potentially relevant information). Compliance with the latter is

---

<sup>267</sup> Ashworth, above n 34, 57.

<sup>268</sup> Dovydas Vitkauskas and Grigory Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights* (Council of Europe human rights handbook, 2012) 44.

<sup>269</sup> *Rowe and Davis v the United Kingdom* [ECtHR] Application no 28901/95 (16 February 2000) [62].

dependent on the circumstances of the particular case, and at times the opportunity for involvement of the defendant may be tokenistic.<sup>270</sup> Nonetheless, this aspect is important to respect the defendant's role as the subject of the trial.<sup>271</sup> It is also noteworthy that although balancing is accepted when the RFT is in conflict with another individual's rights (generally, the rights of a witness not to be subject to violence for example), the ECtHR has retained the requirement of counterbalancing in order to protect the fair trial rights of the defendant. Hence, while protecting the witness's rights as far as possible, the court still applies the principle of minimum interference with the rights of the defendant.<sup>272</sup>

Looking at the ECtHR approach as a whole, protection of the RFT is treated separately from the questions of how to protect national security. Although intrinsically connected (particularly when it comes to counterbalancing), as a first step ECtHR favours the least intrusive measure in order to protect the public interest or the interests of another person, for example a witness. Only then as a second step, the ECtHR assesses how this measure impacts on the defendant and whether there are enough safeguards in place to still consider the trial fair: perceiving these questions as distinct may help to understand the particular character of the RFT. It demonstrates that the impact on fairness must be judged, as the paramount and primary concern, first on its own. Although concessions may be necessary in some circumstances, it cannot be balanced away in its entirety. Otherwise the trial would only be as fair as possible under the circumstances, which does not correspond with basic concept of the RFT developed in liberal democracies.

Despite the severe security challenges facing member states, the ECtHR did not grant any further margin of appreciation in cases where the member states have been

---

<sup>270</sup> See above the cases of *Jasper* and *Fitt* at 4.3.1.2.

<sup>271</sup> See above at 2.1.1.

<sup>272</sup> Ashworth, above n 34, 78.

presented with a grave threat of terrorism. This is in line with the ECtHR's general approach of not allowing the abrogation of established principles in complex cases such as organised crime,<sup>273</sup> corporate fraud<sup>274</sup> or drug trafficking.<sup>275</sup> In relation to terrorism in Northern Ireland the ECtHR held in *Brogan* that:

“The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 para. 3 (art. 5-3).”<sup>276</sup>

In Northern Irish cases, this was also confirmed in relation to the rights to silence and against self-incrimination protected under art 6(1).<sup>277</sup>

Furthermore, in *Hulki Güneş*, the applicant was charged with murder, as well as other offences of separatism and undermining the integrity of the State (Turkey) as a member of the Kurdistan Worker's Party (PKK). He complained that he was unable to confront the person who had allegedly identified him as a member of the PKK and thus had not been tried fairly. The ECtHR agreed, noting that

“[it] is fully aware of the undeniable difficulties of combating terrorism – in particular with regard to obtaining and producing evidence – and of the ravages caused to society by this problem, but considers that such factors cannot justify restricting to this extent the rights of the defence of any person charged with a

---

<sup>273</sup> *Kostovski v the Netherlands* [ECtHR] Application no 11454/85 (20 November 1989) [44].

<sup>274</sup> *Saunders v the United Kingdom* [ECtHR] Applications no 19187/91 (17 December 1996) [74].

<sup>275</sup> *Saïdi v France* [ECtHR] Application no 14647/89 (20 September 1993) at [44]; *Teixeira de Castro v Portugal* [ECtHR] Application no 25829/94 (9 June 1998) [36].

<sup>276</sup> *Brogan and others v the United Kingdom* [ECtHR] Application nos 11209/84; 11234/84; 11266/84; 11386/85 (29 November 1988) [62].

<sup>277</sup> *Heaney and McGuinness v Ireland* [ECtHR] Application no 34720/97 (21 December 2000) [58]; referring to *Brogan and others v the United Kingdom* [ECtHR] Application nos 11209/84; 11234/84; 11266/84; 11386/85 (29 November 1988).

criminal offence. In short, there has been a violation of Article 6 §§ 1 and 3 (d).”<sup>278</sup>

Hence, in the context of counter-terrorism the ECtHR also follows the general approach that prioritises the importance of the RFT with the implication that it cannot be limited merely for the sake of “expediency”.<sup>279</sup> This avoids the situation that one class of suspects – those accused of terrorist acts - will be subject to a lesser standard of due process than others, which would manifestly violate the principle of equality. Due process purports to protect the innocent as well as the guilty. It is vital that those who commit serious crime are, for the sake of legitimacy, subject only to punishment following due process of law. Therefore, independent of the seriousness of the particular offence charged, any wrongful conviction would create the same kind of injustice.<sup>280</sup> *A fortiori*, it has been argued that the greater the crime, the greater the safeguards should be to avoid a wrongful conviction.<sup>281</sup>

Despite pursuing this reasonably consistent approach and being resistant to deviating in the context of counter-terrorism, the ECtHR still does not answer the question conclusively as to what extent restrictions are in fact permissible? Or in other words, how much counterbalancing is necessary to retain the essence of art 6(1)? As a ‘fourth instance’,<sup>282</sup> the ECtHR focuses on whether particular aspects have been addressed. This leaves the national judges to determine what is fair in the circumstances, as only

---

<sup>278</sup> *Hulki Güneş v Turkey* [ECtHR] Application no 28490/95 (19 June 2003) [96]; see also *Sadak and others v Turkey* [ECtHR] Applications nos 29900/96, 29901/96, 29902/96 and 29903/96 (17 July 2001).

<sup>279</sup> For example *Kostovski v the Netherlands* [ECtHR] Application no 11454/85 (20 November 1989) [44]; see also Ashworth, above n 34, 55; Brice Dickson, *The European Convention on Human Rights and the conflict in Northern Ireland* (Oxford University Press, 2010) 202.

<sup>280</sup> Dworkin, above n 53, 48.

<sup>281</sup> This even presents a paradox: “the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important the constitutional protection of the accused becomes”. *R v Johnstone* [2003] UKHL 28 (22 May 2003) [49] (per Lord Nicholls) citing Sachs J in *State v Coetzee* [1997] 2 LRC 593, 677, at [220]; see also Bronitt, above n 22, 71-72.

<sup>282</sup> See above at 4.3.

trial judges are in the position to assess the evidence directly. This could be described as ‘the ultimate fairness question’.<sup>283</sup>

In conclusion, the key question for the court is to distinguish between the questions of ‘what is fair’, and what processes need to be applied in order to ensure fairness. The former can *never* be answered in the abstract; the latter can be and should be addressed in liberal democracies, which have a duty to pursue justice for both victims and offenders.

Finally, although the duty of common law judges to stay proceedings in the ‘interests of justice’ (or to avoid an abuse of process) seems, on the surface, to apply similar requirements to those recognised under the ECHR to preserve the ‘essence’ of the RFT, this chapter has identified a number of differences. In particular the two systems approach the minimum standards of fairness from opposite directions. Under the common law system, the government may suppress information in the public interest unless this would render a trial unfair. As a consequence, the legal discussion revolves around the question of how much needs to be done to ensure that a trial is not unfair. In contrast, under the Convention, upholding the RFT is the starting point. As a fundamental principle, the ECtHR requires limitations to the RFT to be justifiable; restrictions are only allowed in a particular case to the extent absolutely or strictly necessary, and must also maximise respect for the ‘essence’ of the RFT. This shifts the focus to assessing whether the limitation violates the essence of the right, with consideration of whether counterbalancing measures put in place to protect that minimum fairness standards arises at the later stage. While the ECHR requires a process

---

<sup>283</sup> This discretion of the ECtHR has been occasionally misinterpreted. While the ECtHR’s judges avoid making decisions on the ultimate fairness question, the national judges have an obligation to engage. They are not supposed to leave this question to the executive as a national equivalent of the margin of appreciation. Otherwise counterbalancing can become symbolic or as discussed above submissive. See Sangeeta Shah, “The UK’s anti-terror legislation and the House of Lords: the first skirmish” (2005) 5(2) *Human Rights Law Review* 403.



to respect these principles and minimal fairness standards, the common law does not impose strict duties on the judge in how to structure this evaluation of unfairness, leaving judges to reconcile these competing interests through a simple balancing process, an approach which has been rejected by the ECtHR.

#### 4.4 Guiding principles for non-disclosure decision of judges

This Chapter examined how judges should deal with situations where the RFT is in potential conflict with the public interest, such as national security. A common judicial approach to resolving the conflict is the resort to a ‘balancing’ of interests. The concept, however, is a misleading metaphor: it implies that the interests are inherently oppositional, a ‘zero sum’ relationship where promoting security weakens due process and vice versa; also the balancing process lacks any structured approach that would assist decision-makers decide how potential conflicts should be resolved. As Ashworth noted, when these two aspects are combined, it may lead to “sloppy reasoning”<sup>284</sup> and ultimately an outcome that is influenced by preconceived and often irrational value judgments, rather than by legal principles and decisions based on evidence.

Furthermore, the model of balancing does not live up to the rhetoric of a liberal human rights culture, where limitations to individual rights and liberties must be demonstrably justified by the state. An alternate approach to resolving conflicts between interests, which displays more sophistication and is gaining increasing prominence in human rights adjudication, is the principle of proportionality. The principle of proportionality addresses the deficiencies of balancing, providing more structure to the adjudication process, and requiring further justification as any limitation must be *strictly* necessary.

Hence, it promotes maximisation of the protection of the particular right in issue.

Nonetheless, the conflict between the interests of national security and RFT poses particular challenges, which I submit, cannot be effectively overcome by either approach of balancing or proportionality. To avoid the tendency for the gravity of national security risks to always trump the RFT, judges need further assistance in order to determine the relative weight of the competing interests at stake. Acknowledging the

---

<sup>284</sup> Ashworth, above n 46, 229.

expertise of the executive in assessing security risks, the concept of ‘due deference’ can be helpful. Understood correctly, judicial deference to this expertise is earned through reasoned justification, in terms of process and substance. It allows the judges to fulfil their constitutional duty, while having a better-informed idea of the specific security challenges in question. In order to facilitate a ‘culture of justification’, as has described in this Chapter, some innovative institutional adaptation may be required to adjust legal processes to maximise respect for the RFT in the face of national security challenges.

Furthermore, the specific character – or ‘essence’ - of the RFT has to be taken into consideration when in conflict with the public interest of protecting national security. In light of development under the common law, as well as human rights treaties such as the ECHR, it is now possible to identify a set of universal ‘minimum standards’ for securing fair trials. Described as the ‘essence’ of the RFT, these essential elements cannot be simply balanced away in the name of national security. Rather these non-derogable characteristics need to be acknowledged within an adapted or *sui generis* proportionality approach.

Based on these findings, and considering the constitutional nature of the principle of fairness set out in Chapter 2, any regime governing the suppression of information (including use of edited information),<sup>285</sup> should be guided by the following principles:

**P1. A Rule/Exception Model of Disclosure:** disclosure is the rule, with non-disclosure the exception requiring justified. This is not only considered a ‘golden rule’ in the law of evidence as developed under the common law, but also follows from an application of the principle of proportionality. The aim of maximising disclosure and therefore the RFT has three main consequences:

---

<sup>285</sup> ‘Edited information’ for the purposes of this thesis includes any alteration of information such as redacting text or providing summaries. It also includes the measures that would constrain any witnesses in disclosing their identity or discuss a particular subject area.

- First, the state has to adopt a method that discloses as much relevant information as possible.
- Second, any non-disclosure requires justification based on expert evidence, not generalised assertions.
- Third, any substantial forensic disadvantage to the defendant must be ‘compensated’, if possible, by special procedures that give maximum protection to the RFT.

**P2. No Balancing Permitted.** Due to the nature of the RFT,<sup>286</sup> it cannot be balanced away. Hence, the trial cannot be considered as fair, if the ‘essence’ of the RFT has been violated. This assessment has to include the effect of any counterbalancing. Answering this question obviously becomes increasingly difficult the more pieces of information are suppressed.

**P3. Corroboration required in cases based on edited evidence.** It has been held consistently – although not without exceptions – that using edited evidence as the sole or decisive basis of a criminal conviction, or using suppressed evidence as the sole or decisive basis for an administrative measure, would automatically violate the essence of the RFT.

**P4. Judicial Control over Disclosure Process.** In order to guarantee these standards, it is crucial that the judges remain in control of the disclosure proceedings. In particular, this requires that the prosecution does not withhold from the judge or otherwise suppress information relevant to the defendant’s case. Only the judge, as the person in the possession of all the information, will be able to make a competent judgment on the overall fairness of the trial.

---

<sup>286</sup> See above at Chapter 2.

**P5. Unfairness must be compensated through institutional adjustments.** In

certain situations the fairness of the procedure may require the use of institutional adjustments, reflecting what judges require in order to fulfil their duties as described above. In particular, the adjustments should enable the judges to receive: (1) information, (2) expertise, (3) legislative support (ie properly drafted laws), and (4) respect from the other branches in discharging these functions.

Observing these five principles not only increases the protection of the RFT and strengthens the legitimacy of the decisions (through placing limits on judicial discretion), but also promotes a more effective system of ‘checks and balances’. The principles will support judges, as well as other authorities in their decision-making process. The fact that a non-disclosure decision occurs in the context of counter-terrorism is considered within the process, but does not fundamentally alter that process.

Finally, it needs to be emphasised again that nothing excuses decision-makers from their duty to adjudicate upon the ultimate question of fairness! This standard of fairness admittedly changes over time due to our evolving values and understanding of justice, but the *process* of how to address this ultimate question – whether or not a legal process is unfair - does not necessarily need to change.

In the next chapter, the following case studies examine to what extent these principles have been observed or ignored in the UK and Australia. Where deviations from these principles have occurred, what reasons were invoked and how did these tensions manifest in particular cases? The final chapter will outline proposals for reform and consider what sort of legislative regime would reflect these principles.



## Part II.

### Chapter 5: Comparing Australia and the United Kingdom

This Chapter provides the context, and serves as a brief introduction, for the following case studies. For both the United Kingdom (UK) and Australia, there will be an overview of how the right to a fair trial (RFT) is generally protected against the backdrop of the general human rights framework. The Chapter presents, for each jurisdiction, the main national counter-terrorism policies relevant to the legal issues explored in the case studies. The purpose of the Chapter is to define key terms and describe general developments that will be discussed in the subsequent Chapters.

#### 5.1 An introduction to the United Kingdom

##### 5.1.1 The right to a fair trial in the UK

The UK has a long tradition of developing fair trial standards, which dates back to the Magna Carta of 1215<sup>1</sup> and has given substance to them through the common law.<sup>2</sup> This rich body of law has led English judges to generally regard it as

“axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he

---

<sup>1</sup> An early version of the presumption of innocence can be found in Clause 38 of the Magna Carta, which states that, “No bailiff for the future shall, upon his own unsupported complaint, put anyone to his ‘law’, without credible witnesses brought for this purpose.”

<sup>2</sup> To stay with the example of the presumption of innocence, the gradual development of the common law eventually led to landmark cases such as *Woolmington v DPP* (1935) AC 462 (23 May 1935).

should not be tried for it at all."<sup>3</sup>

By signing the *European Convention on Human Rights* (ECHR) in 1951, the RFT received further recognition in the UK. Although the Convention rights only applied indirectly until the enactment of the *Human Rights Act 1998* (UK) (HRA), the UK claimed that its domestic laws had already provided an equivalent, or higher, standard of protection as the ECHR. With the HRA, the UK judges can now directly apply the RFT found in art 6 ECHR,<sup>4</sup> which provides a comprehensive list of fair trial rights that a defendant may claim. Section 2 HRA also requires UK courts to take into consideration the extensive European Court of Human Rights (ECtHR) jurisprudence in relation to art 6. While the UK courts are not strictly bound to follow ECtHR decisions, they tend to do so unless the ECtHR has failed to consider particular aspects or its interpretation lacks clarity.<sup>5</sup> Furthermore, the ECHR has always exerted an indirect influence on the common law as an independent source of law. As Lord Laws observed in *Roth*:

“The common law has come to recognise and endorse the notion of constitutional, or fundamental rights. These are broadly the rights given expression in the European Convention on Human Rights and Fundamental Freedoms (“ECHR”), but their recognition in the common law is autonomous.”<sup>6</sup>

---

<sup>3</sup> *R v Horseferry Road Magistrates Court, ex parte Bennett* [1994] 1 AC 42, 68 (Lord Oliver); see also *R v Brown (Winston)* (1994) 1 WLR 1599, 1606 describes the RFT as a fundamental right.

<sup>4</sup> The HRA did not incorporate the ECHR into the British legal system in the sense that it refers to it as part of the substantive legal system. Rather it gives effect to certain provisions of the Convention, which are referred to as the ‘convention rights’. *Human Rights Act 1998* (UK), s 1; For a general discussion on the first decade of the HRA see Ian Leigh and Roger Masterman, *Making rights real: the Human Rights Act in its first decade* (Hart Publishing, 2008); Sangeeta Shah and Thomas Poole, “The impact of the *Human Rights Act* on the House of Lords (2009) April *Public Law* 347.

<sup>5</sup> Aileen Kavanagh, “Special advocates, control orders and the right to a fair trial” (2010) 73(5) *Modern Law Review* 836, 845.

<sup>6</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 (22 February 2002) [71] (Lord Laws).



Despite the HRA being an ordinary statute, repealable by the legislature, debate has continued in the UK on its legal status in general and in particular the extent of the judicial power to interpret UK legislation to conform with rights in the ECHR.<sup>7</sup> Section 3 HRA states:

“So far as possible to do so, both primary legislation and delegated legislation are to be read and given effect to in a way which is compatible with Convention rights.”

The UK courts have interpreted this section as applying, not only where the meaning of a statutory provision is ambiguous, but also where the meaning of a provision is otherwise clear. Hence, as long as courts assumed that Parliament did not intend to limit the human right in question, courts may ‘read down’ legislation in order to retain compatibility, and thus in some cases rule against the plain meaning of the statute.<sup>8</sup> In cases where the violation of a Convention right cannot be remedied by statutory interpretation, judges can make a declaration of incompatibility under s 4 HRA. In those cases, the legislation is not void or struck down. Until amended by Parliament, the Act (though incompatible with the ECHR) remains good law and must be enforced. The fact that Parliament has the last word – it may remedy the defect or not – ensures that parliamentary supremacy over the courts is not affected.<sup>9</sup>

---

<sup>7</sup> For a discussion of these provisions see K D Ewing, “The *Human Rights Act* and parliamentary democracy” (1999) 62 *Modern Law Review* 79.

<sup>8</sup> See for example *R v A* [2001] UKHL 25 (17 May 2001) [44] (Lord Steyn); *R v Lambert* [2001] UKHL 37 (5 July 2001) [80] (Lord Hope).

<sup>9</sup> Hence, the HRA does not provide for a remedy to enforce a declaring of incompatibility. Art 13 ECHR is intentionally not included as a convention right. The only remedy an individual has is to take the case to the ECtHR.

Given the breadth of these new interpretative and declaratory powers of the courts, it has been widely argued that the HRA has constitutional significance.<sup>10</sup> That said, there has been much criticism about the HRA from both politicians and media. The criticisms include the following: the HRA focuses strongly on ‘rights’ to the neglect of corresponding ‘responsibilities’; the HRA confers rights on people who do not deserve them; and the ECHR strengthens the influence of the ECtHR on the British law.<sup>11</sup> A number of UK governments have expressed plans to abolish the HRA in favour of a UK Bill of Rights, though this has not yet happened.<sup>12</sup>

Finally, it is worth mentioning that after the passing of the HRA, the UK Parliament also installed a new Joint Committee on Human Rights (JCHR), which scrutinises proposed legislation for its compatibility with the HRA, fundamental common law rights and the UK’s international obligations.<sup>13</sup> The JCHR has raised the awareness of human rights,<sup>14</sup> but despite its regular reports concerns remain about its effectiveness in influencing amendments to proposed legislation.<sup>15</sup> This is particularly the case in the field of counter-terrorism,<sup>16</sup> though the JCHR’s reports have indirectly had an impact

---

<sup>10</sup> See for example Vernon Bogdanor, *The new British Constitution* (Hart Publishing, 2009) 53; Anthony Lester, “Human rights and the British Constitution” in Jeffrey Jowell and Dawn Oliver (eds), *The changing constitution* (Oxford University Press, 7<sup>th</sup> ed, 2011) 70; Jeffrey Jowell, “Parliamentary sovereignty under the new constitutional hypothesis” (2006) Autumn *Public Law* 562; Lord Steyn, “Dynamic interpretation amidst an orgy of statutes” (2004) 35(2) *Ottawa Law Review* 163, 174.

<sup>11</sup> Liberty, “Human Rights Act mythbuster”, available at [www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/human-rights-act-mythbuster](http://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/human-rights-act-mythbuster).

<sup>12</sup> See for example Commission on a Bill of Rights, “A UK Bill of Rights? The choice before us” (Paper, Volume 1, December 2012); BBC online, “Human Rights Act versus a British Bill of Rights” (11 May 2015) available at [www.bbc.co.uk/newsbeat/article/32692758/human-rights-act-versus-a-british-bill-of-rights](http://www.bbc.co.uk/newsbeat/article/32692758/human-rights-act-versus-a-british-bill-of-rights).

<sup>13</sup> Website of the Joint Committee of Human Rights:

[www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/role/](http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/role/)

<sup>14</sup> Murray Hunt, “The impact of the *Human Rights Act* on the legislature: a diminution of democracy or a new voice for Parliament?” (2010) 6 *European Human Rights Law Review* 601.

<sup>15</sup> Michael Tolley, “Parliamentary scrutiny of rights in the United Kingdom: assessing the work of the Joint Committee on Human Rights” (2009) 44(1) *Australian Journal of Political Science* 41.

<sup>16</sup> See for example Janet Hiebert, “Parliamentary review of terrorism measures” (2005) 68(4) *Modern Law Review* 676; Janet Hiebert, “Parliament and the Human Rights Act: can the JCHR help facilitate a culture of rights?” (2006) 4(1) *International Journal of Constitutional Law* 1, 27; Tolley, above n 15, 51-52.

through their use by the courts in a number of cases.<sup>17</sup>

### 5.1.2 Counter-terrorism measures in the UK

The UK has been faced with the threat of terrorism for the most of the second half of the 20<sup>th</sup> century.<sup>18</sup> Between 3300-3600 people were killed in the violent conflict in Northern Ireland between 1969 and 1998, and slightly less than 50,000 people were wounded. During this period Britain deployed up to 30,000 troops in Northern Ireland, which cost the British treasury £3.3 billion annually.<sup>19</sup>

During that period the British Government deployed a number of counter-terrorism measures within its territory with varying success. They included search powers,<sup>20</sup> curfews, detention without trial,<sup>21</sup> harsh interrogation methods,<sup>22</sup> and military

---

<sup>17</sup> See for example *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004); or *Secretary of State for the Home Department v MB* [2007] UKHL 46 (31 October 2007).

<sup>18</sup> For a comprehensive overview on terrorism in the UK and UK terrorism legislation see for example Clive Walker, *Blackstone's guide to anti-terrorism legislation* (Oxford University Press, 3<sup>rd</sup> ed, 2014); Clive Walker, *Terrorism and the law* (Oxford University Press, 2011); Steve Hewitt, *The British war on terror: terrorism and counter-terrorism on the home front since 9/11* (Bloomsbury Academic, 2008); Kent Roach, *The 9/11 effect: comparative counter-terrorism* (Cambridge University Press, 2011) 238; Leandro Martínez-Peñas and Manuela Fernández-Rodríguez, "Evolution of British law on terrorism: from Ulster to global terrorism" in Aniceto Masferrer (ed), *Post 9/11 and the state of permanent legal emergency: security and human rights in counter terrorism* (Springer, 2012) 201.

<sup>19</sup> For a general overview of the conflict sees R F Foster, *Modern Ireland 1600-1972* (Allen Lane, 1988); J Boyer Bell, *The Irish Troubles: a generation of violence 1927-1992* (St Martins Press, 1993); Tim Coogan, *The Troubles: Ireland's ordeal, 1966-1996, and the search for peace* (Museum of Denver, 1996); Hewitt, above n 18, Chapter 1.

<sup>20</sup> See for example *Northern Ireland (Emergency Provisions) Act 1973* (UK), part 2.

<sup>21</sup> The measure was based on the *Special Powers Act*, which was first introduced in 1922 but regularly renewed, and introduced with the consent of the British Government. It was finally integrated in the *Northern Ireland (Emergency Provisions) Act 1973*. See also Hewitt, above n 18, 18; R J Spjut, "Internment and detention without trial in Northern Ireland 1971-75", (1986) 49 *Modern Law Review* 712, 736.

<sup>22</sup> These methods were later declared inhuman and degrading treatment violating art 3 ECHR. *Ireland v the United Kingdom*, Application no. 5310/7 (18 January 1978). The five techniques in question were hooding, wall-standing, food deprivation, sleep deprivation and the subjection to noise.

deployment.<sup>23</sup> These severe methods engendered significant criticism and accusations that the limitation of human rights would violate Britain's international commitments.<sup>24</sup>

Given the difficulties for prosecuting suspected terrorists, the RFT was also limited significantly through a number of measures. The Diplock courts in which judges sat without a jury became synonymous with the Northern Ireland conflict.<sup>25</sup> Furthermore, evidential standards were lowered to enable extensive use of confessions.<sup>26</sup> The right to silence was abolished,<sup>27</sup> the burden of proof reversed for many offences,<sup>28</sup> and for a

---

<sup>23</sup> The use of the military had its sad climax on 'Bloody Sunday', when British troops opened fire on civil rights activist demonstrating peacefully in Derry. The incident not only left 14 dead and wounded 26 people, but the attempts to cover up the over-reaction on behalf of the military by the British Government, including a judicial inquiry, also caused considerable political damage to the peace process. The troops claimed that the protesters were armed and that the use of force was justified. The Widgery Tribunal originally backed this version. It took nearly 4 decades to prove that these claims were false, resulting in an official apology by Prime Minister David Cameron. See Bloody Sunday Inquiry, "Report of the Bloody Sunday Inquiry" (Saville Report, 29 January 1998); McDonald, Bowcott and Mulholland, "Bloody Sunday report: David Cameron apologises for 'unjustifiable' shootings" (guardian.co.uk, 15 June 2010); see also Louis Blom-Cooper, "What went wrong on Bloody Sunday: a critique of the Saville inquiry", (2010) January *Public Law* 61.

<sup>24</sup> Both the ICCPR and the ECHR were already in force and applicable to the UK from 1976 and 1951 respectively. However, it has been noted that in many respects the case law of the ECtHR was not settled and many of the cases from Northern Ireland were regarded as test cases. See Brice Dickson, *The European Convention on Human Rights and the conflict in Northern Ireland* (Oxford University Press, 2010) 3, 15.

<sup>25</sup> *Northern Ireland (Emergency Provisions) Act 1973* (UK), s 2. The measure was named after an inquiry led by Lord Diplock into how to deal with the terrorism in Northern Ireland other than by detention without trial. See Diplock Commission, *Report of the Commission to consider legal proceedings to deal with terrorist activities in Northern Ireland* (Cmnd 5185, December 1972). The measures were legislated in *Northern Ireland (Emergency Provisions) Act 1973*. See also John Jackson and Sean Doran, "Conventional trials in unconventional times: the Diplock Court experience", (1993) 4(3) *Criminal Law Forum* 503; Laura Donohue, *Counter-terrorist law and emergency powers in the United Kingdom 1922-2000* (Irish Academic Press, 2001) 126; John Jackson, "Many years on in Northern Ireland: the Diplock legacy", (2009) 60(2) *Northern Ireland Legal Quarterly* 213.

<sup>26</sup> *Northern Ireland (Emergency Provisions) Act 1973*, s 5. See Donohue, above n 25, 131; Steven Greer, "The admissibility of confessions under the Northern Ireland (*Emergency Provisions Act*)" (1980) 31(3) *Northern Ireland Legal Quarterly* 205.

<sup>27</sup> *Criminal Evidence (Northern Ireland) Order 1988* (UK), arts 3-6. For a general critique see John Jackson, "Curtailing the right of silence: lessons from Northern Ireland", (1991) June *Criminal Law Review* 404. Jackson characterised the Order as neither fair nor effective; John Jackson, "Inferences from silence: from common law to common sense" (1993) 44(2) *Northern Ireland Legal Quarterly* 103; K A Cavanaugh, "Emergency rule, normalcy exception: the erosion of the right to silence in the United Kingdom" (2002) 35 *Cornell International Law Journal* 491.

<sup>28</sup> For example *Northern Ireland (Emergency Provisions) Act 1978* (UK), s 2(2) introduced a presumption against bail; *Northern Ireland (Emergency Provisions) Act 1973*, s 6 expressed a presumption that admissions by defendants were made voluntarily; see also below at 7.2.3.

period of time strong reliance was placed on informers, which become known as the supergrass system.<sup>29</sup>

After it became clear that the supergrass system not only was hugely expensive, but also did not deliver the expected conviction rates due to the low quality of the evidence adduced at these trials,<sup>30</sup> the strategy changed. Instead greater emphasis was placed on intelligence work, resulting in a significant expansion of the security and intelligence forces, and a focus on pre-emptively interfering with terrorist attacks, rather than relying on prosecution.<sup>31</sup> Scotland Yard introduced a Special Branch, which transformed eventually into the Anti-Terrorist Branch, and MI5 and MI6 also refocused on terrorism.<sup>32</sup> Intelligence gathered through technical surveillance, or through informers, became the major focus of counter-terrorism.<sup>33</sup>

Towards the end of the violent conflict, the UK Government conducted a review of all the pre-existing counter-terrorism legislation and Parliament passed new comprehensive legislation, the *Terrorism Act 2000* (UK),<sup>34</sup> which sought to address a much wider and international threat of terrorism.<sup>35</sup> After 9/11 the UK was well prepared compared to many other countries that lacked specific counter-terrorism policies, powers and laws. It had a well-developed counter-terrorism infrastructure, with comprehensive legislation

---

<sup>29</sup> Steven Greer, *Supergrasses: a study in anti-terrorist law enforcement in Northern Ireland* (Clarendon Press, 1995).

<sup>30</sup> *Ibid*, 252-53.

<sup>31</sup> Louise Richardson, "Britain and the IRA" in Art and Richardson (eds), *Democracy and counter-terrorism: lessons from the past* (United States Institute of Peace Press, 2007) 63, 83.

<sup>32</sup> By 1994 MI5 used half of its resources for Irish counter-terrorism. This of course had also do with the end of the cold war. Hewitt, above n 18, 22.

<sup>33</sup> Particularly the infiltration of terrorist groups was important, not only to gain information about organisation, structure and planned attacks, but also to act as agent provocateur, sabotage, cause dismay and dispute within the terrorist group and spread paranoia about who could be an informer. Hewitt, above n 18, 23-24.

<sup>34</sup> The Act was a response to the inquiry into terrorism legislation conducted by Lord Lloyd of Berwick (Cm 3420) and published in October 1996. See *Terrorism Act 2000* (Explanatory memorandum) (UK) [4].

<sup>35</sup> *Terrorism Act 2000* (Explanatory memorandum) (UK) [8].

in place, and arguably had gained valuable experience in how to deal with the new threats.<sup>36</sup> It has been suggested that there are only a limited number of methods for countering terrorism.<sup>37</sup> However, any initial advantage UK diminished after it emerged that the ‘new’ terrorist organisations used different methods and strategies. Comparing the Irish terrorists to radical Jihadist organisations, Greer identified numerous differences, which necessitates adjustments to older strategies.<sup>38</sup> In particular, the IRA was secular with clear political and military aims; it consisted of a more or less homogenous and hierarchical group of people, and it had a political counterpart, Sinn Fein, providing a channel for ongoing negotiations with the British government.<sup>39</sup> None of these characteristics are applicable to radical jihadist terrorism.

In light of the history of Northern Ireland, it is not surprising that the UK Government quickly expanded its counter-terrorism powers to address these threats. The *Anti-Terrorism, Crimes and Security Act (2001)* was swiftly drafted and passed after only 16 hours of debate.<sup>40</sup> However, the Act was soon criticised as being an overreaction.<sup>41</sup> Its most controversial measure allowed the indefinite (immigration) detention of foreigners, in situations when a person was believed to be a threat to national security,

---

<sup>36</sup> Steven Greer, “Human rights and the struggle against terrorism in the United Kingdom”, (2008) 2 *European Human Rights Law Review* 163, 171; Hewitt, above n 18, 11; Richardson, above n 31, 94.

<sup>37</sup> Hewitt, above n 18, 11;

<sup>38</sup> Greer, above n 36, 165-167.

<sup>39</sup> For the purpose of this short overview it is neglected that during the troubles there were a number of organisations on each side of the conflict, such as the Official Irish Republican Army (IRA), the Provisional IRA, the Real IRA and the Irish National Liberation Army on the republican side; and such as the Ulster Defence Association and the Ulster Volunteer Force on the unionist side. For a summary on the different parties and paramilitary groups involved see Richardson, above n 31, 67.

<sup>40</sup> Philip Thomas, “September 11<sup>th</sup> and good governance”, (2002) 53 *Northern Ireland Legal Quarterly* 366, 381.

<sup>41</sup> Mark Elliott, “Developments: United Kingdom” (2003) 1(2) *International Journal of Constitutional Law* 334, 336. Helen Fenwick, “The *Anti-Terrorism, Crime and Security Act 2001*: a proportionate response to 11 September?” (2002) 65 *Modern Law Review* 724, 725: “11 September appears to have provided the government with an excuse of introducing coercive, illiberal provisions reaching well beyond those who have [...] connections [to al-Qaida]”; Thomas, above n 40, 385.

There was also criticism for including measures only remotely related to terrorism: Fenwick, *ibid*, 725-26; In the House of Commons it was stated “most of the Bill has simply come out of the Home Office back lobby. It has a lot of stuff that it wants to put before Parliament and it has attached it to this Bill.” Hansard, House of Commons, 19 November 2001, col 94 (Hogg).

but deportation of the person was impossible.<sup>42</sup> The measure was declared incompatible with arts 5 (right to liberty) and 14 (prohibition of discrimination) ECHR by the House of Lords in the landmark case of *A and others v Secretary of State for the Home Department*.<sup>43</sup> Due to the political pressure, these measures were replaced by a control order regime introduced by the *Prevention of Terrorism Act 2005* (UK) (PTA), which did not distinguish between foreigners and British nationals and limited coercive measures to 12 month (albeit renewable indefinitely). The control orders were replaced in 2011 by Terrorism Prevention and Investigation Measures, which remains the current regime of executive orders in the UK.<sup>44</sup>

The London bombing on 7 July 2005, the 7/7 attacks, took the lives of 52 people, and gave another impetus for extending counter-terror legislation. In particular the *Terrorism Act 2006* (UK), which was drafted in the aftermath of the bombings introduced new preparatory and sedition offences.

There has also been no shortage of investigative and prosecution action in relation to countering the terrorism threats. In June 2014, the UK Home Office released data that since 9/11 2,586 people had been arrested in relation to terrorism, of which 391 were convicted.<sup>45</sup> In March 2014 the Independent Reviewer of Terrorism Legislation has reported that since the introduction of control orders, 62 people were subjected to such a

---

<sup>42</sup> *Anti-Terrorism Crime and Security Act 2001* (UK), Part 4; for a discussion of the Act see Fenwick, above n 41, 724.

<sup>43</sup> *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004). For a case comment see David Feldman, "Terrorism, human rights and their constitutional implications?" (2005) 1 *European Constitutional Law Review* 531.

<sup>44</sup> *Terrorism Prevention and Investigation Measures Act 2011* (UK). The regime will be discussed in detail below at 7.1 and 7.2.

<sup>45</sup> Alan Travis, "UK terrorism arrest fall" (The Guardian, 5 June 2014).

measure.<sup>46</sup> As explored in the next Section, Australia has responded in similar ways, influenced by the UK legislative models.

---

<sup>46</sup> As per March 2015, see Anderson, David QC, “Terrorism Prevention and Investigation Measures in 2014” (Third report of the Independent Reviewer on the operation of *Terrorism Prevention and Investigation Measures Act 2011*, March 2015) 2. This includes both control orders and Terrorism Prevention and Investigation Measures.



## 5.2 An introduction to Australia

### 5.2.1 The right to a fair trial in Australia

In Australia, the RFT is protected by a combination of common law and statutory principles, rules and procedures.<sup>47</sup> The rationale for the RFT lies in the general principles of fairness, justice and non-discrimination.<sup>48</sup> However, from a legal point of view, its standing as a fundamental right is rather vulnerable. Most of these principles, rules and procedures may be easily overridden by other legislation. Moreover, although Australia is subject to international human rights law, the RFT as recognised in the *International Covenant on Civil and Political Rights*, cannot directly be invoked in domestic proceedings unless it forms part of domestic law. Hence, in Australia, human rights protection is heavily dependant on the continuing support and will of Parliament.<sup>49</sup> In a political system that has been described as “deeply utilitarian”<sup>50</sup> with a judiciary that follows a “strong positivist tradition”,<sup>51</sup> there is concern that in times of crisis governments and lawmakers will succumb to majoritarian pressures to sacrifice the protection of rights and liberties in order to enhance security.<sup>52</sup>

---

<sup>47</sup> For the general common law approach to rights see above at 2.2.3.

<sup>48</sup> For a general overview on the right to a fair trial in Australia see O'Neill, Rice and Douglas, *Retreat from injustice: human rights law in Australia* (The Federation Press, 2<sup>nd</sup> ed, 2004) 224; Gans *et al*, *Criminal process and human rights* (Federation Press, 2011) Chapters 9-11; Anthony Mason, “Fair Trial” (1995) 19 *Criminal Law Journal* 9; James Jacob Spigelman, “The truth can cost too much: the principle of a fair trial” (2004) 78 *Australian Law Journal* 29.

<sup>49</sup> George Williams, “The constitutional role of the courts: a perspective from a nation without a bill of rights” (2004) 2 *New Zealand Journal of Public and International Law* 25.

<sup>50</sup> Hilary Charlesworth, “The High Court and human rights” in Peter Cane (ed), *Centenary essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 356, 358.

<sup>51</sup> Andrew Lynch, “Legislative and Executive branch vs. the Constitutional Court and the Judiciary: conflict or cooperation?” in Jürgen Bröhmer (ed) *The German Constitution turns 60: Basic Law and Commonwealth Constitution - German and Australian Perspectives* (Peter Lang, 2011) 167, 168.

<sup>52</sup> George Williams, “The constitutional role of the courts: a perspective from a nation without a bill of rights” (2004) 2 *New Zealand Journal of Public and International Law* 25, 30; Brian Galligan and F L Morton, “Australian exceptionalism: rights protection without a bill of rights” in Tom Campbell, Jeffery Goldsworthy and Adrienne Stone (eds), *Protecting rights without a Bill of Rights: institutional performance and reform in Australia* (Ashgate, 2006) 17, 27.

Australia is one of the few Western liberal democracies without a comprehensive constitutional bill of rights or human rights legislation.<sup>53</sup> Traditionally, there has been a strong reluctance in both the population and among politicians to entrench rights.<sup>54</sup> This stems not only from belief in a strong Parliament, but also from the ‘competition of competence’ between the Commonwealth and States that exists within the federal system – human rights charter would be another far reaching federal law that could overrule State and Territory legislation.<sup>55</sup>

There are signs that traditional rights scepticism in Australia is changing. In 2009 the Federal Government undertook a *National Human Rights Consultation*, led by Fr Frank Brennan, into the need for better human rights protection in Australia. In its final report the committee recommended the introduction of a federal human rights Act based on the strong feedback from the population.<sup>56</sup> However, the federal government’s reaction was reserved, only accepting the recommendation to establish a new legislation scrutiny committee in the federal parliament – the *Parliamentary Joint Committee on Human Rights* - tasked with scrutinising proposed legislation and providing a compatibility statement on human rights for each new statute.<sup>57</sup> There is of course the general concern that without a stronger judicial role in giving effect to human rights, there may be

---

<sup>53</sup> On state level there are now the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities 2006* (Vic). However, they do not play a significant role for the purpose of this thesis. For general information on these two Acts see Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 73-138.

<sup>54</sup> Leeser and Haddrick (eds), *Don’t leave us with the Bill: the case against an Australian Bill of Rights* (Menzies Research Centre, 2009).

<sup>55</sup> Hilary Charlesworth, “The Australian reluctance about rights” (1993) 31 *Osgoode Hall Law Journal* 195.

<sup>56</sup> The website [www.humanrightsconsultation.gov.au](http://www.humanrightsconsultation.gov.au) and with it the final report have since been removed from the Internet. In the consultation 87% of 35,000 submissions supported a human rights act and 57% of people interviewed in a telephone survey supported such an idea, with only 14% being opposed. See Frank Brennan, “The practical outcomes of the National Human Rights Consultation” (Address to Judicial Conference of Australia Colloquium, Sydney, 12 October 2013) 10.

<sup>57</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth); the Act provides in s 3 a definition of human rights, which refers to seven core international human rights treaties Australia is a signatory to, and include most significantly the ICCPR.

limited incentives for the legislature to take a strong stand on human rights issues.<sup>58</sup> In relation to counter-terrorism legislation, there is evidence that in many instances careful parliamentary deliberation and scrutiny was missing.<sup>59</sup> While there are hopes for the new *Parliamentary Joint Committee on Human Rights* to grow into an efficient scrutiny mechanism, they have not yet been fully realised.<sup>60</sup>

One of leading Australian cases in relation to the common law governing the RFT is *Dietrich v The Queen*.<sup>61</sup> In that case the High Court held that the accused, who was indigent and had been refused legal aid, should not have been convicted following a trial for a serious offence at which he was not legally represented. The High Court confirmed that the appropriate remedy was a stay of proceedings, on the ground that persisting with the trial of an unrepresented indigent accused, would be unfair and constitute an abuse of process. The decision was hailed as strong message for the RFT at a time when the High Court seemed generally more rights focused and prepared to curb the other branches' powers.<sup>62</sup> However, it is important to understand the scope of the case and not get distracted by the rhetoric that surrounded it. The court emphasised

---

<sup>58</sup> George Williams, "The constitutional role of the courts: a perspective from a nation without a bill of rights" (2004) 2 *New Zealand Journal of Public and International Law* 25, 43.

<sup>59</sup> Dominique Dalla-Pozza, *The Australian approach to enacting counter-terrorism laws* (Doctor of Philosophy Thesis, University of New South Wales, 2010).

<sup>60</sup> See for example George Williams and Daniel Reynolds, "The operation and impact of Australia's parliamentary scrutiny regime for human rights" (2015) 41(2) *Monash University Law Review* 469. William Phillips, "Great expectations, hard times: Reflections on the Parliamentary Joint Committee on human rights" (2015) 37(4) *Law Society of South Australia Bulletin* 28.

Since the establishment of the Committee in 2012, the most substantial amendments to security legislation were introduced in 2014. However, neither the drafting of the *National Security Legislation Amendment Bill (No 1) 2014* (Cth), the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth) nor the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2014* (Cth) were influenced to any considerable extent by the Committee.

<sup>61</sup> *Dietrich v The Queen* (1992) 177 CLR 292 (13 November 1992).

<sup>62</sup> See for example Peter Bailey, "'Righting' the Constitution without a Bill of Rights" (1995) 23 *Federal Law Review* 1.

that it did not create a new common law right to legal counsel. In the words of Mason CJ, “[t]he High Court does not legislate”.<sup>63</sup> Rather it was held,

“in the absence of exceptional circumstance, a trial should be adjourned, where an indigent accused charged with a serious offence lacks legal representation, not due to any conduct on the accused’s part.”<sup>64</sup>

Under such circumstances Mr Dietrich had been denied a “real chance of acquittal”.<sup>65</sup>

The scope of what can be considered a violation of the RFT becomes more obvious when comparing *Dietrich* to the earlier case of *McInnis*,<sup>66</sup> in which the High Court did not find a violation of the RFT despite strong factual similarities between the two cases. Mr McInnis was charged with rape, also a serious crime, and unable to secure legal representation. However, the proceedings were not adjourned and the fact that he was unrepresented was not by itself considered a miscarriage of justice. The fact that *Dietrich* did not explicitly overrule the findings in *McInnis* demonstrates that the High Court did not intend to create a rule that could be seen as a right to legal counsel. Rather the particular circumstances of the trial will determine whether it should be considered unfair or not.<sup>67</sup> This shows that *Dietrich* did not further clarify the factors that lead to an unfair trial and remained well in its common law tradition of being disinclined towards rights development.<sup>68</sup>

The decision in *Dietrich* hinted at some constitutional foundations for the RFT –

---

<sup>63</sup> Mason, above n 48, 9.

<sup>64</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 357 (Toohey J).

<sup>65</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J); cf *McInnis v R* (1979) 143 CLR 575 (19 December 1979) where it was held that the fact that McInnis had no real chance of acquittal was considered such an exceptional circumstance.

<sup>66</sup> *McInnis v R* (1979) 143 CLR 575 (19 December 1979).

<sup>67</sup> For example *Dietrich v The Queen* (1992) 177 CLR 292, 331 (Deane J), 343 (Dawson J).

<sup>68</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 317 (Brennan J). See also Anthony Mason, “Fair Trial” (1995) 19 *Criminal Law Journal* 9; O’Neill, above n 48, 28.

Gaudron and Deane JJ as members of the majority, suggested that the RFT could be even implied from Chapter III of the Australian Constitution.<sup>69</sup> As Gaudron J observed:

“The fundamental requirement that a trial be fair is entrenched in the Commonwealth Constitution by Ch. III's implicit requirement that judicial power be exercised in accordance with the judicial process.”<sup>70</sup>

Although the term ‘right to a fair trial’ was used throughout the decision,<sup>71</sup> it was pointed out in the decision that it more properly characterised as the right not to be subject to a trial that is unfair.<sup>72</sup> It is also misleading as it implies that the Constitution, not the common law duty of judge to control legal processes provides the legal foundation for courts to determine when the continuation of a process would constitute a miscarriage of justice.<sup>73</sup> As the High Court reiterated in a number of subsequent cases, Parliament cannot interfere, in absence of a clear expression by legislation to the contrary, with its judicial duty to ensure the trial is fair (or more precisely not unfair).<sup>74</sup> *Dietrich* raised the prospect of further development of the RFT within the framework of the common law, and that the High Court would progressively elaborate on the essential

---

<sup>69</sup> An implied constitutional right was successfully argued in relation to the freedom of political communication and based on the principle of representative government. See *Australian Capital Televisions Pty Ltd v Commonwealth* (1992) 177 CLR 106 (30 September 1992); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (30 September 1992).

<sup>70</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 362 (Gaudron J); to the same effect Deane at 326.

<sup>71</sup> Mason CJ and McHugh J described it as “convenient, and not unduly misleading, to refer to an accused’s positive right to a fair trial.” *Dietrich v The Queen* (1992) 177 CLR 292, 299 (Mason CJ and McHugh J).

<sup>72</sup> See above at 2.2.3.

<sup>73</sup> See Fiona Wheeler, “The doctrine of separation of powers and constitutionally entrenched due process in Australia” (1997) 23 *Monash University Law Review* 248, 265-266.

<sup>74</sup> *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1, 26; *Nicholas v The Queen* (1998) 193 CLR 173, 208 (Gaudron J), 226 (McHugh J).

elements and scope of that right in subsequent cases.<sup>75</sup> However, this development of the RFT has not happened.<sup>76</sup>

Despite extensively engaging with the RFT in cases and academic commentary, the High Court has never recognised the RFT as an autonomous free-standing right with its own set of remedies.<sup>77</sup> The impact of Chapter III on the fairness of proceedings has been limited.<sup>78</sup> As a constitutional right, the RFT was stillborn – the Australian Constitution was never meant to be depository for rights. George Williams identified another impediment to this development,

“judicial and political battles over questions such as the right to a fair trial are [...] mediated according to the structural features of the Constitution. These include federalism, the separation of judicial power [...] and, to a lesser extent, representative government. This can transform concerns over human rights in Australia into debate about the relative powers of the Commonwealth and the States [...] or about whether the courts are being asked to exercise functions appropriate to their role.”<sup>79</sup>

Certainly, constraining fair trial jurisprudence to the particular concerns of Chapter III is not the most productive way to develop solid human right standards.

Finally, it must be briefly mentioned that international law (in cases where it has not been transposed into domestic legislation) exerts some, albeit limited influence on

---

<sup>75</sup> See for example Fiona Wheeler, “Due process judicial power and Chapter III in the new High Court” (2004) 32(2) *Federal Law Review* 205; Michael McHugh, “Does Chapter III of the Constitution protect substantive as well as procedural rights?” (2001) 21 *Australian Bar Review* 235.

<sup>76</sup> Leslie Zines, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008) 274; Wendy Lacey, “Inherent jurisdiction, judicial power and implied guarantees under Chapter III of the Constitution” (2003) 31 *Federal Law Review* 57.

<sup>77</sup> *Lodhi v Regina* [2007] NSWCCA 360 (20 December 2007) [74] (Spigelman CJ).

<sup>78</sup> See discussion in the case studies below in Chapters 6 and 7.

<sup>79</sup> George Williams, “The constitutional role of the courts: a perspective from a nation without a bill of rights” (2004) 2 *New Zealand Journal of Public and International Law* 25, 42.

Australian law. Nothing precludes judges from relying on international law when interpreting statutes or developing the common law.<sup>80</sup> In *Mabo* Brennan J even stated that,

“international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.”<sup>81</sup>

However, it seems that such use remains the exception rather than the rule in Australia, inspiring use among a minority of senior judges.<sup>82</sup>

### 5.2.2 Counter-terrorism measures in Australia

Before 9/11, Australia did not have in place any counter-terrorism legislation at the national level based on the notion of an ‘act of terrorism’.<sup>83</sup> Such behaviour would have been treated under general (typically state or territory) criminal offences, with the gravity and motive of the offences being considered in determining the appropriate sentence. The absence of such legislation reflected not only the rarity of terrorism in

---

<sup>80</sup> This also includes indirectly the jurisprudence of the ECtHR. While the ECHR is a regional human rights treaty, the prominence of its Court in developing a modern understanding of human rights has had and continues to have an impact on international human rights standards. See Michael Kirby, “The Australian debt to the European Court of Human Rights” in Breitmoser *et al* (eds), *Human rights, democracy and the rule of law* (Dike, 2007) 391

<sup>81</sup> *Mabo v Queensland* (No 2) (1992) 175 CLR 1, 42 (Brennen J).

<sup>82</sup> Charlesworth, above n 50, 367. One of the exceptions is Kirby J. See for example Michael Kirby, “The Australian use of international human rights norms: from Bangalore to Balliol – a view from the antipodes” (1993) 16(2) *University of New South Wales Law Journal* 363; Michael Kirby, “Domestic implementation of international human rights norms” (1999) 5(2) *Australian Journal of Human Rights* 27; Kristen Walker, “International law as a tool of constitutional interpretation” (2002) 28(1) *Monash University Law Review* 85; Gerald Brennan, “Human rights, international standards and the protection of minorities” in Peter Cane (ed), *Centenary essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 333.

<sup>83</sup> Australia has, however, enacted several statutes giving legal expression domestically to international Conventions is a party to and which are dealing with terrorism. These Conventions and subsequent statutes do not aim at defining terrorism, but rather punish certain acts, which are generally an expression of terrorism, such as the high-jacking of aircrafts, proliferation of nuclear material or offences in relation to internationally protected persons. See Golder and Williams, “What is ‘terrorism’? Problems of legal definition” (2004) 27 *University of New South Wales Law Journal* 273-75.

Australia, but post-Hilton bombing, a commitment to dealing with terrorism by use of the ordinary criminal law, rejecting ‘special’ war-time powers and offences controversially enacted in the UK to deal with terrorism in Northern Ireland.<sup>84</sup> This approach changed of course following the 9/11 attacks. The initial response was the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which introduced new terrorism offences into the *Criminal Code Act 1995* (Cth).<sup>85</sup> Both of these new offences as well as the wide definition of terrorism were strongly influenced by the *Terrorism Act 2000* [UK].

The official motivation for counter-terrorism legislation was to bring Australian laws into accordance with the UN Security Council Resolution 1373, which required Member States to ensure terrorists would be prosecuted and that domestic laws reflected the seriousness of terrorism.<sup>86</sup> However, there was additional concern that Australia would become a target given the close alliance with the United States and its involvement in the Afghanistan and Iraq wars. After 88 Australians were killed in the Bali bombings, Australia felt directly threatened by global terrorism. In 2003 a public alert system was introduced, which originally set the threat level at ‘medium’ (that an attack could occur), but rose to ‘high’ (that an attack is likely to occur) in September 2014. It remains at that level today.

What followed the initial response had been described as ‘hyper-legislating’.<sup>87</sup> Between 2001 and 2014 the Australian Parliament passed over 60 pieces of legislation in relation

---

<sup>84</sup> O’Donnell and Bronitt, “Philips’ brief: the Hilton bombing, calling out the troops and turning points in history” (2014) 38 *Criminal Law Journal* 59-62.

<sup>85</sup> Bernadette McSherry, “Terrorism offences in the *Criminal Code*: broadening the boundaries of Australian criminal law” (2004) 27(2) *University of New South Wales Law Journal* 354.

<sup>86</sup> UN SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001).

<sup>87</sup> Kent Roach, *The 9/11 effect: comparative counter-terrorism* (Cambridge University Press, 2011) 309.



to terrorism,<sup>88</sup> by far exceeding the legislative efforts of the United States, UK and Canada.<sup>89</sup> Not only were the number of legislative measures adopted excessive,<sup>90</sup> but many of these measures have been criticised as unjustified, harsh and disproportionate infringements of human rights.<sup>91</sup> They were often rushed through Parliament and suffered from poor drafting and inadequate scrutiny from academics or law reform bodies.<sup>92</sup> As a proper overview of counter-terrorism measures would exceed the scope of this section only those relevant to case study will be introduced.<sup>93</sup>

In line with the trend to strengthen preventive ‘pre-crime’ policies,<sup>94</sup> the Australian Government has placed a strong emphasis on the importance of intelligence-gathering. This has resulted in both an expansion of intelligence institutions and their powers, including new (and highly controversial) ASIO detention and questioning powers.<sup>95</sup>

---

<sup>88</sup> While there is no official list of counter-terrorism legislation, George Williams, a leading researcher in the field, has counted 62 pieces of federal legislation up to October 2014. George Williams, “Does Australia need new anti-terror laws?” (Lionel Murphy Memorial Lecture, Canberra, 22 October 2014).

<sup>89</sup> Roach, above n 87, 310.

<sup>90</sup> Just in 2002 it was estimated that more than 100 new criminal offences were introduced, many of which carried a life sentence. See McSherry, above n 85, 354.

<sup>91</sup> There has also been extensive debate over whether the increased threat level required the adoption of all these measures, or whether terrorism was a proxy for other political purposes, such as toughening border control and immigration policy: Angus McCullough and Sharon Pickering, “Counter-terrorism: the law and policing of pre-emption”, in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (Routledge, 2010) 13, 17.

<sup>92</sup> Andrew Lynch, “Legislating with urgency: the enactment of the *Anti-terrorism Act [No 1] 2005*” (2006) 30 *Melbourne University Law Review* 747; this has also been criticised by Martin Scheinin, *Australia: study on human rights compliance while countering terrorism* (Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/HRC/4/26/Add.3, 14 December 2006) [65].

<sup>93</sup> For further overview and discussion of counter-terrorism measures in Australia see Lynch, McGarrity and Williams, *Inside Australia’s anti-terrorism laws and trials* (UNSW Press, 2015); George Williams, “A decade of Australian anti-terror laws” (2011) 35 *Melbourne University Law Review* 1136; Roach, above n 87, 309; McSherry, above n 85, 354; Edwina MacDonald and George Williams, “Combating terrorism: Australia’s *Criminal Code* since September 11, 2001” (2007) 16 *Griffith Law Review* 27; Nicola McGarrity, “‘Testing’ our counter-terrorism laws: the prosecution of individuals for terrorism offences in Australia (2010) 34 *Criminal Law Journal* 92.

<sup>94</sup> See above at 3.1.

<sup>95</sup> See for example Lisa Burton, Nicola McGarrity and George Williams, “The extraordinary questioning and detention powers of the Australian Security Intelligence Organisation” (2012) 36 *Melbourne University Law Review* 415; Jenny Hocking, *Terror laws: ASIO, counter-terrorism and the threat to democracy* (UNSW Press, 2004) 212; Joo-Cheong Tham, “Casualties of the domestic ‘war on terror’: a review of recent counter-terrorism laws” (2004) 28(2) *Melbourne University Law Review* 512, 514; Parliamentary Committee on ASIO, ASIS and DSD, *ASIO’s questioning and Detention Powers* (Review

Concerned about the protection of sensitive information in criminal proceedings, the Government introduced the *National Security Information (Criminal Proceedings) Act 2004* (Cth) (NSIA), which became effective on 11 January 2005.<sup>96</sup> While NSIA was not specifically targeting terrorism trials, its Explanatory Memorandum clearly identified terrorism as the main justification for the measure. It was introduced not only to control the management of sensitive information, but also to permit the limited use of sensitive information in trials without requiring full disclosure. Not surprisingly, NSIA raised concern that it would introduce the use of ‘secret evidence’ into the field of criminal law. The leading human rights lawyer and advocate, Julian Burnside, described the NSIA as “perhaps the most draconian piece of legislation ever passed by an Australian Parliament in time of peace.”<sup>97</sup>

The 2005 London bombing, which claimed the life of one Australian, was yet another trigger for further counter-terrorism measures in Australia. The *Anti-Terrorism Act [No 2] 2005* (Cth), passed after only six and a half hours of debate, introduced a control order regime,<sup>98</sup> which was modelled on the UK regime under the PTA, but included

---

of the operation, effectiveness and implications of Division 3 of Part III in the *Australian Security Intelligence Organisation Act 1979*, November 2005).

<sup>96</sup> The Act was originally only applicable in criminal proceedings, but amended in 2005 to also include civil proceedings. See *National Security Information Legislation Amendment Act 2005*. Since then its full title is *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

<sup>97</sup> Julian Burnside, “The Dreyfus affair” (2006) 137 *Victorian Bar News* 29, 31; see also Patrick Emerton, “Paving the way for conviction without evidence: a disturbing trend in Australia’s ‘anti-terrorism’ laws” (2004) 4(2) *Queensland University of Technology Law Journal* 129.

<sup>98</sup> The regime was inserted into the *Criminal Code Act 1995* (Cth) as Division 104. See generally Geoff McDonald, “Control orders and preventative detention” why alarm is misguided” in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 106; Andrew Lynch and Alexander Reilly, “The constitutional validity of terrorism orders of control and preventative detention” (2007) 10 *Flinders Journal of Law Reform* 105; Lisa Burton and George Williams, “What future for Australia’s control order regime?” (2013) 24 *Public Law Review* 182. Alongside the control order regime, the Government also introduced provisions for preventative detention as Division 105 of the *Criminal Code Act 1995* (Cth). The measure is directed towards persons, who are suspected to commit a terrorist attack in the near future or have done so and need to be prevented from destroying evidence. Under these provisions a person can be held for up to 14 days. So far the measure has never been used. For a comment on their usefulness Svetlana Tyulkina and George Williams, “Preventative detention orders in Australia” (2015) 38(2) *University of New South Wales Law Journal* 738; See also Margaret White “A judicial perspective: the making of preventative detention orders” in

some significant modifications.<sup>99</sup> While only a handful of people have been subjected to control orders in Australia,<sup>100</sup> the system has seeped into other areas of serious crime prevention causing a normalisation of measures that were justified as a response to extraordinary circumstances.<sup>101</sup>

Given the severity and breadth of counter-terrorism measures, the Government sought to appease concern through a commitment to periodically review national security legislation.<sup>102</sup> The annual reviews conducted by the Independent National Security Legislation Monitor (INSLM) are particularly relevant to this thesis.<sup>103</sup> The INSLM position, created as a part time post in 2010, submits Annual Reports to the Australian Government on the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation.<sup>104</sup>

---

Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 116; James Renwick, "The constitutional validity of preventative detention" in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 127; Claire Macken, "Preventative detention in Australian law" issues of interpretation (2008) 32(2) *Criminal Law Journal* 71; Rebecca Ananian-Welsh, "Preventative detention orders and the separation of judicial powers" (2015) 38(2) *University of New South Wales Law Journal* 756.

<sup>99</sup> See below at 7.1; see also Andrew Lynch, "Control orders in Australia: a further case study in the migration of British counter-terrorism law" (2008) 8(2) *Oxford University Commonwealth Law Journal* 159.

<sup>100</sup> To date only six control orders have been issued. On the question of necessity see Burton and Williams, above n 98, 184-187; Lynch, above n 99, 180.

<sup>101</sup> Nicola McGarrity, "From terrorism to bikies: control orders in Australia (2012) 37(3) *Alternative Law Journal* 166; Gabrielle Appleby and John Williams, "The anti-terror creep: law and order, the States and the High Court of Australia" in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (Routledge, 2010) 150.

<sup>102</sup> Department of Prime Minister and Cabinet, "Counter-Terrorism White Paper: Securing Australia – Protecting our Community" (2010) 56.

<sup>103</sup> Another feature that was inspired by the UK Independent Reviewer of Terrorism Legislation: see <https://terrorismlegislationreviewer.independent.gov.uk>.

<sup>104</sup> Mr Bret Walker SC was the first Monitor from April 2011 to April 2014. Currently the Hon Roger Gyles AO QC holds the position. For more information see the INSLM's website: <http://www.inslm.gov.au>. The INSLM Annual Reports examine specific pieces of legislation: the 2012 and 2016 INSLM Reports dealt to large extent with control orders: Bret Walker, "Independent National Security Legislation Monitor's Declassified Annual Report" (20 December 2012); Roger Gyles, "Independent National Security Legislation Monitor Inquiry into control order safeguards: Part 2" (13 April 2016); the INSLM 2013 Report included an in-depth review of the NSIA: Bret Walker, "Independent National Security Legislation Monitor's Annual Report" (7 November 2013).

In 2013, the Council of Australian Governments (COAG) conducted another comprehensive review of all Australian counter-terrorism laws, examining their operation and effectiveness.<sup>105</sup> The COAG Committee was chaired by the Hon Anthony Whealy QC, who had been a sitting judge in a number of terrorism trials in New South Wales, included the constitutional challenge to the NSIA.<sup>106</sup>

Despite these reports, and other review mechanisms, as well as the use of ‘sunset clauses’ in a number of statutes, the Government has shown little willingness to repeal or even scale-back unused or harsh legislation. The introduction of more recent legislation, such as the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth), which grants security agencies access to metadata, suggests to the contrary, that the expansion of counter-terrorism laws continues without abatement.

---

<sup>105</sup> Council of Australian Governments, “Review of counter-terrorism legislation” (Final Report, 2013).

<sup>106</sup> Justice Whealy had been the trial judge in *R v Lodhi* [2006] NSWSC 691 (23 August 2006).

### 5.3 Conclusion

While the present Chapter provides the background for the following case studies, it also points to some general conclusions. In relation to the RFT, Australia's main protection mechanism remains the common law, and the leading case of *Dietrich* demonstrates that the Australian judges, by and large, adhere to the traditional constitutional position that Parliament is vested with the power to expand the scope of protected rights, rather than the courts. In the UK, the introduction of the HRA brought ECHR rights into the UK domestic legal system for the first time. It signalled legislative willingness to give more power to the judges in reviewing governmental action and legislation. Public scepticism about the ECHR, however, means that the judiciary is careful about not over-stepping its new powers to (re)interpret domestic law in an ECHR-compliant fashion. Since the common law approach to rights protection has not been entirely cast aside in favour of constitutionalising rights, it is perhaps preferable to view this as a "hybrid" system.

The Chapter also revealed significant differences in relation to each country's experience with terrorism. The UK had extensive experience in counter-terrorism over the last half century. Australia had little experience of dealing with terrorism before 9/11, an event precipitating a wide range of new terrorism legislation over the last 15 years. Many of the new measures were inspired by or adopted from the UK. While Australia became increasingly a target for radical jihadist terrorism, it seems that the severity of these measures were not suitable for countering the actual terrorism threat, nor consistent with the human rights safeguards in Australia. In particular, the impact of the HRA on the UK counter-terrorism legislation had arguably not been sufficiently considered in Australia.



## **Chapter 6: Sensitive information in criminal proceedings**

Traditionally, in both Australia and the United Kingdom (UK), issues surrounding non-disclosure of sensitive information in criminal proceedings have been resolved through the application of common law rules and discretions. Judges have relied upon their inherent jurisdiction to regulate their own processes that serve to uphold values of fairness and maintain public confidence in the administration of justice. At the same time, the courts have extended protection, in the public interest, to sensitive classes of information. This information includes state secrets and the content of government documents, as well as the identity of police informers and vulnerable witnesses. The immunity from production of certain material in open court, known as ‘public interest immunity’ (PII), has developed on a case-by-case basis, and has been subject to many changes over time. Amendments to these rules have been driven, not only by security needs to which the courts have always exercised some degree of deference, but also by an evolving understanding of fair trial standards.

Over the last three decades, legislation governing PII has increased significantly. In most cases, the legislation has aimed to codify the common law and clarify the scope of legal principles as well as create new public interest exceptions where necessary. This notwithstanding, common law precedents have remained significant aids to interpreting statutes and for this reason, the Chapter explores in depth the historical development of the common law doctrine.

In criminal proceedings, a distinction can be drawn between sensitive information that the prosecution intends to suppress in its entirety, and information intended to be

produced at trial, albeit in an edited form. In the former case the prosecution does not intend to rely on the material (this is termed ‘unused material’), whereas in the latter, the prosecution intends to rely upon the sensitive information at trial.

Under the umbrella of ‘suppressed information’, further distinctions can be drawn between information deemed irrelevant and information which is material to issues in dispute, and therefore potentially vital to the defence case. If the information objectively considered is immaterial, it follows that no damage to the fairness of the trial will result from its suppression. This gives rise to the questions of what constitutes ‘material’ evidence?; and who determines whether or not particular information meets that threshold of materiality? These questions are discussed in Section 6.1. On the other hand, where information is considered to be relevant, at least to some degree, but its disclosure would threaten national security, the court has to assess this factor in light of any impact non-disclosure would have on the fairness of the trial. This is examined in Section 6.2.

In cases where the state intends to adduce and rely on sensitive information, this thesis distinguishes between, ‘edited evidence’ and ‘secret evidence’. ‘Edited evidence’ is defined as any evidence that is redacted and/or stripped of parts of its content, which clearly imposes limits the defence to fully test that evidence. This broad definition has the effect of including the issue of anonymous and absent witness evidence, which, although not always treated in the category of sensitive information, presents the same dilemma for the parties involved and is regularly justified in the interest of national security. As the court’s judgment ultimately relies on such edited information, the impact on procedural fairness may be even more pronounced.<sup>1</sup> The crucial question is,

---

<sup>1</sup> The issue is not limited to courts in the strict sense. The same is true for all institutions and actors, who have to rely on edited information, such as tribunals or if applicable juries.



whether there is sufficient information, in its edited form, to be meaningfully challenged by the defence. This is examined in Section 6.3.

Where ‘secret evidence’ is concerned, the court may rely on material that the defendant has not had the opportunity to access and challenge. This lack of access constitutes a serious departure from the general principles and practices in criminal proceedings granting the defendant a right of ‘full answer and defence’. To date, however, the use of secret evidence has only been authorised in administrative proceedings. This will be discussed in Chapter 7.

How these distinctions will translate into the structure of this Chapter is visualised in Figure 6.1.

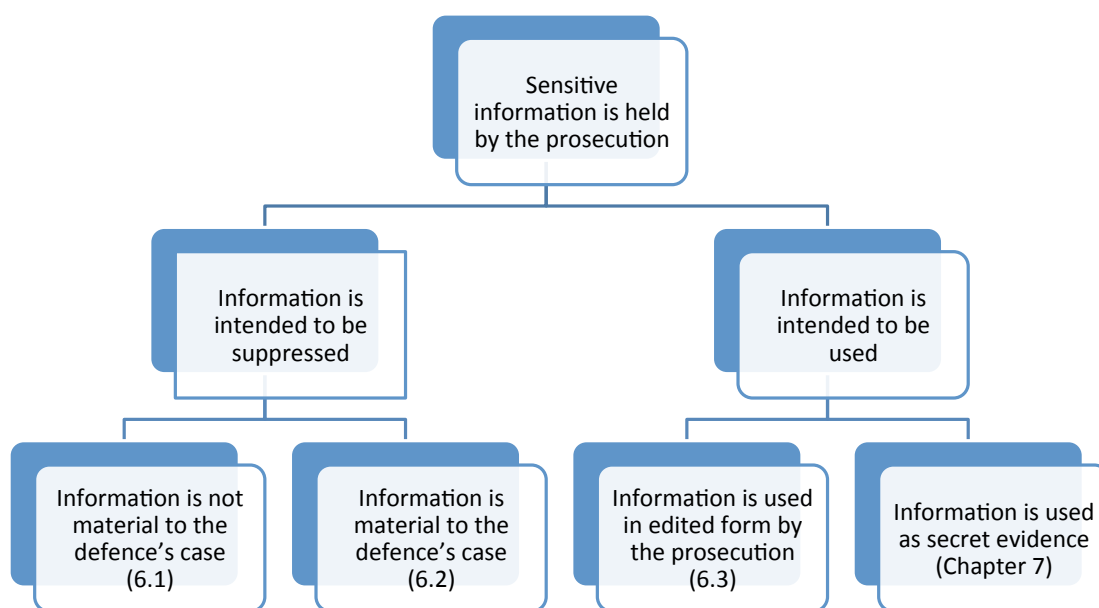


Figure 6.1: overview Chapter 6

For completeness, it is important to mention that there is a final category of evidence, which concerns sensitive information initially provided to the defendant, but later sought to be suppressed by the state during a public trial. The defendant may have been

made aware of the information, by virtue of being a state employee (a public servant or contractor) or by having been entrusted with it, legally or illegally, and knows or has reasonable cause to believe that the information is classified. In both Australia and the UK, knowingly passing on or disclosing such information constitutes a criminal offence.<sup>2</sup> While full disclosure in such cases creates a similar security dilemma for the state, which sits at odds with the right to a fair trial (RFT), unlike the previous categories of sensitive information, here the defendant's knowledge of the information means that the he/she can participate in any *in camera* proceedings. Given that the focuses on situations where the defendant suffers from a lack of information, the scenario will not be further discussed in the Chapter.<sup>3</sup>

This Chapter reveals a trend in both Australia and the UK of expanding use of edited and secret evidence in criminal proceedings. It will examine the ways in which the judiciary in both jurisdictions has attempted to reconcile this trend with established principles of fairness. This Chapter argues that any differences in resolving non-disclosure requests, including the role envisioned for the defence, do not simply stem from diverging human rights frameworks and public law principles but rather reflect the differing understandings of the role of judges, and the separation of powers. As a result, the discussion routinely refers to Chapter 4 where the alternative approaches to balancing, and the application of these principles, have been discussed. Ultimately, this Chapter draws upon case studies to suggest that the differing methodologies have a real

---

<sup>2</sup> *Official Secrets Act 1989* (UK), ss1-6; *Crimes Act 1914* (Cth), s 79; there are also more specialised offences, for example *Naval Discipline Act 1957* (UK), s 34 (Unauthorised disclosure of information); *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZS (Secrecy relating to warrants and questioning). In Australia, there are now additional offences under the NSIA (ss 42-45), which do neither depend on a classification of the document prior to the trial nor on an prior obligation of the defendant to protect the information.

<sup>3</sup> However, the Australian case *Lappas*, in which the accused was charged with espionage for disclosing national security documents, had a strong impact on the development of the law in relation to disclosure in Australia. See below at 6.2.3.1.

impact on the level of protection accorded to the fair trial and that without the application of principles specifically developed for these ‘hard cases’, the RFT risks becoming seriously damaged.

## 6.1 General disclosure duties of the prosecution

Before a court can rule on disclosure, the prosecution must bring the information concerned to the attention of both the court and the defence, irrespective of whether or not it is intended to be relied upon in the prosecution's case. In this respect, recent developments in the UK have triggered significant changes to the disclosure regime as a whole, and will be reviewed below.

In the leading English case of *Ward*, Glidewell LJ held that any “[n]on-disclosure is a potent source of injustice”.<sup>4</sup> Although it is generally accepted that any information, including unused material, should be disclosed where it is capable of shedding light on matters in dispute, indiscriminate disclosure of all information can equally impede the fairness and efficiency of the trial. There is clearly a public interest in deterring defendants from pursuing ‘fishing expeditions’, requesting any and all types of information, that would result in the delay of proceedings and waste resources.<sup>5</sup> From a practical point of view, imposing such extensive disclosure obligations would put a cumbersome burden on the prosecution, who would be constantly required to anticipate new lines of argument, and accordingly seek, organise and make accessible any potentially relevant information to the defence.

Clearly, there is a tension between two sets of interests: while on the one hand disclosure rules seek to avoid injustice, discretion on the part of the state/prosecution to determine the extent to which unused material should be disclosed is equally important. The scope of discretion enjoyed by state agencies has been a contentious issue, to which courts have offered different answers over time.

---

<sup>4</sup> *R v Ward* [1993] 1 WLR 619, 642 (Glidewell LJ). And the quote continued: “and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence.”

<sup>5</sup> See for example *Alister v R* (1984) 154 CLR 404, 415.

The issues surrounding the prosecution's duties to disclose unused material are not specific to the area of sensitive information, and for this reason, this Section will only act as a general overview. However, an assessment of whether, and to what extent, sensitive information must be suppressed to protect national security can only be addressed where the existence and content of that information is 'known' to the court.

Until the early 1990s, the rules and exceptions surrounding pre-trial disclosure of unused material were exclusively developed under the common law in both Australia and the UK.<sup>6</sup> This lack of legislation can be explained historically by the professional expectation that Crown lawyers would always act in the interest of fairness, and hence should be allowed a wide discretion as to when disclosure to the defence was necessary.<sup>7</sup> This expectation, however, has always sat uncomfortably with the fact that neither the police nor prosecutors consider themselves to be trustees of national security information.<sup>8</sup>

The downside of this broad, unreviewable discretion became apparent in the UK in the late 1980s and early 1990s, in a series of miscarriage of justice cases, most of which related to the conflict in Northern Ireland (including the *Guildford Four*, the *Maguire Seven* and *Judith Ward*).<sup>9</sup> As the appeals and reviews revealed, the miscarriages had been caused or related to the suppression of unused material that would cast serious doubt over the convictions.<sup>10</sup> At the same time, another English criminal trial, concerning the

---

<sup>6</sup> See for example *R v Bryant and Dickson* (1946) 31 Cr App R 146 (31 December 1946). This case is considered as one of the earliest cases on disclosure rules stating a duty of the prosecution to make a credible witness available to the defence, who is not called by the prosecution, but has information inconsistent with the guilt of the accused.

<sup>7</sup> David Corker and Stephen Parkinson, *Disclosure in criminal proceedings* (Oxford University Press, 2009) 2, 133. This attitude was for example reflected in the *Attorney-General's Guidelines 1981* (UK), which provide the prosecution with an enormous amount of discretion.

<sup>8</sup> Ben Emmerson *et al*, *Human Rights and Criminal Justice* (Sweet and Maxwell, 3<sup>rd</sup> ed, 2012) 472-73.

<sup>9</sup> See Kent Roach and Gary Trotter, "Miscarriages of justice in the war against terror" (2005) 109(4) *Penn State Law Review* 973-988.

<sup>10</sup> For a discussion of the string of miscarriage of justice cases see John Niblett, *Disclosure in criminal proceedings* (Blackstone Press, 1997) Chapter 3. See also Corker and Parkinson, above n 7, 11.

illegal export of weapons to Iraq by Matrix Churchill Ltd. in the early 1980s, exposed similar concerns. In that case, it was neither the police nor prosecution who sought to suppress the sensitive information, but government Ministers intending to conceal their knowledge of ‘inconvenient’ information relating to approvals of the illegal exports on the basis of PII.<sup>11</sup>

### 6.1.1 Disclosure duties of the prosecution in the United Kingdom

As a reaction to the high profile disclosure scandals in the early 1990s, both Parliament and the judiciary in the UK removed prosecutorial discretion (thereby widening the prosecution’s disclosure obligations) and increased judicial control over disclosure decisions. This unforeseen, yet significant increase in the judiciary’s workload of hearing pre-trial disclosure requests meant that a number of adjustments to the disclosure process were required to redress the balance between the interests of the various stakeholders.

Ultimately, the discretion of the police and prosecution has been reinstated, justified in part by the introduction of guiding principles and procedures governing disclosure, laid down in judicial decisions, prosecutor guidelines and legislation. Most importantly, courts have clarified that - as a general rule - the prosecution must disclose “all material evidence which the prosecution had gathered and from which the prosecution have made their own selection”<sup>12</sup> and is likely to be of assistance to the defendant.

Furthermore, when assessing PII requests, it is the courts, rather than the prosecution,

---

<sup>11</sup> The trial ultimately collapsed, but the events surrounding the trial caused an uproar that eventually led to an inquiry undertaken by Sir Richard Scott, “The Report of the Inquiry in to the Export of Defence Equipment and Dual Use Goods to Iraq and Related Prosecutions” (HC 115, 1995-96), commonly referred to as the ‘Scott Report’. See also Dawn Oliver, “The Scott Report” (1996) Autumn *Public Law* 357; Niblett, above n 10, 27.

<sup>12</sup> *R v Ward* [1993] 1 WLR 619, 645 (Glidewell LJ) referring to Lawton LJ’s judgment in *R v Hennessey* (1978) 68 Cr App R 419, 426.

who have to decide (i) whether, and to what degree, the information is considered sensitive, (ii) the use the defendant may have of the information and as such (iii) whether disclosure is required.<sup>13</sup> These principles alone have turned the prosecution into a “temporary custodian” of information.<sup>14</sup> Unsurprisingly, courts initially struggled to identify how to define and classify ‘material’ evidence. After a number of attempts,<sup>15</sup> this is now defined in a single, objective test in s 3(1)(a) CPIA 1996,<sup>16</sup> requiring the prosecution to disclose any material, which “might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused”.<sup>17</sup> In the landmark case of *H and C*, the House of Lords described this obligation as ‘the golden rule’.<sup>18</sup> The legislation clarifies that the prosecution must keep its disclosure decisions under continuous review.<sup>19</sup>

The general principles and obligations are further specified by the *Attorney General’s Guidelines on Disclosure 2005*<sup>20</sup> and the *Crown Prosecution Service, Disclosure Manual for investigations started on or after 4 April 2005*.<sup>21</sup> They regulate how the police and prosecution interact to process sensitive information. In such cases the

---

<sup>13</sup> *R v Ward* [1993] 1 WLR 619, 680-81.

<sup>14</sup> Corker and Parkinson, above n 7, 135.

<sup>15</sup> Crucial in the process of defining the materiality of evidence was *R v Keane* [1994] 1 WLR 746 (14 March 1994). *Ibid*, 752 - adopting a test suggested by Jowitt J in *R v Melvin* (unreported), 20 December 1993 – it was held that documents are to be considered as material, “which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence which the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)”. The definition was also confirmed in *R v Brown (Winston)* [1998] AC 367 (24 July 1998) 376 (Lord Hope) stating that these obligations have to be interpreted widely. The impracticality of the test then led to the introduction of disclosure obligations in the *Criminal Procedure and Investigations Act 1996* (UK), which itself became the target of much criticism. See Mike Redmayne, “Criminal Justice Act 2003: (1) Disclosure and its discontents” (2004) June *Criminal Law Review* 441, 442-44; Corker and Parkinson, above n 7, 19-20.

<sup>16</sup> as amended by s 32 *Criminal Justice Act 2003* (UK). For a general overview on these amendments see Andrew Keogh, *Criminal Justice Act 2003: A guide to the new law* (Law Society Publishing, 2004) 43.

<sup>17</sup> See also the leading Scottish case *McInnes v HM Advocate* [2010] UKSC 7 (10 February 2010).

<sup>18</sup> *R v H and C* [2004] 2 AC 134, 147.

<sup>19</sup> *Criminal Procedure and Investigations Act 1996* (UK), s 7A.

<sup>20</sup> Available at [www.gov.uk/attorney-general-s-guidelines-on-disclosure-2005-and-2011](http://www.gov.uk/attorney-general-s-guidelines-on-disclosure-2005-and-2011) (last visited 15 July 2016). Hereafter referred to as the 2005 Guidelines.

<sup>21</sup> Available at [www.cps.gov.uk/legal/d\\_to\\_g/disclosure\\_manual/](http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/) (last visited 15 July 2016). Hereafter referred to as the 2005 Manual.

Guidelines require that an appointed Disclosure Officer prepares a list, with reasons, of material that could jeopardise the public interest if disclosed.<sup>22</sup> The final decision on disclosure rests with the prosecution,<sup>23</sup> who must be prepared to justify to the court why the risk of harm occasioned by disclosure was assessed to be real and not fanciful.<sup>24</sup> In this assessment, although each piece of information has to be individually considered,<sup>25</sup> the anticipated harm caused by disclosure may be direct or incremental, which considerably widens the scope of protection.<sup>26</sup> Importantly, before making a PII application the prosecution should aim to disclose as much as is possible, which could include providing summarised, redacted or otherwise edited documents.<sup>27</sup>

Despite these developments, the police and prosecution retain their wide discretion,<sup>28</sup> with internal administrative guidelines acting as the principal safeguards against abuse. Quirk criticises this internal oversight for failing to counteract police and prosecutor cultures and working practices which operationalise (and neutralise) these principles.<sup>29</sup> This criticism foregrounds the importance of ensuring that all branches of government - judiciary, executive and legislative - are committed to upholding and protecting the

---

<sup>22</sup> 2005 Manual, [6.4] and [8.2]. The list is referred to as Schedule MG6D. Examples of sensitive material are material relating to national security, intelligence agencies, intelligence from foreign sources or given in confidence, relating to informants, undercover officers endangered by the material, revealing investigation techniques or hinders the prevention of or facilitates crime. (2005 Manual, [8.4] referring to the Code of Practice, [6.12.]) In circumstances where disclosure may potentially cause loss of life, material will not be included in the Schedule, but brought to the prosecutor's attention separately (2005 Manual, Chapter 9).

<sup>23</sup> However, the prosecution can also be obliged to make a PII application, if the police or any other agency disagrees with the judgment of the prosecution to disclose sensitive material in whole or in part (2005 Manual, [13.3.]).

<sup>24</sup> 2005 Manual, [8.17]; 2005 Guidelines, [20].

<sup>25</sup> Blanket claims relating to a 'class' of information cannot be relied upon: 2005 Manual, [8.18]. See also Sir Richard Scott, "The acceptable and unacceptable use of public interest immunity" (1996) 4 *Public Law* 427.

<sup>26</sup> 2005 Manual, [8.14].

<sup>27</sup> 2005 Guidelines, [20].

<sup>28</sup> The Guidelines, for example, list additional reasons supporting non-disclosure, including the overburdening of the parties, misleading information, and information that would cause unjustified delays (2005 Guidelines, [6]). Such material, together with neutral or material damaging to the defendant, is immune to PII claims: "It is only in truly borderline cases that the prosecution should seek a judicial ruling on the disclosability of material in its possession." See 2005 Guidelines, [20]. This wording has been adopted from *R v H and C* [2004] 2 AC 134, 155.

<sup>29</sup> Hannah Quirk, "The significance of culture in criminal procedure reform: why the revised disclosure scheme cannot work" (2006) 10 *Int'l Journal of Evidence & Proof* 42.



ideals of fairness in the administration of justice.<sup>30</sup> This duty, first and foremost, must be reflected in legislation, and embedded in police and prosecution decision processes. Concerns as these about the operation of the disclosure regime have prompted a number of reviews and enquiries.<sup>31</sup> While they have identified room for improvement particularly on the part of the prosecution and the police, and supported by robust case management system of the judiciary, they have not triggered any wider legislative reforms.

### 6.1.2 Disclosure duties of the prosecution in Australia

In Australia, the prosecution's disclosure obligations were traditionally also governed by the common law, which necessitated "disclos[ure of] all relevant evidence to an accused, and a failure to do so may, in some circumstances, require the quashing of a verdict of guilty."<sup>32</sup> As in the UK, the prosecution has traditionally been allowed a wide discretion, based on the assumption that the prosecution is independent to the Crown, and acting in the interests of justice. The duty of disclosure however has been conceived of as one that is owed to the court, and not to the defendant.<sup>33</sup> In the absence of a clear disclosure duty owed to the defence, there must be concern whether this assumption holds true.

Spared the high profile miscarriage of justice cases occurring in the UK, Australian courts have not seen the need to further define the content and scope of the disclosure

---

<sup>30</sup> See above at 4.4.

<sup>31</sup> See Lord Justice Gross, "Review of disclosure in criminal proceedings" (Judiciary of England and Wales, September 2011); Lord Justice Gross and Lord Justice Treacy, "Further review of disclosure in criminal proceedings: sanctions for disclosure failure" (Judiciary of England and Wales, November 2012); Sir Brian Leveson, "Review of efficiency in criminal proceedings" (Judiciary of England and Wales, January 2015).

<sup>32</sup> *Mallard v R* (2005) 224 CLR 125, 133 (Gummow, Hayne, Callinan and Heydon JJ) referring to *Grey v R* (2001) 75 ALJR 1708.

<sup>33</sup> *Cannon v Tahche* (2002) 5 VR 317 (13 June 2002) [57]-[58]; see also *R v Hennessey* (1979) 68 Cr App R 419, 426 (Lawton LJ).

obligations. That said, some State Parliaments have recently enacted statutory rules dealing with disclosure,<sup>34</sup> with Directors of Public Prosecution (DPPs) adopting and developing their own disclosure guidelines or policies to fill the regulatory gaps.<sup>35</sup>

It is beyond the scope of this Section to review and compare the various guidelines and policies. Although varying in content and scope, they have at least introduced some minimum standards. It is also difficult to determine authoritatively how, if at all, the UK developments have influenced the development of State and Territory DPP guidelines and policies. In *R v Reardon*, Hodgson JA considered the English cases discussed above, and argued that the principles laid down in *Keane* and *Brown* should be equally applicable in NSW.<sup>36</sup> His Honour recognised that the few Australian authorities that have referred to these English cases “have not suggested they are not applicable in Australia”.<sup>37</sup> In the absence of any authoritative High Court rulings on the issue, it is likely that English cases will remain persuasive among lower courts.

### 6.1.3 Comparative observations

Miscarriage of justice cases in the UK precipitated ongoing discussions about the prosecution’s obligations, discretion, and police cooperation, in relation to disclosure.

As a result of these debates, the courts now have the responsibility to determine whether it is in the public interest to suppress the information in order to protect national

---

<sup>34</sup> See in particular *Criminal Procedure Act 2009* (Vic); *Criminal Procedures Act 1986* (NSW) as amended by the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013 No 10* (NSW); *Criminal Code Act 1899* (Qld). Criminal law is a state power as not listed in s 51 of the Australian Constitution.

<sup>35</sup> Commonwealth Director of Public Prosecutions, *Statement on prosecution disclosure* (2006); Director of Public Prosecutions, *Guidelines 2007* (NSW) Guideline 18; Director of Public Prosecutions, *Guidelines 2005* (NT) Guideline 8; Director of Public Prosecutions, *Director’s guidelines 2013* (Qld) Guideline 29; Director of Public Prosecutions, *Prosecution policy 2005* (SA) Guideline 9; Director of Public Prosecutions, *Directors policy on disclosure 2014* (Vic); Director of Public Prosecutions, *Statement of prosecution policy and Guidelines 2005* (WA) [101]-[118].

<sup>36</sup> *R v Reardon* (2004) 146 A Crim R 475, 488.

<sup>37</sup> *Ibid*, 489.

security, as soon as information is considered to be ‘material’. But what is considered to be ‘material’ is still, to a large extent, a matter within the discretion of the prosecution and the police.

In Australia, the drivers for law reform have been the Commonwealth, State and Territory Offices of the DPP rather than the courts. Before the events of 9/11 and the Bali bombings, Australia did not have to deal with the comparable political pressure to secure convictions, often to the detriment of the RFT, such as was created by ‘the Troubles’ in Northern Ireland. Later Australian cases such as *Haneef* have however revealed that Australia is not immune from such pressures and that under certain conditions, counter-terrorism investigations and prosecutions can become heavily politicised.<sup>38</sup> This vulnerability increases the importance of clarifying the content and scope of disclosure obligations placed upon both the police and prosecution.

The difficulties of regulating the disclosure of unused material from outside state agencies, means that it is vital that the policies, guidelines and legislation counter institutional cultures of *excessive* secrecy within state agencies, as well as implement internal safeguards to minimise the risks of miscarriage of justice from non-disclosure. The challenge is aggravated in situations where state agencies, such as intelligence services, are in possession of information that may be relevant to the defence (ie ‘material’), but are reluctant to disclose it even to the prosecution. In this situation, the information is equally likely to be withheld from the court, never to be subjected to any disclosure decision, and unfairness to the defence will simply never be known.

---

<sup>38</sup> See John Clarke, “Report of the inquiry into the case of Dr Mohamed Haneef” (21 November 2008); Michael Head, “What the Haneef inquiry revealed (and did not)” (2009) 34(4) *Alternative Law Journal* 243; Stephen Keim, “Dr Haneef and me (2008) 33(2) *Alternative Law Journal* 99.

## 6.2 Suppression of sensitive information

Today, under the common law, the suppression of sensitive information is generally sought under the doctrine of PII. However, until the middle of the last century, PII was a legal doctrine that applied solely in civil proceedings. This did not mean that there were no means to suppress sensitive information in criminal proceedings. For example, prosecutors and police frequently sought to suppress the disclosure of information relating to the identity of police informers. In the 19<sup>th</sup> century, the doctrine was framed as a ‘Crown privilege’, a distinct rule under the common law, under which non-disclosure of the informer’s identity was subject to a mandatory exception in cases where disclosure of that information was considered necessary to prevent a miscarriage of justice.

The two doctrines of PII and Crown Privilege continued to develop in parallel, though the application of PII to criminal proceedings meant that the differences between the two needed to be reconciled. On the one hand the ‘rule and exception’ approach characterised the informer privilege, whereas on the other hand the balancing approach had developed in civil proceedings to resolve claims of PII. While the balancing approach originally gained ascendancy, the courts have always been aware that requirements of fairness in criminal proceedings – which developed apace during the 19<sup>th</sup> and 20<sup>th</sup> centuries – deserved special (perhaps even paramount) attention.

Given that the Australian courts, for a long time, relied upon English common law decisions, by comparing the legal tests, their rationale and the weight attached to the RFT, it is possible to determine the precise point in time at which the two systems diverged. While distinct historical conditions may explain some of the divergence, in recent times, the differing human rights frameworks and conceptions of judicial roles

and responsibilities have been more influential in shaping particular approaches. As this legal divergence occurred in a linear manner gradually over time, this Section is structured chronologically, beginning with the formative 19<sup>th</sup> century cases recognising police informer privilege, and establishing the guiding principles that have come to shape the law in Australia.

### 6.2.1 Police informers, crown privilege and public interest immunity

In criminal trials, the rule governing the suppression of information was first applied to protect the identity of police informers. This is unsurprising given that in the early 19<sup>th</sup> century an organised professional police force emerged that needed to gather information on the criminal classes, and ensure a steady flow of information. Exposing the identity of police informers in legal proceedings would not only endanger informants, but also deter others from coming forward with relevant information.<sup>39</sup>

With contemporary PII cases still referring to early expressions of the informer privilege, it is worth examining its development and underlying rationale under the common law.

Originally, the common law applied the absolute rule that the defendant had no right to know the name of an informer.<sup>40</sup> However, as early as the *Hardy* case in 1794, the courts recognised an exception to this rule, if it were “really and truly [...] necessary to

---

<sup>39</sup> For example *Arthur Stanley Smith* (1996) 86 A Crim R 308, 311.

<sup>40</sup> *R v Akers* (1790) 6 Esp 127 (Lord Kenyon), as cited in Henry Mares, “Balancing public interest and a fair trial in police informer privilege: a critical Australian perspective” (2002) 6 *International Journal of Evidence and Proof* 94, 96. The protection of the information was originally referred to as Crown privilege. However, the term was not an accurate description as a privilege generally refers to a protection of a litigant, which can be relied on or waived. See *Duncan v Cammell, Laird & Co Ltd* [1942] AC 624, 641; *Sankey v Whitlam* (1978) 142 CLR 1, 19.

the investigation of the truth of the case”.<sup>41</sup> At this stage, the burden of satisfying this threshold remained with the defence. In *Hardy* itself, the exception was ultimately not applied by the court. Despite the significance of the *Hardy* case for the development of the common law rule in late 19<sup>th</sup> and 20<sup>th</sup> century, this exception was rarely invoked, and when it was, it was rarely successful.<sup>42</sup>

The exception to the informer rule was formulated more clearly in the leading case of *Marks v Beyfus* (1890) where Lord Esher held:

“if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.”<sup>43</sup>

Again, the court held that the exception was not applicable on the facts of that case, although this fact is rarely noted in later citations. Mares has attributed the outcome in *Marks v Beyfus* to the still very basic understanding of the presumption of innocence at the time,<sup>44</sup> as well a heavy reliance on informers in general. But as the presumption of innocence became more firmly entrenched,<sup>45</sup> so did the application of the informer rule. Whereas in the earlier cases disclosure could only be triggered when it was necessary to prove the defendant's innocence, after *Woolmington* (1935) a reasonable doubt raised

---

<sup>41</sup> *R v Hardy* (1794) 24 State Trials 199, at p 808 (Eyre CJ) as cited in *Duncan v Cammell, Laird & Co Ltd* [1942] AC 624, 634. Although in this case it was the recipient of the information rather than the informant that was protected, it was the beginning of the common law rule.

<sup>42</sup> See Mares, above n 39, 98.

<sup>43</sup> *Marks v Beyfus* (1890) 25 QBD 494, 498. It may be mentioned that *Marks v Beyfus* was not a criminal case, but a civil action for malicious prosecution.

<sup>44</sup> Mares, above n 40, 101-102.

<sup>45</sup> See *Woolmington v DPP* (1935) AC 462 (23 May 1935); *Brown v The King* (1913) 17 CLR 570, 584 (Barton ACJ).

by the defence became sufficient to apply the exception.<sup>46</sup> This can be seen in more recent leading UK cases on the subject, such as *R v Hallett* where the Court of Appeal (CA) held that disclosure would be ordered where the defendant may “be deprived of the opportunity of casting a doubt upon the case against him”.<sup>47</sup> Based on this approach, a conviction on appeal in *R v Agar* was quashed as the suppression of the informer’s identity had prevented the defendant from inquiring as to whether the informer had worked together with the police.<sup>48</sup>

#### *Modern Australian cases on police informers*

In Australia, although courts originally followed the English authorities in relation to the suppression of informers’ identities, with the expansion of the PII doctrine, the approach to disclosure decision-making shifted towards a discretion based on balancing competing interests. While some cases still applied the 19<sup>th</sup> century ‘rule and exception’ of the police informer privilege, ‘balancing’ has become the preferred approach.

One Australian case, which endorsed the ‘rule and exception’ approach, was *Cain v Glass (No 2)*,<sup>49</sup> a murder trial arising from a shooting between two rival motorcycle groups that killed seven people. McHugh JA, with whom Kirby P agreed, applied the court’s reasoning in *Marks v Beyfus*, explicitly rejecting the ‘balancing’ approach due to the special nature of the informer rule.<sup>50</sup> McHugh JA not only distinguished between the requirements of the informer rule in criminal and civil cases, but also between informers providing ‘intelligence’, as considered in *Alister v The Queen*.<sup>51</sup> In such cases he

---

<sup>46</sup> See above at 6.1.1 the case of *Ward*. In some situations it may be difficult to determine when the threshold of a reasonable doubt is reached and what constitutes a “real, and not a fanciful” possibility that the information is beneficial to the defendant. However, such questions are unavoidable, occur regularly in legal proceedings and are ultimately for the court to decide.

<sup>47</sup> *R v Hallett* [1986] Crim LR 462, 7D as cited in *R v Agar* (1990) 2 All ER 442, 447.

<sup>48</sup> *R v Agar* (1990) 2 All ER 442, 448.

<sup>49</sup> *Cain v Glass (No 2)* (1985) 3 NSWLR 230 (19 November 1985).

<sup>50</sup> *Ibid*, at 246-48.

<sup>51</sup> *Ibid*, 247 (McHugh JA). For more discussion on *Alister v R* (1984) 154 CLR 404 (13 February 1984).

suggested that a wider balancing test may be justified to better protect national security information, with the effect that “evidence [is] not necessarily disclosable even though it established innocence.”<sup>52</sup>

Not all State Supreme Courts, however, followed the approach in *Cain v Glass (No2)*. In *Jarvie v Magistrates’ Court of Victoria at Brunswick*, the Supreme Court of Victoria unanimously adopted the balancing approach, taking wider principles of PII into consideration.<sup>53</sup> Nonetheless, Brooking J’s leading judgment recognised that as soon as the informer’s identity is considered to be of “substantial” rather than merely “slight assistance”, the defence’s interest in disclosure will necessarily prevail over the state’s interest in non-disclosure.<sup>54</sup> While this approach endorses undertaking a balancing exercise, its structure is reminiscent of the old informer rule.

The introduction of s 130 of the *Evidence Act 1995 (Cth)* (EA) codified the PII doctrine, and its application to police informers,<sup>55</sup> finally settling upon the balancing approach as the correct methodology, at least in federal law.<sup>56</sup> In his study on police informers in Australia, however, Mares interprets the conflicting authorities to indicate that s 130 EA may not properly reflect the common law position, and suggests that the balancing test was introduced “perhaps erroneously”.<sup>57</sup> In fact, Mares dismisses any reference to the balancing approach in case law as merely “lip-service”, arguing that judges in substance follow the rule of non-disclosure.<sup>58</sup> While the analysis below will support Mares’ conclusions, it is sufficient at this stage to point to the tension between the language and

---

<sup>52</sup> *Ibid.*

<sup>53</sup> *Jarvie v Magistrates’ Court of Victoria at Brunswick* [1995] 1VR 84, 88 (Brooking J, with whom Southwell and Teague JJ agreed).

<sup>54</sup> *Ibid.*, at 90.

<sup>55</sup> *Evidence Act 1995 (Cth)*, s 130(4)(e).

<sup>56</sup> Australian Law Reform Commission, *Evidence: Volume 1* (Report 26 (Interim), 1985) [864].

<sup>57</sup> Mares, above n 40, 110.

<sup>58</sup> *Ibid.*, 112.



content within the Australian authorities of police informers.

## 6.2.2 Public interest immunities in criminal proceedings in the UK

### 6.2.2.1 The roots of PII in civil proceedings

Under the common law, suppressing material that may jeopardise national security falls within the scope of PII - a concept that had developed in the context of civil trials.<sup>59</sup>

Assuming that the state is best placed to assess the implications of disclosing sensitive information, until the 1960s, PII certificates signed by a Minister of the Crown were seen as ‘conclusive’ and automatically prevented any related disclosure. Illustrating this point, in the leading UK authority *Duncan v Cammell, Laird & Co Ltd* [1942],<sup>60</sup> the plaintiff requested that the state disclose plans of submarines. Occurring against the backdrop of WWII, it is unsurprising that the Crown opposed disclosure on national security grounds, relying upon a Ministerial certificate as conclusive proof of this claim. On appeal, the authority of the certificate without more was upheld by House of Lords.

In *Conway v Rimmer*, to limit its potential abuse of PII certificates,<sup>61</sup> the House of Lords recognised that judges could review the evidence before ruling on disclosure, in circumstances where the party challenging the Ministerial certificate had persuaded the court that the information concerned was relevant.<sup>62</sup> After satisfying this initial hurdle, the court could then balance the competing interests to determine whether, or to what extent, the information should be disclosed.<sup>63</sup> It is important to emphasise that while having to convince the court of its relevance, the evidence remained undisclosed to the

---

<sup>59</sup> For a more extensive overview see for example Simon Brown, “Public interest immunity” (1994) *Winter Public Law* 579.

<sup>60</sup> *Duncan v Cammell, Laird & Co Ltd* [1942] AC 624 (27 April 1942).

<sup>61</sup> William Wade and Christopher Forsyth, *Administrative law* (Oxford University Press, 10<sup>th</sup> ed by Christopher Forsyth, 2009) 719.

<sup>62</sup> *Conway v Rimmer* [1968] AC 910 (2 May 1968).

<sup>63</sup> *Ibid*, 943.

defence.<sup>64</sup> Although subsequent English authorities have affirmed that Ministerial certificates are no longer conclusive in themselves, judges continued to attach great weight to them in PII claims. For example, in the *Air Canada* case, Lord Denning MR stated that certificates should not be

“overridden unless the court is of the opinion that the disclosure of the document is necessary for fairly disposing of the matter, or to put in another way, necessary for the due administration of justice”.<sup>65</sup>

Obscured by the language of ‘fairness’, we see that the scales remain tilted in favour of the Minister’s certificate.

### 6.2.2.2 Applying PII to criminal cases

As a result of the prosecution’s expanding disclosure duties during the late 1980s and early 1990s, the question arose as to whether the use of PII could similarly be applied in criminal proceedings, beyond those matters involving police informers? If this were the case, would the rules developed in civil proceedings be the same in criminal proceedings?

*A priori*, the approach taken in civil proceedings sits uncomfortably with some of the general principles applied in criminal proceedings. In particular, many of the procedures governing disclosure tend to limit the principle of adversariness and the equality of arms. Whereas in criminal proceedings, judges can exercise their discretion to order the disclosure of relevant information, the *Conway v Rimmer* approach would limit this

---

<sup>64</sup> See for example *Burmah Oil Co Ltd v Governor and Co of the Bank of England* [1980] AC 1090, 1117 (Lord Wilberforce); *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 411-12 (Lord Denning MR). The House of Lords confirmed that it would not inspect unless the documents are likely to give substantial support to the defendants’ case and not helping the defendant on a ‘fishing’ expedition.

<sup>65</sup> *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 408.

power to cases where the defendant had convinced the court that this was necessary.<sup>66</sup>

For this reason, some earlier civil cases cautioned that the principles applied under PII may *not* be the same in criminal cases.<sup>67</sup>

These issues were first addressed by Mann LJ in *ex parte Osman*,<sup>68</sup> who commented in obiter that, as the underlying rationale for non-disclosure is the same in civil and criminal proceedings, there was no reason why PII should not apply equally to both.<sup>69</sup> Although he cited in support of this position the Northern Territory Supreme Court decision of *R v Robertson, ex parte McAulay*,<sup>70</sup> which itself relies primarily upon cases grounded in UK civil authority,<sup>71</sup> his judgment importantly goes on to qualify that

“the application of the public immunity doctrine in criminal proceedings will involve a *different balancing exercise* to that in civil proceedings [...] In those cases, which establish a privilege in regard to information leading to the detection of crime, there are observations to the effect that the privilege cannot prevail if the evidence is necessary for the prevention of a miscarriage of justice. *No balance is called for*. If admission is necessary to prevent miscarriage of justice, balance does not arise.”<sup>72</sup>

Despite this later clarification bearing strong similarities to the original rule-exception approach, *ex parte Osman* is generally cited as good authority in favour of applying the

---

<sup>66</sup> Ian Leigh, “Public Interest Immunity” (1997) 50(1) *Parliamentary Affairs* 55, 57.

<sup>67</sup> See for example *Duncan v Cammell, Laird & Co Ltd* [1942] AC 624, 633-4 (Viscount Simon LC): “The judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same.”

<sup>68</sup> *R v Governor of Brixton Prison, ex parte Osman* [1991] 1 WLR 281 (14 November 1990).

<sup>69</sup> *R v Governor of Brixton Prison, ex parte Osman* [1991] 1 WLR 281, 288 (Mann LJ).

<sup>70</sup> (1983) 71 FLR 429 (2 June 1983).

<sup>71</sup> In *Robertson* the Court refers to *Conway v Rimmer* and *Sankey v Whitlam* - the former was a civil case (see above at 6.2.1) and the latter a private prosecution in Australia, which grounded its authority equally on UK civil cases: see *R v Robertson, ex parte McAulay* (1983) 71 FLR 429, 436-37. For a detailed discussion of *Sankey v Whitlam* (1978) 142 CLR 1 (9 November 1978) see below at 6.2.3.1.

<sup>72</sup> *R v Governor of Brixton Prison, ex parte Osman* [1991] 1 WLR 281, 288-290 (Mann LJ) (emphasis added).

PII doctrine more generally in criminal trials, and, *prima facie*, of reaching non-disclosure decisions through judicial discretion and balancing. Yet as this analysis reveals, *ex parte Osman* preserves to some degree, the ‘rule and exception’ approach underlying the informer rule.<sup>73</sup> The tension inherent between these approaches provides an uncertain foundation for importing PII into criminal proceedings.

A clear distinction between the application of PII in civil and criminal proceedings was emphasised in the “Report of the Inquiry in to the Export of Defence Equipment and Dual Use Goods to Iraq and Related Prosecutions” (‘Scott Report’).<sup>74</sup> Reviewing established principles of fairness, and leading authorities on the informer rule, the Scott Report characterised disclosure issues in cases involving sensitive information as revealing a tension between two *public* interests: the first is the interest to protect national security, and the second, the need to protect a criminal defendant’s RFT, and an innocent person’s right against wrongful conviction. Finding the suggestion “grotesque” that the latter “would ever have to give way in a balancing exercise”,<sup>75</sup> Scott states that disclosure must prevail where “there is a *real possibility* that withholding of the documents *may cause or contribute* to a miscarriage of justice.”<sup>76</sup>

As this formulation indicates a rather low threshold as to when ‘material’ evidence must be disclosed to the defence, the question of whether particular information is ‘material’

---

<sup>73</sup> See for example *R v Keane* [1994] 1 WLR 746, 751-752 (Lord Taylor CJ); *R v Brown* (Winston) [1994] WLR 1599, 1607-8 (Steyn LJ).

<sup>74</sup> ‘Scott Report’, above n 11. See also Richard Scott, “The Use of Public Interest Immunity Claims in Criminal Cases” (1996) 2 *Web Journal of Current Legal Issues*; Scott, above n 25; Oliver, above n 11. This criticism was made as part of a wider inquiry into the *Matrix Churchill* trial and its subsequent collapse in 1992. In the trial three directors of Matrix Churchill Ltd. were charged with violating export regulations when delivering weapons to Iraq in the early 1980s. During the trial the relevant Minister made a number of PII claims. Some of them were rejected and eventually it turned out that the company had informed the Government about the deals. Given that the export were made with ministerial approval it became clear that that PII claims were misused to suppress this information.

<sup>75</sup> Scott, above n 74, 8.

<sup>76</sup> *Ibid*, 10 (emphasis added).

must be addressed *a priori*.<sup>77</sup> Additionally, the collateral question arises of whether every non-disclosure of material evidence will necessarily lead to a miscarriage of justice. As this thesis demonstrates, on this point the courts have seen some scope to manoeuvre, by perceiving the threshold for miscarriage of justice as a higher one.

In this same period, the courts developed the PII doctrine further. The case of *R v Brown* held that the court has a duty to inspect PII material before determining its relevance,<sup>78</sup> and that any non-disclosure order must be kept under continual review throughout the trial.<sup>79</sup>

The defendant's involvement in non-disclosure proceedings also underwent change. In *R v Davis, Rowe and Johnson* the unanimous English CA distinguished between three types of proceedings, depending on the information's sensitivity, available to protect information.<sup>80</sup> The first type (Type I) or the 'standard approach' requires the prosecution to notify the defence of its intention to make a PII application, and specify the category of material concerned. This approach allows the defendant to make relevant submissions to the court. In the second type (Type II), the prosecution has an obligation to inform the defendant of the *ex parte* hearing, but does not have to specify the category of the material discussed, on the basis that this itself would disclose the protected information. In the third type of proceedings (Type III), reserved for exceptional cases, the prosecution need not notify the defence of the PII application as this alone would alert the defence to the existence of suppressed information, thereby prejudicing national security.<sup>81</sup>

---

<sup>77</sup> This emphasis has been re-enforced in *R v H and C* [2004] 2 AC 134: see below at 6.2.2.3.

<sup>78</sup> *R v Brown (Winston)* [1994] WLR 1599, 1607-8 (Steyn LJ); this has also been confirmed in *R v H and C* [2004] 2 AC 134, 155.

<sup>79</sup> *R v Brown (Winston)* [1994] WLR 1599, 1607-8 (Steyn LJ); also *Criminal Procedure and Investigations Act 1996* (UK), s 15(3)(4).

<sup>80</sup> *R v Davis, Rowe and Johnson* [1993] 1 WLR 613, 617.

<sup>81</sup> This has now also been put into legislation: see Rule 22.3 of the *Criminal Procedure Rules 2013* (UK).

These three procedural variations to disclosure proceedings must be viewed in light of two important obligations. The first is the prosecution's duty to aim to disclose as much information as possible prior to making a PII claim, which may require summarising or providing redacted or edited copies of documents.<sup>82</sup> The second obligation, under s 16 CPIA 1996, is that the defendant be heard in PII decisions.<sup>83</sup> Given their incompatibility with these obligations, Type II and Type III proceedings may constitute serious deviations from the adversarial principle of the criminal trial.<sup>84</sup> Type III closed hearings are particularly problematic as the defendant, unaware of the hearing, is not in a position to challenge or appeal any non-disclosure decision.<sup>85</sup> Despite the secrecy and the appearance of illegitimacy, Type III proceedings at least guarantee that an independent judge will exercise oversight functions, a criterion emphasised by the European Court of Human Rights (ECtHR),<sup>86</sup> and which should be further intensified under such circumstances.<sup>87</sup>

As we have seen, the extension of PII from civil to criminal proceedings also introduced the language of discretionary balancing to non-disclosure decisions. This development, which was at odds with earlier decisions on police informers, coincided with a series of miscarriage of justices in the UK in relation to non-disclosure of relevant information. As a reaction to this systemic failure, the police/prosecution discretion was curbed, increasing the courts supervisory role over non-disclosure decisions. In light of the common law development of disclosure rules, the next section examines how the

---

<sup>82</sup> *Attorney-General's Guidelines on Disclosure 2005* (UK) [20]; *R v H and C* [2004] 2 AC 134, 155. It is important to point out that this concerns information that is not relied on by the prosecution. This in contrast to the NSIA, which allows the prosecution to admit edited evidence in support of the prosecution's case.

<sup>83</sup> *R v H and C* [2004] 2 AC 134, 156.

<sup>84</sup> The proceedings have been discussed in some of the subsequent disclosure cases; see also Ian Leigh, "Reforming public interest immunity" (1995) 2 *Web Journal of Current Legal Issues* 11.

<sup>85</sup> See also , above n 15, 455.

<sup>86</sup> See above at 4.3.2.

<sup>87</sup> See below at 8.2.2.

doctrines have been influenced by decisions of the ECtHR, and its rigorous efforts to ensure that the RFT under art 6 ECHR is not unduly infringed.

### 6.2.2.3 The Strasbourg case law and *R v H and C*

In the early 2000s, the ECtHR passed a series of judgments on non-disclosure arising out of individual complaints from the UK, which have offered guidance to the UK judiciary on the approach to take to protect the RFT under art 6 ECHR. Given the detailed discussion of art 6 case law in Chapter 4, a brief summary will be sufficient.<sup>88</sup>

In these decisions, the ECtHR held that the defendant's right to full disclosure of sensitive but relevant material is the starting point, but is not absolute. The right can be restricted where 'strictly necessary' to protect certain public interests, such as national security. Importantly however, any restrictions on these grounds that impair the rights of defence must be counter-balanced by adjusting the procedural rules.<sup>89</sup> Operating to protect the essence of the RFT, the approach has been described as proportionality *sui generis*. Whereas the informer privilege rests on a default position of non-disclosure (rule) subject to an exception in the interest of fairness, the ECtHR reverses this approach, giving priority to RTF individual.

The ECtHR has underscored that the trial judge is best placed to apply these principles and maintain ongoing review of any non-disclosure decisions.<sup>90</sup> Judicial supervision was stated to particularly play a key role in 'compensating' for the deviations in Type II

---

<sup>88</sup> For a more detailed discussion on the position of the ECtHR including the UK cases above at 4.3.1.

<sup>89</sup> *Rowe and Davis v the United Kingdom* [ECtHR] Application no 28901/95 (16 February 2000) [61]; *Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000) [51]; *Fitt v the United Kingdom* [ECtHR] Application no 29777/96 (16 February 2000) [45].

<sup>90</sup> *Rowe and Davis v the United Kingdom* [ECtHR] Application no 28901/95 (16 February 2000) [63]-[65]; *Dowsett v the United Kingdom* [ECtHR] Application no 39482/98 (24 June 2003) [47]-[50]; *Atlan v the United Kingdom* [ECtHR] Application no 36533/97 (19 June 2001) [45].

disclosure proceedings.<sup>91</sup> A procedural adjustment available is the appointment of a special advocate.<sup>92</sup> While usually a matter of discretion, the ECtHR has ruled that where the judge has to decide an ‘issue of fact’, procedural adjustments *must* be made.<sup>93</sup> Any shortcomings in the trial process can only be cured on appeal by newly inspecting the relevant information, or by disclosing it to the defendant.<sup>94</sup>

While the evolving Strasbourg jurisprudence did not seem to have an immediate impact on the UK case law, *R v H and C* offered the House of Lords an opportunity to review this area of law.<sup>95</sup> Charged with conspiracy to supply prohibited ‘Class A’ drugs, the defendants in that case made far-reaching disclosure requests for the supply of documents to assist their defence that evidence had been planted and the operation had lacked appropriate authorisation. The police however claimed PII as the requested undercover observation logs contained sensitive operation techniques and procedures. Referring to the ECtHR judgement in *Edwards and Lewis*, the trial judge appointed a special advocate for the PII hearing concerning the police material. On appeal, the CA agreed that while such an appointment is possible, the appointment at this stage of the proceeding was “premature”.<sup>96</sup>

When the House of Lords was subsequently called upon to clarify the compatibility of the special advocate regime with art 6, their Lordships also reviewed the domestic and

---

<sup>91</sup> *Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000) [55]; *Fitt v the United Kingdom* [ECtHR] Application no 29777/96 (16 February 2000) [48].

<sup>92</sup> *Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000) [55]-[56]; *Fitt v the United Kingdom* [ECtHR] Application no 29777/96 (16 February 2000) [48]-[49]; for discussion on the dissenting opinions see above at 4.3.1.2.

<sup>93</sup> *Edwards and Lewis v the United Kingdom* [ECtHR] Application nos 39647/98 and 40461/98 (22 July 2003) [57]-[59].

<sup>94</sup> *Edwards v the United Kingdom* [ECtHR] Application no 13071/87 (16 December 1992) [36]-[37]; *IJJ, GMR and AKP v the United Kingdom* [ECtHR] Applications nos 29522/95, 30056/96 and 30574/96 (19 September 2000) [114]; *Dowsett v the United Kingdom* [ECtHR] Application no 39482/98 (24 June 2003) [46]. See also Table 4.1 above at 4.3.1.2.

<sup>95</sup> *R v H and C* [2004] 2 AC 134 (5 February 2004). For a general case comment see also Chris Taylor, “The courts and applications for public interest immunity: *R v H and C*” (2004) 8(3) *International Journal of Evidence and Proof* 179.

<sup>96</sup> *R v H and C* (2003) 1 WLR 3006, 3019.



European law on disclosure, consolidating the relevant principles into a series of questions designed to guide the prosecution and trial judge in PII cases.<sup>97</sup> Importantly, their Lordships re-affirmed the ‘golden rule’ that the prosecution is under an obligation to disclose all evidence that weakens its case or strengthens the defendant’s case.<sup>98</sup>

Nonetheless their Lordships recognised that exceptions may be justified, and may not result in an unfair trial.<sup>99</sup> To limit deviations from the rule, two factors must be taken into account: The court must first be satisfied that disclosure would entail a “real risk of serious prejudice” to the public interest. This requirement implies some sort of justification to convince the court that the threshold is met, which coincides with

---

<sup>97</sup> *R v H and C* [2004] 2 AC 134, 155-56, worth citing in full:

“When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:

1. What is the material which the prosecution seek to withhold? This must be considered by the court in detail.
2. Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below be ordered.
3. Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.
4. If the answer to (2) and (3) is Yes, can the defendant’s interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?  
This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see paragraph 22 above). In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).
5. Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.
6. If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.
7. If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review.”

<sup>98</sup> See *Criminal Procedure and Investigations Act 1996* (UK), s 3(a).

<sup>99</sup> *R v H and C* [2004] 2 AC 134, 148.

‘deference as respect’, discussed in Chapter 4.<sup>100</sup> Secondly, the court must consider the possibility of disclosing parts of the information or in an edited form. In assessing these two factors, the House of Lords noted that the court may need to appoint a special advocate.<sup>101</sup> Consideration of the impact of any non-disclosure on the overall fairness of the trial was stated to be paramount, and the House of Lords emphasised that if a fair trial could not be assured, disclosure of more information must be ordered, or the proceedings must be stayed. This series of questions is illustrated in Figure 6.2. below.

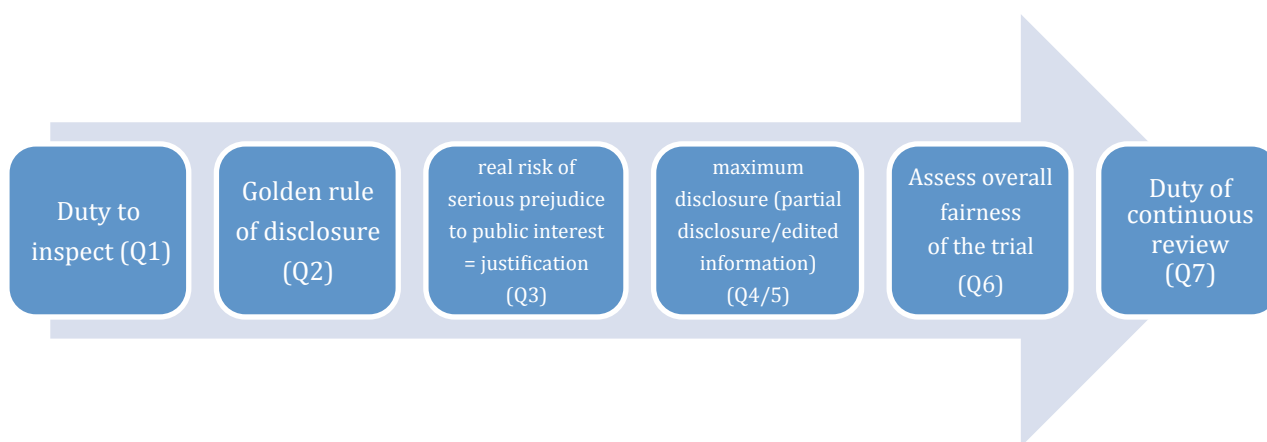


Figure 6.2: chain of relevant disclosure questions in *R v H and C*

The court in *R v H and C* avoided the word ‘balancing’ entirely, finally acknowledging it as both unhelpful and illusory in protecting the RFT. While an important clarification, this acknowledgement arguably did not amount to a significant development in the law. The real innovation in the case was its inversion of the ‘rule and exception’ approach to upholding art 6 ECHR compared to the informer privilege. Following *Marks v Beyfus*, non-disclosure on public interest grounds was accepted (the rule), unless non-disclosure would render the trial unfair (the exception). Since *R v H and C* however, the ‘golden

<sup>100</sup> See above at 4.2.1.

<sup>101</sup> *R v H and C* [2004] 2 AC 134, 150. The common law power of a court to appoint a special advocate on an *ad hoc* basis in a civil trial if it is necessary in the interest of justice was first pronounced by the CA in *Rehman*. As the SIAC Rules were not applicable on appeal, the Court flagged the possibility to appoint a special advocate by virtue of its inherent jurisdiction to control the fairness of its proceedings analogously to the SIAC Rules. *Secretary of State for the Home Department v Rehman* [2000] 3 WLR 1240, 1251. For more information on SIAC see below at 7.1 and 7.2.

rule' and the individual's RFT has become the starting point in accordance with the principle of proportionality.

Despite being heralded as a "major step forward",<sup>102</sup> *R v H and C* has been also criticised on a number of grounds. First, a principal drawback is that discretion and responsibilities have again been shifted to the prosecution without the imposition of additional safeguards. Secondly, the case failed to resolve the uncertainty surrounding the process of appointing of special advocates. These aspects will be discussed in turn.

The judgement implies that if the prosecution were to apply the law properly, a judicial ruling on non-disclosure would only be necessary in "truly borderline cases".<sup>103</sup> The House of Lords emphasised in particular that there is no requirement for the prosecution to disclose evidence that is regarded as "neutral" or has an adverse effect on the defendant's case,<sup>104</sup> but that there is an obligation to maximise disclosure, and include edited information where necessary.<sup>105</sup> As there have been no more recent cases on disclosure before the Supreme Court, it can be assumed that the reasoning in *R v H and C* has helped both trial judges to resolve PII claims and the state to fulfil its disclosure obligations according to the law. With the prosecution only held to account by professional and ethical duties to act in the interests of justice,<sup>106</sup> some scholars believe that the wide discretion may even be contrary to Article 6 ECHR.<sup>107</sup> An additional criticism of the increased pressure on the prosecution "to get disclosure right",<sup>108</sup> is that

---

<sup>102</sup> Taylor, above n 95, 185

<sup>103</sup> *R v H and C* [2004] 2 AC 134, 155.

<sup>104</sup> *Ibid*, 148 and 154.

<sup>105</sup> *Ibid*, 155; see also 2005 Guidelines, [20].

<sup>106</sup> *Ibid*, 146.

<sup>107</sup> Emmerson *et al*, above n 8, 474.

<sup>108</sup> Corker and Parkinson, above n 7, 143.

even when made in good faith, decisions on whether information is ‘relevant’ are not always easy and prosecutors may need the assistance of the court.<sup>109</sup>

Another issue side-stepped by the House of Lords was the extent to which additional safeguards, and importantly the judicial power to appoint special advocates, are needed to preserve the adversarial nature of the trial.<sup>110</sup> Although UK law allows for the appointment of special advocates, the Law Lords in *R v H and C* did not engage closely with the implications of ECtHR ruling in *Edwards and Lewis*, which required procedural adjustments when deciding on ‘issues of fact’ in a closed hearing.<sup>111</sup> Beyond agreeing with the CA that the appointment of a special advocate prior to assessing the necessity of disclosure was premature,<sup>112</sup> no principled rule was formulated to govern the circumstances when an additional adversarial element must be considered. The question of when a contention will fall under an ‘issue of fact’ for the purposes of requiring a special advocate was not considered by the House of Lords. In *R v H and C*, evidence surrounding the covert policing operation was clearly relevant both to the defendants’ claim that evidence had been planted and any decision of whether to stay the proceedings. The same is true of *Edwards and Lewis* where the case turned upon the defendant’s argument of entrapment.<sup>113</sup>

Unfortunately, there was no need to address this issue as it was not formally included in the appeal. Hence, the decision as to whether or not a special advocate should be appointed rests entirely within the discretion of the trial judge. The only elaboration on this point given by the Court was that such an appointment would only occur in

---

<sup>109</sup> Redmayne, above n 15, 457-458: this is particularly the case when the true relevance of this evidence only becomes obvious during the course of the trial.

<sup>110</sup> However, see below at 8.2.2 for a discussion about introducing inquisitorial elements to closed proceedings.

<sup>111</sup> *R v H and C* [2004] 2 AC 134, 154.

<sup>112</sup> *Ibid*, 156.

<sup>113</sup> *Edwards and Lewis v the United Kingdom* [ECtHR] Application nos 39647/98 and 40461/98 (22 July 2003).

“exceptional circumstances”.<sup>114</sup> This prediction seems to have been accurate.<sup>115</sup>

### 6.2.3 Suppression of sensitive information in Australia

In their approach to PII claims, the Australian courts have tended to follow early English authority. In particular, they have agreed that it is up to the courts to decide whether information should be disclosed, and where the public interest lies.<sup>116</sup> As such, although a Minister’s certificate always attracted considerable weight,<sup>117</sup> the Australian courts rejected claims that it alone was conclusive.<sup>118</sup>

It is noteworthy that beginning in the 1970s, several years ahead of the UK, PII had been applied to criminal proceedings in Australia. The extension of PII from the civil to the criminal sphere was relatively uncontroversial and, as such, when the question arose of how to approach non-disclosure requests in criminal proceedings, the balancing approach that had been hitherto applied in the civil context, was adopted.<sup>119</sup> Since the common law provided the starting point for the statutory formulation of PII in the *Evidence Act 1995 (Cth)*, further discussion of the earlier Australian cases and their approach to non-disclosure decisions is necessary.

---

<sup>114</sup> *R v H and C* [2004] 2 AC 134, 150. Given the ethical and practical issues involved, the court has to demonstrate a need for the appointment in the in the interest of justice. “Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant.”

<sup>115</sup> The precise number is actually unknown, but there are indications that it is reasonably low. See Eric Metcalfe, “Secret Evidence” (Justice Report, June 2009) 168.

<sup>116</sup> *Sankey v Whitlam* (1978) 142 CLR 1, 38-39 (Gibbs CJ); 58-59 (Stephen J).

<sup>117</sup> In *Sankey v Whitlam* (1978) 142 CLR 1, 43, Gibbs CJ referred to the amount as “full weight”; see also *Alister v R* (1984) 154 CLR 404, 412 (Gibbs CJ), 435-36 (Wilson and Dawson JJ) which was affirmed in *Watson v AWB Limited (No 2)* [2009] FCA 1047 (17 September 2009) [52].

<sup>118</sup> *Cain v Glass (No 2)* (1985) 3 NSWLR 230, 234; see also *Sankey v Whitlam* (1978) 142 CLR 1, 59 (Stephen J); *Alister v R* (1984) 154 CLR 404, 413 (Gibbs CJ).

<sup>119</sup> This also explains why Mann LJ has referred to Australian cases in *R v Governor of Brixton Prison, ex parte Osman* [1991] 1 WLR 281 (14 November 1990). See above at 6.2.2.2.

In the aftermath of 9/11, concerns about the protection afforded to sensitive information in legal proceedings led the Australian Government to introduce the *National Security Information (Criminal Proceedings) Act 2004* (Cth) (NSIA). Although invoked infrequently, this complex legislation has an enormous impact on the trial procedures. As the NSIA guarantees the Executive and its security agencies greater control over the management and suppression of sensitive information, this Section enquires in particular whether the NSIA has increased the ability of the state to suppress information without violating the RFT as it was intended?

### 6.2.3.1 PII in criminal proceedings and the *Evidence Act 1995*

The law governing the use of PII in criminal proceedings was tested in two high profile High Court cases in the late 1970s and early 1980s: *Sankey v Whitlam*,<sup>120</sup> and *Alister v R*,<sup>121</sup> respectively.

In *Sankey v Whitlam*, Mr Sankey claimed that former Prime Minister Whitlam and several of his cabinet Ministers had illegally conspired to borrow money from overseas without appropriate approval from the Loan Council, thus committing offences under the *Financial Agreement Act 1927* (Cth).<sup>122</sup> PII claims were made in relation to a number of Cabinet documents that Mr Sankey had requested during the trial. Although the High Court held that there was no basis for the charges against Whitlam, the decision allowed the Court to review the principles in relation to PII claims. Firstly, the Court rejected the conclusiveness of ‘class claims’ (in this case, protection was claimed for Cabinet papers as a class of evidence), and held that the particular documents should be produced before the Magistrate for determining where the balance of public interest

---

<sup>120</sup> *Sankey v Whitlam* (1978) 142 CLR 1 (9 November 1978).

<sup>121</sup> *Alister v R* (1983) 154 CLR 404 (13 February 1984).

<sup>122</sup> *Sankey v Whitlam* (1978) 142 CLR 1 (9 November 1978).

lies.<sup>123</sup> The Court further affirmed the balancing approach as governing non-disclosure decisions in criminal proceedings.<sup>124</sup>

In *Alister v R*, the defendants were charged with conspiracy to murder and attempted murder, being the alleged perpetrators of the Sydney Hilton bombing.<sup>125</sup> At trial, the defendants claimed that the leading Crown witness, a police informant who had infiltrated the group, was an ASIO employee. They requested all ASIO documents relating to the informant, but the Attorney-General objected on the grounds that disclosure would be prejudicial to national security. The High Court held that the courts must have the power to review ASIO documents that are potentially relevant to both establishing an accused's innocence, and undertaking a meaningful balancing exercise of competing public interests.<sup>126</sup> After inspecting the documents, the Court found that the requested ASIO files were not relevant to the case and as such, disclosure was unnecessary.<sup>127</sup>

#### *General disclosure rule and preparedness to inspect sensitive material*

In *Sankey* the High Court confirmed the courts' jurisdiction to inspect documents *ex parte*, after it has been established that "on balance" it is "desirable" or even "essential" to reaching a decision on disclosure.<sup>128</sup> Considering the issue further, *Alister*

---

<sup>123</sup> *Sankey v Whitlam* (1978) 142 CLR 1, 46-47 (per Gibbs CJ). As the PII claim was based on the class of documents (namely, Cabinet in confidence), rather than their content, a large part of the discussion was centred around the question of whether it is necessary for the proper functioning of the government to keep those documents out of the public eye. Accordingly, there was less analysis of whether their content – if disclosed - would damage the public interest. Although the decision distinguishes between class claims and content claims, the overall findings suggest that their treatment of both types of content is rather similar. See also Andrew Ligertwood and Gary Edmond, *Australian Evidence* (LexisNexis Butterworth, 5<sup>th</sup> ed, 2010) 502.

<sup>124</sup> The case was in fact a private prosecution. However, Stephen J held that this fact had no impact on the question of crown privilege. See *ibid*, 67.

<sup>125</sup> *Alister v R* (1983) 154 CLR 404 (13 February 1984).

<sup>126</sup> *Ibid*, 414 (Gibbs CJ).

<sup>127</sup> *Ibid*, 469 (Gibbs CJ, Wilson, Brennan and Dawson JJ).

<sup>128</sup> *Sankey v Whitlam* (1978) 142 CLR 1, 46 (Gibbs CJ); see also *ibid*, 96 (Mason J).

emphasised that before the question of disclosure arises, the defendant must demonstrate that the information bears some relevance to matters in dispute. In their reasoning, the High Court relied upon *Air Canada* and *Burmah Oil Co. Ltd.*, decisions where the House of Lords held that it would inspect documents only when it was convinced that the disclosure request was more than a ‘fishing expedition’ for evidence.<sup>129</sup> Indeed, the information should be likely to support the party requesting disclosure. Nevertheless, given that these precedents related to civil rather than criminal proceedings, the court held that “special weight [must be attached] to the fact that the documents may support the defence of an accused person in criminal proceedings,”<sup>130</sup> and as such inspection should occur as soon as “it appears ‘on the cards’ that the documents will materially assist the defence.”<sup>131</sup> In *Alister*, although the defendant merely *suspected* that the prosecution witness worked for ASIO, this was sufficient to convince the court that the defendant was not simply ‘fishing’ for evidence, in spite of the highly sensitive nature of the material concerned.<sup>132</sup> Seen in this light, the burden of convincing the court of the information’s relevance for the purposes of inspection appears lower than that required to obtain disclosure, bearing stronger parallels to the threshold of the prosecution’s general obligation to disclose all ‘material’ evidence in the first place.

---

<sup>129</sup> *Burmah Oil Co Ltd v Governor and Co of the Bank of England* [1980] AC 1090, 1117 (Lord Wilberforce); *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 411-12 (Lord Denning MR), 438 (Lord Wilberforce).

<sup>130</sup> *Alister v R* (1984) 154 CLR 404, 414 (Gibbs CJ), also 439 (Wilson and Dawson JJ),

<sup>131</sup> *Ibid*; see also *ibid*, 456 (per Brennan J); for further discussion of the issues see *Attorney-General (NSW) v Chidgey* (2008) 182 A Crim R 536, 551-553 (Beazley JA, with whom James and Kirby JJ agreed). *cf Commonwealth of Australia v Northern Land Council and another* (1993) 176 CLR 604 (21 April 1993); in this civil litigation the High Court upheld the immunity claim of the Government in relation to Cabinet documents even without inspection. However, the Court recognised that “in criminal proceedings the position may be different” (at 618).

<sup>132</sup> See *Alister v R* (1984) 154 CLR 404, 412 (Gibbs CJ). This approach also aligns with the general presumption under the common law that access to documents shall be given as long as the party seeking the document is able to identify sufficiently its direct or indirect relevance. If the evidence is also admissible, it should be also discoverable. See Ligertwood and Edmond, above n 123, 502.



*The balancing exercise*

In both *Sankey* and *Alister*,<sup>133</sup> the High Court introduced the rhetoric of balancing into PII decisions, with the court in *Sankey* paying particular attention to the earlier English decision of *Conway v Rimmer*. It was held that even where evidence is both admissible and relevant, suppression is generally justifiable when disclosure would harm national interests.<sup>134</sup> In this respect, the national (security) interest must be weighed against the competing public interests of the RFT, and the risk of obstructing the administration of justice by withholding relevant documents from the defence.<sup>135</sup>

However, even in *Sankey* some comments made indicate that the balancing approach is not always straightforward, and that criminal proceedings may necessitate additional rules to safeguard the RFT. As Stephen J emphasised, there is a

“need to consider the particular nature of the proceedings in which the claim to Crown privilege arises in order to determine what are the relevant aspects of public interest which are to be weighed and what is to be the outcome of that weighing process.”<sup>136</sup>

To illustrate this point, his Honour pointed to the fair trial exception to the informer rule, suggesting that in circumstances where the information is pivotal to establishing the defendant’s innocence, the balance would fall in favour of disclosure.<sup>137</sup>

The High Court authorities discussed above demonstrate that Australian judges have encountered the same difficulties as their English counterparts in reconciling national security interests with the RFT. While resorting to rhetoric of balancing, they are in fact,

---

<sup>133</sup> See in particular, *Alister v R* (1984) 154 CLR 404, 412-414 (Gibbs CJ).

<sup>134</sup> *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs CJ).

<sup>135</sup> *Ibid*, 43 (Gibbs CJ), 56 (Stephen J).

<sup>136</sup> *Ibid*, 60 (Stephen J).

<sup>137</sup> See also *Alister v R* (1984) 154 CLR 404, 431 (Murphy J dissenting).

upon close scrutiny, following a structure akin to the general rule and exception approach. Although in criminal proceedings, the High Court gives precedence to the RFT and sets a higher threshold test to justify non-disclosure, they have not clearly articulated how it should be given effect.

Again, an inconsistency lies in the weight attached to a Minister's certificate declaring that disclosure is against the public interest. While courts have held that these certificates are never conclusive, the public importance of suppressing individual documents of a sensitive nature is equally recognised, with some members of the judiciary suggesting that "the court's acceptance of the claim [by the Minister] may often be no more than a matter of form."<sup>138</sup> Other judges, by contrast, suggest that "those who urge Crown privilege for classes of documents regardless of particular contents carry a heavy burden".<sup>139</sup> Mason J reasons that this is because

"[a]n affidavit claiming Crown privilege should state with precision the grounds on which it is contended that documents or information should not be disclosed so as to enable the court to evaluate the competing interests."<sup>140</sup>

These statements indicate that once the information has been established to be relevant, the party objecting to disclosure bears the onus of convincing the court otherwise.<sup>141</sup> Even so, the conflict between attaching great weight to the Minister's PII claim and requiring a clear justification remains unresolved.<sup>142</sup> The mediating concept of balancing was (and continues to be) a judicial tool for concealing discrepancies and

---

<sup>138</sup> *Sankey v Whitlam* (1978) 142 CLR 1, 59 (Stephen J); see also *Alister v R* (1984) 154 CLR 404, 435 (Wilson and Dawson JJ),

<sup>139</sup> *Sankey v Whitlam* (1978) 142 CLR 1, 62 (Stephen J).

<sup>140</sup> *Ibid*, 96 (Mason J). This is exactly what did not happen in this case according to Mason J.

<sup>141</sup> This also seems to be the reading of Ligertwood and Edmond of the case *Ligertwood and Edmond*, above n 123, 504.

<sup>142</sup> See above at 4.2: if great weight is given to the PII claim, because it is properly justified, the reference to the Minister would be redundant as the weight is actually given to the argument itself.

differences in judicial approaches to PII.

*The enactment of the s 130 of the Evidence Act 1995 (Cth)*

In early 1990, following the recommendations of the Australian Law Reform Commission Report on Evidence, the Australian Parliament enacted s 130 *Evidence Act 1995* (Cth) (EA). As this section aimed to codify the common law governing PII,<sup>143</sup> the common law authorities continue to inform how the courts approach disclosure. This section confirms that trial judges must engage in a balancing exercise when considering requests to suppress “a document that relates to matters of state” in the public interest,<sup>144</sup> such as national security.<sup>145</sup> While there are no directions as to *how* to balance the interests involved, s 130 EA states that “the court may inform itself in any way it thinks fit”.<sup>146</sup> It further specifies that the court may order production of the document for the purpose of inspection,<sup>147</sup> and includes a (non-exhaustive) list of factors that may be taken into consideration.<sup>148</sup> These factors include: the importance of the information; whether the proceedings are criminal; the nature of the offence; whether the information has already been published; and the consequences of a potential non-disclosure. Although silent on where the burden of proof lies, if common law decisions are to be

---

<sup>143</sup> Australian Law Reform Commission, *Evidence: Volume 1* (Report 26 (Interim), 1985) [864]; see also *Chapman v Luminis Pty Ltd [No 2]*(2000) 100 FCR 229, 246 (von Doussa J).

<sup>144</sup> *Evidence Act 1995* (Cth), s 130(1). Legislation only applies to the trial. Otherwise, in particular in the pre-trial phase, the CL continues to apply, although the burden to trigger disclosure may be higher outside the actual trial. See for example *Cain v Glass (No 2)* (1985) 3 NSWLR 230, 251. The term “matters of state” was intended to emphasise that these documents are important to the functioning of government and not to other interest even if they may align with the public interest. See *Young v R* (1999) 107 A Crim R 1, 10-11 (Spigelman CJ).

<sup>145</sup> *Evidence Act 1995* (Cth), s 130(4)(a).

<sup>146</sup> *Ibid*, s 130(3).

<sup>147</sup> *Ibid*, s 133.

<sup>148</sup> *Ibid*, s 130(5). This list is not exclusive.

informative, the burden will rest with the party claiming non-disclosure.<sup>149</sup>

### *The case of R v Lappas & Dowling*

The next milestone in the development of non-disclosure rules in Australia was the ACT Supreme Court case of *R v Lappas & Dowling* in 2001.<sup>150</sup> Although the decision did no more than apply established principles, its impact on the policy development surrounding disclosure cannot be overestimated. Given its significance and the questions it raised, it is worth reviewing the case in detail.

Mr Lappas was an analyst at the Defence Intelligence Organisation (DIO), who allegedly passed on confidential documents to Ms Dowling, intending for them to be sold in settlement of his debts to her. Having reported his own behaviour to the Security Officer of the DIO, Mr Lappas was charged with multiple counts relating to espionage offences.

The second count required that the prosecution prove that Mr Lappas shared the documents “for a purpose intended to be prejudicial to the safety or defence of the Commonwealth”.<sup>151</sup> It is of significance however that in confessing to a friend, Mr Lappas claimed that the documents did not include “any information that would harm anyone”.<sup>152</sup> Since the DIO had claimed PII for the documents, and had opposed production in court, the prosecution had to prove that Mr Lappas had the requisite *mens rea* without access to the documents, which could confirm or deny their prejudicial

---

<sup>149</sup> Stephen Odgers, *Uniform Evidence Law* (Lawbook, 8<sup>th</sup> ed, 2009) 655. Odgers refers to *Sankey v Whitlam* and *Fernando v Minister for Immigration & Multicultural & Indigenous Affairs*, and also follows the general legal principle that the party who claims a certain circumstance also has to prove it.

<sup>150</sup> *R v Lappas & Dowling* [2001] ACTSC 115 (26 November 2001).

<sup>151</sup> *Crimes Act 1914* (Cth), s 78(1); The section has since been repealed and included in Division 91 of the *Criminal Code Act 1995* (Cth).

<sup>152</sup> *R v Lappas & Dowling* [2001] ACTSC 115 (26 November 2001) [21]; see also *R v Simon Lappas* [2003] ACTCA 21 (31 October 2003) [76].

nature. At the same time the defendant claimed that he could prove his lack of requisite intention, and therefore innocence, by accessing the content of the documents. Hence, this was a rare case where the information subject to a PII claim by the Executive (DIO) was not only needed by the defence to establish innocence, but also by the prosecution in order to prove the defendant's guilt!

In deciding the PII claim, Gray J applied the balancing process, as required by s 130 EA,<sup>153</sup> finding, even without having engaged in a security assessment, that the interests of security prevailed:

“If that is the view taken by the appropriate government representative, I have no reason to go behind it. I certainly do not arrogate to myself a decision as to whether the claimed possible consequences of any greater publication of the document than the claimant would permit would, in fact, not take place.”<sup>154</sup>

Given the importance of the documents for both parties, a number of compromise strategies were suggested by the prosecution that would enable partial disclosure of the documents.<sup>155</sup> One proposal rejected by the Court was the ‘empty shell’ strategy, which would allow the prosecution to present a document that had all the features of the original - including the ‘top secret’ designation on its cover - except for its content.<sup>156</sup>

Furthermore, Gray J rejected the proposed use of a document summary, which “by reason of its generality, would not have assisted the prosecution to draw any inferences

---

<sup>153</sup> *R v Lappas & Dowling* [2001] ACTSC 115 (26 November 2001) [26].

<sup>154</sup> *Ibid.*

<sup>155</sup> Due to the nature of the offence, the issue here was not to keep the information secret from the defendant, which would be a regular concern in counter-terrorism procedures. Mr Lappas in his capacity as an analyst had of course seen the content previously. In fact the documents were presented in a closed hearing at the committal stage, in which the defence counsel was included. *R v Lappas & Dowling* [2001] ACTSC 115 (26 November 2001) [3]. Furthermore, it should be clarified that the fact that the judge granted immunity to the documents does not allow an inference that the content could be useful for a foreign power, as the criteria are different: *R v Lappas & Dowling* [2001] ACTSC 115 (26 November 2001) [22].

<sup>156</sup> *Ibid.*, [3].

to support the intent that the prosecution would seek to prove in respect of the charge.”<sup>157</sup> Equally a submission that included substantial sections of ‘blacked out’ text was rejected on the basis that it would not allow the prosecution to draw the relevant inferences.<sup>158</sup>

Another (failed) attempt by the prosecution to remedy deficiencies in their case was to call a witness to testify as to the ‘character’ of the document’s content, relying on the argument that the original document was “not available”.<sup>159</sup> Gray J confirmed that a PII claim did not make the document “impractical to produce”; the document is of course “available”, PII merely prevents its disclosure. Furthermore, such a witness could only provide an interpretation of the evidence, which would be impossible to challenge without disclosing the content.<sup>160</sup> Such a process, his Honour concluded, would be “redolent with unfairness”.<sup>161</sup>

Ultimately Gray J denied that the government could have its ‘cake and eat it’ - namely, to suppress relevant information, *and* integrate (untested) assumptions about its content and nature to support their own case for conviction.<sup>162</sup> In upholding the PII claim, and refusing to order its disclosure, Gray J also accepted that the procedural unfairness could not be remedied, and ordered that the proceedings be stayed in the interests of the due administration of justice.<sup>163</sup>

---

<sup>157</sup> *R v Lappas & Dowling* [2001] ACTSC 115 (26 November 2001) [8]. The summary did not identify any names nor described any events.

<sup>158</sup> *R v Lappas & Dowling* [2001] ACTSC 115 (26 November 2001) [9].

<sup>159</sup> The strategy was based on s 48(4) *Evidence Act 1995* (Cth), which allows such a procedure in cases where the particular document is “not available to the party”. The prosecution further argued that according to cl 5 of Part 2 *Dictionary of the Evidence Act 1995* (Cth) a document is “not available” when “it would be impractical to produce the document [...] during the course of the proceedings.”

<sup>160</sup> *R v Lappas & Dowling* [2001] ACTSC 115 (26 November 2001) [14]

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*, [24].

<sup>163</sup> *Ibid.*, [30].

Due to the availability of alternative charges and the low level nature of the security breach, Gray J was able reach such a ‘compromise’ result in this particular case.

However, as has been stressed by the CA, the offences in general committed by the accused, such as espionage, are of severe gravity,<sup>164</sup> which causes some serious concern for the Government. It realised that under particular circumstances it may have to choose between the public interest in keeping sensitive information secret, or pursuing a criminal conviction. Considering this choice to be made is unsatisfactory, the Government began searching for a legal solution making it possible to comply with the requirements of the court to adduce information that respects the defendant’s RTF, and still protect national security sufficiently.<sup>165</sup> As a result the Australian Government tasked the Australian Law Reform Commission (ALRC) “to inquire into and report on measures to protect classified and security sensitive information in the course of investigations and legal proceedings”,<sup>166</sup> while concurrently drafting legislation to address the concerns.<sup>167</sup>

### 6.2.3.2 The National Security Information Act 2004 (Cth)

In 2003, the ALRC published the Background Paper *Protecting Classified and Security Sensitive Information*,<sup>168</sup> which was soon followed up with a Discussion Paper<sup>169</sup> and a Final Report in 2004.<sup>170</sup> Following the US approach, the ALRC recommended that new

---

<sup>164</sup> *R v Simon Lappas* [2003] ACTCA 21 (31 October 2003).

<sup>165</sup> See Explanatory memorandum to the NSIA.

<sup>166</sup> Australian Law Reform Commission, *Protecting classified and security sensitive information* (Background Paper 8, July 2003) [1.1].

<sup>167</sup> Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29311 (Mr Ruddock).

<sup>168</sup> Australian Law Reform Commission, *Protecting classified and security sensitive information* (Background Paper 8, July 2003).

<sup>169</sup> Australian Law Reform Commission, *Protecting classified and security sensitive information* (Discussion Paper 67, January 2004).

<sup>170</sup> Australian Law Reform Commission, *Keeping secrets: The protection of classified and security sensitive information* (Report 98, May 2004).

legislation be enacted regulating the non-disclosure process in legal proceedings of information likely to prejudice national security.<sup>171</sup> The *National Security Information (Criminal Proceedings) Act 2004 (Cth)* (NSIA) received Royal Assent on 14 December 2004 and became effective on 11 January 2005.<sup>172</sup>

As the legislation does not automatically apply to particular offences, but rather becomes effective after the DPP has given notice to the court and defence that the Act applies,<sup>173</sup> it runs parallel to the common law rules of PII claims and the relevant provisions in the EA. In relation to the suppression of information, the NSIA has introduced a ‘notification system’. This system requires that any potential use of sensitive information by any party must be brought to the attention of the Commonwealth Attorney-General as early as possible in the proceedings. Additionally, the NSIA lays out a procedure according to which non-disclosure requests are determined in mandatory closed hearings. The legislation also provides instructions for courts as to how to determine disclosure orders. Most importantly, the underlying rationale of the NSIA is

“to provide a procedure in cases where information relating to, or the disclosure of which may affect, national security could be introduced during federal criminal proceedings. The aim of the [Act] is to allow this information to be introduced in an edited or summarised form so as to facilitate the prosecution of

---

<sup>171</sup> The NSIA has been modelled on the *Classified Information Procedure Act 1980* (US); for comments on the Act see for example Brian Tamanaha, “A critical review of the Classified Information Procedures Act” (1986) 13 *American Journal of Criminal Law* 277; Jeff Jarvis, “Protecting the nation's national security: the Classified Information Procedures Act” (1995) 20 *Thurgood Marshall Law Review* 319.

<sup>172</sup> The Act was originally only applicable in criminal proceedings, but amended in 2005 to also included civil proceedings. See *National Security Information Legislation Amendment Act 2005* (Cth). Since then its full title is *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)*.

<sup>173</sup> NSIA, s 6; in civil proceedings the Attorney-General must give notice that the Act applies, irrespective of whether he is a party to the case or not (NSIA, s 6A).



an offence without prejudicing national security and the right of the defendant to a fair trial.”<sup>174</sup>

As is immediately evident, the NSIA seeks to remedy the rejection of edited and summarised information that occurred in *Lappas*. The question therefore arises as to whether other innovations introduced by the NSIA, designed to modify and extend the common law of PII, were warranted and importantly, whether the process works effectively to address the implications of *Lappas*. Before answering these questions, the following Section will provide a brief overview of the NSIA, upon which the subsequent analysis will be based.

*Overview: Non-disclosure certificates, mandatory closed hearings and instructions on balancing*

A primary aim of the NSIA was to increase the Commonwealth Attorney-General’s control over potentially sensitive information, compared to that available under PII.<sup>175</sup> Accordingly, the NSIA requires both the defence and the prosecution to report to the Attorney-General if they know or believe that they, or witness they are calling, will disclose sensitive information in the course of the proceedings.<sup>176</sup> A failure to do so constitutes a criminal offence punishable with imprisonment of up to two years.<sup>177</sup> After such notice has been given, the judge is obliged to adjourn the proceedings, providing the Attorney-General with the option to issue a non-disclosure certificate. Importantly, the certificate is not limited to requesting total suppression of the information, but -

---

<sup>174</sup> Explanatory Memorandum (2004) to the NSIA.

<sup>175</sup> This concerns in particular information that is known by the defendant, who attempts to profit from making threaten of disclosing it. In the US this was labelled “graymailing” and was a driving force for the introduction of the *Classified Information Procedure Act 1980* (US). See for example Richard Salgado, “Government secrets, fair trials, and the *Classified Information Procedures Act*” (1988) 98 *Yale Law Journal* 427.

<sup>176</sup> NSIA, ss 24-25.

<sup>177</sup> NSIA, s 42.

unlike certificates under the PII doctrine - may also propose both partial or edited disclosure.<sup>178</sup> Thereafter, the certificate is considered to be conclusive and valid until a final court order is made in relation to disclosure.<sup>179</sup> Any disclosure of information governed by the certificate constitutes a criminal offence.<sup>180</sup>

In order to determine whether to follow the Attorney-General's certificate or not, the court *must* hold a hearing. Such hearings are closed,<sup>181</sup> and must satisfy the requirements of s 29 NSIA,<sup>182</sup> which restricts attendance at such hearings to (a) the magistrate, judge or judges of the proceedings, (b) court officials, (c) the prosecutor, (d) the defendant, (e) any legal representative of the defendant, (f) the AG and any legal representative of the AG, and (g) any witnesses allowed by the court.<sup>183</sup> Furthermore, the court has the discretion to exclude the defendant, his/her legal representative and court officials, if it expects that sensitive information will be disclosed during the hearing and that this disclosure would be likely to prejudice security.<sup>184</sup> While legal representatives and the court officials can avoid any possibility of exclusion from closed hearings by gaining an appropriate security clearance,<sup>185</sup> the defendant's participation is not dependant upon obtaining security clearance.<sup>186</sup> Nevertheless, the defendant or his/her legal representative may still make a submission in favour of disclosure.<sup>187</sup>

---

<sup>178</sup> See below at 6.3.2.

<sup>179</sup> NSIA, ss 26(5), 27(1); this can have a potential impact on committal as well as bail hearings. See Patrick Emerton, "Paving the way for conviction without evidence: a disturbing trend in Australia's 'anti-terrorism' laws" (2004) 4(2) *Queensland University of Technology Law Journal* 129, 155.

<sup>180</sup> NSIA, ss 43-44; for the sake of completeness, it is also a criminal offence to disclose information covered by the notice to the Attorney-General, but before the issue of a non-disclosure certificate (NSIA, ss 40-41). All these offences are punishable with imprisonment for up to two years.

<sup>181</sup> NSIA, ss 25(4), 27(5) and 28(5).

<sup>182</sup> Equally the requirements of s 29 NSIA are applicable to hearings under s 25 (3) concerning the evidence of a witness.

<sup>183</sup> NSIA, s 29(2). This section expressly excludes the jury (if there is any) from the hearings.

<sup>184</sup> NSIA, s 29(3).

<sup>185</sup> NSIA, s 29 read in combination with s 39(3)(4). If there has been a timely application the court must adjourn the proceedings to allow the legal representative to gain security clearance.

<sup>186</sup> NSIA, s 29(3)(a).

<sup>187</sup> NSIA, s 29(4).

Section 31 is the central provision of the NSIA, setting out the court's power to issue non-disclosure orders following a closed hearing.<sup>188</sup> The court can either order non-disclosure in the form sought by the Attorney-General,<sup>189</sup> or it can disagree with the Attorney-General's certificate and order that the sensitive information be disclosed in full or in part.<sup>190</sup> In order to make this decision, s 31 requires the court to consider any risk of jeopardising national security expressed in the Attorney-General's certificate, the effects of non-disclosure on the defendant's RFT, as well as any other matters the court considers relevant.<sup>191</sup> Although it is for the court to undertake this balancing exercise, the NSIA tilts the balance in favour of national security as it states: "In making its decision, the Court must give *greatest* weight to the [Attorney-General's certificate]."<sup>192</sup> The court must give reasons decision in a written statement, which must be provided to the parties and the Attorney-General.<sup>193</sup> However, the prosecutor and the Attorney-General (the *statement recipients*) must be given an advance (draft) copy of this statement to allow them the opportunity to request alterations where disclosure of the written statement itself is likely to prejudice national security.<sup>194</sup> The court has to make a decision on any alteration request,<sup>195</sup> which may itself be subject to an appeal by the statement recipients.<sup>196</sup>

---

<sup>188</sup> s 27(3) hearing (in relation to the disclosure of information) or a s 28(5) hearing (in relation to the exclusion of witness).

<sup>189</sup> NSIA, s 31(1)(2)(4). Nevertheless, the court's order can differ in terms of the disclosure of the summary or statement of the Attorney-General's certificate.

<sup>190</sup> NSIA, s 31(5). This is of course under the condition that the information is admissible otherwise.

<sup>191</sup> NSIA, s 31(7).

<sup>192</sup> NSIA, s 31(8) (emphasis added).

<sup>193</sup> NSIA, s 32.

<sup>194</sup> NSIA, s 32(3).

<sup>195</sup> NSIA, s 32(4).

<sup>196</sup> NSIA, s 33.

The court's final (non)disclosure order can also be challenged by the prosecutor, the defendant and the Attorney-General.<sup>197</sup> Both the defence and the prosecution, in determining whether or not to appeal in such cases, may apply for an adjournment to the court, which *must* be granted.<sup>198</sup>

Although the balancing exercise set out under the NSIA considers the defendant's RFT,<sup>199</sup> though 'greatest weight' is attached to security interests, s 19 NSIA specifies that unless it "expressively or implied provides otherwise", the Act does not affect the general power of the courts "to control the conduct of [...] federal proceeding[s], in particular with respect to abuse of process".<sup>200</sup> Section 19 also expressly clarifies that issuing a non-disclosure order,<sup>201</sup> does not prevent the court from later exercising its power to stay proceedings as a result of that particular order having "a substantial adverse effect on a defendant's right to receive a fair hearing".<sup>202</sup>

It is not obvious whether s 19 NSIA is merely stating an obvious implication, or whether s 19 is intending to limit the circumstances in which the court can rely on its inherent jurisdiction to prevent abuses of process. The interaction between ss 19 and 31 therefore raises complex and troubling issues surrounding the constitutionality of legislative attempts to constrain judicial independence and fetter judicial duties to uphold the RFT through the legal process.

---

<sup>197</sup> NSIA, s 37. In accordance with s 30, the Attorney-General is called an intervener and treated as a party to the proceeding.

<sup>198</sup> NSIA, s 36.

<sup>199</sup> NSIA, s 31(7)(b).

<sup>200</sup> NSIA, s 19(1).

<sup>201</sup> This is an order under s 31 NSIA, following the Attorney-General certificates.

<sup>202</sup> A *substantial adverse effect* is defined by the s 7 NSIA as an effect that is adverse and not insubstantial, insignificant or trivial.

*The impact of the NSIA on the RFT I: balancing interests under the NSIA*

By tilting the balance in favour of the Attorney-General's certificate, s 31(8) NSIA has arguably modified the doctrine of PII, as formulated under the EA. This step has been heavily criticised for creating the impression that the Attorney-General's certificates are conclusive.<sup>203</sup> In *Lodhi* it was argued that such legislative direction effectively strips the court of its discretion, thereby constituting an impermissible limitation on the judicial power under Chapter III of the Australian Constitution.<sup>204</sup> As the Constitution itself does not provide a substantive RFT, in order to be successful, the plaintiffs in *Lodhi* needed to demonstrate that the direction was in fact a usurpation of judicial power that would infringe Chapter III.

In *Lim*, the High Court held that Parliament is barred from enacting legislation that "direct[s] the courts as to the manner and outcome of the exercise of their jurisdiction."<sup>205</sup> What constitutes an impermissible direction was further clarified in *Nicholas* by Brennan CJ's explanation that:

"[a] law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid. However, a law which merely prescribes a Court's practice or procedure does not direct the exercise of the judicial power in finding facts, applying law or exercising an available discretion."<sup>206</sup>

---

<sup>203</sup> See for example International Commission of Jurists, *Assessing damage, urging action* (Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, 2009) 153; Law Council of Australia, *Anti-terrorism reform project* (Report, November 2008) 81.

<sup>204</sup> *R v Lodhi* [2006] NSWSC 571 (7 February 2006). The constitutional challenge, which ultimately failed, was put forward by some representatives of the media acting as an interest group.

<sup>205</sup> *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1, 37 (Brennan, Deane and Dawson JJ).

<sup>206</sup> *Nicholas v The Queen* (1998) 193 CLR 173, 188 (footnote omitted).

Whealy J upheld the constitutional validity of the NSIA by effectively reading down the section,<sup>207</sup> stating that “[t]he use of the expression ‘greatest weight’ appears to be grammatically correct since the legislation is contemplating three (or more) considerations”.<sup>208</sup> It followed that, “[t]he mere fact that the legislation states that more weight, that is the greater weight, is to be given to one factor over another does not mean that the other factor is to be disregarded.”<sup>209</sup> Tilting the balance in *such* a nuanced manner was held to be legitimate guidance of the judicial process, and thus did not violate the separation of powers.<sup>210</sup> In fact, the expression “greater weight” had already been used in *Alister* by Wilson and Dawson JJ.<sup>211</sup> Supporting this conclusion, the Court also noted that the NSIA does not limit the court in considering other factors, and in particular the defendant’s absolute right to be heard and call and examine evidence.<sup>212</sup> Hence, Whealy J concluded that “there is no suggestion, on the proper construction of ss 31(7) and (8) that the certificate is conclusive or determinative of the issue”.<sup>213</sup> Given the limited impact that s 31(8) NSIA has had on the judicial exercise of discretion, the INSLM recommended that it should be repealed on the ground that it has “produce[d] no perceptible benefit in the public interest”.<sup>214</sup>

In prescribing how to undertake the balancing exercise, Australian courts have not only upheld the constitutional validity of the NSIA, they have furthermore indicated that the

---

<sup>207</sup> Bret Walker, “Independent National Security Legislation Monitor’s Annual Report” (7 November 2013) 137.

<sup>208</sup> *R v Lodhi* [2006] NSWSC 571 (7 February 2006) [108].

<sup>209</sup> *Ibid.* This has been affirmed on appeal; see *Lodhi v R* [2007] NSWCCA 360 (20 December 2007) [36]-[39] (Spigelman CJ). Special leave has been refused: *Lodhi v The Queen & Anor* [2008] HCA Trans 225 (13 June 2008).

<sup>210</sup> *Lodhi v R* [2007] NSWCCA 360 (20 December 2007) [57] (Spigelman CJ). Spigelman CJ even indicated that even without such a reading the tilting would have been in constitutional. Like in *Nicholas* he accepted that although the discretion has been limited by legislation that alters the balancing process, it does not go as far as constituting an usurpation of judicial power, as it does not alter the ‘essential character’ of the court. *Ibid.*, [66]-[69].

<sup>211</sup> *Alister v R* (1984) 154 CLR 404, 435 as it was also pointed out by the Counsel for the Government. See *R v Lodhi* [2006] NSWSC 571 (7 February 2006) [109].

<sup>212</sup> *R v Lodhi* [2006] NSWSC 571 (7 February 2006) [107].

<sup>213</sup> *Ibid.*, [105].

<sup>214</sup> Walker, above n 207, 139. It seems that the INSLM is generally opposed to any tilting of the balance.

approach taken to PII should apply equally to hearings under the NSIA.<sup>215</sup> That being said, s 31 NSIA is susceptible to an alternate, more restrictive interpretation. In an article critiquing Australia's terrorism laws, the retired High Court Justice, McHugh offered the following assessment of the impact of the reforms introduced by the NSIA:

“[I]n theory the [Act] does not direct the Court to make the order which the Attorney wants. But it goes as close to it as it thinks it can. It weights the exercise of the discretion in favour of the Attorney-General and in a practical sense directs the outcome of the closed hearing.”<sup>216</sup>

Assuming that the Attorney-General has a strong influence on the extent of disclosure, and the court retains its jurisdiction to avoid a miscarriage of justice, it is submitted that the NSIA model governing disclosure, somewhat paradoxically, resembles the approach adopted under the common law rule governing police informers. By tilting the balance in favour of non-disclosure, non-disclosure has effectively become the ‘rule’, and disclosure the ‘exception’. The latter is required only when necessary in the interest of justice, or in the words of the NSIA, where non-disclosure has a substantially “adverse effect on a defendant’s right to receive a fair trial”.<sup>217</sup> It can further be argued that the tilting of the balance does not even constitute a modification to the approach under the EA, where as discussed above, uncritical acceptance of the Minister’s certificate has become common practice.<sup>218</sup> On this view, the courts may have been correct in their assessment that the NSIA reforms effected limited change to both the process and outcome of determining disclosure matters.

---

<sup>215</sup> *R v Lodhi* [2006] NSWSC 571 (7 February 2006) [96], [108], which was affirmed in *Lodhi v R* [2007] NSWCA 360 (20 December 2007) [36] (Spigelman CJ); see also Walker, above n 207, 127.

<sup>216</sup> Michael McHugh, “Constitutional implications of terrorism legislation” (2007) 8 *The Judicial Review* 189, 209.

<sup>217</sup> NSIA, ss 19(2) and 31(7)(b).

<sup>218</sup> See above at 6.2.3.1.

But if it is true that the NSIA has not significantly changed the law or its practice, the question then arises as to what purpose the new balancing provisions under the NSIA serve?<sup>219</sup> Some would argue that either extending the sections in the EA,<sup>220</sup> or inserting existing EA provisions into the NSIA would have been both easier and more effective, allowing EA case law to be incorporated into interpretations of the NSIA.

The above analysis suggests that much of the common critique in relation to the NSIA and its attempt to ‘tilt the balance’ in favour of non-disclosure misses its target. The real issue is at what stage the exception (disclosure) prevails over the rule (non-disclosure, relying upon the Attorney-General’s certificate). Section 19 emphasises, albeit awkwardly, that although courts retain their power to take all steps necessary to ensure the fairness of the trial, there may be some limitations upon their inherent power to stay proceedings to avoid an abuse of process. Section 3(1) NSIA, outlining the legislative objectives, is even more explicit about the effect of such limitation. It states that information, which is likely to prejudice national security, should be suppressed, “except to the extent that preventing the disclosure would *seriously interfere* with the administration of justice”.<sup>221</sup> The way in which these terms interrelate, has been explained by Spigelman CJ.<sup>222</sup> His Honour held that circumstances, which would have a “substantial adverse effect on the right to receive a fair hearing” (s 31(7) NSIA), would equally constitute a “serious interference with the administration of justice” (s 3(1) NSIA).

As such, while ss 3 and 19 NSIA ‘minimise’ the interference of s 31(8) on the court’s ability to stay proceedings in the interests of the administration of justice, the legislation

---

<sup>219</sup> Andrew Palmer, “Investigating and prosecuting terrorism: the counter-terrorism legislation and the law of evidence” (2004) 27(2) *University of New South Wales Law Journal* 373, 394.

<sup>220</sup> Emerton, above n 179, 160.

<sup>221</sup> NSIA, s 3 (emphasis added).

<sup>222</sup> *Lodhi v R* [2007] NSWCAA 360 (20 December 2007) [25]-[27] (Spigelman CJ).



leaves a ‘gap’ of circumstances where the non-disclosure impacts negatively upon the fairness of the trial, but is not sufficiently ‘serious’ to warrant a stay of proceedings. An important issue therefore arises as to the degree of unfairness that will constitute a *serious* interference with justice.

Our understanding of demands of justice and fairness has changed significantly since *Marks v Beyfus* was decided at the end of the 19<sup>th</sup> century.<sup>223</sup> The general legal trend, reflected in common law development, statutory reforms and international law, has favoured the expansion of the scope and range of protections for the RFT.<sup>224</sup> The NSIA in contrast, is an aberration, designed to lower the minimum due process standards necessary for ensuring a fair trial. This is evidenced firstly in the provisions which allow edited information to be adduced as evidence without rendering the trial unfair,<sup>225</sup> and secondly, in the statutory construction of the NSIA. The encouragement of judges to defer (or more precisely, attach *greatest* weight) to the Attorney-General’s certificate, is not problematic *per se*. The real concern in the operation of s 31 NSIA, is that once the judge has undertaken the balancing exercise, it seems to imply that the interests of fairness have been sufficiently considered, and there is no continuing obligation to review the non-disclosure decision. A closer examination of ss 3 and 19 NSIA, and reading the Act as a whole, however, suggest that there is a duty to engage in ongoing review of non-disclosure decisions and that the initial balancing exercise is only the starting point, since negative impact upon the fairness of the trial caused by that non-disclosure has not yet been determined.

---

<sup>223</sup> *Marks v Beyfus* (1890) 25 QBD 494 (9 July 1890).

<sup>224</sup> See above at 2.2.

<sup>225</sup> This concern is based on the assumption that edited evidence does not have the same strength as unedited evidence. In particular, because the NSIA does not provide for any safeguards concerning edited evidence.

Addressing these concerns, it is submitted that courts should interpret s 31 NSIA as a model that aligns more closely with a ‘rule and exception’ approach. Non-disclosure appears to be the default position to protect the interests of national security. In determining whether to allow disclosure, ss 3 and 19 NSIA should be read into the balancing exercise. Of particular relevance is s 31(7)(b), which requires the court to consider any *substantial* adverse effect on the defendant’s RFT. As was the case under the police informer rule, disclosure should only be ordered where the suppression of information would result in unfairness to the defendant, and lead to an abuse of process. In addition to allowing access to information that is needed to establish the defendant’s innocence, under the NSIA, access to information should also be granted where it would facilitate proving the accused’s guilt beyond reasonable doubt. This is particularly necessary in cases where the Minister’s certificate requests the use of edited evidence.

*The impact of the NSIA on the RFT II: the position of the defence under the NSIA*

While the defendant can be excluded from non-disclosure hearings where the court expects that sensitive information will be disclosed that would prejudice national security, the NSIA allows for the defendant’s counsel to be present if they possess appropriate security clearance. Although Australia has not opted for a system of special advocates, they are available under the common law, and their appointment would not be inconsistent with the NSIA.<sup>226</sup>

Commentators have generally applauded the advent of the ‘security-cleared lawyer’ who, drawn from the independent profession and retained by defence counsel, is best

---

<sup>226</sup> *R v Lodhi* [2006] NSWSC 586 (21 February 2006) [28]; see also Anthony Whealy, “Difficulty in obtaining a fair trial in terrorism cases” (2007) 81 *Alternative Law Journal* 743, 750.

placed to represent the defendant in an *ex parte* hearing.<sup>227</sup> Such a system can be distinguished from more restrictive schemes of ‘special advocates’. However, the effectiveness of security-cleared lawyers also depends heavily upon how the system is regulated. For example, if security-cleared lawyers are prevented from discussing topics relevant to defence strategy with their clients after participating in a closed hearing, it will create ethical dilemmas, particularly where disclosure constitutes a criminal offence. Furthermore, by controlling the process of security clearance, the government could effectively control the pool of lawyers able to act in national security trials. This in turn would not only impede upon the defendant’s right to retain a lawyer of his/her own choosing, which is one of the minimum guarantees of the RFT under the ICCPR,<sup>228</sup> but would also threaten “the independence of the legal profession”.<sup>229</sup>

It is important to note that the processes governing non-disclosure certificates and closed hearings can be circumvented by relying upon s 22 NSIA. This section, entitled “Arrangements for the federal criminal proceedings about disclosures relation to or affecting national security”, allows the parties to agree, subject to judicial approval, on how to handle issues of disclosure outside of the method prescribed by the NSIA.<sup>230</sup> Given the desirability of such an agreement, this consensus model has become common practice, and both defence counsel and prosecutors routinely “attempt to negotiate detailed orders under s 22 as part of the pre-trial process”.<sup>231</sup> The underlying rationale of

---

<sup>227</sup> See Kent Roach, “Secret evidence and its alternatives” in Aniceto Masferrer (ed), *Post 9/11 and the state of permanent legal emergency: security and human rights in counter terrorism* (Springer, 2012) 179, 188.

<sup>228</sup> ICCPR, Art 14(3)(d): “... defend himself in person or through legal assistance of his own choosing”. For a general comment on the aspect see David Weissbrodt, *The right to a fair trial under the UDHR and the ICCPR* (Martinus Nijhoff, 2001) 115.

<sup>229</sup> Law Council of Australia, *Anti-terrorism reform project* (Report, November 2008) 80.

<sup>230</sup> *R v Lodhi* [2006] NSWSC 571 (7 February 2006) [29].

<sup>231</sup> NSIA, s 22 has been described by the INSLM as the “most often used, and in some senses the most important, provision in the NSI Act”: Walker, above n 207, 127-128; see also Whealy, above n 226, 749; Stephen Donaghue, “Reconciling security and the right to a fair trial: The *National Security Information Act* in practice” in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in*

this section seems to have been the possibility of negotiating the use of information stemming from foreign intelligence agencies, which is subject to international agreements of how to use this information. However, the frequent use may also point to the impracticality of the NSIA in general. Skeptics may argue that the benefits for the government of opting for the ‘tailored’ consensus processes extends even further. Not only can these agreements determine the extent of disclosure, but parties can also agree to depart from crucial aspects of procedural fairness. Given that the state and defendant typically have unequal access to resources, the ‘consensus’ reached may considerably disadvantage the defendant. Due to a presumption against bail in terrorism offences, defendants generally remain in pre-trial detention.<sup>232</sup> This could strongly motivate the defendant to proceed with the trial as soon as possible, clearly placing the prosecution in the favourable bargaining position.<sup>233</sup> This threat to the principle of adversariness raises concerns about the potential prejudice caused by ‘negotiated justice’, which may be difficult for the trial judge to identify and address. That said, the court does retain some supervisory role, since agreements under s 22 must be judicially approved.

*The impact of the NSIA on the RFT III: alterations to the trial dynamic under the NSIA*

Once the NSIA is taken to apply to a proceeding, it has a significant impact on the dynamic of the adversarial trial.<sup>234</sup> The obligation placed upon the defence to alert the Minister to broad categories of sensitive information (i.e falling under the wide

---

*the War on Terror* (Federation Press, 2007) 87, 92. In practice these negotiations will be led by the Attorney-General’s representative and the defence.

<sup>232</sup> *Crimes Act 1914* (Cth), s 15AA.

<sup>233</sup> Thanks to Teneille Elliott, advisor to the INSLM, who pointed this valuable aspect out to me. [although the INSLM did not follow this position in his report].

<sup>234</sup> In *Lodhi*, it was argued by the defendant that some of the disruptions would actually alter the character of the NSW Supreme Court.

umbrellas of ‘likely [to] prejudice’ and ‘national security’),<sup>235</sup> allows the Attorney-General not only to assess potential sensitivities related to particular material, but also confers upon the Attorney General and relevant security agencies considerable surveillance powers and influence over the trial process. Furthermore, the risk of serious penalties for breaching this obligation has the effect that defence lawyers make general and frequent warnings about potentially sensitive information informing the defence case. Some defence lawyers, reluctant to reveal the defence strategy in advance of the trial, may seek to discharge their ‘reporting’ obligations under the NSIA in general and abstract terms.<sup>236</sup> This tactic, which could include notifying the Attorney-General of an entire brief of evidence, would in practice make it difficult for the Attorney-General to identify relevant issues.<sup>237</sup> It would similarly be unhelpful to the prosecution’s case and result in significant delays, as receipt of notices, even those referring to immaterial sensitive information, automatically adjourns proceedings, and potentially leads to closed hearings and interlocutory appeals.<sup>238</sup> Whealy J regarded these disruptions to the proceedings as the “most significant potential problem” of the NSIA.<sup>239</sup> Considering that these trials by their nature already involve complex offences, evidential problems and lengthy pre-trial proceedings, the NSIA’s procedures may cause serious detriment to a defendant’s right to a trial without undue delay.<sup>240</sup> In practice, major disruptions to

---

<sup>235</sup> NSIA, ss 8 and 17; in particular, “national security means Australia’s defence, security, international relations or law enforcement interests.” This wide definition has been heavily criticised as nearly meaningless. See for example Mark Rix, “Counter-terrorism and information: the NSI Act, fair trials, and open, accountable government” (2011) 25(2) *Continuum* 285, 287; Emerton, above n 179, 151. However, the definition is arguable not much wider as the one used under PII and the s 130 *Evidence Act 1995* (Cth). See *R v Lodhi* [2006] NSWSC 571 (7 February 2006) [112] (Whealy J).

<sup>236</sup> Donaghue, above n 231, 89.

<sup>237</sup> *Ibid.*, 89.

<sup>238</sup> The prosecution or the defendant may appeal all decisions made by the court, that relate to the disclosure or non-disclosure of information generally in court (s 31), to the information included in the record of the closed hearing (s 29) or to the information included in the statement giving the reasons of a s 31 order (s 32). In all these cases the court has to adjourn the proceedings until the appellant court has heard and settled the issue.

<sup>239</sup> Whealy, above n 226, 748.

<sup>240</sup> ICCPR, art 14(3)(c); the Human Rights Committee emphasised in its *General Comment No 32*, UN Doc CCPR/C/GC/32 (23 August 2007) [35] that the right to be tried without undue delay does not only

the trial process have been avoided by trial judges, who have sought to resolve issues during the pre-trial stage, and by the widespread use of s 22 arrangements.<sup>241</sup> However, avoiding delays requires the willing cooperation of all parties.<sup>242</sup> The restrictive impact of adjournments and closed hearings upon the judge's ability to control proceedings was also argued in *Lodhi* to amount to an unconstitutional restriction of judicial power by the legislature.<sup>243</sup> However, Whealy J observed that even in the worst case scenario, the trial judge could still bring the trial to an orderly end by granting a stay of proceedings.<sup>244</sup>

Compared to the process prescribed by the EA for dealing with ordinary PII claims, NSIA hearings have a number of disadvantages. Primarily, whereas the NSIA makes adjournments and closed hearings mandatory, under PII the trial judge retains the power to determine whether adjournments and the use of *in camera* proceedings are necessary.<sup>245</sup> Secondly, PII claims do not necessarily require the Attorney-General's involvement, and may be handled by either senior departmental officials or the heads of the relevant intelligence agency, which simplifies the process.<sup>246</sup> The intervention of the Attorney-General under the NSIA changes the adversarial dynamic of an ordinary criminal trial. It would be wrong to assume that the Attorney-General's representative and the DPP, as public office holders, have identical interests in relation to the disclosure of sensitive material. In Australia, as in the UK, the DPP is an independent

---

include the time between the charge and the trial, but also the time until the final judgement. For a general comment on the aspect see Weissbrodt, above n 228, 125.

<sup>241</sup> *R v Lodhi* [2006] NSWSC 571 (7 February 2006) [85]. See also Roger Gyles, "Independent National Security Legislation Monitor Inquiry into control order safeguards: Part 2" (13 April 2016) 4.

<sup>242</sup> Whealy, above n 226, 749.

<sup>243</sup> There is it was argued that the NSIA provisions have "the effect of altering the character or nature of the Supreme Court of New South Wales, in that its effect is to obliterate an essential attribute of the Supreme Court of New South Wales namely its power to discharge, without interference, its fundamental object of determining guilt or innocence." *R v Lodhi* [2006] NSWSC 571 (7 February 2006) [24].

<sup>244</sup> *R v Lodhi* [2006] NSWSC 571 (7 February 2006) [88]. See further discussion of this issue, Whealy, above n 226, 749.

<sup>245</sup> Donaghue, above n 231, 90.

<sup>246</sup> *Ibid.*

statutory office-holder, and there may well be cases where the prosecution proposes to rely on information it considers to be critical for achieving a conviction, that the Attorney-General intends to suppress.

### 6.2.3.3 Evaluating the NSIA – a success or failure?

The NSIA is complex in terms of its structure and operation. Whealy J in his scathing comment *ex curiae* suggested that the NSIA “gives the appearance of having been drafted by persons who have little knowledge of the function and processes of a criminal trial”.<sup>247</sup> It is unsurprising that the use of non-disclosure certificates has been fairly limited.<sup>248</sup>

As noted above, there is a certain redundancy in the NSIA provisions, as the judiciary has interpreted them to be consistent with the balancing approach prescribed by the EA.<sup>249</sup> To this effect, the INSLM concluded that “[t]he NSI Act is by no means a radical novel departure in the law, as the[] statutory aims and purposes [...] fit comfortably within previous (and continuing) common law notions of the public interest.”<sup>250</sup> This brings us back to the key question of whether the NSIA serves a distinct purpose. As discussed above, the NSIA can be interpreted as an attempt to lower the standards of what constitutes a fair trial. Such fears have been rejected by experienced judges.<sup>251</sup> More likely, the NSIA was a legislative attempt to re-structure non-disclosure processes to prioritise security without infringing upon Chapter III of the Constitution, which

---

<sup>247</sup> Whealy, above n 226, 745. Whealy J was the first judge, who had to deal with the NSIA in NSW.

<sup>248</sup> Until 2013, thirteen criminal non-disclosure and witness exclusion certificates have been issued by the Attorney-General under the NSIA: see Walker, above n 207, 283. These certificates covered only three trials (*Lodhi*, *Khazaal* and *Baladjam and others*) between 2004 and 2013. Ten out of the thirteen certificates were issued in the *Lodhi* trial.

<sup>249</sup> *R v Lodhi* [2006] NSWSC 571 (7 February 2006) [96] and [108]; reaffirmed in *Lodhi v R* [2007] NSWCCA 360 (20 December 2007) [36] (Spigelman CJ).

<sup>250</sup> Walker, above n 207, 127.

<sup>251</sup> Whealy, above n 226, 749.

itself establishes a low threshold for upholding the RFT. It is arguable therefore, that the ‘unsuccessful’ constitutional challenge in *Lodhi* was in fact a ‘success’ for the RFT as it lead the courts to both reject the conclusiveness of certificates, and reserve for themselves, rather than the Executive or Parliament, the responsibility to determine what constitutes ‘fair’ and ‘unfair’ proceedings. The major deficiency in reserving such power to the Australian courts is that attributes of the RFT are developed on an *ad hoc*, case-by-case basis.

It must be conceded that the purpose of the NSIA was to prioritise the protection of sensitive information in legal proceedings, not to provide guidance on how best to avoid unfairness to the defendant resulting from non-disclosure decisions. The NSIA is a strong policy statement that the government prioritises the interests of national security, leaving no doubt about what judges are expected to do when performing the balancing exercise. It is submitted however, that the NSIA constitutes a ‘missed opportunity’ to clarify the balancing process in light of jurisprudential developments in international human rights law that offer a more structured approach to weighing competing rights and interests.<sup>252</sup> Instead of drawing from these developments, the proponents of the NSIA were satisfied with a ‘black box’ approach to the disclosure processes. The inevitable lack of transparency that this entails has meant that courts are left with the task of reconciling the public policy interests with the requirements of fairness. The NSIA provisions allowing the use of edited evidence underscore this issue, as partial accounts may distort the assessment of the evidence and prejudice the jury. Under these circumstances, determining for the judges when the trial becomes unfair is a difficult

---

<sup>252</sup> This is particularly so in a country without a legislated bill of rights. The assumption would be that while there is no general protection, the individual statutes would reflect the human right standards of the society.



exercise,<sup>253</sup> compounded by the additional challenges presented by potential disruptions and delays inherent in counter-terrorism trials.

#### 6.2.4 Comparative observations

Until the 1990s, the common laws of England and Australia developed similar approaches to governing the non-disclosure of information in the public interest, and were frequently informed by each other's leading authorities. Under the PII doctrine, the balancing approach was adopted, with the courts acknowledging that the weight attached to competing values may differ between civil and criminal proceedings. In the UK in the 1990s, responding to RFT challenges before the ECtHR, the House of Lords in *R v H and C* reframed the law around a 'principled model'. In contrast, Australian cases have continued to apply the unmodified common law 'balancing model', that inform both the EA and NSIA. Practically, this means that while the UK courts must follow a number of steps before making any disclosure decisions, the Australian courts may take into account any interest they consider to be relevant, with only limited guidance as to how to weigh the interests in the balancing exercise.

Given that courts generally defer to the security assessment offered by the government, the main difference is that in practice in Australia, judges apply a 'rule and exception' approach that *prima facie* favours non-disclosure on security grounds. The inquiry then asks whether disclosure is necessary to avoid an unfair trial and potential miscarriage of justice. In contrast in the UK, at least in theory, the judges apply a 'principled approach' that *prima facie* favours the RFT of the defendant. Under this model, non-disclosure is only permitted where justified and strictly necessary. In this respect, the default

---

<sup>253</sup> For the importance of jury instructions see below at 8.2.4.2.

positions in both jurisdictions are polar opposites, sending very different messages about the perceived importance of the RFT.

Other differences concern the ways of how to ‘compensate’ for forensic disadvantages caused to the defence case as an outcome of non-disclosure. In Australia, although the NSIA prescribes closed hearings, the defendant must always be given notice and be permitted to make submissions. This requirement has been seen as crucial by the ECtHR, even when strong dissents have noted that the right to be informed and make submissions can be symbolic. While UK judges enjoy a wider discretion as to the mode of proceedings, the fact that *ex parte* hearings can be allowed, of which the defendant will not be informed, constitutes a much more severe restriction upon the defendant’s ability to assert his/her RFT. It is in this context that the need for special advocates has been debated vigorously.

The final difference between the approaches taken in Australia and the UK lies in the novel provisions of s 22 NSIA, which allows the parties in Australia to circumvent the statutorily prescribed process regulating non-disclosure. While s 22 is routinely relied upon, the ‘consensual’ model requires close trial judge supervision, as the unequal bargaining power of the parties (prosecution, defence and Attorney-General) may adversely impact upon fairness in a particular trial.

### 6.3 - The partial use of sensitive information in criminal procedures

In both Australia and the UK, there is widespread acceptance among both politicians and the judiciary that a criminal conviction cannot be based on evidence inspected by the court, but withheld from the defence ('secret evidence'). In 2004, the UK Government's proposal to allow secret evidence to be admitted was met with strong resistance from the legal community,<sup>254</sup> who argued that it violated the internationally recognised rights of the defendant to cross-examine witnesses,<sup>255</sup> and to have all evidence "produced in the presence of the accused at a public hearing with a view to adversarial argument".<sup>256</sup>

However, without the ability to rely upon secret evidence to secure convictions, the state may be confronted with tough choices as exemplified in *Lappas*:<sup>257</sup> to withdraw the charges and protect the sensitive information, or to disclose the information to secure a conviction, risking any prejudice that disclosure may entail to national security.<sup>258</sup>

---

<sup>254</sup> See Press Association, "Blunkett anti-terror proposals condemned" (The Guardian, 2 February 2004). Six special advocates, Nicholas Blake QC, Andrew Nicol QC, Manjit Singh Gill QC, Ian Macdonald QC, Rick Scannell and Tom de la Mare, even wrote an open letter to *The Times* on 7 February 2004, stating that their experience suggests that such proposals would not be compatible with the fundamental right to have a fair trial and would refuse to participate in such proceedings. See also Audrey Gillan, "Lawyers attack Blunkett anti-terror plan" (The Guardian, 7 February 2004).

<sup>255</sup> Sir Ivor Richardson of the NZ Court of Appeal expressed this by stating that "The right to confront an adverse witness is basic to any civilised notion of a fair trial. That must include the right for the defence to ascertain the true identity of an accuser where questions of credibility are in issue." *R v Hughes* [1989] 2 NZLR 129,148-149 as cited in *R v Davis* [2008] 1 AC 1128, 1140 (Lord Bingham).

<sup>256</sup> *Kostovski v The Netherlands* [ECtHR] Application no 11454/85 (20 November 1989) [41]; see in particular art 6(3)(d) ECHR; art 14(3)(e) ICCPR; see also *Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000) [55].

<sup>257</sup> See above at 6.2.1.

<sup>258</sup> Whereas in the previous section, the focus was on information necessary for the defendant to raise doubts about the charges, the focus here is on information, the prosecution needs to prove all elements of the offence beyond reasonable doubt.

One way to side-step this dilemma is to enact legislation that allows the court to rely upon edited evidence, modified in such a way so as not to disclose sensitive information in open court.<sup>259</sup>

Depending on its type, there are various methods of editing evidence. In relation to documents, these include redacting the sensitive parts, or summarising texts that excludes the sensitive information. Where secretive evidence would come to light through witness testimony (in either written or oral form), cross-examination may be prohibited on particular sensitive topics, or identities of witnesses concealed. Most anonymous witness cases concern intimidated witnesses, who are either in fear of reprisal or of facing their aggressor.<sup>260</sup> Where proceedings raise national security issues, it may be in the public interest to order the suppression of evidence of the identity of state officials, such as security officials, police officers and undercover agents, or of particular aspects of their work, such as surveillance techniques. Non-disclosure in these circumstances not only protects the agencies' working methods and strategies, but also shields individuals from reprisal and allows for their continued employment in field operations.

Closely related to anonymous witnesses is the framework governing absent witnesses.

Although out-of-court statements from absent witnesses are generally treated as hearsay, the issues raised are similar, in so far as they severely limit the defence's ability to challenge the evidence. For a number of reasons, there is limited scope to argue that the use of absent witnesses serves the public interest of national security.

Firstly, witnesses in the possession of sensitive information are, strictly speaking, not

---

<sup>259</sup> As defined in the introduction of this Chapter, to "edited evidence" is referred to in this thesis as any evidence that is stripped of parts of its content and therefore creates limitations to be fully tested by the defence.

<sup>260</sup> The latter category mainly concerns children; see for example *Youth Justice and Criminal Evidence Act 1999* (UK).

“unavailable” to testify. Secondly, establishing the reliability of the evidence, as is needed in cases of absent witnesses, is compounded by the need to suppress that very same evidence. Nonetheless, the underlying similarities between the principles applied to absent and unavailable witness allow some analogies to be drawn.

While the use of edited evidence appears to be a viable compromise between the RFT and national security, the defence’s ability to examine the evidence will often be significantly limited in scope or in effect. After discussing the potential for using edited evidence in the UK and Australia, this Section considers how its reliability can be meaningfully tested, and what safeguards are needed to be put in place to protect the RFT and mitigate the limitations placed on the defendant’s right to confrontation - a right that would ordinarily facilitate the robust challenge of any witness testimony or documentary evidence tendered by the prosecution.

### **6.3.1 The use of edited evidence in the United Kingdom**

In the UK, there is no comprehensive legislation allowing for the use of edited evidence in criminal proceedings, on public interest grounds such as national security.

Nonetheless, such use is permissible to a certain extent under the common law, and more recently, under specific legislation.

#### **6.3.1.1 Edited documents**

As the common law generally allows documents of any form to be submitted as evidence, edited documents are not *per se* inadmissible. However, it is crucial that the undisclosed information is not relevant to the material issues in the case. If its relevance is suspected and the information is requested by the defence, the prosecution will need

to justify its non-disclosure through a PII claim. Furthermore, edited prosecution evidence may be excluded by the judge, exercising a discretion under s 78(1) of the *Police and Criminal Evidence Act 1984* (UK) in circumstances where it “would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”<sup>261</sup> With the passage of the *Justice and Security Act 2013* (UK), the UK Parliament introduced a general “closed material procedure” allowing otherwise ‘secret evidence’ to be adduced by the prosecution in a summarised form – a process that is commonly known as ‘gisting’.<sup>262</sup> However, the Act explicitly excluded the application of the closed material procedure from criminal proceedings,<sup>263</sup> an exclusion suggesting that gisting would involve too grave a departure from the right to confrontation ordinarily applied in criminal proceedings.

### 6.3.1.2 Anonymous witnesses

#### *The common law*

In the UK, witness intimidation first emerged as a policy concern in the 1970s during the Northern Ireland conflict. Two major reports published at that time rejected legislative proposals to facilitate anonymous witnesses to give evidence on the ground that it would alter the criminal trial in an unacceptable way.<sup>264</sup> That said, the courts in

---

<sup>261</sup> *Police and Criminal Evidence Act 1984* (UK), s 78(1) is also complemented by the more general provision in s 82(3) *Police and Criminal Evidence Act 1984* (UK), which allows “the court to exclude evidence [...] at its discretion.” The section was intended to preserve the common law powers, but is rarely relied on today. See generally Ian Dennis, *The law of evidence* (Sweet & Maxwell, 2<sup>nd</sup> ed, 2002) 74.

<sup>262</sup> See *Secretary of State for the Home Department v MB* [2007] UKHL 46 (31 October 2007) [42], [66], [85] and [90].

<sup>263</sup> *Justice and Security Act 2013* (UK), s 6(11). On the Act generally see Adam Tomkins, “Justice and security in the United Kingdom” (2014) 47(3) *Israel Law Review* 305.

<sup>264</sup> Diplock Commission, *Report of the Commission to consider legal proceedings to deal with terrorist activities in Northern Ireland* (Cmnd 5185, December 1972) [7(b)] and [20] (“Diplock Report”). As a consequence the continuation of extra-judicial detention as well as trials without a jury had been recommended. See also Gilbert Marcus, “Secret witnesses” (1990) Summer *Public Law* 207, 210-12; *Report of a committee to consider, in the context of civil liberties and human rights, measures to deal*

Northern Ireland relied upon their inherent power to act in the interests of justice to introduce modifications, allowing witnesses some degree of anonymity.<sup>265</sup>

This is illustrated in *Murphy and Maguire*, a trial concerning the murder of two British soldiers at an IRA funeral in 1988.<sup>266</sup> The trial judge, Hutton LCJ, permitted the eye-witnesses, journalists who had already received death threats, to testify from behind a screen, visible only to the court, the prosecution and the defence lawyer, but not to the defendants. Although the case was initially criticised for its questionable use of authorities to support the modifications,<sup>267</sup> it was later acknowledged that there was only minimal impact upon the fairness of the trial. Importantly, the defence counsel did not object to the judge's order, the witnesses' credibility was not questioned, and ultimately the journalists' testimonies were not the sole or main source of evidence identifying the defendants.<sup>268</sup>

Over the course of the following two decades, trial judges in the UK made further inroads to the principle of confrontation.<sup>269</sup> Most of these derogations are of limited relevance for the purpose of this thesis, being neither applicable to criminal proceedings, nor required to protect witnesses from retaliation nor the public interest in national security.<sup>270</sup> However these *ad hoc* in-roads fostered a sense of legal insecurity

---

*with terrorism in Northern Ireland* (Cmnd 5847, 1975) [55] (“Gardiner Report”) as cited in Ian Dennis, “The right to confront a witness: meanings, myths and human rights” (2010) 4 *Criminal Law Review* 255, 269.

<sup>265</sup> A case regularly cited as a reference is *Scott v Scott* [1913] AC 417 (5 May 1913). However, it is important to point out that this case concerned the principle of open justice more generally and does not propose to keep information from the defendant.

<sup>266</sup> *R v Murphy and Maguire*, Northern Ireland Crown Court (April 1989, unreported). The decision was upheld by the Northern Ireland Court of Appeal.

<sup>267</sup> The authority cited in *Murphy and Maguire* was a case where only the public was excluded, but not the defendant himself. See *R v Davis* [2008] 1 AC 1128, 1142 (Lord Bingham); also Marcus, above n 264, 214-17.

<sup>268</sup> *R v Davis* [2008] 1 AC 1128, 1142 (Lord Bingham with whom Lord Mance agreed) and 1255 (Lord Carwell).

<sup>269</sup> Metcalfe, above n 115, 145-146.

<sup>270</sup> See for example *R (Al-Fawwaz) v Governor of Brixton Prison* [2002] 1 AC 556 (17 December 2001), which concerned an extradition hearing; *R v Watford Magistrates' Court, ex parte Lenman* [1993] Crim LR 388, which was a committal hearing; or *R v X* (1989) 91 Cr App R 36; *R (D) v Camberwell Green*

around the principle of confrontation, which was directly addressed by the House of Lords in the landmark case of *Davis* in 2008.<sup>271</sup>

The *Davis* case was also a murder trial, but the facts were significantly distinct from those in *Murphy and Maguire*: firstly, the testimonies of the intimidated witnesses, who were able to identify the accused as the gunman, were decisive in the case. Secondly, the anonymity orders granted by the trial judge were more extensive, allowing the witnesses to use pseudonyms, testify from behind a screen and have their voices electronically altered. In addition to the witnesses remaining unseen by the defendant, the defence lawyer was restricted from asking questions that would identify them.<sup>272</sup> Lastly, the case was further complicated by Davis' suspicion that one of the witnesses was his ex-girlfriend, who he argued, may have accused him out of vengeance and encouraged others to do the same. Here, the use of the anonymous witnesses not only limited the defence's ability to test the accuracy of their statements, but also went to the issue of credibility. The appeal provided the House of Lords with the opportunity to undertake a detailed review of the common law, as well as international authorities including those from the ECtHR.<sup>273</sup> Emphasising the longstanding principle of confrontation, their Lordships observed that many of the cases deviating from the principle in the UK had not satisfactorily addressed its fundamental nature and as a result, "[b]y a series of small steps, largely unobjectionable on their own facts, the courts have arrived at a position which is irreconcilable with the long-standing

---

*Youth* [2005] 1 WLR 393 (27 January 2005), which allowed the use of video links for protecting child victims. Statutory provisions for such cases were later included in the *Youth Justice and Criminal Evidence Act 1999* (UK).

<sup>271</sup> *R v Davis* [2008] 1 AC 1128 (18 June 2008).

<sup>272</sup> Although the defence counsel was not barred from seeing the witnesses, he chose not see them as he would have received information he was not allowed to discuss with his client, which he regarded as incompatible with the client-counsel relationship.

<sup>273</sup> For a discussion of the ECtHR case law see above at 4.3.1.1.



principle.”<sup>274</sup> Given the severe limitations imposed upon the defence case, the House of Lords held unanimously that the departure from the common law principle of confrontation was unjustified.<sup>275</sup> Furthermore, the modifications were seen as likely to be inconsistent with the requirements laid down by ECtHR to uphold art 6 ECHR, as the measures had not been sufficiently ‘counter-balanced’ to protect the principle of confrontation,<sup>276</sup> and the evidence had been ‘sole or decisive’ in identifying the perpetrator.<sup>277</sup> Since Davis was unable to ascertain whether his ex-girlfriend had in fact been a prosecution witness, Lord Bingham famously described the modifications to the common law principle as requiring the defendant to “take a blind shot at a hidden target”, with the effect that “[a] trial so conducted cannot be regarded as meeting ordinary standards of fairness.”<sup>278</sup>

Although the ruling in *Davis* did not claim that the principle of confrontation is absolute, their Lordships made it clear that any exceptions, recognised by the common law, were extremely limited, and that further derogation would require Parliamentary approval.<sup>279</sup> Since the scope of these limited exceptions was unclear, the Government represented *Davis* as having identified a gap in the law,<sup>280</sup> and swiftly enacted the *Criminal Evidence (Witness Anonymity) Act 2008* (UK), which has since been replaced,

---

<sup>274</sup> *R v Davis* [2008] 1 AC 1128, 1148 (Lord Bingham); see also *ibid*, 1152, where Lord Rodger emphasised the persistency of the principle over time: “[I]t is axiomatic that the common law is capable of developing to meet new challenges. But threats of intimidation to witnesses and the challenge which they pose to our system of trial are anything but new. In theory, the common law could have responded to that challenge at any time over the last few hundred years by allowing witnesses to give their evidence under conditions of anonymity. But it never did—even in times, before the creation of organised police forces, when conditions of lawlessness might have been expected to be far worse than today.”

<sup>275</sup> *Ibid*, 1148-49 (Lord Bingham).

<sup>276</sup> *Ibid*, 1172 (Lord Mance) with whom Lord Bingham agreed at 1148.

<sup>277</sup> *Ibid*, 1147 (Lord Bingham), 1158 (Lord Carswell), and 1172 (Lord Mance). For a discussion of these principles see above at 4.3.1.1.

<sup>278</sup> *Ibid*, 1149 (Lord Bingham).

<sup>279</sup> *Ibid*, 1148 (Lord Bingham), 1153 (Lord Rodger), 1173 (Lord Mance).

<sup>280</sup> United Kingdom, *Parliamentary Debate*, House of Commons, 26 June 2008, vol 478, no 119, col 523-524 (Mr Jack Straw).

without substantive modification, by new provisions in the *Coroners and Justice Act 2009* (UK).<sup>281</sup>

### *Coroners and Justice Act 2009* (UK)

Under the *Coroners and Justice Act 2009* (UK) (CJA), the court can make an order to suppress a witness' identity,<sup>282</sup> upon meeting the following three conditions:<sup>283</sup>

- Condition A: the order is necessary to protect the safety of the witness or another person, prevent serious harm to property or real harm to the public interest.<sup>284</sup>
- Condition B: the order would not render the trial unfair.
- Condition C: the testimony is needed to pursue the interests of justice, but the witness would not testify without the protection of an anonymity order.<sup>285</sup>

Although the court may take into consideration any matter it regards as relevant in determining whether these conditions have been met, the legislation also sets out a non-exhaustive list of criteria that are particularly important for safeguarding the RFT.<sup>286</sup>

The CJA is not an invitation for the court to balance one set of interests (Conditions A and C) against another (Condition B), it requires all three conditions to be satisfied.

---

<sup>281</sup> See *Donovan and another v R* [2012] EWCA Crim 2749 (29 November 2012) [3]. The 2008 Act was criticised for having been rushed through Parliament in less than two weeks. See Liberty, *Liberty briefing on the Criminal Evidence (Witness Anonymity) Bill* (July 2008) 9. However, the law-makers took some recommendations of human rights groups on board and added a sunset clause to the Act, which eventually required the renewal of the provisions in the 2009 Act.

<sup>282</sup> The court can apply various measures to suppress the identity of the witness from the defendant, such as withholding the name or other identifying details of the witness, the use of a pseudonym, the restriction of questions in cross-examination, which could identify the witness, the use of screens as well as voice modulation (*Coroners and Justice Act 2009* (UK), s 86(2)). These measures, however, cannot be applied in relation to the judge or the jury (*Coroners and Justice Act 2009* (UK), s 86(4)).

<sup>283</sup> *Coroners and Justice Act 2009* (UK), s 88(2)-(5).

<sup>284</sup> In relation to the necessity requirement the Act clarifies that the fear of the witness must be reasonable. (*Coroners and Justice Act 2009* (UK), s 88(6)). See also *R v Mayers and others v R* [2009] 1 WLR 1915, 1926: "necessary" is more than "desirable" or "convenient".

<sup>285</sup> *R v Mayers and others v R* [2009] 1 WLR 1915, 1926: "reluctance" is not enough.

<sup>286</sup> *Coroners and Justice Act 2009* (UK), s 89(2)(a)-(f),

Thus, the fairness of the trial (Condition B) must be addressed independently.<sup>287</sup> The CJA however does not provide guidance on how to apply these three conditions in assessing whether the threshold for anonymity has been met.<sup>288</sup> Compared to the position articulated in *Davis*, the CJA has significantly deviated from the common law approach. Under the Act, although ‘sole or decisive’ reliance on the anonymous statement is one consideration to be taken into account by the court, it is no longer determinative of the question of fairness.<sup>289</sup> These legislative reforms imply that a trial may be fair in cases where there are no or few concerns about the honesty and reliability of the evidence to be given by the anonymous witness.<sup>290</sup>

The CA first commented on the CJA in the case of *Mayers*,<sup>291</sup> confirming that although the use of anonymous witnesses does not automatically produce unfairness,<sup>292</sup> the making of an anonymity order should still be considered a measure of last resort.<sup>293</sup>

Importantly, the CA emphasised that the prosecution shares the duty to ensure the

---

<sup>287</sup> In *Taylor and Crabb* Court of Appeal Criminal Division (22 July 1994, unreported) the CA suggested that after taking into consideration the grounds of fear, the importance of the evidence, the evidence of credibility and the prejudice to the defendant, the court must *balance* “the need for protection [...] against the unfairness”. The approach has been subsequently labelled as inconsistent by Lord Hutton in *Al-Fawwaz*, which was endorsed by Lord Bingham in *Davis*: if accepted that there are only rare exceptions to the right of confronting a witness, balancing cannot be asked for. See *R v Davis* [2008] 1 AC 1128, 1144.

<sup>288</sup> *R v Mayers and others v R* [2009] 1 WLR 1915, 1923; see also Corker and Parkinson, above n 7, 234.

<sup>289</sup> The common law in this area has been abolished explicitly by the s 1(2) *Criminal Evidence (Witness Anonymity) Act 2008*. However, the provisions in the *Coroners and Justice Act 2009* (UK) do not affect the law in relation to PII (*Coroners and Justice Act 2009* (UK), s 95) and also the authority of *H and C* remains undiminished. This also includes the potential use of special advocates. See *R v Mayers and others v R* [2009] 1 WLR 1915, 1920.

<sup>290</sup> Coincidentally, the Crown Prosecution Service guidelines on witness anonymity continue to mention that any application for an anonymity order is likely to fail in cases where the witness testimony is the sole or decisive evidence against the defendant: see Crown Prosecution Service, *The Director’s guidance on witness anonymity 2009* (UK) [5].

<sup>291</sup> *R v Mayers and others v R* [2009] 1 WLR 1915 (12 December 2008). The case joined four separate cases on appeal. Before addressing those cases individually, the Court discussed the general functioning of the new provisions in great detail.

<sup>292</sup> *Ibid*, 1929.

<sup>293</sup> *Ibid*, 1920. See also Crown Prosecution Service, *The Director’s guidance on witness anonymity* (2009) para 6 emphasising the duty of the prosecution to explore all available alternatives.

fairness of the trial, which includes proactively investigating the credibility of its witnesses.<sup>294</sup>

In their interpretations of the ‘sole or decisive’ rule, the CA has favoured an approach similar to that used under common law.<sup>295</sup> As a result, while the CJA did not widen the exceptions to the principle of confrontation in criminal proceedings to the point where it would contradict the prior decision in *Davis*, it is uncertain how a court would decide a case where credibility of the anonymous witness was accepted or some examination (counter-balancing) was possible, but the statement constitutes the sole evidence of a conviction.

In resolving this uncertainty, some guidance may be drawn from the case law surrounding absent witnesses. Although not directly relevant to national security,<sup>296</sup> analogies can be made due to the comparable nature of both the interests involved and underlying rationales behind the rules.<sup>297</sup>

### *Absent witnesses and hearsay evidence*

Similar to the problems created by anonymous witness evidence, the main difficulty of

---

<sup>294</sup> *R v Mayers and others v R* [2009] 1 WLR 1915 (12 December 2008) 1921. See also Crown Prosecution Service, *The Director’s guidance on witness anonymity 2009* (UK) [11]; this includes: potential relationships to the victim or the defendant, past convictions or dishonesty in the police investigation or any other reasons to believe that the witness may be untruthful in its statement.

<sup>295</sup> See for example *R v Glasgow* and *R v Bahmanzadeh*, which were both included in the appeal of *R v Mayers and others v R* [2009] 1 WLR 1915 (12 December 2008). In both cases the complaint was rejected as the anonymous witness was not considered as decisive and the defence was able to cross-examine to test the accuracy of the testimony; see also *Donovan and another v R* [2012] EWCA Crim 2749 (29 November 2012): in this case the conviction was quashed on appeal as the anonymous witness was considered decisive and there were doubts about the credibility of the witness.

<sup>296</sup> While the *Criminal Justice Act 2003* (UK) could theoretically be drawn upon, its relevant provisions, ss 114 and 116, setting out the cases in which hearsay evidence is admissible, are very unlikely to apply in national security cases.

<sup>297</sup> In *Al-Khawaja and Tahery v the United Kingdom* [ECtHR] Applications nos 26766/05 and 22228/06 (15 December 2011) [46], [49] and [137], the ECtHR referred both to *Davis* and the *Coroners and Justice Act 2009* (UK); see also *R v Horncastle and Others* [2010] 2 AC 373, 441: “The critical question is whether, in either case [anonymous and absent witnesses], the demands of a fair trial require that a sole or decisive test should apply regardless of the particular circumstances and, in particular, regardless of the cogency of the evidence.”

‘absent witness’ evidence (although prima facie hearsay) is to ascertain its reliability, as it potentially undermines the defendant’s RTF. This is particularly the case where the absent witness’ testimony is the ‘sole or decisive’ evidence against the defendant.<sup>298</sup> In *Horncastle*, the UK Supreme Court addressed this particular question and rejected the ECtHR’s strict approach to the ‘sole or decisive’ rule<sup>299</sup> on the ground that it lacked a proper justification.<sup>300</sup> It held that since the ultimate aim is to guarantee safe convictions, there is scope for exceptions provided that reliability is otherwise guaranteed.<sup>301</sup>

The unanimous decision in *Horncastle* thoughtfully engaged with the ECtHR’s case law, suggesting that the Supreme Court was seeking an ongoing dialogue with Strasbourg over the scope of the RFT under art 6.<sup>302</sup> The case of *Al-Khawaja and Tahery*<sup>303</sup> allowed the ECtHR the opportunity to respond and although in substance the arguments put forth in *Horncastle* were dismissed,<sup>304</sup> the ECtHR did not insist on strict application of the ‘sole or decisive’ rule. Observing that it was never understood to be absolute, exceptions to the rule were held to be permissible under art 6 provided that any disadvantages suffered by the defence are counterbalanced by ensuring the

---

<sup>298</sup> Similarly to s 89(2) *Coroners and Justice Act 2009* (UK), the fact that the case is solely or to a decisive extent based on the absent witness is just one criteria for the judge to consider, albeit not determinative. Under s 125(1) *Criminal Justice Act 2003* (UK) the court must only direct the jury to acquit the defendant or discharge the jury for a retrial, where the decisive statement is *in addition* considered unconvincing. Hence, under both sets of statutory provisions, the overall fairness of trial may still be upheld in cases provided that reliability is sufficiently demonstrated or tested by the defendant.

<sup>299</sup> For example *Luca v Italy* [ECtHR] Application no 33354/96 (27 February 2001) [40]. Which was affirmed in the Chamber’s decisions of *Al-Khawaja and Tahery v the United Kingdom* [ECtHR] Applications nos 26766/05 and 22228/06 (20 January 2009) [36]. For a discussion of these cases see above at 4.3.1.1.

<sup>300</sup> *R v Horncastle and Others* [2010] 2 AC 373 (9 December 2009) 433 and 453.

<sup>301</sup> According to the Supreme Court these safeguards are now provided by the *Criminal Justice Act 2003* (UK). See *R v Horncastle and Others* [2010] 2 AC 373 (9 December 2009) 438 and 455. The Supreme Court also referred to other common law countries, including Australia, which do not apply the ‘sole or decisive’ rule. See *Ibid*, 439 and 459 (Annex 1).

<sup>302</sup> Brice Dickson, *Human rights and the United Kingdom Supreme Court* (Oxford University Press, 2013) 214; see also *R v Horncastle and Others* [2010] 2 AC 373 (9 December 2009) 432.

<sup>303</sup> *Al-Khawaja and Tahery v the United Kingdom* [ECtHR] Applications nos 26766/05 and 22228/06 (15 December 2011).

<sup>304</sup> *Ibid*, [129]-[142].

reliability of the evidence.<sup>305</sup> Given their similarity, the ECtHR's implicit confirmation of the Supreme Court's approach to absent witnesses can likely be expected to also apply in relation to the evidence of anonymous witnesses.

### 6.3.2 The use of edited evidence in Australia

In Australia, all types of evidence adduced in an edited format to protect the interest of national security is now largely regulated by the NSIA. The statute allows for the introduction of edited documents, as well as the suppression of sensitive information concerning witnesses. In cases where the NSIA does not apply, the common law and more recently, specific legislation also allows the use of anonymous witnesses in particular situations. Under the common law, exceptions to the general rule (that a defendant may confront and cross-examine prosecution witnesses) continue to be governed by the doctrine of PII. Similar to the UK, although there is no general rule in Australia that would exclude redacted documents missing *irrelevant* information, where *relevant* information is withheld, PII is attracted and the documents are deemed inadmissible.<sup>306</sup>

#### 6.3.2.1 Edited evidence under the NSIA 2004

As mentioned above, in response to the conflict prompted by *Lappas*, one of the main objectives of the NSIA was to allow the admissibility of edited evidence in criminal procedures.

When issuing a non-disclosure certificate under the NSIA, the Attorney-General now has the options to request the partial disclosure of a document. The NSIA expressly

---

<sup>305</sup> *Ibid*, [147]. For a more detailed discussion see Mike Redmayne, "Hearsay and human rights: *Al-Khawaja* in the Grand Chamber" (2012) 75(5) *Modern Law Review* 865.

<sup>306</sup> *Evidence Act 1995* (Cth), s 134.

identifies the following options as acceptable ways of editing evidence: (i) deleting sensitive information; (ii) deleting sensitive information, while attaching a summary of the concerned information; or (iii) deleting information and attaching “a statement of facts that the information would, or would be likely to, prove”.<sup>307</sup> The content of the certificate will be examined at the s 31 hearing,<sup>308</sup> and, if the court makes an order, the prosecution will be able to admit and rely on the edited document, rather than having to choose between adducing or suppressing the whole document.<sup>309</sup>

Where witness evidence is concerned, the Attorney-General can issue a certificate requesting that a particular witness not be called.<sup>310</sup> Although not expressly mentioned in the NSIA, the legislation has been interpreted to allow the certificate to alternatively request the suppression of a witness’ *identity*. This can be achieved by screening or placing restrictions on particular questions directed to the witness.<sup>311</sup> Again, instead of seeking a certificate, the parties can also agree to such measures under s 22 NSIA.

At the time of its enactment, concerns were voiced that the NSIA would be a ‘gateway’ to using secret evidence in criminal proceedings.<sup>312</sup> The Government denied that this was a risk, and thus far, there are no indications that the prosecution has attempted to interpret the provisions in such a fashion.<sup>313</sup> Nonetheless, the increased scope for adducing edited evidence in criminal proceedings, particularly in the form of summaries or statements of facts, comes close to sanctioning convictions based on secret evidence. These measures raise concern not only as to the reliability of the edited evidence, but

---

<sup>307</sup> NSIA, s 26(2)(a)(i)-(iii).

<sup>308</sup> See above at 6.2.3.2.

<sup>309</sup> NSIA, s 31(2)-(3).

<sup>310</sup> NSIA, s 28(2).

<sup>311</sup> *R v Lodhi* [2006] NSWSC 596 (15 March 2006) [59]; see also *Lodhi v R* [2006] NSWCCA 101 (4 April 2006). In *Lodhi* an order was made that certain ASIO witnesses would be screened from everyone except the court and the legal representatives.

<sup>312</sup> Julian Burnside, “The Dreyfus affair” (2006) 137 *Victorian Bar News* 29, 31; see also Emerton, above n 179, 129.

<sup>313</sup> Walker, above n 207, 125, 140.

also the difficulties, which the defendants experience, in challenge its admissibility. An important safeguard is that the NSIA does not allow the prosecution to withhold sensitive evidence from the judge. Donaghue, who has appeared as counsel for the Commonwealth in several terrorism cases, has pointed out that “the accuracy and adequacy of any summary of statement of facts is subject to verification by the court in any proceedings relating to the certificate”.<sup>314</sup> Despite this important safeguard, some sort of ‘judgment’ as to the evidence’s quality and effect must be made, which, however, may be just *one* possible interpretation of the document. Without knowing the content of the information personally, any interpretation as to its importance is extremely difficult for a defendant to challenge, and for a jury to assess. In the INSLM’s report on the NSIA, Bret Walker SC preferred the approach of the *Classified Information Procedure Act 1980* (US) (CIPA) adopted in the US,<sup>315</sup> which includes an additional safeguard that edited evidence should only be allowed by the court, if the defendant has “substantially the same ability to make his defence as would disclosure of the specific classified information.”<sup>316</sup>

The question then arises as to whether the application of the NSIA will avoid encountering such ‘stalemates’ as arose in *Lappas*.<sup>317</sup> In *Lappas* the redacted document was held to be covered by PII and as such, was not admissible in accordance with s 134 EA. The NSIA could address the issue of admissibility. However, Mr Lappas never conceded that the content of the leaked documents would have been useful to a foreign power. The prosecution claimed that the sensitive character of the document would allow an inference to prove intent regarding this fact. Gray J held that the defendant *must* have an opportunity to challenge the claim that the document permits such

---

<sup>314</sup> Donaghue, In 230, 91.

<sup>315</sup> Walker, above n 207, 146.

<sup>316</sup> *Classified Information Procedure Act 1980* (US), s 6(c).

<sup>317</sup> For a discussion of the *Lappas* case see above at 6.2.3.1.



inference.<sup>318</sup> Hence, even if the edited document – whether redacted or summarised – would be admissible, as long as the relevant parts are not disclosed, this opportunity would be equally denied under the NSIA.<sup>319</sup> On this analysis, it is highly likely that even applying the provisions of the NSIA, the court in *Lappas* would have reached a similar outcome. Emerton observed that the court in *Lappas* granted a stay *not* because of their ruling on disclosure, but rather because the prosecution had failed to prove its charges.<sup>320</sup> The only way to avoid such a situation would be to rely on suppressed evidence, ie granting the use of secret evidence. While edited evidence is now admissible, where it cannot be properly tested due to its altered format, a conviction should not, as a matter of fairness, be permitted.

### 6.3.2.2 Anonymous witnesses under the common law

Until the 1990s, the Australian common law recognised only a limited judicial power to permit the use of anonymous witness evidence. The leading authority on this point was the Queensland case, *Ex parte Gibson*.<sup>321</sup> In this case, the Magistrate did not consider himself competent to make an order that would conceal the witness' identity from either the court, the defendant or the defendant's legal representatives, as he believed it would constitute a denial of natural justice.<sup>322</sup> The decision particularly relied upon the authority of the New Zealand case of *Hughes*,<sup>323</sup> and aligns very much with the findings in *Davis*.<sup>324</sup> However, the decision was not followed in a number of other Australian

---

<sup>318</sup> *R v Lappas & Dowling* [2001] ACTSC 115 (26 November 2001) [21].

<sup>319</sup> *Ibid*, [14], [24].

<sup>320</sup> Emerton, above n 179, 146.

<sup>321</sup> *R v Stipendiary Magistrate at Southport; ex parte Gibson* [1993] 2 Qd R 687 (9 December 1991).

<sup>322</sup> *Ibid*, 690 (Williams J). The case that was primarily concerned with the question of whether an undercover officer was an informer within the meaning of the *Drugs Misuse Act 1986* (Qld) formerly ss 46-48, now ss 119-121.

<sup>323</sup> *R v Hughes* [1989] 2 NZLR 129.

<sup>324</sup> See above at 6.3.1.2.

jurisdictions, and provoked legislative reform in Queensland to permit undercover officers to testify anonymously.<sup>325</sup>

In the Victorian case of *Jarvie*, the CA overruled a lower court decision that reached a similar conclusion to that in *ex parte Gibson*. The CA held unanimously that a magistrate has the jurisdiction to permit undercover police officers to testify anonymously during committal proceeding.<sup>326</sup> This power is subsumed within the PII doctrine, and is justified by the same rationale that allows courts to suppress the identity of police informers in the public interest. Manifestly, there is a public interest in maintaining both an undercover police officer's personal safety and ability to undertake covert operations.<sup>327</sup> To resolve the tension between this public interest and the RFT, the CA held that a balancing approach must be applied.<sup>328</sup> Importantly, Brooking J clarified that the balancing approach under the PII doctrine not only applies to undercover officers, but needs to be undertaken for all witnesses where disclosure of their identity would place them 'at risk'.<sup>329</sup>

Reaching the same conclusion in *Gee*,<sup>330</sup> the Supreme Court of South Australia granted anonymity to a witness who was neither an informer, nor an undercover police officer, but who otherwise would not have testified.<sup>331</sup> In support of this decision, Gray J relied

---

<sup>325</sup> Part 2 Division 5, *Evidence Act 1977* (Qld). The provisions allow the head of agencies to issue a certificate to protect the identity of a covert operative. The court may make orders it sees fit to protect the officer's identity. More generally, Queensland police officers cannot be required to disclose information, if that would prejudice an investigation or the general effectiveness of the law enforcement, or jeopardises a confidential source unless disclosure is necessary for the fairness of the trial or in the public interest. See *Police Powers and Responsibilities Act 2000* (Qld), s 803.

<sup>326</sup> *Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1VR 84, 91.

<sup>327</sup> *Ibid*, 88, 91. Cf *Van Mechelen and others v the Netherlands* [ECtHR] applications nos 21363/93, 21364/93, 21427/93 and 22056/93 (23 April 1997) discussed above at 4.3.1.1.

<sup>328</sup> *Ibid*.

<sup>329</sup> *Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1VR 84, 99.

<sup>330</sup> *Gee v Magistrates Court (SA)* (2004) 89 SASR 534 (1 October 2004).

<sup>331</sup> However, it is important that the fact of the witnesses being threatened is established on a solid basis: *Ibid*, 556-57.

on PII authorities rather than on case law dealing with anonymous witnesses.<sup>332</sup> In contrast to Lord Bingham's judgment in *Davis* that recognised limited exceptions to the principle of confrontation and the right to confront one's accusers,<sup>333</sup> Gray J's understanding of the principle in *Gee* is considerably narrower. In his Honour's reasons, the DPP - rather than the witness - is the accuser, who the defendant has a right to confront. In order to retain the fairness of the trial, the DPP only has a duty to disclose the case to such an extent that it can be met by the defence.<sup>334</sup>

In sum, in the absence of specific legislation, the Australian judiciary has seen fit to apply the doctrine of PII and the balancing approach to facilitate the reliance on anonymous witnesses in criminal proceedings. This is despite the fact that s 130 EA, which governs the PII doctrine and was intended to restate the common law position, does not expressly provide for the use of anonymous witnesses.<sup>335</sup>

### 6.3.3 Comparative observations

The scope for using edited evidence in criminal proceedings in Australia and the UK has expanded significantly. This expansion over the last two decades has been facilitated by the development of common law principles, as well as legislative reform.

---

<sup>332</sup> Gray J referred in particular to referred to *Sankey v Whitlam* where Stephen J noted "relevant aspects of the public interest are not confined to strict and static classes." Stephen J himself referred to Lord Hailsham in the British case of *D v The National Society for the Prevention of Cruelty to Children* [1978] AC 171 (2 February 1977), where he stated that "the categories of public interest are not closed."

<sup>333</sup> *R v Davis* [2008] 1 AC 1128, 1144. Lord Bingham endorsed Lord Hutton in *R (Al-Fawwaz) v Governor of Brixton Prison* [2002] 1 AC 556 (17 December 2001).

<sup>334</sup> *Gee v Magistrates Court (SA)* (2004) 89 SASR 534, 553 (Gray J).

<sup>335</sup> Finally, it should be mentioned that Part 3.2 *Evidence Act 1995* (Cth) now comprehensively set out the rules about the use of hearsay and thus of absent witnesses. However, as stated above, the scope for suppressing of sensitive information under these provisions is limited. In particular, under s 65 *Evidence Act 1995* (Cth) a representation of a person is admissible, if that person is unavailable and the representation was made when made in circumstances "that make it highly probable that the representation is reliable". Both aspects are difficult to meet. First, a person, who requires protection, is not unavailable. An argument to same effect has been made in *Lappas* in relation to documents and has been rejected. See *R v Lappas & Dowling* [2001] ACTSC 115 (26 November 2001) [13]. Secondly, it would be difficult to prove reliability, if in addition to the absence of the witness parts of the representation would be withheld in the interest of national security.

It is now possible in Australia and the UK to preserve the anonymity of witnesses in criminal trials, protecting both the individual and their families from repercussions, as well as promoting the public interest in facilitating ongoing police operations.

In Australia, under both the common law and NSIA, judges must balance the interests involved in any non-disclosure decision. By contrast, in the UK, courts must apply a number of statutorily mandated conditions, following a seemingly more principled approach. In striving for a more coherence in non-disclosure decisions, judges in the UK have adopted the proportionality *sui generis* approach, consistent with the ruling in *R v H and C*, as well as ECtHR jurisprudence. Nonetheless, the decisions concerning the ‘sole or decisive’ rule demonstrate that UK courts retain some flexibility and edited information can be admitted where its reliability is considered to be sufficiently strong. Whether this qualification operates as an additional corrective (or ‘compensatory’ measure), or simply reverts to a traditional balancing-type approach applied in PII cases, remains to be seen.

In relation to edited documents, Australia has more options in place, allowing the prosecution to submit summaries of redacted documents as well as a statement of facts of what the suppressed information would prove or be likely to prove. Whether this presents an advantage to the prosecution in criminal proceedings is still questionable. In all instances where edited documents are used, the prosecution must persuade the trier of fact that despite the alterations, the evidence is both accurate and credible. While credibility may be assessed and challenged with regard to the circumstances surrounding the document’s creation, any summaries or statements of fact may reflect a distorted, biased interpretation making it difficult to assess their accuracy. Judicial supervision over admission of edited documents can provide an important safeguard, however the approval of the edited document is still based on the judge hearing only

one side. A jury, who must be convinced of guilt beyond reasonable doubt, may be unsure of how to assess the value of edited evidence. This is particularly dangerous in the absence of an additional corroboration requirement. Australia has never endorsed an equivalent to the ‘sole or decisive’ rule. Any such consideration would only form part of the court’s general duty to protect fairness of the trial, and would only serve as one relevant factor (among others) to be considered in the balancing exercise.

Despite recent developments in the UK, suggesting that the ‘sole or decisive’ rule has been relaxed, it is submitted that anonymity is an exception permissible only in situations where reliability is clearly demonstrated, and the defendant is afforded an opportunity to challenge the evidence. In terms of developing and shaping the law in this area, the courts in the UK have been much more active than their Australian counterparts. There have been a number of high profile cases in the UK, which closely engaged with the rights of the defendant. As noted above, the productive and ongoing dialogue between the UK Supreme Court and the ECtHR,<sup>336</sup> has caused the UK judiciary to engage and think critically with the standards of fairness required (under the common law, specific legislation and art 6 ECHR) in cases where evidence cannot be properly tested by the defendant. It is unlikely that the UK Supreme Court, without the need to justify deviation from settled ECtHR case law on art 6, would have engaged to the same extent with this issue in *Horncastle*. While it remains to be seen how exceptions to the ‘sole or decisive’ rule will apply and evolve over time, the close evaluation of new legislation and the discussion of processes have strengthened the fundamental values argued for in this thesis: namely, legitimacy, clarity and transparency.<sup>337</sup>

---

<sup>336</sup> See Marny Requa, “Absent witnesses and the UK Supreme Court: judicial deference as judicial dialogue?” (2010) 14(3) *International Journal of Evidence and Proof* 208.

<sup>337</sup> See above at 4.4.

With a limited pool of appeals in Australia, it is unsurprising that there have been few opportunities for higher courts to refine and develop these rules and principles. Despite Executive concerns over the decision in *Lappas*, the NSIA can hardly be described as a ‘demand-driven’ measure. Rather, it must be considered to a large extent to be a political and symbolic response to the heightened sense of insecurity within government following 9/11. The fact that the onerous NSIA processes are routinely bypassed by ‘consensus’ between the parties underscores the symbolic rather than instrumental importance of the reform. Although the NSIA now permits the wide use of edited evidence, there is no indication that it constitutes a significant break from the established common law approach. In fact, the judicial preparedness to defer to the Executive on matters of national security is matched by their resistance to lowering the threshold of RFT, and what is considered to be a miscarriage of justice.

#### **6.4 – Comparative aspects between Australia and the United Kingdom**

The ‘golden rule’ in criminal law, that all relevant evidence must be produced, is under threat in both Australia and the UK from an expanding range of public interest exceptions, including, most significantly for this thesis, the public interest in suppressing sensitive information on national security grounds.

In relation to the suppression of unused information, this expansion has occurred through extending the doctrine of PII from civil proceedings into the realm of the criminal proceedings. While originally there were few specific common law rules governing the suppression of information pertaining to certain classes of evidence, such as police informers, it is now accepted that the classes that justify non-disclosure are not closed, and that courts have a duty to balance these interests with established principles of fairness. To provide further guidance to courts in how to resolve, and prioritise these interests, parliaments have increasingly legislated into this field. The law has moved beyond a binary determination of whether to ‘admit’ or ‘exclude’ evidence in the public interest, and now encompasses ‘compromise’ strategies such as permitting the use of edited evidence or summaries. Despite increased legislative guidance and alternatives to full disclosure, judges continue to attach considerable weight to the fundamental rights of the defendant (RFT), in particular the principle of confrontation, when deciding whether to suppress (wholly or partially) sensitive information. In determining whether (or to what extent) that evidence should be suppressed, the courts must determine first, the relevance of that evidence and whether it can be excluded in the public interest without risking an unsafe conviction; and secondly, the reliability of any evidence in its edited or summary form. Although relevance and reliability are generally safeguarded by adversarial procedures, proceedings concerning sensitive information limit the scope

for proper examination, making the process of arriving at a non-disclosure decision crucial.

While legal developments in this field share similarities both in the UK and Australia, there are differences in how the rules – including safeguards - have expanded, the methodology applied in non-disclosure decisions, and the extent of involvement of the defendant in the decision-making process. These differences often hinge upon different understandings of the RFT, and the extent to which limitations are legitimate and permissible in the public interest. In the UK, PII is still governed by the common law, which has been strongly influenced by both high profile miscarriage of justice cases, as well as the growing influence of ECtHR's case law on art 6. Although legislation has played a limited role, it has been relied upon to both clarify and extend the common law in the area of anonymous witness evidence. Overall the courts have been actively engaged in locating compromise solutions that recognise the public importance of protecting sensitive information as well as defining and upholding the scope of defendant's RFT. In Australia, the courts have played a less prominent role in shaping this field of law. One of the main reasons for this more limited judicial role was that once the overarching PII principles were imported into criminal proceedings, Australian courts have not engaged in further doctrinal refinement. The EA was intended to reflect the existing common law, and the NSIA, although facilitating the admissibility of edited evidence, has been interpreted to align with the predominant balancing approach under the common law. Although the Australian courts could have outlined a clearer structure for the balancing approach (as occurred in the UK), further judicial development of the fair trial standard has been resisted. Such a clarification has neither been considered to be part of their constitutional duty nor consistent with their understanding of the separation of powers, which requires Parliament to engage in such reforms. In a



practical sense, the limited number of appeals contesting the law in the field in Australia also provided the courts with fewer opportunities to test, refine and develop legal doctrine.

There are also differences in terms of the methodology applied to non-disclosure decisions in the UK and Australia. Over time, the UK courts abandoned the balancing model, replacing 'blackbox' decision-making with a more transparent and principled approach. Although principles *per se* are not foreign to the common law, the courts in fact applied the novel 'proportionality *sui generis*' approach advocated by ECtHR. Even in cases concerning anonymous witnesses, where legislation has replaced the common law, the CJA 2009 requires that the decision requires compliance with three specific conditions, rather than the traditional common law balancing approach.

In Australia, both the common law and legislation governing non-disclosure require the courts to engage in a balancing exercise. Although fairness is always a consideration, there is no clear guidance on how to weigh each of the competing public interests. This has meant that Australian courts have tended to follow the government's assessment of the document's sensitivity over the public interest in upholding the RFT. However, the NSIA provision 'tilting the balance' in favour of security in non-disclosure applications has been 'read down' by the courts. As a result, non-disclosure is now 'the rule' unless the interests of justice require that disclosure be ordered to avoid a miscarriage of justice - a threshold that remains poorly defined in non-disclosure cases. But the threshold for preventing a miscarriage of justice, which serves to protect the integrity of the court, is substantially lower than what is required to protect the RFT as interpreted by the ECtHR. As such, art 6 ECHR has been interpreted to require at least some involvement of the defendant in the hearing, for the purpose of counterbalancing any of the limitations placed on the right. While the NSIA certainly leaves room for such an

approach, no explicit criteria or conditions have been laid down to determine what is required to ensure the fairness of the trial. This Australian approach therefore differs from a ‘proportionality *sui generis*’ approach under the ECHR, where (i) limitations are based on the principle of strict necessity, and (ii) the ‘golden rule’ of disclosure means that suppression of information is instead treated as the exception rather than the rule. Admittedly, it is possible in national security cases that the test of strict necessity is easily met given the traditional deferential attitude by the judiciary in such cases. That said, there are fundamental differences in relation to how Australian and UK courts approach fairness. The principled approach aims at a minimising the limitation to the RFT (proportionality in the narrow sense), which may be achieved by use of compensation measures. In contrast, balancing factors all competing interests into a single overall judgement as to whether the necessary standards of fairness have been satisfied. Hence, while balancing addresses a minimum standard directly, the principled approach is based on more elaborate and structured decision-making, where compliance with steps and conditions is mandated to ensure that the minimum standards of fairness are never compromised. The starting point of the principled approach is the RFT, which demonstrates a much stronger commitment to respecting, to its full extent, the rights and interests of defendant.

Another difference in their decision-making methods is that in the UK, courts have a distinct duty to keep any non-disclosure order under continuous review. Although there is no similarly defined corresponding obligation in Australia, it is conceivable that such an obligation could be read into s 19 NSIA, in light of the overarching judicial duty to stay proceedings where they would otherwise result in a miscarriage of justice.

A related point is how the defendant is informed of, and included in, these processes.

Under the NSIA, any hearing involving a non-disclosure decision must necessarily be

held *in camera* and, on request, *ex parte*. Although the UK courts have retained discretion in this regard, in exceptional circumstances the defendant may not even be informed of the *ex parte* hearing (type III). As discussed above, only the UK's principled approach explicitly requires the court to consider adopting 'compensatory measures' where limitations have been imposed upon the defendant's RFT. These considerations have centred on the use of special advocates.<sup>338</sup> While courts can similarly appoint special advocates in Australian proceedings,<sup>339</sup> this measure is considered to be available only in "exceptional circumstances".<sup>340</sup> The need for special advocates in the Australian context may be less pressing, as defence counsel are permitted to attend a closed hearing, where they possess the appropriate security clearance. This approach, however, raises serious ethical issues for the defence lawyer, who is obliged to withhold certain information from their client.

In terms of protecting human rights, the UK has benefited from falling under the scrutiny of the ECHR. In fact, the Supreme Court's more active engagement with art 6 jurisprudence may be attributable to the requirement imposed by s 2 HRA to interpret all legislation in conformity with the ECHR.<sup>341</sup> This is not to say that Australian courts do not have access to similar interpretive principles.<sup>342</sup> Indeed, the UK courts have often highlighted the common law origins of rights and principles now championed by the ECtHR.<sup>343</sup> The judicial inertia in Australia to further develop the balancing approach in

---

<sup>338</sup> For more detailed discussion about the use of special advocates see below at 7.2.2.

<sup>339</sup> *R v Lodhi* [2006] NSWSC 586 (21 February 2006).

<sup>340</sup> *Ibid.*, [45]. In *Lodhi* the appointment of a special advocate was considered as premature. See also Whealy, above n 226, 750-751.

<sup>341</sup> Whether this can be interpreted as a true dialogue between the branches of government as well as between the British courts and the ECtHR is beyond the scope of this thesis. For discussion see for example Alison Young, "Is dialogue working under the *Human Rights Act 1998*?" (2011) October *Public Law* 773; Tom Hickman, "The courts and politics after the Human Rights Act: a comment" (2008) Spring *Public Law* 84; Richard Clayton, "Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the *Human Rights Act 1998*" (2004) Spring *Public Law* 33; For the main provision of the HRA see also above 5.1.1.

<sup>342</sup> See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42

<sup>343</sup> The Scott Report equally addressed the common law rather than the ECHR.

non-disclosure decisions can be attributed in part to the judges' understanding of their role in Government. Developing the scope of rights by interpreting legislation in accordance with the principle of proportionality is generally perceived as an encroachment into executive power.<sup>344</sup> Interestingly, critics of the ECHR system in the UK often flag this point. The fact that Australian courts are reluctant to engage in defining the scope of defendants' rights will not be an issue when there is a culture of rights protection prevalent in Parliament when new legislation is enacted.

Unfortunately, although beyond the scope of this thesis, it is clear that there is inadequate scrutiny of the effect of legislation on human rights in Australia. This is illustrated in provisions of the NSIA which not only prescribe mandatory closed hearings and allow edited evidence to be adduced, but by 'tilting the balance' also send a clear message to trial judges to follow non-disclosure requests in the public interest of national security, rather than maximise the protection of the RFT.

The balancing approach *per se* does not contradict the ECHR. Where applied, the ECtHR would review each individual case to determine whether relevant issues had been addressed. The prominent requirement in the ECtHR's art 6 case law - that the judge remains in control over proceedings - has been established in early Australian disclosure cases, and has not (yet) been abolished by Parliament. Even the statutory requirement for judges to 'tilt the balance' in favour of security has been read down to avoid placing limitations on the court's ability to make balanced non-disclosure decisions.

It may be argued that the differences between the UK and Australian disclosure frameworks are largely semantic, as ultimately, judges in both jurisdictions have the

---

<sup>344</sup> Gerald Brennan, "The Parliament the executive and the courts: roles and immunities" (1997) 9(2) *Bond Law Review* 136.

power to determine whether the trial, as a whole, has been conducted fairly. However, having a clear process that maximises the extent of disclosure, requiring justification for any non-disclosure and considering counter-balancing measures can avoid abuse, will strengthen the individual RFT, and promote the values of legitimacy, clarity and predictability in the law. All of these attributes are enormously important in times of insecurity and increasing pressure to secure convictions.



## Chapter 7: Sensitive information in quasi-criminal proceedings

The trend towards increased secrecy in criminal proceedings is also apparent in civil and administrative counter-terrorism proceedings. The latter proceedings do not end in the imposition of punishment following a finding of criminal guilt, but are justified by reference to other purposes such as prevention. Hence, rather than punishing a person for past behaviour, these civil and administrative measures aim at preventing conduct which may lead to a terrorist attack in the future, which is typically based on a risk assessment.<sup>1</sup> Given this difference, courts have generally held that a lower standard of fairness is acceptable in these proceedings than would ordinarily apply in a criminal trial.<sup>2</sup> This includes not only a lower standard of proof, but also relaxed rules of evidence, which can allow secret evidence to be admitted in *ex parte* proceedings.

The benefit of lowering fair trial standards is that the proceedings may be conducted with more speed and efficiency, which is essential where the resulting orders are intended to prevent imminent harm.<sup>3</sup> An alternative process, which would allow more rigorous scrutiny of evidence, would undermine the preventive purpose of such measures. However, in the context of counter-terrorism, the civil and administrative measures available have coercive effects not dissimilar to those applied in the criminal

---

<sup>1</sup> For example, the objective of the Australian CO regime is “to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act”; *Criminal Code Act 1995* (Cth), s 104.1.

<sup>2</sup> See for example *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46 (31 October 2007) [23]-[24] (Lord Bingham); Lord Hoffman in agreement at [48]; Baroness Hale agreeing at [65] and *Al Kateb v Godwin* (2004) 219 CLR 562 (6 August 2004); cf Douglas Husak, “Preventative detention as punishment? Some possible obstacles” in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the limits of the criminal law* (Oxford University Press, 2013) 178.

<sup>3</sup> See Packer, who characterized due process as obstacles. See Packer, Herbert, “Two models of the criminal process (1964) 113(1) *University of Pennsylvania Law Review* 1, 13.

justice system, with the potential to impose severe limitations on the liberties of individuals, such as preventive detention, house arrest or forced relocation. This creates a tension between the public interest in conducting speedy and efficient proceedings, and the general requirements of fairness, as discussed in Chapter 2.

Although one could assume that the differing rationales behind punishment and prevention would apply to distinct types of conduct, there is a considerable overlap between the situations that trigger preventive measures and criminal offences. Counter-terrorism laws have introduced a range of new preparatory, inchoate and status-based offences, covering a wide range of situations and behaviours that might also provide the legal and evidential basis for imposing preventative measures. In Australia, for example, providing training to, or receiving training from, a listed terrorism organisation is both a basis for a control order (CO),<sup>4</sup> and a criminal offence.<sup>5</sup> Because of this potential overlap, and coercive effect, these preventive measures have been labelled as ‘quasi-criminal’.<sup>6</sup> Moreover, breach of these civil orders is typically a *criminal* offence,<sup>7</sup> which further blurs the distinction between criminal, civil and administrative measures.

As these quasi criminal measures invoke a lower standard of proof and allow the wider use secret evidence, they may be preferred to criminal charge, where the prosecution

---

<sup>4</sup> *Criminal Code Act 1995* (Cth), s104.2 (2)(b).

<sup>5</sup> *Criminal Code Act 1995* (Cth), s102.5.

<sup>6</sup> In Australia, COs are even regulated with the *Criminal Code 1995* (Cth). For an overview of the civil/criminal law overlap in Australia see Simon Bronitt and Sue Donkin, “Australian responses to 9/11: new world legal hybrids?” in Aniceto Masferrer (ed), *Post 9/11 and the state of permanent legal emergency: security and human rights in counter terrorism* (Springer, 2012) 223, 231.

<sup>7</sup> Because these civil orders are tailored to restraining specific conducts of individuals, for example attending specific places of workshop, they have been described as a form of “personalised criminal law”: Roger Leng, Richard Taylor and Martin Wasik, *Blackstone’s Guide to the Crime and Disorder Act 1998* (Blackstone Press, 1998) 13. Although this description was coined in relation to Anti-Social Behaviour Orders (ASBO) in the UK, it applies equally to CT preventive measures, such as preventive detention and COs.



has to deal with the potential issues that sensitive information is either (a) inadmissible,<sup>8</sup> (b) admissible but cannot be disclosed under any circumstances on public interest grounds, and thus leaving the prosecution only with (c) admissible but weak evidence, which may not fulfilling the standard of beyond reasonable doubt.<sup>9</sup> As such, there is a real danger that civil and administrative measures will be favoured over criminal prosecution to achieve similar outcomes in a quicker and more efficient manner.<sup>10</sup> This potential for bypassing the criminal process and due process safeguards underscores the importance of extending analysing the use of sensitive information in these ‘alternate’ civil and administrative proceedings.

This Chapter concentrates on CO-type proceedings in Australia and the United Kingdom (UK), which are the most prominent form of administrative, preventative counter-terrorism measures.<sup>11</sup> While there are a number of different models, CO can be generally defined as an administrative measure (although reviewed or issued by a court), which allows a suspect’s behaviour to be controlled where it poses a danger to the public.<sup>12</sup> It is also worth pointing out that there is a general trend towards relying on preventative measures, which fall outside the usual criminal process, but limit the

---

<sup>8</sup> In the UK this includes the use of intercept evidence, which is not admissible in regular criminal trials. The general exclusion of intercept evidence from legal proceedings in s 17 *Regulation of Investigatory Powers Act 2000* (UK) has been expressly exempted for CO and TPIM hearings: see *Prevention of Terrorism Act 2005* (UK), sch para 9 and *Terrorism Prevention and Investigation Measures Act 2011* (UK), sch7 para 4(2); see also the *Thomas* case in relation to statements made under duress: *Jabbour v Thomas* (2006) 165 A Crim R 32, 34.

<sup>9</sup> See for example David Anderson QC, “Examination of witness” (Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, HC 495-I, 11 July 2012) 9 (Q 22). In Australia, the INSLM has emphasised that both insufficient evidence to prosecute, and sufficient, but highly sensitive evidence, cannot in itself be a justification for the CO regime as this would blatantly circumvent the criminal law. Rather COs must always be future orientated. See Bret Walker, “Independent National Security Legislation Monitor’s Declassified Annual Report” (20 December 2012) 31-33.

<sup>10</sup> Lucia Zedner, “Seeking security by eroding rights: the side-stepping of due process” in Benjamin Goold and Liora Lazarus (eds), *Security and human rights* (Hart Publishing, 2007) 257; check Joint Committee on HR 2006.

<sup>11</sup> Other measures are asset freezing and preventative detention. However, CO-type proceedings distinguish themselves, as they are the most severe in terms of both the degree of the limitation on liberty, as well as the lengthy time period they can be applied for.

<sup>12</sup> As there are now variations of CO proceedings. The term “control order-type proceedings” (CO-type) is used to describe of the variants that have been developed.

subject's personal liberty.<sup>13</sup> These developments have attracted both academic and public debate, with significant media attention in the UK focusing on Anti-Social Behaviour Orders (ASBOs)<sup>14</sup> and Sexual Offences Prevention Orders (SOPOs)<sup>15</sup>, and in Australia on indefinite detention for dangerous sexual offenders.<sup>16</sup> Some references will be made to wider developments in those related fields, and analogies will be drawn particularly to the case law governing the Australian CO regimes targeting organised crime, which are to a large extent based on the terrorism CO legislation. However, an in-depth analysis of the full range of preventative measures would exceed the scope of this thesis.<sup>17</sup>

The questions addressed in this Chapter differ from those asked in Chapter 6. In criminal trials, the focus is generally on the information needed to establish each element of the offence beyond reasonable doubt or to raise some doubt as to the defendant's guilt. Given that secret evidence can be taken into consideration when making a CO decision, these minimum guarantees of fairness are mostly irrelevant. In civil proceedings, questions of fairness hinge upon the extent to which the process may

---

<sup>13</sup> For a general analysis of preventive measures in the UK see Andrew Ashworth and Lucia Zedner, *Preventive justice* (Oxford University Press, 2014). Preventative measures have been equally applied in the area of health and safety, as well as immigration measures.

<sup>14</sup> *Crime and Disorder Act 1998* (UK), s 1. Upon conviction the ASBOs have been replaced by Criminal Behaviour Orders: see the *Anti-social Behaviour, Crime and Policing Act 2014* (UK).

<sup>15</sup> *Sexual Offences Act 2002* (UK), s 104.

<sup>16</sup> *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 13.

<sup>17</sup> Some types of preventative measures are imperfect analogies since they differ from counter-terrorism COs in their nature, legal set-up or the type of risk assessments applied. For example, anti-social or dangerous individuals are assessed on their past criminal/disorderly behaviour and psychological evaluation, rather than intelligence and secret evidence. See for example *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), ss 13, 44, 45. In immigration proceedings, secret evidence is regularly used to limit personal liberties based on risk assessments. However, from a legal perspective, a key distinction appears to be that the individual subject to these controls is not a citizen: see generally Rayner Thwaites, *The liberty of non-citizens: indefinite detention in Commonwealth Countries* (Hart Publishing, 2014). The use of secret evidence in ordinary civil proceedings must also be distinguished. Despite the fact that the claimant may suffer a disadvantage as a consequence of such proceedings, the state does not ostensibly apply its coercive powers in order to limit individual liberties. Therefore justifications for fair trial standards as a consequence of the use of coercive powers, as discussed in Chapter 2, are not applicable. Cf Ryan Goss, "Balancing away Article 6 in *Home Office v Tariq*: fair trial rights in closed material proceedings" in Martin *et al* (eds), *Secrecy, Law and Society* (Routledge, 2015) 58. Goss criticises that making such distinctions causes inconsistencies in how the ECtHR and the UK Supreme Court's approach to the issues of fairness.

compromise the judge's independence and ability to exercise his/her discretion as to whether or not to suppress information, as well as the level of adversariness and involvement of the controlee in that process.

After explaining the main mechanism of CO-type proceedings in the UK and Australia, this Chapter will separately assess the extent to which secret evidence can be used in both jurisdictions. It will then compare (a) the position of the controlee in the proceedings, (b) the requirements of an adversarial process, and (c) the judicial approach to ensuring the fairness of the proceedings, to determine (d) the levels of legitimacy, clarity and predictability of the measures.<sup>18</sup>

---

<sup>18</sup> There is a growing body of scholarship offering general legal comparisons between UK and Australia in this field. While many of these comparisons focus on the usefulness, efficiency and legality of CO, the validity of these findings must be regarded with some degree of caution due to the high number of variables between the Australian and the UK legal systems: see in particular Clive Walker, "The reshaping of control orders in the United Kingdom: time for a fairer go, Australia!" (2013) 37 *Melbourne University Law Review* 143; Lisa Burton and George Williams, "What future for Australia's control order regime?" (2013) 24 *Public Law Review* 182; Andrew Lynch, "Control orders in Australia: a further case study in the migration of British counter-terrorism law" (2008) 8(2) *Oxford University Commonwealth Law Journal* 159; Andrew Lynch, Tamara Tulich and Rebecca Welsh, "Secrecy and control orders: the role and vulnerability of constitutional values in Australia and the United Kingdom" in David Cole, Frederico Fabbrini and Arianna Vedashi (eds), *Secrecy, national security, and the vindication of constitutional law* (Edward Elgar Publishing, 2013) 154; Bronwen Jagers, "Anti-terrorism control orders in Australia and the United Kingdom: a Comparison" (Research Paper No 28, Parliamentary Library, Parliament of Australia, 29 April 2008); Sue Donkin, *The Evolution of Pre-emption in Anti-Terrorism Law: A Cross-Jurisdictional Examination* (Doctor of Philosophy thesis, Griffith University, Brisbane, 2011) 106; Sasha-Dominik Bachmann and Matthew Burt, "Control orders post 9/11 and human rights in the United Kingdom, Australia and Canada: a Kafkaesque dilemma?" (2010) 15(2) *Deakin Law Review* 131.

## 7.1 General aspects of control orders<sup>19</sup>

In the UK, the CO regime was introduced by the *Prevention of Terrorism Act 2005* (UK) (PTA) to replace the indefinite (immigration) detention regime,<sup>20</sup> which had been declared incompatible with arts 5 and 14 ECHR by the House of Lords.<sup>21</sup> The *Civil Procedure (Amendment No. 2) Rules 2005* (UK), which accompanied the PTA, set out the procedure to govern closed hearings. However, this procedure was not novel in the UK. Closed hearings had previously been introduced in matters before the Special Immigration Appeals Commission (SIAC) to overcome the problem of disclosing sensitive information that had formed the basis of a deportation order.<sup>22</sup> Since then, the procedures regulating these closed hearings have been adopted in a number of administrative processes involving sensitive information.<sup>23</sup> Rather than being creatures of statute, the requirements and safeguards ensuring that closed hearings are consistent with art 6 ECHR, have largely been developed by the courts. Even when the CO regime was replaced with Terrorism Prevention and Investigation Measures (TPIMs), to be more targeted and human rights-friendly,<sup>24</sup> the procedures governing the use of secret evidence remained in place.<sup>25</sup> Consequently, judicial rulings on the fairness of CO

---

<sup>19</sup> In the following section – unless further specified - the term “control order” will be used as a generic term, which covers also covers Terrorism Prevention and Investigation Measures (TPIMs).

<sup>20</sup> *Anti-Terrorism Crime and Security Act 2001* (UK), Part 4.

<sup>21</sup> *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004); Many of the detainees were subsequently put under COs.

<sup>22</sup> For further discussion see below at 7.2.

<sup>23</sup> It is now used by over 22 authorities dealing with sensitive information; see United Kingdom, *Parliamentary Debate*, House of Commons, 1 March 2010, vol 506, no 47, col 739 (Mr Andrew Dismore). For an overview of counter-terrorism prevention outside the criminal process see also Ashworth and Zedner, above n 13, 181.

<sup>24</sup> This was a result of the Home Office (UK), *Review of Counter-Terrorism and Security Powers: Findings and Recommendations* (Cm 8004, January 2011); see *ibid* at 3 and 6; see also United Kingdom, *Parliamentary Debate*, House of Lords, 5 October 2011, vol 730, col 1134 (Lord Henley, Minister of State).

<sup>25</sup> Now regulated in Part 80 of the *Civil Procedure Rules 1998* (UK).

procedures under the repealed legislation are still relevant for the current TPIM regime.<sup>26</sup>

The Australian Government introduced the CO regime into the *Criminal Code 1995* (Cth) (CC 1995) as a reaction to the London 7/7 bombings and the general perception of an increased threat from home-grown terrorism.<sup>27</sup> Although the UK regime served as a template, the Australian Parliament made a number of modifications, two of which are of particular interest. Firstly, whereas in the UK the court's function is limited to reviewing a Minister's decision to grant CO, in Australia the court *is* the issuing authority.<sup>28</sup> Secondly, the CC 1995 only expressly authorises the use of secret evidence during the interim stage of CO proceedings, with the implication that secret evidence is inadmissible in subsequent hearings that confirm (or revoke) the CO.<sup>29</sup> My analysis below, however, reveals this segregation is not complete, and that secret evidence (albeit in modified form) may still influence the final outcome of the confirmation hearing. While these two significant modifications appear to be designed to enhance both the adversarial nature and judicial oversight of these preventive measures, critics

---

<sup>26</sup> Given that the PTA was read down, ie interpreted in a way compatible with the HRA, rather than declared incompatible, it was possible to use the same process for the TPIM regime without concerns about a renewed challenge in this respect. See Home Office (UK), *Review of Counter-Terrorism and Security Powers: Findings and Recommendations* (Cm 8004, January 2011) 39. Although TPIMs are less severe, the High Court confirmed that the same requirements of art 6 ECHR apply. See *Secretary of State for the Home Department v CC* [2013] 1 WLR 2171, 2220.

<sup>27</sup> The actual need for such severe measures has been doubted and the introduction of the CO regime therefore has been regularly criticised. See Andrew Lynch, "Control orders in Australia: a further case study in the migration of British counter-terrorism law" (2008) 8(2) *Oxford University Commonwealth Law Journal* 159, 180; Andrew Lynch, "*Thomas v Mowbray*: Australia's 'war on terror' reaches the High Court" (2008) 32 *Melbourne University Law review* 1182, 1184.

<sup>28</sup> It is worth noting that both systems have been criticised for different reasons: the UK for not giving judges enough control to safeguard human rights and Australian for potentially violating the integrity of the judges by engaging to such a close extent in what is essentially an executive process. See Burton and Williams, above n 18, 182.

<sup>29</sup> In the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2015* (Cth), the Government proposed an amendment to the NSIA, which would explicitly allow the use of secret evidence in CO proceedings – including the confirmation stage. See in Schedule 15 of the Bill the proposed s 38J(2)(e) and (3)(d) NSIA. The legislation lapsed in April 2016 at prorogation of Parliament, but seems likely to pass in the future. The thesis explores the law as it stands at the time of writing. But while the proposed legislation would eliminate the ambiguity of the law in relation to the use of secret evidence, it would not alter the conclusions made in this thesis about the threats to the fair trial standards in CO proceedings in Australia.

have noted that the Australian legislation did not give sufficient weight to the distinctive constitutional arrangements in the UK,<sup>30</sup> in particular, the fact that the UK regime operates under the ECHR. Although these UK developments would have been hard for Australian law-makers to predict, the Australian CO regime has not since been amended, nor has its interpretation reflected the shifting approach taken in the UK following litigation under art 6 ECHR.

### *The main mechanisms of CO proceedings*

In Australia,<sup>31</sup> after having obtained the Attorney-General's consent, a senior police officer may request that an interim control order (iCO) be issued by the court in relation to a particular person.<sup>32</sup> The request can be based on a number of grounds, which can be divided into two categories:<sup>33</sup> the senior police officer

- suspects on reasonable grounds that the order would substantially assist in preventing
  - a terrorist act; or
  - the provision of support for or the facilitation of a terrorist act; or
- suspects on reasonable grounds that the person has
  - provided training to, received training from or participated in training with a listed terrorist organisation; or
  - engaged in a hostile activity in a foreign country; or
  - been convicted in a foreign country of an terrorism offence; or

---

<sup>30</sup> Lynch, Tulich and Welsh, above n 18, 163.

<sup>31</sup> For a more detailed description of the Australian CO regime see for example Burton and Williams, above n 18, 182; Jagers, above n 18; Lynch, above n 18, 159.

<sup>32</sup> *Criminal Code Act 1995* (Cth), s 104.3; issuing courts are the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia (*Ibid*, s 100.1)

<sup>33</sup> *Ibid*, s104.2 (2); in urgent cases the senior police officer can directly apply to the court without the consent of the Attorney-General.

- provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country.

Before issuing an iCO, the court must consider the available supporting material and be satisfied on the balance of probabilities: (1) that the ground claimed in the request is fulfilled;<sup>34</sup> and (2) that the measures requested are

“reasonably necessary, and reasonably appropriate and adapted, for the purpose of (i) protecting the public from a terrorist act; or (ii) preventing the provision of support for or the facilitation of a terrorist act; or (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.”<sup>35</sup>

A confirmation hearing is then to be held “as soon as practicable”.<sup>36</sup> While the iCO will in most cases be issued *ex parte*, the subsequent confirmation hearing is meant to be adversarial.<sup>37</sup> The CC 1995 provides an exhaustive list of measures the controlee can be subjected to, which range from ‘minor’ restrictions, such as an order to remain in the country or to be fingerprinted, to extremely intrusive measures, such as house arrest or

---

<sup>34</sup> *Ibid*, s 104.4 (1)(c).

<sup>35</sup> *Criminal Code Act 1995* (Cth), s 104.4 (1)(d); In doing so the court must also take the person’s personal circumstances into consideration.

<sup>36</sup> This is qualified by an overall time limit set by the legislation: the iCO must be served as soon as practical, but at least 48 hours before the confirmation hearing (s 104.12); the confirmation hearing must also be held as soon as practical, but no later than 72 hours after the iCO has been issued. (s104.5 (1A)); the senior AFP member who requested the CO must decide at least 48 hours before the time of the confirmation hearing (which has to be set in the iCO), whether he wants the CO to be confirmed or not (s 104.12A (1)); no CO can last longer than 12 months from the day the iCO has been issued (s 104.5 (1)(f)). However, the 12 months limit can be circumvented by making “successive control orders in relation to the same person.” (s104.16 (2)). Despite the apparent legislative intention that iCO proceedings would be expedited, none of the iCOs issued in Australia were confirmed quickly. Thomas’ iCO was valid for 12 months due to the legal challenge and Hicks’ iCO for three months, which was agreed to by Hicks in order to be able to properly prepare for the confirmation hearing. Two other iCOs expired after a year and one was confirmed after six months. The final iCO, issued 10 September 2015 has not been confirmed at the time of writing.

<sup>37</sup> While section 104.14 of the *Criminal Code Act 1995* (Cth) suggests an adversarial nature of the confirmation hearing, my analysis is highly critical of such a characterisation. See below at 7.3.1.

the wearing of a tracking device.<sup>38</sup> Any violation of a CO constitutes a punishable offence attracting up to 5 years imprisonment.<sup>39</sup>

In the UK, the original CO regime<sup>40</sup> was replaced by TPIMs in 2011.<sup>41</sup> The main differences between the two regimes concern the severity of the measures imposed.<sup>42</sup> As the grounds and mechanisms for issuing orders as well as the procedures governing the use of secret evidence have remained reasonably similar, a rigorous distinction between the CO and the TPIM regimes is not essential for the purposes of this thesis.<sup>43</sup> In contrast to the Australian regime, in the UK the Home Secretary may issue a TPIM provided the following conditions are met:<sup>44</sup> firstly, the Home Secretary must be satisfied on the balance of probabilities that the concerned individual is or has been involved in a terrorism-related activity; secondly, the Home Secretary must reasonably consider the measure to be necessary to protect the public and prevent the individual from further involvement in terrorism-related activities; finally, with the exception of cases requiring urgency, the Home Secretary must also seek permission from the

---

<sup>38</sup> *Criminal Code Act 1995* (Cth), s 104.5(3).

<sup>39</sup> *Ibid.*, s 104.27.

<sup>40</sup> Under that regime there were two types of COs: derogating and non-derogating ones. Derogating COs were assumed to impact on the rights of the individual in such a way that a derogation from art 5 ECHR would have been necessary. Such an order has never been issued and is therefore not relevant here. The term ‘control order’ in the UK context always refers to non-derogating ones.

<sup>41</sup> The Act received the Royal Assent on 14 December 2011. For a more detailed discussion of the TPIM system see for example Ben Middleton, “Terrorism Prevention and Investigation Measures: constitutional evolution, not revolution?” (2013) 77 *Journal of Criminal Law* 562; Walker, above n 18, 143.

<sup>42</sup> Changes in particular concern the maximum length a CO can remain in place, the limitation of measures a person can be subjected to and the stricter standard of proof. See also below Table 7.1. It should be noted that parallel to the *Terrorism Prevention and Investigation Measures Act 2011* (UK) another Bill was prepared containing more severe measures (*Enhanced Terrorism Prevention and Investigation Measures Bill*), which would essentially re-introduce all more severe measures previously available under the CO regime. The Bill is ready to be passed in case exceptional circumstances demand it. See further: Helen Fenwick, “Designing ETPIMs around ECHR review or normalization of ‘preventative’ non-trial-based executive measures?” (2013) 76(5) *Modern Law Review* 876.

<sup>43</sup> In the following, references are only made to the current regime. References to the *Prevention of Terrorism Act 2005* (UK) will only be made where the requirements differ significantly.

<sup>44</sup> *Terrorism Prevention and Investigation Measures Act 2011* (UK), ss 3(1)-(5). There is also a condition that the terrorism-related activity has to be “new”. This condition is only relevant in cases where the person has been previously subjected to a TPIM.



court.<sup>45</sup> While the court applies the principles of judicial review to assess whether the conditions have been satisfied, it can only refuse its permission where the Home Secretary's decision was "obviously flawed".<sup>46</sup> The threshold for obtaining the TPIM does not appear to be onerous, and there is no evidence of a court ever rejecting an application.<sup>47</sup> Although not mandatory, the 'permission' interim hearing is held *ex parte*.<sup>48</sup> After a TPIM has been issued, the court must engage in a mandatory review of the decision to ensure that the circumstances have not changed, and the conditions are still satisfied.<sup>49</sup> The legislation again directs that the principles of judicial review are to be applied,<sup>50</sup> and states expressly that the process must comply with art 6 ECHR.<sup>51</sup> Although under the repealed CO regime, the courts had interpreted their role in reviewing a CO as one requiring the application of "intense scrutiny",<sup>52</sup> the court is under an obligation to protect sensitive information and conduct the proceedings *ex parte*.<sup>53</sup> Finally, the TPIM Act 2011 exhaustively lists twelve measures that can be imposed by the Home Secretary.<sup>54</sup> An individual violating a TPIM may be liable to a maximum penalty of 5 years imprisonment.<sup>55</sup>

---

<sup>45</sup> *Ibid*, ss 3(5) and 6. The relevant courts are the High Court in England and Wales, the Outer House of the Court of Session (for Scotland) and the High Court in Northern Ireland (*Ibid*, s 30(1)).

<sup>46</sup> *Ibid*, s 6(3)(6)(7).

<sup>47</sup> Walker, above n 18, 162.

<sup>48</sup> See *Terrorism Prevention and Investigation Measures Act 2011* (UK), s 6(4); Walker, above n 18, 165.

<sup>49</sup> The date for the review hearing must be determined in a direction hearing, which itself is to be held within seven days after the TPIM has been served, unless the court decides otherwise. The direction hearing is generally also open to the controlee; see *Terrorism Prevention and Investigation Measures Act 2011* (UK), s 8. Within the review hearing the court can quash the order or any measure or give directions to the Home Secretary directions of how to alter the order (*ibid*, s 9(5)). If the court does not exercise any of these powers, it has to at least decide on the continuation of the order (*ibid*, s 9(6)).

<sup>50</sup> *Terrorism Prevention and Investigation Measures Act 2011* (UK), s 9.

<sup>51</sup> *Ibid*, sch 4 para 5(1).

<sup>52</sup> *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140 (01 August 2006) [65] (Lord Phillips CJ). Although the decision was made in relation to COs, the wording in the *Prevention of Terrorism Act 2005* (UK) and the *Terrorism Prevention and Investigation Measures Act 2011* (UK) is almost identical.

<sup>53</sup> See in particular *Terrorism Prevention and Investigation Measures Act 2011* (UK), sch 4 para 2; *Civil Procedure Rules 1998* (UK) pt 80.

<sup>54</sup> *Terrorism Prevention and Investigation Measures Act 2011* (UK), sch 1 part 1.

<sup>55</sup> *Ibid*, s 23.

Table 7.1 below offers a comparison of the main features of the CO regimes in Australia and the UK. It clearly shows that the original CO in the UK was not only the harshest one in terms of its extensive measures and a low standard of proof, but was also applied the most despite the obligation to prosecute if possible.

Table 7.1: comparison of control order regimes in Australia and the UK

	<b>Control Orders Australia</b>	<b>Control Orders United Kingdom<sup>56</sup></b>	<b>TPIMs United Kingdom</b>
Judicial involvement	Issuing authority	Reviewing authority	Reviewing authority
Standard of proof for issuing	Balance of probabilities	Reasonable suspicion	Reasonable belief / balance of probabilities <sup>57</sup>
Obligation to prosecute if possible	No	Yes	Yes
Use of secret evidence	At interim stage only	At any stage	At any stage
Special advocate for closed hearings	Possible	Mandatory	Mandatory
Severity of measure	12 exclusive measures <sup>58</sup>	No limitation (incl. curfew and relocation) <sup>59</sup>	12 exclusive measures (no relocation) <sup>60</sup>
Maximum length	12 months (not renewable)	12 months (indefinitely renewable)	12 months (once renewable)
Direct involvement in terrorism	Not necessary	Necessary	Necessary
Maximum penalty for violation	5 years imprisonment	5 years imprisonment	5 years imprisonment
# of orders made	6 <sup>61</sup>	52 (2005-2011) <sup>62</sup>	10 (2012-2015) <sup>63</sup>

<sup>56</sup> The table considers only non-derogating COs.

<sup>57</sup> The raise of the standard of proof in relation to the individual's involvement in counter-terrorism activity has been introduced by *Counter-Terrorism and Security Act 2015* (UK), s 20(1). This amendment has already been proposed by the JCHR in the first review of the CO regime. See Joint Committee on Human Rights, "Counter-terrorism policy and human rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006" (12<sup>th</sup> Report of Session 2005-06, HC 915, 14 February 2006) [66].

<sup>58</sup> *Criminal Code Act 1995* (Cth), s104.5(3); the Australian legislation does not provide for any limitation of the particular measures and there is also no case law that held that limitations would be required for measures such as curfews or the ban of telecommunication devices.

<sup>59</sup> *Prevention of Terrorism Act 2005* (UK), s 1(3) set out a non-exhaustive list of measures. Home Secretary could impose any measures he or she considered as appropriate. However, the courts have introduced some limitations. See for example *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45 (31 October 2007); *Secretary of State for the Home Department v E and another* [2007] UKHL 47 (31 October 2007). One of most controversial measures was requiring the forced relocation of the controlee, which was intended to break up local associations. The measure was used in almost every second CO case: see David Anderson QC, "Control orders in 2011" (Final report of the Independent Reviewer on the *Prevention of Terrorism Act 2005*, March 2012) 36.

<sup>60</sup> *Terrorism Prevention and Investigation Measures Act 2011* (UK), sch 1 part 1; curfew has been reduced to an "overnight residence measure" and a total ban of telecommunication devices is not permissible.

<sup>61</sup> Roger Gyles, "Independent National Security Legislation Monitor Inquiry into control order safeguards: Part 2" (13 April 2016) 5; According to the INSLM, 23 COs more were considered until 2013: see Bret Walker, "Independent National Security Legislation Monitor's Annual Report" (7 November 2013) 13.

## 7.2 Secret evidence in control order and TPIM hearings in the UK

The UK TPIM regime enables the Executive to impose restrictions on individuals with the objective of preventing terrorism. Much like its predecessor, the TPIM regime allows the use of secret evidence at all relevant stages. As noted above, TPIMs are issued by the Home Secretary, subject to receiving the court's permission after an initial review.<sup>64</sup> The concerned individual is neither informed nor involved in this initial process,<sup>65</sup> and as such the TPIM is issued entirely on the basis of secret evidence.

Even in the subsequent review processes, which are designed to be adversarial, the individual and his/her legal representative can be excluded where the court finds it "necessary [...] in order to secure that information is not disclosed contrary to the public interest".<sup>66</sup> This applies to both the first review hearing before the High Court and any subsequent hearings on appeal,<sup>67</sup> which are regulated by special rules in the *Civil Procedures Act 1998* (UK).<sup>68</sup>

In order to avoid disclosing sensitive information to the individual, the Home Secretary must first apply to the court,<sup>69</sup> presenting the sensitive information, and provide reasons justifying non-disclosure.<sup>70</sup> The court must hold a closed hearing to consider any

---

<sup>62</sup> David Anderson QC, "Control orders in 2011" (Final report of the Independent Reviewer on the *Prevention of Terrorism Act 2005*, March 2012), 29-30; 10 were in force when the regime expired. Most of them were then put under TPIMs.

<sup>63</sup> Anderson, David QC, "Terrorism Prevention and Investigation Measures in 2014" (Third report of the Independent Reviewer on the operation of *Terrorism Prevention and Investigation Measures Act 2011*, March 2015) 2.

<sup>64</sup> *Terrorism Prevention and Investigation Measures Act 2011* (UK), 3(5).

<sup>65</sup> *Ibid*, 6(4).

<sup>66</sup> *Civil Procedure Rules 1998* (UK) 80.18.

<sup>67</sup> This could also concern the direction hearing, where the respondent could be included.

<sup>68</sup> The *Civil Procedure (Amendment No 3) Rules 2011* (UK) introduced Part 80 into the *Civil Procedure Rules 1998* (UK); *Civil Procedure Rules 1998* (UK), s 80.22 explicitly excludes other relevant parts of the *Civil Procedure Rules 1998* (UK) (Parts 31-33) on the use of evidence and in particular the use of hearsay evidence.

<sup>69</sup> *Civil Procedure Rules 1998* (UK), 80.24(1)(a)

<sup>70</sup> *Ibid*, 80.24(2)(b)

application made,<sup>71</sup> and where it agrees that disclosure would be contrary to the public interest, it must give permission to the Home Secretary to suppress the information.<sup>72</sup>

Importantly, and in contrast to PII in criminal procedures, such permission does not prevent the court from relying on the sensitive information in reviewing the TPIM.

While the public interest is the primary criteria, the TPIM Act also provides that any rule governing the proceedings must conform with art 6 ECHR.<sup>73</sup> This notwithstanding, the Home Secretary cannot be forced to disclose information to the defendant, even where the court decides that disclosure, either in full or in a summarised form, is necessary. In these circumstances, the suppressed evidence cannot be relied upon in the proceedings.<sup>74</sup>

An additional mandatory prerequisite for the use of secret evidence is the appointment of a special advocate who will be present in the *ex parte* hearing.<sup>75</sup> In general terms, special advocates are security-cleared lawyers appointed by the Attorney-General to represent the individual's interests in *ex parte* hearings.<sup>76</sup> However, the legislation expressly states that the special advocate is neither retained by nor responsible to the individual and therefore does not enter into an ordinary lawyer-client relationship.<sup>77</sup>

Once appointed, the special advocate receives all of the open (non-sensitive)

---

<sup>71</sup> *Ibid*, 80.25(2); this also applies in cases where the Secretary of State has objected to a request by the special advocate to communicate certain information with the respondent; however certain exceptions apply.

<sup>72</sup> *Ibid*, 80.25(8); see also *Terrorism Prevention and Investigation Measures Act 2011* (UK), sch 4, s 4(1)(c).

<sup>73</sup> *Terrorism Prevention and Investigation Measures Act 2011* (UK), sch 4, s 5.

<sup>74</sup> *Civil Procedure Rules 1998* (UK), 80.25(7).

<sup>75</sup> *Ibid*, 80.24(1)(b); Whenever a hearing is held *ex parte*, the Attorney-General must appoint a special advocate *Ibid*, s 80.19.

<sup>76</sup> *Ibid*, s 80.20; Constitutional Affairs Committee, "The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates" (7<sup>th</sup> Report of Session 2004–05, HC 323-I, 3 April 2005) 58. "The Special Advocate examines closed passages in statements and closed documents to ascertain whether, for example, no possible or no real harm could arise from disclosure, or the material in question is already in the public domain." This function of arguing for further disclosure is often overlooked, but essential. Blake J, who acted as a special advocate for 10 years before joining the bench, stated that he could not recall a case where no document had been removed from the non-disclosure list. *MH and others v Secretary of State for the Home Department* [2008] EWHC 2524 (admin) [36] as cited in Eric Metcalfe, "Secret evidence" (Justice Report, June 2009) 170.

<sup>77</sup> *Terrorism Prevention and Investigation Measures Act 2011* (UK), sch 4 s 10(4).

information that can be discussed with the individual. If the Home Secretary makes a request to suppress information, the special advocate has to be notified and provided with the sensitive information and any supporting material.<sup>78</sup> In closed hearings, the special advocate can make submissions, adduce evidence and cross-examine witnesses, as well as request further disclosure.<sup>79</sup> However, once the special advocate has been given access to the sensitive information, he/she is barred from discussing it with the individual unless the court's permission is granted,<sup>80</sup> which effectively precludes the advocate from seeking further instructions from the individual.

The use of secret evidence in legal proceedings, subject to the appointment of special advocates, dates back to the establishment of the SIAC in 1997.<sup>81</sup> The use of special advocates in these closed SIAC hearings followed from the ECtHR decision of *Chahal*,<sup>82</sup> which constituted a challenge to the UK immigration authorities' use of secret evidence as a basis to deport allegedly dangerous foreigners.<sup>83</sup> The ECtHR upheld the challenge, noting that the use of secret evidence violated arts 5(4) (access to court) and 13 (right to an effective remedy) ECHR. In its reasons, the ECtHR referred to the special advocates scheme 'used in Canada' which, it observed, could guarantee both fairness in proceedings as well as non-disclosure of sensitive information. Although the Canadian regime was mischaracterised to some degree by the ECtHR,<sup>84</sup> the British

---

<sup>78</sup> *Civil Procedure Rules 1998* (UK), 80.24(2).

<sup>79</sup> *Ibid*, s 80.20.

<sup>80</sup> *Ibid*, s 80.21.

<sup>81</sup> *Special Immigration Appeals Commission Act 1997* (UK).

<sup>82</sup> *Chahal v the United Kingdom* [ECtHR] Application no 22414/93 (15 November 1996).

<sup>83</sup> One particular issue was that, due to the sensitivity of the information, some courts were unable to review the Minister's evidence and thus could not provide effective judicial oversight. Although in national security cases an advisory panel to the Home Office could be called to review the decision (colloquially known as the 'Three Wise Men'), the ECtHR in *Chahal v the United Kingdom* held that the advisory panel and its procedure were not an adequate substitute for a court. The ECtHR was also critical of the fact that the respondent was neither afforded legal representation nor full access to the allegations against him: at [130].

<sup>84</sup> The ECtHR most significantly failed to note that in Canada special advocates were not used in judicial proceedings. Rather, these special advocates appeared *ad hoc* before a Governmental Committee, which mainly reviewed the activities of the Canadian Security intelligence Services. Furthermore, Canadian

Government established its new regime along the lines of the *Chahal* decision and thus effectively introduced the use of secret evidence into the British court system.<sup>85</sup>

The decision in *Chahal* also gave rise to the assumption that these new procedures would satisfy the requirements of art 6 ECHR,<sup>86</sup> and the SIAC model subsequently became the blueprint for numerous procedures where the use of sensitive information was required.<sup>87</sup> While early cases confirmed this assumption,<sup>88</sup> the compatibility of the SIAC regime with art 6 was later successfully challenged in the courts, recognising a need to further develop its procedural safeguards.<sup>89</sup> But rather than declaring the regime to be incompatible with the ECHR,<sup>90</sup> English courts read down the legislation to ensure compatibility.<sup>91</sup> This approach has also allowed the legislature to reproduce the provisions originally enacted under the CO regime in the TPIM without making significant changes.

---

special advocates had no legal restrictions placed upon their communications with the defendants. They were still obliged not to disclose any of the information, but this was the advocates responsibility. For more detail on the Canadian system see John Ip, “The rise and spread of the special advocate” (2008) *Winter Public Law* 717, 718; Metcalfe, above n 76, 173-177; Craig Forcette and Lorne Waldman, “Seeking justice in an unfair process: Lessons from Canada, the United Kingdom, and New Zealand of the use of “special advocates” in national security proceedings” (Report, August, 2007) 5.

<sup>85</sup> See for example United Kingdom, *Parliamentary Debate*, House of Lords, 23 June 1997, vol 580, col 143 (Lord Lester of Herne Hill).

<sup>86</sup> No violation found in earlier SIAC cases; see for example *A, X and Y, & Ors v Secretary of State for the Home Department* [2002] EWCA Civ 1502 (25 October 2002) [57] (Lord Woolf CJ); see also *Secretary of State for the Home Department v MB* [2007] UKHL 46 (31 October 2007) [51]-[54] (Lord Hoffman), who based his whole dissent on this presumption; explanatory memorandum of the *Prevention of Terrorism Act 2005* (UK), s 7(2).

<sup>87</sup> Closed procedures were/are now used in more than 22 different types of proceedings, including the indefinite detention regime under the *Anti-Terrorism Crime and Security Act 2001* (UK), the CO regime under the *Prevention of Terrorism Act 2005* (UK), as well as the TPIM under the *Terrorism Prevention and Investigation Measures Act 2011* (UK). Other tribunals using secret evidence relevant in relation to CT are the Proscribed Organisations Appeals Commission (introduced 2000) or the Investigatory Powers Tribunal (introduced 2000); see United Kingdom, *Parliamentary Debate*, House of Commons, 1 March 2010, vol 506, no 47, col 739 (Mr Andrew Dismore); see also Metcalfe, above n 76, 36.

<sup>88</sup> See for example *Rehman v Secretary of State for the Home Department* [2001] UKHL 47 (11 October 2001); *Roberts v Parole Board* [2005] UKHL 45 (7 July 2005).

<sup>89</sup> *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004); *A and others v the United Kingdom* [ECtHR] application no 3455/05 (19 February 2009) [209].

<sup>90</sup> *Human Rights Act 1998* (UK), s 4.

<sup>91</sup> *Ibid*, s 3; see also above at 5.1.1.

### 7.2.1 The irreducible minimum of information

After its introduction, the 2005 CO legislation was quickly criticised for authorising the use of secret evidence. In its first review for renewal, the British Parliament's Joint Committee of Human Rights (JCHR) expressed concerns whether special advocates alone were adequate safeguards of art 6 ECHR.<sup>92</sup> This notwithstanding, the legislation remained unchanged, leaving questions of compatibility with the ECHR to be determined by the courts.

The fundamental importance of disclosure to the RTF has never been doubted. As Lord Phillips expressed:

“The best way of producing a fair trial is to ensure that a party to it has the fullest information of both the allegations that are made against him and the evidence relied upon in support of those allegations.”<sup>93</sup>

However, as the right to a fair trial (RFT) has never been accepted to be absolute, it was unclear how limitations upon the right could be sufficiently counter-balanced.

The first case to challenge CO procedure was *MB* in 2006.<sup>94</sup> MB was placed under a CO restricting his movement under suspicion of intending to travel to Iraq to join the fight against the Coalition.<sup>95</sup> He denied the allegations and appealed to the High Court.

Sullivan J sitting in first instance held that as there was no open evidence, not even in a summarised form, supporting these allegations, the claims were impossible for the

---

<sup>92</sup> Joint Committee on Human Rights, “Counter-terrorism policy and human rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006” (12<sup>th</sup> Report of Session 2005-06, HC 915, 14 February 2006) [76]-[78]. The Committee recommended not to renew the PTA without further serious debate.

<sup>93</sup> *Secretary of State for the Home Department v AF & Another (No 3)* [2009] UKHL 28 (10 June 2009) [64].

<sup>94</sup> *Re: MB* [2006] EWHC 1000 (Admin) (12 April 2006).

<sup>95</sup> *Ibid.*, [18].



controlee to challenge effectively.<sup>96</sup> As a result, his Honour issued a declaration of incompatibility under s 4 HRA, stating that s 3 PTA, which governed supervision of the CO by the court, was inconsistent with the RFT. As this declaration had no immediate effect upon the respondent's rights, the CO remained valid,<sup>97</sup> and Sullivan J's ruling was appealed. The crucial question for the Court of Appeal (CA) was whether the court's supervisory role in reviewing orders and the appointment of a special advocate are sufficient to safeguard the fairness of the proceedings, in circumstances where all substantial evidence supporting the CO has been withheld from the respondent. The CA answered this question in the affirmative, overruling the declaration of incompatibility made at first instance.<sup>98</sup>

The same issue was discussed in *AF*, a case where the respondent was suspected of associating with the Libyan Islamic Fighting Group.<sup>99</sup> AF provided innocent explanations of how he knew certain people considered to be extremists, but could not address the undisclosed material that had founded the Minister's 'reasonable suspicion', and as a result, the allegations against him. On this basis Ouseley J quashed the CO,<sup>100</sup> but in light of the CA ruling in *MB*, refrained from making a declaration of incompatibility, instead granting AF's application to appeal directly to the House of Lords.<sup>101</sup>

The House of Lords considered both *AF* and *MB* in a joint appeal.<sup>102</sup> The Law Lords first clarified that art 6 ECHR applied to CO proceedings, but confirmed that they were

---

<sup>96</sup> *Ibid*, [66]-[67].

<sup>97</sup> *Ibid*, [103]-[104]. see above at 5.1.1 on the relationship between ss 3 and 4 *Human Rights Act 1998* (UK). The disadvantage of a declaration of incompatibility is, as can be seen in this case, that the defendant does not receive a direct remedy.

<sup>98</sup> *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140 (01 August 2006) [86].

<sup>99</sup> *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin) (30 March 2007).

<sup>100</sup> *Ibid*, [131] and [176].

<sup>101</sup> *Administration of Justice Act 1969* (UK), s 12(3)(b).

<sup>102</sup> *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46 (31 October 2007).

not of a criminal nature, since the court's function was to evaluate the risk of future conduct, rather than judge the appellants' past behaviour.<sup>103</sup> Although this meant that neither controlee could rely on rights relating specifically to criminal trials in art 6(3) ECHR, they were entitled to such procedural protection "as is commensurate with the potential consequences."<sup>104</sup> With Lord Hoffman dissenting,<sup>105</sup> the majority the House of Lords upheld the appeals, finding a violation of art 6 ECHR, and referred the cases back to the first instance for reconsideration. Rather than issuing a declaration of incompatibility, the majority applied s 3 HRA and read down the relevant provisions of the PTA 2005.<sup>106</sup> However, the majority judges disagreed on whether proceedings could be fair in cases where, despite the involvement of a special advocate, the main evidence is withheld from the controlee.<sup>107</sup> Delivering the leading judgment, Lord Bingham acknowledged the important function of the special advocate, but emphasised that the "task of the court in any given case is to decide, looking at the process as a whole, whether a procedure has been used which involved significant injustice to the controlled person."<sup>108</sup> Given that none of the substantial evidence had been disclosed, he considered that there had been such an injustice, violating "the very essence of the right to a fair hearing".<sup>109</sup> Lord Bingham also adopted the approach that "the concept of fairness imports a core, irreducible minimum of procedural protection."<sup>110</sup> Although not explicitly stated, his Lordship's opinion implies that the presence of a special advocate

---

<sup>103</sup> *Ibid*, [23]-[24] (Lord Bingham); Lord Hoffman in agreement at [48]; Baroness Hale agreeing at [65].

<sup>104</sup> *Ibid*, [24] (Lord Bingham).

<sup>105</sup> Lord Hoffmann held that in cases where the judge decides that disclosure is not in the public interest, the participation of a special advocate is sufficiently compensating of the disadvantage experienced by the controlee. *Ibid*, [51]-[55], following the *Chahal* decision.

<sup>106</sup> *Ibid*, [44], [70]-[72]. JCHR expressed its surprise about the decision of the House of Lords to add words to the statute in order to achieve compatibility. See Joint Committee on Human Rights, "Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill" (9<sup>th</sup> Report of Session 2007-08, HC 199, 7 February 2008) [46]-[47].

<sup>107</sup> See in particular *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46 (31 October 2007) [74] (Baroness Hale).

<sup>108</sup> *Ibid*, [35].

<sup>109</sup> *Ibid*, [41] (MB) and 43 (AF).

<sup>110</sup> *Ibid*, [43].

does not *in itself* counterbalance the lack of disclosure.<sup>111</sup> Baroness Hale, Lord Carswell and Lord Brown did not go this far, ruling that through the combined effort of the judge and the special advocate, it will usually be possible to afford the sufficient standard of fairness to the controlee.<sup>112</sup> Since the judge conducting the hearing is best placed to evaluate the fairness of the trial, appeal courts should be hesitant to interfere with a decision made at first instance.<sup>113</sup> Baroness Hale, Lord Carswell and Lord Brown stopped short of stating that there is a requirement under art 6 that a controlee must *always* be provided with a minimum of information.<sup>114</sup>

Given the lack of a coherent approach by the majority of the House of Lords, the judges at first instance struggled to apply the law laid out in *MB and AF*.<sup>115</sup> More guidance was needed and provided by the House of Lords in another joint appeal, including again the case of *AF*. In *AF (No 3)* the CA formulated the crucial question of whether in cases relying upon the use of secret evidence, the appointment of a special advocate may be a sufficient safeguard as determined by the judge, or whether a core irreducible minimum of evidence must always be provided to the controlee. The majority of the CA considered the former position to be in line with the House of Lord's dicta in *MB and AF* and held that any assessment of fairness rests with the trial judge who must consider all circumstances of the case.<sup>116</sup>

---

<sup>111</sup> *Ibid*, [35]. Lord Bingham cites Lord Woolf in *Roberts* that a special advocate is “never a panacea for the grave disadvantages of a person affected not being aware of the case against him.” In relation to *MB* he did not engage in a discussion of whether the secret evidence was challengeable. For his Lordship the decisive factor was that the controlee was not even aware of the thrust of the case. *Ibid*, [41].

<sup>112</sup> *Ibid*, [66] per Baroness Hale.

<sup>113</sup> *Ibid*, [67] (Baroness Hale); [86]-[87] (Lord Carswell);

<sup>114</sup> See in particular *ibid* Lord Brown at [90], who indicated that there may even be the rare occasion where the judge would come to the conclusion that the proceedings are fair despite no disclosure of the essential evidence as the evidence must be considered as unanswerable.

<sup>115</sup> Baroness Hale admitted herself that the opinions were “enigmatic”: *Secretary of State for the Home Department v AF & Another (No 3)* [2009] UKHL 28 (10 June 2009) [100].

<sup>116</sup> *Secretary of State for the Home Department v AF and Others* [2008] EWCA Civ 1148 (17 October 2008) [64]; Sedley LJ dissenting, at [119].

Two weeks before *AF (No 3)* came before the House of Lords, the ECtHR handed down its decision in *A and others v the United Kingdom*.<sup>117</sup> Although this landmark case dealt with the legality of the indefinite detention regime in the UK,<sup>118</sup> its scrutiny of the use of secret evidence against the requirements of art 6 ECHR,<sup>119</sup> was of direct relevance to the House of Lords' decisions in *AF (No 3)*.<sup>120</sup> The ECtHR noted that although special advocates provide an important safeguard, this function, however, cannot be properly performed unless the controlee has been "provided with sufficient information [...] to give effective instructions to the special advocate".<sup>121</sup> What is considered to be sufficient information is a question for the individual judge, but the ECtHR clarified that in cases where "the open material consisted purely of general assertions" and the decision to detain an individual was based "solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied."<sup>122</sup> In this case, the ECtHR found violations of art 5(4) ECHR in relation to four out of the eleven applicants.

*AF (No 3)* did not concern indefinite detention, but rather non-derogating COs - measures which fall just short of detention.<sup>123</sup> Their Lordships followed the ECtHR ruling, with varying degrees of enthusiasm.<sup>124</sup> In separate but concurring speeches, their

---

<sup>117</sup> *A and others v the United Kingdom* [ECtHR] application no 3455/05 (19 February 2009).

<sup>118</sup> See above at 5.1.2.

<sup>119</sup> The ECtHR examined the requirements of art 5(4) ECHR in relation to detention hearings, though, in this particular case, the Court imported the art 6 ECHR minimum guarantees applicable to criminal proceedings since these hearing, though civil in character, involved the severe deprivation of liberty: *A and others v the United Kingdom* [ECtHR] application no 3455/05 (19 February 2009) [217].

<sup>120</sup> *Human Rights Act 1998* (UK), s 2(1)(a), stating that ECtHR decisions have to be taken into consideration; see also Aileen Kavanagh, "Special advocates, control orders and the right to a fair trial" (2010) 73(5) *Modern Law Review* 836, 843.

<sup>121</sup> *A and others v the United Kingdom* [ECtHR] application 3455/05 (19 February 2009) [220].

<sup>122</sup> *Ibid*, [220]. For further interpretation of this aspect in the UK see *AT v Secretary of State for the Home Department* [2012] EWCA Civ 42 (07 February 2012) [47].

<sup>123</sup> Although Lord Phillips in *AF (No 3)* at [57] generally accepted a relationship between the requirements of fairness and of what is at stake in the trial, he did not assume that the ECtHR would make a distinction "when dealing with minimum of disclosure necessary for a fair trial".

<sup>124</sup> *Secretary of State for the Home Department v AF & Another (No 3)* [2009] UKHL 28 (10 June 2009) [59] (Lord Phillips); at [81] (Lord Hope); Lord Hoffmann at [70] followed the ECtHR's decision as he felt obliged, although he considered the outcome as "wrong".

Lordships held that the controlee must always be provided with sufficient information to give effective instructions to the special advocates, irrespective of how compelling the closed evidence might be,<sup>125</sup> and “notwithstanding that sometimes this will be impossible and national security will thereby be put at risk”.<sup>126</sup>

Judicial concerns expressed in *AF (No 3)* that the decision may destroy the CO system<sup>127</sup> or make it unsustainable,<sup>128</sup> have not been realised.<sup>129</sup> That said, the practicality of the governing principle of a “core irreducible minimum” remains questionable.<sup>130</sup> In cases, where the government must rely heavily on sensitive information, the minimum summary of information with which the controlee needs to be provided, is now known as a ‘gist’. Early reports on the process of ‘gisting’ indicated that the government remains reluctant to disclose information. In some cases, gisting has even become a strategy to provide the *absolute* minimum amount of information. Following *AF (No 3)* the government potentially provides less disclosure than it otherwise would have, only incrementally releasing further information upon judicial request.<sup>131</sup>

Notwithstanding these weaknesses, the decision in *AF (No 3)* has been welcomed. The JCHR, for example, stated that the decision to increase disclosure would address some unfairness.<sup>132</sup> In *AF (No 3)*, the three COs were sent back to the High Court for

---

<sup>125</sup> *Ibid.*, [59], (Lord Phillips).

<sup>126</sup> *Ibid.*, [116] (Lord Brown).

<sup>127</sup> *Ibid.*, [70].

<sup>128</sup> *Ibid.*, [87].

<sup>129</sup> Helen Fenwick and Gavin Phillipson, “Covert derogations and judicial deference: redefining liberty and due process rights in counter-terrorism law and beyond” (2011) 56(4) *McGill Law Journal* 863, 910.

<sup>130</sup> For example *Secretary of State for the Home Department v AF & Another (No 3)* [2009] UKHL 28 (10 June 2009) [85] (Lord Hope); [106] (Baroness Hale).

<sup>131</sup> Joint Committee on Human Rights, “Counter–Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010” (9<sup>th</sup> Report of Session 2009–10, HC 395, 26 February 2010) [50]–[53].

<sup>132</sup> *Ibid.*, [53],

reconsideration,<sup>133</sup> with the government further reviewing several others and, in some cases, the orders were revoked on the ground that the supporting information could not be disclosed.<sup>134</sup> The effect of *AF (No 3)* has been that in disclosure cases, the focus has shifted away from determining *which* principle must be applied, considering now *how* to apply those principles. As these are predominantly questions for the trial judge,<sup>135</sup> few cases have been reviewed on appeal since *AF (No 3)*.<sup>136</sup> As the next Section reveals, expert opinions on the effectiveness of special advocates as a means of safeguarding the rights of the controlee are divided.

### 7.2.2 The use of special advocates and their effectiveness

Since their introduction in SIAC proceedings, special advocates have become the principal safeguard of the RTF, justifying the use of closed procedures and secret evidence in the UK. Their presence in these proceedings is intended to counterbalance any disadvantage that flows from excluding the controlee from the closed hearing, and to ensure that the fairness of the proceeding is not unduly compromised. The use of special advocates however is not beyond controversy.<sup>137</sup> In December 2004, Ian MacDonald QC resigned as a special advocate, describing his role as providing:

---

<sup>133</sup> *AF and Others v Secretary of State for the Home Department (No 3)* [2009] UKHL 28 (10 June 2009) [69].

<sup>134</sup> This included revoking one of the COs in *AF (No 3)*: Joint Committee on Human Rights, “Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010” (9<sup>th</sup> Report of Session 2009-10, HC 395, 26 February 2010) [25]-[27].

<sup>135</sup> And the trial judge is in the best position to consider the necessary extent of disclosure; see *Secretary of State for the Home Department v AF & Another (No 3)* [2009] UKHL 28 (10 June 2009) [121] (Lord Brown).

<sup>136</sup> See for example *AT v Secretary of State for the Home Department* [2012] EWCA Civ 42 (07 February 2012); *BM v Secretary of State for the Home Department* [2011] EWCA Civ 366 (05 April 2011); *Mohamed (formerly CC) v Secretary of State for the Home Department* [2014] 1 WLR 4240 (2 May 2014).

<sup>137</sup> See for example Joint Committee on Human Rights, “Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning” (19<sup>th</sup> Report of Session 2006-07, HC 394, 30 July 2007) [210].

“ [...] a fig leaf of respectability and a false legitimacy to indefinite detention without knowledge of the accusations being made and without any kind of criminal charge or trial.”<sup>138</sup>

There are several limitations inherent within this system, including the fact that special advocates do not act on behalf of the individual, and are barred from contacting the individual after they have been given access to the sensitive information. The use of special advocates also raises ethical concerns as they are “acting in a way hitherto unknown to the legal profession”,<sup>139</sup> interfering with the conventional relationship between lawyer-client, where the lawyer is guided by, and acts in accordance with, client instructions.<sup>140</sup> Special advocates themselves have raised concerns relating to the challenges of their role, airing some of these grievances in public statements and in testimonies before Parliamentary Committees.<sup>141</sup> As a result, special advocates now receive administrative support,<sup>142</sup> are able to call their own witnesses, make submissions and adduce evidence.<sup>143</sup> In certain situations, they may even communicate with the controlee after judicial permission has been granted in consultation with the Home Secretary.<sup>144</sup> The Court’s conclusion in *AF (No 3)* that the appointment of a special advocate, without more, would not necessarily counter-balance any unfairness has been

---

<sup>138</sup> Ian MacDonald QC, “Police State?” (2005) 3 *Counsel* 16, 17.

<sup>139</sup> *R v H and C* [2004] 2 AC 134, 150.

<sup>140</sup> This difficulty facing the special advocate is particularly apparent in cases involving secret intercept evidence or witness testimony, where the defendant may be best person, or indeed the only person, who is in a position to comment, explain or refute incriminating inferences drawn from that material..

<sup>141</sup> Constitutional Affairs Committee, “The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates” (7<sup>th</sup> Report of Session 2004–05, HC 323-II, 3 April 2005) Ev 2 (Neil Garnham QC); Constitutional Affairs Committee, “The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates” (7<sup>th</sup> Report of Session 2004–05, HC 323-I, 3 April 2005) [52].

<sup>142</sup> For example Constitutional Affairs Committee, “The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates” (7<sup>th</sup> Report of Session 2004–05, HC 323-I, 3 April 2005) [97]; A Secretariat has been introduced to support the special advocates in their work. The Special Advocates Support Office, located in the Treasury Solicitor’s Department, helps with administrative as well as legal matters. All staff working in that Office are security cleared and thus able to examine the sensitive information.

<sup>143</sup> *Civil Procedure Rules 1998* (UK), s 80.20.

<sup>144</sup> *Ibid*, s 80.21.

crucial in supporting these ‘concessions’. The Court also cautioned that, despite their important functions, the effectiveness of special advocates should not be overestimated.<sup>145</sup>

While the system of special advocates has improved, it is far from perfect and the changes made to date, have arguably not gone far enough in resolving the main concerns. Although special advocates may seek permission to communicate with the controlee after having accessed sensitive information, it seems that the more relevant the information, the less likely it is that permission will be granted due to the higher risks associated with disclosure.<sup>146</sup> Furthermore, any application by a special advocate to the court to communicate with the defendant on a particular topic would reveal to the government, whose representative would be present in such a hearing, any defence strategy. Despite recommendations by the JCHR,<sup>147</sup> the Constitutional Affairs Committee,<sup>148</sup> and the Independent Monitor of the UK Terrorism Legislation<sup>149</sup> further relaxation of the communication restriction has not been considered.

Furthermore, a special advocate’s ability to adduce evidence and call witnesses has brought little improvement in practice,<sup>150</sup> due to the difficulty of locating suitable witnesses with the necessary security clearance. In cases where the witness has been security-vetted, their independence from the government and therefore their value to the

---

<sup>145</sup> Baroness Hale admitted in *AF (No 3)* that she had previously, and in particular in *MB*, overestimated the capabilities of special advocates in *ex parte* CO hearings; see *Secretary of State for the Home Department v AF & Another (No 3)* [2009] UKHL 28 (10 June 2009) [101], [104]-[106].

<sup>146</sup> Metcalfe, above n 76, 195.

<sup>147</sup> Joint Committee on Human Rights, “Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010” (9<sup>th</sup> Report of Session 2009-10, HC 395, 26 February 2010) [72].

<sup>148</sup> Constitutional Affairs Committee, “The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates” (7<sup>th</sup> Report of Session 2004-05, HC 323-I, 3 April 2005) [86].

<sup>149</sup> David Anderson QC, “Terrorism Prevention and Investigation Measures in 2013” (Second report of the Independent Reviewer on the operation of *Terrorism Prevention and Investigation Measures Act 2011*, March 2014) 58 (Recommendation 10).

<sup>150</sup> Joint Committee on Human Rights, “Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010” (9<sup>th</sup> Report of Session 2009-10, HC 395, 26 February 2010) [57].



defence case may be questionable.<sup>151</sup> This makes it virtually impossible for special advocates to have access to independent experts.<sup>152</sup> Intelligence Officers, on the other hand are treated as experts in their field, always available to strengthen the government's case.<sup>153</sup> This inequality of arms constitutes an almost insurmountable obstacle to successfully challenging government evidence in closed proceedings.<sup>154</sup>

Overall, opinions are divided as to the effectiveness of the regime. While there are positive voices pointing to the achievements and usefulness of special advocates,<sup>155</sup> including their vital role in achieving a proportionate approach to protecting the various interests,<sup>156</sup> some reject the use of special advocates altogether. Critics argue that their appointment creates an illusion of fairness, incapable of being maintained in reality. In *Roberts v Parole Board*, Lord Steyn stated:

“It is not to the point to say that the special advocate procedure is "better than nothing". Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a

---

<sup>151</sup> Martin Chamberlain, “Special advocates and procedural fairness in closed proceedings” (2009) 28(3) *Civil Justice Quarterly* 314, 319

<sup>152</sup> Constitutional Affairs Committee, “The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates” (7<sup>th</sup> Report of Session 2004–05, HC 323-II, 3 April 2005) [75] and [87]; Joint Committee on Human Rights, “Counter–Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010” (9<sup>th</sup> Report of Session 2009-10, HC 395, 26 February 2010) [54] and [57]; see also Anderson, above n 149, 58 (Recommendation 10).

<sup>153</sup> See above at 3.2.1.2.

<sup>154</sup> Chamberlain, above n 151, 320; Joint Committee on Human Rights, “Counter–Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010” (9<sup>th</sup> Report of Session 2009-10, HC 395, 26 February 2010) [57].

<sup>155</sup> *AHK and others v SSHD* [2012] EWHC 1117 Admin (2 May 2012) [44], [78]; see also *Secretary of State for the Home Department v AR & Ors* [2008] EWHC 2789 (Admin) (14 November 2008) [3]; *A, X and Y, & Ors v Secretary of State for the Home Department* [2002] EWCA Civ 1502 (25 October 2002) [89] (Brooke LJ).

<sup>156</sup> *Charakaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350, 398 citing Kent Roach, “Ten ways to improve Canadian anti-terrorism law” (2006) 51 *Criminal Law Quarterly* 102, 120; See also Kent Roach, “Secret evidence and its alternatives” in Aniceto Masferrer (ed), *Post 9/11 and the state of permanent legal emergency: security and human rights in counter terrorism* (Springer, 2012) 179, 198.

fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only.”<sup>157</sup>

Lord Steyn’s position, while highly principled, is impractical as secret evidence continues to be used, and an outright rejection of the use of special advocates seems unproductive, and ultimately self-defeating. The better position, I would submit, is that the effectiveness of special advocates should be measured against what they can realistically deliver, and on this approach, special advocates have a positive influence on the level of fairness in closed proceedings. Although there is much scope for improvement,<sup>158</sup> it seems that there is limited political will in the UK to improve the existing system,<sup>159</sup> which is particularly regrettable given that the use of closed hearings is constantly increasing.<sup>160</sup>

### 7.2.3 Rules of evidence in closed hearings

As mentioned earlier, due to their civil nature, CO-type proceedings are not bound by the strict rules of evidence that would apply in criminal trials, presenting further challenges for special advocates in closed hearings. Much of the classified information that can be relied upon in closed proceedings would not be sufficiently reliable to adduce in criminal proceedings.<sup>161</sup> Deviations from the ordinary rules of evidence are

---

<sup>157</sup> *Roberts v Parole Board* [2005] UKHL 45 (7 July 2005) [88] (Lord Steyn).

<sup>158</sup> See below at 8.2.4.1.

<sup>159</sup> Home Office, “The Government response to the Report by David Anderson QC on Terrorism Prevention and Investigation Measures in 2013” (December 2014).

<sup>160</sup> Now used in more than 22 different types of proceedings: see United Kingdom, *Parliamentary Debate*, House of Commons, 1 March 2010, vol 506, no 47, col 739 (Mr Andrew Dismore). A discussion of the spread of secret hearings and special advocates is beyond the scope of this thesis. See Angus McCullough *et al*, “Response to consultation” (Collective response to the “Justice and Security Green Paper” from special advocates, 2011).

<sup>161</sup> These concerns can be overstated, since there has been extensive reform and increasing number of statutory exceptions to the common law rules of evidence in criminal proceedings.

expressly permitted by legislation, including the admission of intercept evidence,<sup>162</sup> as well as hearsay evidence.<sup>163</sup> Hence, the usual assumptions around unreliability are to a certain extent displaced or at least neglected, blurring the line in CO proceedings between decisions based on suspicion and those requiring proof.<sup>164</sup>

The use of intelligence can have further ramifications. In cases where information stems from foreign intelligence agencies, it is sometimes difficult to determine the real source.<sup>165</sup> In the UK, the use of foreign intelligence led to controversy when it was revealed that some information relied upon in closed hearings may have been obtained through torture or inhuman treatment.<sup>166</sup> Of course, the issue of evidence obtained by torture or inhuman treatment is not new in the UK, having arisen in the context of the Troubles in Northern Ireland. The Diplock courts in terrorism cases (sitting without juries) relied heavily on confessions, though the common law still required the prosecution to demonstrate that the making of the confession had been voluntary.<sup>167</sup>

Section 6 of the *Northern Ireland (Emergency Provisions) Act 1973* (UK) modified the common law by allowing the admission of any statements by the accused (including

---

<sup>162</sup> *Regulation of Investigatory Powers Act 2000* (UK), s 18(1)(dd), as amended by *Terrorism Prevention and Investigation Measures Act 2011* (UK), sch 7, s 4.

<sup>163</sup> *Civil Procedure Rules 1998* (UK), s 80.22(1), displacing part 33 of the Rules; this may even concern the use of second or third-hand hearsay evidence; see Metcalfe, above n 76, 51.

<sup>164</sup> See above at 3.3.

<sup>165</sup> The involvement of foreign intelligence agencies in securing this information may of course provide the grounds for non-disclosure. Foreign agencies in order to protect their sources and methods of intelligence will only provide information under the condition that these will not be disclosed. This is referred to as the control principle. See for example *R (on the application of Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65 (10 February 2010) [5]

<sup>166</sup> This concerned mainly intelligence services from countries where the use of torture was known. However, there were equally allegations of MI6 being involved in such interrogations. See Joint Committee on Human Rights, "Allegations of UK complicity in torture" (23<sup>rd</sup> Report of Session 2008-09, HL Paper 152/HC 230, 4 August 2009); see also Ian Cobain, "Tony Blair knew of secret policy on terror interrogations" (The Guardian, 18 June 2009). Cobain and Karim, "UK linked to notorious Bangladesh torture centre." (The Guardian, 17 January 2011).

<sup>167</sup> Diplock Commission, *Report of the Commission to consider legal proceedings to deal with terrorist activities in Northern Ireland* (Cmnd. 5185, 1972) Para 87 as cited in John Jackson and Sean Doran, "Conventional trials in unconventional times: the Diplock Court experience", (1993) 4(3) *Criminal Law Forum* 506.

confessions) in criminal proceedings for scheduled offences.<sup>168</sup> In addition the section clarified that the court was not excluding these statements, unless the defence could point to evidence, *prima facie*, that their statement had been made under conditions of torture or inhuman or degrading treatment.<sup>169</sup> Where the *prima facie* threshold was met, the onus then shifted to the prosecution to establish the voluntary nature of the confession beyond reasonable doubt.<sup>170</sup> While these reforms to the rules of evidence were enacted in the context of terrorism prosecutions, it reveals that the UK had been prepared to risk relying upon evidence that may have been tainted by torture or inhuman treatment.

In the current context, the SIAC began to hear and admit such ‘tainted’ evidence, though it conceded that the weight attached to the evidence would need to be adjusted in light of the circumstances in which it was obtained.<sup>171</sup> Rejecting this approach, the House of Lords unanimously held that evidence obtained through torture or inhumane treatment could never be heard.<sup>172</sup> However, its ruling did not alter the burden of proof, which rests upon the party claiming that the evidence was obtained by torture.

Requiring the controlee to discharge this burden seems inappropriate in closed hearings,

---

<sup>168</sup> Scheduled offences are those terrorism offences listed in the Schedule 4 of the *Northern Ireland (Emergency Provisions) Act 1973* (UK). See also *People v Coffey*, 39 LRNS, 704, 706 (1911).

<sup>169</sup> In the US context, *Miranda v Arizona* [1966] USSC 143 (13 June 1966) [71] emphasised that a statement made by a defendant without the presence of a lawyer, the burden lies with the prosecution to prove that the statement was made freely.

<sup>170</sup> *Northern Ireland (Emergency Provisions) Act 1973* (UK), s 6(1)(2). See also generally Steven Greer, “The admissibility of confessions under the Northern Ireland (*Emergency Provisions*) Act 1978” (1980) 31 *Northern Ireland Legal Quarterly* 205. The provision was transferred into s 76 *Terrorism Act 2000* (UK). However, as located in Part VII, it is only applicable to Northern Ireland.

<sup>171</sup> *Ajouaou and A & Ors v Secretary of State for the Home Department* [2003] UKSIAC 1/2002 (29 October 2003) [81]; under particular circumstance the weight of the evidence could even be reduced to nil. SIAC argued that it was not a criminal court and only required to assess reasonable grounds for suspicion

<sup>172</sup> *A and Others v Secretary of State for the Home Department* [2005] UKHL 71 (8 December 2005) [51] (Lord Bingham). In English law, the process of securing confession by torture was abolished along with the Star Chamber, with its prohibition recognised under common law, art 3 ECHR and the *UN Convention Against Torture* (CAT), to which the UK is a party. However the CAT is not directly incorporated into UK law as it has been considered as sufficiently protected by the common law. In particular art 15 CAT states that statements made as a result of torture shall not be admitted as evidence in any proceedings.

where the individual may be unaware of the source, the circumstances and even the exact content of a statement.<sup>173</sup> Nonetheless, the House of Lords maintained that evidence is admissible, unless the SIAC is satisfied on the balance of probabilities that it had been obtained by way of torture.<sup>174</sup> Although it is the pronounced policy of the Home Secretary not to use evidence allegedly obtained by torture,<sup>175</sup> the issue has highlighted the difficulties associated with secret evidence and the limitations of special advocates.

#### 7.2.4 Judicial level of scrutiny

The difficulties with the lower standards of evidence applied in such special hearings are also related to the judge's role in both scrutinising the evidence and determining how much disclosure is necessary to comply with art 6 ECHR as required by *AF (No 3)*. In hearings where proceedings are largely one-sided, fairness will crucially depend on judicial involvement. Generally, when it comes to the human right compatibility of counter-terrorism measures, UK judges – with a tailwind from the ECtHR – have largely stood up to the challenge and resisted temptations to defer to the government over security matters.<sup>176</sup> This marks to some extent a break with the past and traditional judicial behaviour. The Law Lords have now taken on a dual role of not only upholding the security of the population, but also of protecting the liberties of individuals.<sup>177</sup> Their Lordships' references to the HRA have made it clear that they are not engaging in

---

<sup>173</sup> *Ibid*, [55], [59] (Lord Bingham).

<sup>174</sup> *Ibid*, [121] (Lord Hope).

<sup>175</sup> Home Office (UK), *The Government Reply to the twenty-third Report of the Joint Committee on Human Rights 2008-09* (Cm 7714, October 2009) 3.

<sup>176</sup> See for example Fenwick and Phillipson, above n 129, 863; cf Cian Murphy, "Counter-terrorism and the culture of legality: the case of special advocates" (2013) 24(1) *King's Law Journal* 19.

<sup>177</sup> *Secretary of State for the Home Department v AF & Another (No 3)* [2009] UKHL 28 (10 June 2009) [76] (Lord Hope).

political judgments on the wisdom of counter-terrorism policies, but are rather carrying out their strict judicial function of scrutinising proceedings according to law.

The courts have described *in abstracto* what a core irreducible minimum of procedural fairness requires in the context of secret evidence in counter-terrorism proceedings.

However, these descriptions do not clarify the extent to which the court in a particular case is capable and willing to scrutinise the reliability of the intelligence. Judges regularly point to the expertise of the executive in matters of national security.<sup>178</sup>

Expressing a more nuanced view, Lord Bingham accepted that while great weight must be given to the executive, the more political the matter, the more deference is owed to the executive.<sup>179</sup> The judicial preparedness to scrutinise intelligence assumes less importance in the context of a lowered standard of proof: the government need only establish that the Minister's suspicion (not belief) is reasonable, which limits judicial intervention to cases where the decision is "obviously flawed".<sup>180</sup> This lowered threshold of proof prompted Lord Phillips' concern that

"[r]easonable suspicion may be established on grounds that establish an overwhelming case of involvement in terrorism-related activity but, because the threshold is so low, reasonable suspicion may also be founded on misinterpretation of facts in respect of which the controlee is in a position to put forward an innocent explanation. A system that relies upon the judge to

---

<sup>178</sup> See for example *Rehman v Secretary of State for the Home Department* [2001] UKHL 47 (11 October 2001) [31] (Lord Steyn); [62] (Lord Hoffmann).

<sup>179</sup> *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004) [29].

<sup>180</sup> *Terrorism Prevention and Investigation Measures Act 2011* (UK), s 6(3)(6)(7); so far there is no evidence that a court has ever rejected a Minister's request. See Walker, above n 18, 162.

distinguish between the two is not satisfactory, however able and experienced the judge.”<sup>181</sup>

This concern has now been partially addressed by raising the standard of proof in establishing whether an individual is, or has been, involved in terrorism-related activity to the civil standard of ‘balance of probabilities’.<sup>182</sup> The amendment is certainly an important step towards improving procedural fairness, and increasing the scope for more robust judicial scrutiny of TPIM decisions. However, in establishing whether measures are necessary to prevent future risks to the public, the standard of proof is still a reasonable belief.

### 7.2.5 Conclusion

In the UK, the legal principles governing the use of secret evidence in quasi-criminal proceedings have been reasonably settled as a result of the *AF (No 3)* decision.<sup>183</sup> The starting point, as in criminal proceedings, is the importance of respecting the individual’s RFT. This right however is not absolute and both the threat of terrorism and the need for secrecy are accepted justifications for imposing restrictions on access to information that disturb the usual informational equilibrium required by the ‘equality of arms’ principle. However, any limitations to the RFT must be ‘compensated’ as far as possible to achieve the minimum of level of fairness required by art 6 ECHR. To meet this threshold in CO hearings, the proceedings require the involvement of a special

---

<sup>181</sup> *Secretary of State for the Home Department v AF & Another (No 3)* [2009] UKHL 28 (10 June 2009 [63]) (Lord Phillips). The statement was still in relation to the CO regime, where the standards was still a reasonable suspicion, but amendment to a reasonable belief under the TPIM regime seem insignificant in practice.

<sup>182</sup> *Counter-Terrorism and Security Act 2015* (UK), s 20(1).

<sup>183</sup> However, the use of secret evidence in civil proceedings - now regulated by the *Justice and Security Act 2013* (UK) - is still ongoing.

advocate, judicial supervision, and that the controlee is provided with a ‘gist’ of the evidence, sufficient to inform the controlee of the main reasons for imposing a TPIM.

The cases discussed above demonstrate that the courts have played an important role in defining the scope of the RFT.<sup>184</sup> With the HRA, the UK courts have gained a statutory reference point against which they can directly apply and develop common law constitutional values. Despite acknowledging the executive’s expertise in the area of national security, courts have expressly reserved, and at times exercised, their power to review the decisions of the executive.<sup>185</sup> This development was also accompanied by minor policy changes. Compared to the measures available under the repealed CO legislation, TPIMS are more restrained in scope, avoiding some of the more intrusive measures that were previously available. In addition, the recent amendment to raise the burden of proof constituted an important step to improving procedural fairness, indicating that TPIMS are designed to be more proportionate in their approach.

However, once secret evidence is used, the fairness of the trial is still heavily dependant upon both the effectiveness of the special advocate system and the willingness and capability of the courts to meaningfully review and scrutinise intelligence. The importance of these safeguards must be seen in light of the ruling in *AF (No 3)* which has unintentionally encouraged the government to provide the defence with no more than the minimum threshold of information, rather than disclosing as much information as possible.

---

<sup>184</sup> Adam Tomkins, “National security and the role of the court: a changed landscape?” (2010) 126 (October) *Law Quarterly Review* 543; Fenwick and Phillipson, above n 129, 916.

<sup>185</sup> *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140 (1 August 2006) [48].



### 7.3 Secret evidence in Australian control order hearings

In Australia, the CO regime allows for the suppression and admission of sensitive information to varying degrees at both the interim and confirmation stages. This can happen either in accordance with the provisions as set out by the CO legislation or by applying the provision of the NSIA. However, there is still some uncertainty as to the extent to which secret evidence can be used, and its impact upon the character of proceedings. In particular, the question arises whether CO proceedings are, or perhaps are required to be, adversarial in nature. In the absence of a bill of rights, courts are not able to read fairness guarantees into the CO legislation. The only remedy available to the courts is to rule that the legislation infringes the separation of powers inherent within Chapter III of the Commonwealth Constitution.<sup>186</sup>

The constitutionality of the CO regime was challenged in *Thomas* and eventually upheld by the High Court. However, the suppression and use of sensitive information was only indirectly addressed. The Court held that issuing a CO was a judicial function, and that provisions in the *Criminal Code 1995 (Cth) (CC)* did not authorise courts to act in a non-judicial manner, including the *ex parte* hearing. Gleeson CJ clarified that although “particular information is not made available to the subject of a CO or his/her lawyers”, the case before the Court was not about particular aspects of procedural fairness.<sup>187</sup> Rather, such questions must be decided in the context of the particular facts. It is noteworthy that the decision in *Thomas* only determined the constitutionality of the interim stage of the CO regime, and not the confirmation stage.<sup>188</sup> However, the majority implied that the regime has to be regarded as one set of proceedings. Limitations may be acceptable at the interim stage bearing in mind higher standards of

---

<sup>186</sup> See above at 5.2.1.

<sup>187</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 335 (Gleeson CJ).

<sup>188</sup> *Ibid*, 358.

procedural fairness applied at the confirmation stage,<sup>189</sup> which indicated that the majority judges did not anticipate any claims of unconstitutionality to arise at this later stage. However, no Australian CO authority has conclusively clarified at which stages, and to what extent, secret evidence can be used. One of the reasons is that in neither of the published cases sensitive information emerged as an issue, since in both cases significant amounts of information had already been revealed in the respective previous legal proceedings.<sup>190</sup> And also in the more recent four CO cases, it has also been reported that no information has been withheld from the controlees.<sup>191</sup>

The next Section sets out the various stages at which sensitive information can be withheld from the controlee, focusing on the confirmation stage in order to assess the overall standing of the controlee. Given the dearth of CO cases in Australia, comparisons will be drawn from Australian serious crime order regimes, which allow the suppression of criminal intelligence at a state level.<sup>192</sup>

### 7.3.1 The use and suppression of sensitive information in CO proceedings

#### *The interim hearing*

The first step in requesting an interim CO (iCO) requires the senior Australian Federal Police (AFP) member to obtain written consent of the Attorney-General. Attached to this application must be all relevant information, both in favour and against the iCO, as

---

<sup>189</sup> *Ibid*, 335 (Gleeson CJ).

<sup>190</sup> In *Thomas* the AFP relied on the interrogations records conducted in Pakistan, which had been declared inadmissible during his criminal trial: *ibid*. In *Hicks* the AFP relied predominantly on letters Hicks wrote to his family, while training in Pakistan and Afghanistan: *Jabbour v Hicks* [2008] FMCA 178 (19 February 2008).

<sup>191</sup> Roger Gyles, “Independent National Security Legislation Monitor Inquiry into control order safeguards: Part 1” (29 January 2016) 4.

<sup>192</sup> Comparisons drawn with serious and organized crime legislation must take account of the different constitutional frameworks at state and federal level. For a more detailed explanation see below at 7.3.2.

well as a draft of the proposed restrictions on the controlee.<sup>193</sup> However, s 104.2(3A) CC makes it clear that the summary of the grounds in this draft request need not include any information that is likely to prejudice national security within the meaning of the NSIA. If the Attorney-General consents, the senior AFP member can then make a request to the issuing court to grant an iCO,<sup>194</sup> again attaching the relevant information and draft request as amended by the Attorney-General.<sup>195</sup> The issuing court must consider the information received and may even request further information<sup>196</sup> in order to be satisfied on the balance of probabilities that the ground claimed in the request has been met,<sup>197</sup> and that the measures requested are reasonably necessary and appropriate.<sup>198</sup>

The decision to issue an iCO is made *ex parte*.<sup>199</sup> The issuing court is only obliged to include a summary of grounds for its decisions to the controlee.<sup>200</sup> However, the Code clarifies – again – that the summary does not require any information to be included if it is likely to prejudice national security.<sup>201</sup> Hence, the court can rely on sensitive information when issuing an iCO without revealing this information to the controlee. This can create a situation where a controlee is subjected to a coercive measure without having been provided with any real justification.

---

<sup>193</sup> Exceptions apply in urgent cases, see *Criminal Code Act 1995* (Cth), s 104.6.

<sup>194</sup> According to the definition section of Part 5.3 (*Criminal Code Act 1995* (Cth), s 100.1) an “**issuing court**” means: (a) the Federal Court of Australia; or (b) the Family Court of Australia; or (c) the Federal Circuit Court of Australia.”

<sup>195</sup> *Criminal Code Act 1995* (Cth), s 104.3.

<sup>196</sup> *Cf Thomas v Mowbray* (2007) 233 CLR 307, 418 (Kirby J).

<sup>197</sup> *Criminal Code Act 1995* (Cth), s 104.4(1)(c);

<sup>198</sup> *Ibid*, s 104.4(1)(d);

<sup>199</sup> The legislation does not expressly specify these are *ex parte* hearings. See *Thomas v Mowbray* (2007) 233 CLR 307, 338 (Gummow and Crennan JJ) and 371 (Kirby J); however, David Hicks was actually notified of the iCO hearing, but chose not to adduce evidence that would challenge the claim that such an order was necessary to substantially assist in preventing a terrorist attack. The iCO must be personally served by an AFP member and its terms explained to the controlee before it takes effect and is legally binding: see *Criminal Code Act 1995* (Cth), s 104.12.

<sup>200</sup> *Criminal Code Act 1995* (Cth), s 104.5(1)(h).

<sup>201</sup> *Ibid*, s 104.5(2A); “likely to prejudice national security” has to be understood within the meaning of the NSI Act, which as mentioned above has a very broad meaning. See above at 6.2.3.2.

The process of issuing an iCO is driven exclusively by one party, the senior AFP member, which deviates from the usual principle of adversariness applied in civil proceedings. In *Thomas* the use of *ex parte* proceedings to issue the iCO was justified by the urgency of the situation, as well as the fact that the iCO was a merely ‘stop-gap’ measure prior to the confirmation hearing. This later hearing, being *inter partes*, would then offer the controlee sufficient opportunities to contest the evidence.<sup>202</sup> Importantly, the majority also found that the judge at all times during the interim stage retained discretion in deciding what information must be included in the summary of grounds.<sup>203</sup> However, the question of whether the controlee was sufficiently informed to *fairly* contest the order was not raised in the case. Kirby J in his dissent in *Thomas* found the iCO process to be unconstitutional. He reasoned that the sensitive information adduced by the AFP and relied upon by the court had not been made available to the controlee, and could not therefore be challenged.<sup>204</sup> In these circumstances, Kirby J considered that the issuing court was merely acting as a “rubber stamp” of the government.<sup>205</sup> Unlike the majority, Kirby J did not view the provisional nature of the iCO decision as justification for derogating from the usual requirements of fairness.

### *The confirmation hearing*

The legislation requires a confirmation hearing to be held as soon as practical to issues a formal CO. For this to occur, the senior AFP member must notify the court as well as the controlee of their intention to proceed to a hearing. At this stage the controlee must be given the documents, as presented to the Attorney-General, setting out the reasons

---

<sup>202</sup> For example *Thomas v Mowbray* (2007) 233 CLR 307, 335 (Gleeson CJ); 355 (Gummow and Crennan JJ).

<sup>203</sup> For example *ibid*, 335 (Gleeson CJ).

<sup>204</sup> *Ibid*, 436.

<sup>205</sup> *Ibid*.

for and against issuing the order and the necessity to impose any specific conditions.<sup>206</sup> Furthermore, the controlee must be informed about “any other details *required to enable the person to understand and respond* to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order”.<sup>207</sup> However, the legislation expressly permits information to be suppressed from the controlee where it is likely to prejudice national security.<sup>208</sup>

The requirement to provide the controlee with these details can be compared to the introduction of ‘gisting’ in *AF (No 3)*.<sup>209</sup> But unlike the UK position, the Australian legislation does not require the government to disclose to the controlee a core irreducible minimum of information.<sup>210</sup> Consequently, if the CO is based on sensitive information, the controlee will not know the case against him/her in its entirety, or, perhaps, at all.<sup>211</sup> This would seriously impair the controlee’s ability to meet the case, and therefore constitutes a severe deviation from the standard of fairness applied in criminal proceedings.<sup>212</sup> Although the controlee and his/her legal representative can adduce evidence and make submissions during the confirmation hearing,<sup>213</sup> the

---

<sup>206</sup> *Criminal Code Act 1995* (Cth), s 104.12A (2)(ii).

<sup>207</sup> *Ibid*, s 104.12A (2)(iii) (emphasis added).

<sup>208</sup> *Ibid*, s 104.12A (3). The section goes even further in clarifying the scope by including information that is likely:

“(a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or  
(b) to be protected by public interest immunity; or  
(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or  
(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.”  
[This kind of clarification is of course more or less redundant, as paragraphs (b) to (c) could all be subsumed under paragraph (a).]

<sup>209</sup> See above at 7.2.1.

<sup>210</sup> See Tamara Tulich, “Adversarial intelligence? Control orders, TPIMs and secret evidence in Australia and the United Kingdom” (2012) 12(2) *Oxford University Commonwealth Law Journal* 341, 359.

<sup>211</sup> This seems also be the understanding of the COAG Review, which recommended the introduction of clause requiring a minimum amount of information to enable an effective defence. Council of Australian Governments, “Review of counter-terrorism legislation” (Final Report, 2013) [233]-[235] (Recommendation 31).

<sup>212</sup> Burton and Williams, above n 18, 199 mention that this deviates from the common law rule to be informed about the case citing *Kioa v West* (1985) 159 CLR 550 and *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44.

<sup>213</sup> *Criminal Code Act 1995* (Cth), s 104.14(1).

legislation provides that the absence of such representation is not a hindrance for confirming the CO.<sup>214</sup>

*Limitations to the adversarial character of the confirmation hearing*

While at the stage of issuing an iCO, the AFP may choose to suppress sensitive information upon which the court may rely, the legislation does not expressly authorise its use at the confirmation stage.<sup>215</sup> The lack of such authorisation, combined with the requirement that the AFP provide additional information at this later stage, implies that the confirmation hearing was intended by the legislature to be fully adversarial. Such an implication would bring the hearing into conformity with the process of administrative hearings in general, where decisions can only be based on evidence produced in court. Drawing on broader fairness arguments, the dicta in *Thomas* suggests that the confirmation hearing will ‘compensate’ for any disadvantage suffered by the controlee where secret evidence has been used at the interim stage.<sup>216</sup>

There are strong arguments to suggest that the confirmation hearing should be fully adversarial,<sup>217</sup> though such a perception is challenged by (a) the potential ‘spill over’ of

---

<sup>214</sup> *Ibid*, s 104.14(4); this is the case as long as the court is satisfied on the balance of probabilities that the order has been served correctly.

<sup>215</sup> Lacking a statutory authorisation, the UK case of *Al Rawi* may become relevant, in which the Supreme Court held that a court cannot itself introduce a scheme for secret evidence under the common law. See *Al Rawi & Ors v Security Service & Ors* [2011] UKSC 34 (13 July 2011). Given that the decision was based on the common law and not on the HRA, it is very likely that the High Court would pay attention to that case. An essential feature of the common law trial (both civil and criminal) is that the party know the case against him or her and be able to cross-examine opposing witnesses. This is based on the principle of natural justice. See *ibid*, [12]-[13] (Lord Dyson). Although it was held that the courts possess the inherent power to regulate their own proceedings and develop procedural rules, there were no sufficient reasons to introduce a closed material procedure. As a consequence the UK Parliament introduced the *Justice and Security Act 2013* [UK]. See Adam Tomkins, “Justice and security in the United Kingdom” (2014) 47(3) *Israel Law Review* 305.

<sup>216</sup> See for example *Thomas v Mowbray* (2007) 233 CLR 307, 335 (Gleeson CJ); 355 (Gummow and Crennan JJ).

<sup>217</sup> As already mentioned above, the High Court in *Thomas* avoided ruling on the constitutionality of *Criminal Code Act 1995* (Cth), s 104.12A(3), which sets out the amount of information that must be provided to the controlee before the confirmation hearing. The Chief Justice explained that the case was

secret evidence from the interim stage; (b) the use of redacted documents and summaries under the NSIA; and (c) the high level of judicial deference likely to be given to executive assessments of security risks based on intelligence.

*(a) The potential ‘spill over’ of secret evidence from the interim stage*

When confirming or amending an iCO, the legislation requires the judge to take the original interim application into account,<sup>218</sup> which need not have been shared with the controlee.<sup>219</sup> This raises the following questions:

- *To what extent should secret information from the interim stage be taken into consideration in the confirmation hearing?*
- *Is there an obligation for the judge to bring previously secret information to the attention of the controlee before it can be relied upon?*

In an academic comment, Tulich interpreted the requirement to consider the original application at the confirmation stage as a way in which “the Criminal Code facilitates reliance upon secret evidence in the confirmation of a control order.”<sup>220</sup> But even if the requirement is read in the more favourable way to the controlee that only disclosed information from the original application can be taken into account, in practice the controlee may still be disadvantaged, as the provision must be read in the context of civil procedure. Here the trier of fact is the judge, who had originally received the secret evidence during the interim hearing, and it seems unconvincing that this would not operate as an influence on the judge’s final assessment. Members of the judiciary are certainly trained and accustomed to consider facts and arguments selectively, but the requirements for the judges to assess national security risks and the relatively low

---

not about procedural fairness, as these requirements must be decided in the particular circumstances of the case.

<sup>218</sup> *Criminal Code Act 1995* (Cth), s 104.14 (3)(a).

<sup>219</sup> *Ibid.*, s 104.12A (3).

<sup>220</sup> Tulich, above n 210, 359.

standard of proof would make it difficult for a judge to determine precisely which facts have informed his/her final assessment.

*(b) The use of redacted documents and summaries under the NSIA*

The government may also suppress information or rely upon secret information in CO proceedings, by notifying the court and the controlee that the NSIA shall apply to the confirmation CO hearing. While the NSIA applies to both civil and criminal proceedings in broadly similar terms,<sup>221</sup> the provisions differ in relation to the balancing exercise. Rather than considering whether the suppression or partial use of sensitive information would have “a substantial adverse effect on the defendant’s right to receive a fair trial”, in civil proceedings the judge must consider whether there would be “a substantial adverse effect on the *substantive hearing*.”<sup>222</sup> This altered wording implies that a lower standard of fairness is acceptable in civil proceedings. Furthermore, it is likely that, consistent with the ruling in *Lodhi*,<sup>223</sup> the provisions are not to be understood as limiting the court’s inherent jurisdiction to determine the fairness of the hearing.<sup>224</sup> In light of the alternate balancing exercise, the AFP would be permitted to adduce redacted documents, summaries of facts and statements relating to the sensitive information. This is where the full force of the NSIA is revealed. In the previous Chapter it was argued that in criminal proceedings such evidence may have limited forensic value since it may not convince a jury of the defendant’s guilt beyond reasonable doubt. However, in proceedings with a lower civil standard of proof, where the judge is the trier of fact, such edited evidence could reasonably persuade the court to confirm a CO. This again

---

<sup>221</sup> For a general discussion about the working of the NSIA see above at 6.2.3.2.

<sup>222</sup> NSIA, s 38L(7)(b).

<sup>223</sup> See discussion above at 6.2.3.3.

<sup>224</sup> See also *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013) and *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 82 ALJR 454 (7 February 2008) discussed below at 7.3.2.



means that a CO could be based on information that is unavailable to and thus difficult to challenge by the controlee.

*(c) Judicial deference*

Finally, there is concern as to whether judges are capable of assessing and dealing with risks effectively. In *Thomas*, Gleeson CJ addressed these concerns, drawing attention to similar risk assessments routinely undertaken by judges to deny bail or issue apprehended violence orders. Although acknowledging these to be imperfect analogies,<sup>225</sup> Gleeson CJ considered the involvement of judges in this task was “good thing”, pointing to the traditional judicial role in protecting individual rights, and acting impartially and independently, in situations where the liberty of individuals are affected.<sup>226</sup>

However, the perceived benefits of impartiality depend upon the courts’ ability to meaningfully scrutinise the evidence brought before them. As Kirby J noted in his dissent, involving the judiciary in this risk assessment “becomes a bad thing if the powers are granted in vague and inappropriate terms.”<sup>227</sup> It can even become “a very bad thing if the judge concerned is required to act in exceptional ways in private and subject to constraints not normal or proper to the judicial office.”<sup>228</sup> Both dissenters, Kirby and Hayne JJ, claimed that it was not part of the court’s normal function “to determine what is reasonably necessary *for the protection of the public*”,<sup>229</sup> but rather a function of the executive or legislature, since such assessments require the expert prediction of risk based on police and intelligence work - a framework that does not

---

<sup>225</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 128-29. In *Thomas* the question was dealt with in relation to whether issuing a CO is a judicial function or not. See also Andrew Lynch and Alexander Reilly, “The constitutional validity of terrorism orders of control and preventative detention” (2007) 10 *Flinders Journal of Law Reform* 105; and Lynch, above n 18, 172.

<sup>226</sup> *Ibid.*, 329.

<sup>227</sup> *Ibid.*, 437.

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*, 417 (Kirby J), (emphasis in original); *ibid.*, 468 (Hayne J).

provide the judge with clear legal standards to apply. Hayne J discussed the issue in depth, pointing out that when judges are required to predict future outcomes, they make use of expert evidence.

“Intelligence information, gathered by government agencies, presents radically different problems. Rarely, if ever, would it be information about which expert evidence, independent of the relevant government agency, could be adduced. In cases where it could not be tested in that way (and such cases would be the norm rather than the exception) the court, and any party against whose interests the information was to be provided, would be left with little practical choice except to act upon the view that was proffered by the relevant agency.”<sup>230</sup>

The fact that the court’s only choice, practically speaking, is to defer to the executive damages the appearance of impartiality.

Although the majority in *Thomas* found that courts can issue COs as a legitimate exercise of judicial power, the dilemmas presented to the courts set out by Hayne J are real, and continue to challenge how judges can be expected meaningfully to scrutinise sensitive information. Put bluntly, even though judges *can* issue COs, does not mean that they will be any good at it. In the context of CO proceedings, there is a concern that judges tend to defer to the government’s request even though they may not have seen all the information. The same is true in the case of edited evidence, where although it may have been seen, it has not been subjected to proper scrutiny. Although relying upon edited evidence offers more transparency than the use of secret evidence, in practice, both types cast doubt over whether the confirmation hearing is truly adversarial.<sup>231</sup>

---

<sup>230</sup> *Ibid*, 477.

<sup>231</sup> On adversariness as a relevant criterion for determining the fairness of a trial in Australia see below at 7.3.2 and for the comparison in relation to the UK below at 7.4. For a discussion of the idea that if

Dyzenhaus and Thwaites agree with the dissenting judgments in *Thomas*. However, rather than suggesting that the courts leave the field entirely to the executive, the authors propose instead institutional evolution. In particular, Dyzenhaus and Thwaites claim that Hayne J's position overlooks efforts that have been made so far to "accommodate intelligence in the evidence-based legal process",<sup>232</sup> and innovations introduced elsewhere to strengthen the adversarial nature of the process.<sup>233</sup> My thesis aligns with this approach, and will also contribute to this development by making further suggestions for institutional evolution below.<sup>234</sup>

In sum, there are a number of concerns surrounding the adversarial character of the confirmation hearing, which remain unclarified in the legislation or judicial decisions. Above all, there is ambiguity as to whether secret evidence is permitted in confirmation hearings. Even if this was not the legislative intent, the regime does not provide adequate safeguards to guarantee the necessary level of adversariness in the face of a lower standard of proof, the judge's initial exposure to secret evidence, and the difficulties that the courts face in scrutinising sensitive information. Functioning under the potentially erroneous assumption that judges are capable of both assessing, and distinguishing between, sensitive information to be either taken into account or ignored, the current regime does not seem to allow for the usual oversight model of an independent and impartial judge ensuring the fairness of the proceedings.

---

adversariness plays a lesser role, the inquisitorial powers of the judge will have to increase see below at 8.2.2.

<sup>232</sup> David Dyzenhaus and Rayner Thwaites, "Legality and emergency: the judiciary in a time of terror" Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 9, 21.

<sup>233</sup> For example the use of special advocates. See *ibid*; also David Dyzenhaus, *The constitution of law: legality in a time of emergency* (Cambridge University Press, 2006) 205-220; See also above at 4.2.3.

<sup>234</sup> See below at 8.2.

### 7.3.2 Serious crime legislation and the use of criminal intelligence in state courts

Ultimately, neither of the two published Australian CO cases determined the constitutionality of using secret evidence in CO proceedings. However, a number of cases dealing with the use of ‘criminal intelligence’ in the context of serious crime prevention orders, may provide further guidance on how the High Court is likely to approach the legality of secret evidence, the limits imposed by the principle of fairness and the requirements of adversariness.

There are currently statutes in six Australian jurisdictions aimed at disrupting and restricting serious and organised crime, and in particular declared criminal organisations, or ‘bikie gangs’.<sup>235</sup> Although the Acts differ slightly from each other, they are all similarly modelled on the provisions of Division 104 of the *Crimes Code 1995* (Cth).<sup>236</sup> They authorise the relevant State Commissioner of Police to apply to the State Supreme Court for a declaration that an organisation engages in serious crime. Once a declaration has been granted, the State Commissioner of Police may then request that a CO order be issued relating to a person who is either a member of a declared organisation, associates with a member of a declared organisation or engages in serious criminal activity. Although such COs may restrict the association, movement

---

<sup>235</sup> *Corruption and Crime Commission Act 2003* (WA); *Serious and Organised Crime (Control) Act 2008* (SA); *Serious Crime Control Act 2009* (NT); *Criminal Organisation Act 2009* (Qld); *Criminal Organisations Control Act 2012* (Vic); *Crimes (Criminal Organisations Control) Act 2012* (NSW).

<sup>236</sup> See Nicola McGarrity and George Williams, “When extraordinary measures become normal: pre-emption in counter-terrorism and other laws” in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (Routledge, 2010) 131; SA Premier, Mike Rann, at time referred to organised crime groups as “terrorists within our community”. Cited *ibid*, 143; see also Nicola McGarrity, “From terrorism to bikies: control orders in Australia (2012) 37(3) *Alternative Law Journal* 166; only the WA Act is structured differently, where the courts only have the function of reviewing decisions issued by the Corruption and Crime Commission.

and possession of certain items,<sup>237</sup> they do not include the more restrictive measures included in the counter-terrorism legislation.<sup>238</sup>

Before discussing the relevant aspects of these cases, it is important to point out that Chapter III of the Australian Constitution, which is the primary source for the requirement of fairness in federal proceedings,<sup>239</sup> is not directly applicable, as the Acts dealing with serious crime were legislated by the States. That said, State courts still have “a constitutionally mandated position in the Australian legal system”,<sup>240</sup> since they are regularly called upon to exercise federal power. In order to perform this function, State courts are required to uphold the same (minimum) standards of justice, impartiality and integrity as those implied in Chapter III.<sup>241</sup> Where an Act requires the State Supreme Court to deviate from this standard, it must be declared to be unconstitutional. This is now known as the *Kable* principle.<sup>242</sup> The reason why a clear distinction must be drawn is because there is no entrenched separation of powers on a state level.<sup>243</sup> The consequence for the following analysis is that any findings in this area can only be applied by analogy to the federal counter-terrorism CO regime.

Relevant for the present purpose is that these state legislative schemes allow certain information to be used and suppressed where it is declared to be criminal intelligence,

---

<sup>237</sup>For example *Criminal Organisation Act 2009* (Qld), s 19(2); *Serious and Organised Crime (Control) Act 2008* (SA), s 22(5); *Criminal Organisations Control Act 2012* (Vic), s 47(2).

<sup>238</sup>In particular they do not go as far as including house arrest or the wearing of tracking devices; see *Criminal Code Act 1995* (Cth), s104.5(3).

<sup>239</sup>See above at 5.2.1.

<sup>240</sup>*Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 617 (Gummov J).

<sup>241</sup>*Kable v Director of Public Prosecutions* (NSW) 189 CLR 51, 104 (Gaudron J).

<sup>242</sup>*Ibid.*

<sup>243</sup>*Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 614 (Gummov J).

Hence, the strict separation of power can be overridden by statute allowing State judges to take on certain tasks, which federal judges cannot. For the relevance of *Kable* in the context of serious crime legislation see further Anthony Gray, “Due process, natural justice, Kable and organisational control legislation” (2009) 20 *Public Law Review* 290; Steven Churches and Sue Milne, “Kable, K-Generation, Kirk and Totani: validation of criminal intelligence at the expense of natural justice in Ch III courts” (2010) 18 *Australian Journal of Administrative Law* 29; Tarasha Gavin, “Extending the reach of *Kable*: *Wainohu v New South Wales*” (2012) 34 *Sydney Law Review* 395; Mirko Bagaric, “Editorial: The revived *Kable* doctrine as a constitutional protector of rights?” (2011) 35 *Criminal Law Journal* 197.

which is defined by the various statutes in broadly similar terms across Australia.<sup>244</sup> In South Australia, for example, criminal intelligence is defined as any information,

“relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or to endanger a person's life or physical safety.”<sup>245</sup>

Once such information is declared, criminal intelligence enjoys special protection from disclosure.<sup>246</sup> Crucially, rather than excluding the information from the proceedings, the statutes specifically allow criminal intelligence to form the basis of substantive orders!<sup>247</sup> *A priori*, this declaration of information as criminal intelligence gives consideration exclusively to security interests. Given the consequences of such special protection and secret use, the question of fairness must be considered. Over the past seven years, the High Court has had to rule on the constitutionality of such provisions in a number of cases.<sup>248</sup>

### *Constitutional challenges to criminal intelligence*

The latest in a series of cases challenging the constitutionality of the serious crime

---

<sup>244</sup> The statutes differ of whether the police or the courts may declare criminal intelligence.

<sup>245</sup> *Serious and Organised Crime (Control) Act 2008* (SA), s 3 (definition); see also *Criminal Organisation Act 2009* (Qld), s 59; *Liquor Licensing Act 1997* (SA), s 4; *Crimes (Criminal Organisations Control) Act 2012* (NSW), s 3. The definition has been developed under the Counsel of Australian Governments (COAG) in relation to the restriction of particular firearms.

<sup>246</sup> For example *Criminal Organisation Act 2009* (Qld), s 78.

<sup>247</sup> For example *ibid*, s 60;

<sup>248</sup> See in particular *South Australia v Totani* (2010) 242 CLR 1 (11 November 2010), *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 82 ALJR 454 (7 February 2008), *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013), *Wainohu v New South Wales* (2011) 243 CLR 181 (23 June 2011).

legislation is *Pompano*.<sup>249</sup> The case challenged an application by the Queensland Police in 2012 to declare Pompano Pty Ltd to be part of a criminal organisation.<sup>250</sup> During the proceedings, the respondent argued before the High Court that certain provisions of the *Criminal Organisation Act 2009 (Qld)* (COA 2009) were unconstitutional. Most importantly the respondent claimed that the provisions of the COA 2009, which permit the Supreme Court “to receive and act upon material which must not be disclosed to a respondent”,<sup>251</sup> substantially impaired the integrity of the Supreme Court.

The High Court unanimously upheld the legislation to be valid, on the basis that none of the provisions in the Act limit the Supreme Court’s capacity to act fairly and impartially.<sup>252</sup> The majority conceded that the procedure of mandatory closed hearings departed from the established judicial process, but held that this did not result in unconstitutionality.<sup>253</sup> The issue framed by the High Court was whether the process envisioned by the COA 2009 *as a whole* compromised institutional integrity, and this was held not to be the case.<sup>254</sup> French CJ, concurring with the majority, emphasised that the Supreme Court’s decision to declare and use criminal intelligence is discretionary.<sup>255</sup>

Although the COA 2009 explicitly recognises this judicial discretion,<sup>256</sup> in order to preserve the integrity of the Supreme Court and avoid a violation of the *Kable* principle, the High Court has interpreted similar state legislation to be of the same effect, even in the absence of explicit recognition. Under a number of these state Acts, the

---

<sup>249</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013).

<sup>250</sup> It was alleged that Pompano Pty Ltd was associated with the Finks Motorcycle Club. For further details on the case see Greg Martin, “*Pompano* and the short march to curial fairness” (2013) 38(2) *Alternative Law Journal* 118.

<sup>251</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013) [98].

<sup>252</sup> *Ibid*, [167] and [88] (French CJ).

<sup>253</sup> *Ibid*, [138].

<sup>254</sup> *Ibid*, [157].

<sup>255</sup> *Ibid*, [32] (French CJ).

<sup>256</sup> *Criminal Organisation Act 2009 (Qld)*, s 72.

Commissioner of Police is authorised to declare criminal intelligence, which then triggers the protection of the information.<sup>257</sup> However, the inclusion of the words “could reasonably be expected” within the definition of criminal intelligence has been understood as sufficient to make the Commissioner’s declaration reviewable.<sup>258</sup>

Critical for the outcome in *Pompano* was the High Court’s finding that these proceedings do not have to be adversarial in order to be fair.<sup>259</sup> In particular, the majority rejected arguments that adversarial process is essential to ensuring procedural fairness. The judges pointed out that a respondent would rarely be in a position to meaningfully challenge any information about actual or suspected criminal activity. As such, the suppression of such information would not necessarily result in unfairness.<sup>260</sup> Furthermore, the decision in *Pompano* explicitly allowed the courts to take fairness into account in making a declaration that information was criminal intelligence.<sup>261</sup> The majority clarified that these criminal intelligence provisions only cover information that would otherwise be admissible, though is not adduced due to the security risks. The protection afforded to criminal intelligence does not cover information “that would otherwise be irrelevant or inadmissible.”<sup>262</sup>

There is a contrary view that impartiality cannot substitute adversariness as a safeguard for fairness,<sup>263</sup> and that adversariness is deeply ingrained in the common law

---

<sup>257</sup> *Serious and Organised Crime (Control) Act 2008* (SA), s 29(2); *Liquor Licensing Act 1997* (SA), s 28A(1); similarly *Corruption and Crime Commission Act 2003* (WA), 76(2).

<sup>258</sup> *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 (2 February 2009) at [135]-[136] and [143]; *South Australia v Totani* (2010) 242 CLR 1 (11 November 2010) at [124] per Gummow J; similarly the use of statutory interpretation in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 82 ALJR 454 (7 February 2008) at [30]-[33]. See also Churches and Milne, above n 243, 30-31.

<sup>259</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013) [120].

<sup>260</sup> *Ibid*, [160]

<sup>261</sup> *Ibid*, [162] majority; [32] per French CJ; see *Criminal Organisation Act 2009* (Qld), s 72(2).

<sup>262</sup> *Ibid*, [148]. It must be noted that the Act allows for the admission of hearsay evidence!!!!

<sup>263</sup> For example Steven Churches, “How closed can a court be and still remain a common law court?” (2013) 20 *Australian Journal of Administrative Law* 117; Stephen Odgers, “The High Court on crime in 2013: analysis and jurisprudence” (2014) 38 *Criminal Law Journal* 4.



tradition.<sup>264</sup> In *Al-Rawi*, Lord Kerr famously described as a fallacy the assumption that because the judge can see everything, this will guarantee a fair result:

“To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.”<sup>265</sup>

The majority in *Pompano* did not address the question of how a court can compensate for the lack of adversarial proceedings.<sup>266</sup> French CJ pointed out that in order to avoid an abuse of process, the court has the inherent power to inform itself, which includes the power to call witnesses.<sup>267</sup> However, he stops short of demanding such inquisitorial inquiry mandated in cases where the controlee has no access to criminal intelligence.

One additional aspect of the Queensland legislation is the use of a Public Interest Monitor (COPIM) in closed hearings.<sup>268</sup> While the COPIM can access all information<sup>269</sup> and is able to make submissions,<sup>270</sup> the position is not meant to work for,<sup>271</sup> or even together with, the respondent.<sup>272</sup> While the role of the COPIM has been held to be

---

<sup>264</sup> Churches and Milne, above n 243, 41-42. They argue that the common law is based on the idea that parties present evidence to the court and not that the court has to make efforts to inform it. Consequently the authors consider the review of a one-sided or self-informed judge in an adversarial system no more than a “sniff test”.

<sup>265</sup> *Al Rawi & Ors v Security Service & Ors* [2011] UKSC 34 (13 July 2011) at [93].

<sup>266</sup> Odgers, above n 263, 4.

<sup>267</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013) [44] (French CJ).

<sup>268</sup> *Criminal Organisation Act 2009* (Qld), Part 7: Criminal Organisation Public Interest Monitor (COPIM); a similar model has been also introduced in NSW under *Crimes (Criminal Organisations Control) Act 2012* (NSW), Division 2: Criminal Intelligence Monitor.

<sup>269</sup> *Criminal Organisation Act 2009* (Qld), s 88(1).

<sup>270</sup> *Ibid*, s 89(2).

<sup>271</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013) [54] (French CJ); [112] (Hayne, Crennan, Kiefel and Bell JJ); [208] (Gageler J)

<sup>272</sup> This is implied in the fact that the monitor cannot make submissions when the respondent or his/her legal representative are present and even may be excluded by the court from such parts of the proceedings. *Criminal Organisation Act 2009* (Qld), s 89(3)(4) and *Crimes (Criminal Organisations Control) Act 2012* (NSW), s 28F(3)(4). Although there are also no explicit restriction of communication between the Monitor and the respondent, the position clearly differs from the model in the UK, where the communication of the special advocate with the respondent is clearly regulated. See below at 8.2.4.1

important in ensuring that the Court observes procedural fairness,<sup>273</sup> these limitations have been described as a “minimalist approach to the protection of the respondent’s interests”.<sup>274</sup> Gageler J pointed out that the COPIM’s presence alone could not guarantee fairness.<sup>275</sup> To assure the independence of the office, the COPIM must be qualified for appointment to a higher Australian Court,<sup>276</sup> and is excluded from the role if he or she has affiliations with the police.<sup>277</sup> The criteria for appointment indicate that the primary role of COPIM is to independently monitor the judicial role, not that exercise a monitoring role over the police.<sup>278</sup> Given that assessing prospective security risks, rather than maintaining procedural fairness, is the most difficult aspect for the judiciary, the selection criteria for the COPIM are, it is submitted, a misfit for safeguarding the public interest.<sup>279</sup> Although Gageler J concurred with the majority in *Pompano*, he placed more emphasis on the importance of allowing the respondent the opportunity to challenge the basis of an order. As denying the respondent such an opportunity would be unconstitutional,<sup>280</sup> he perceived that the criminal intelligence provisions threatened procedural fairness.<sup>281</sup> In contrast to the other members of the bench, Gageler J concluded that constitutional validity can neither be based on the presence of the COPIM, nor on the judicial discretion to declare the material to be criminal intelligence or to refuse granting the final CO. Validity is preserved *only* by the

---

<sup>273</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013) [65] (French CJ), [208] (Gageler J).

<sup>274</sup> *Ibid*, [65] (French CJ).

<sup>275</sup> *Ibid*, [208] (Gageler J).

<sup>276</sup> *Criminal Organisation Act 2009* (Qld), s 84(1); those are any State Supreme Court, the Federal Court of Australia or the High Court of Australia.

<sup>277</sup> *Ibid*, s 84(3)(d).

<sup>278</sup> Explanatory notes to the *Criminal Organisation Bill 2009* (Qld) 3.

<sup>279</sup> See below at 8.2.2 for the proposal of introducing Security Review Advisors assisting to the judge in closed hearings.

<sup>280</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013) [177]-[178] (Gageler J).

<sup>281</sup> *Ibid*.

inherent power of the court to stay proceedings “where practical unfairness becomes manifest”.<sup>282</sup>

Gageler J’s dicta indicates that his Honour accepts the possibility that a lack of information *can* cause unfairness. Once such a situation occurs, the question of fairness is then considered separately from the question of disclosure, making the process much clearer.<sup>283</sup> However, it is submitted that in *Pompano*, both the majority and Gageler J shared the same general attitude towards fairness. Gageler J’s approach did not add further procedural protections for the respondent. The only difference is that the majority conflated the issues of fairness and security, making it harder to assess the relative weight to be attached to each of these interests. The High Court decisions in the ‘bikie’ cases highlight that the constitutionality of provisions allowing the use of criminal intelligence relies upon upholding the integrity of the judicial process. So long as the court is not forced to make decisions, or compelled to make unfair decisions, constitutional validity is maintained.<sup>284</sup>

The decisions discussed above recognise the need to rely upon secret evidence in administrative proceedings, but fail to articulate the minimum criteria for procedural fairness in the circumstances. Limitations to the adversarial process and position of the respondent are not always an impediment for the fairness of the proceedings. Although judges must take fairness into account in making non-disclosure decisions,<sup>285</sup> the extent of that duty – particularly when those limitations undermine the integrity of the court – remains unclear.

---

<sup>282</sup> *Ibid*, [178]; see also [212].

<sup>283</sup> The separation does not mean that rights have no effect at the stage of declaring criminal intelligence. [199] But Gageler J points out the differences of balancing under s72(1) and the balancing deciding on PII [204].

<sup>284</sup> Cf *South Australia v Totani* (2010) 242 CLR 1 (11 November 2010); French Court is pushing the concept of institutional integrity – see Kirk (pointed out by Dominique) – see G+T article.

<sup>285</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013) [162]

The Australian judiciary has been criticised for upholding procedural fairness through statutory interpretation, rather than through the application of constitutional values.<sup>286</sup>

The High Court has avoided engaging more closely with the question of capability,<sup>287</sup> and the necessity of compensation, or in other words, with the question of substantive fairness.<sup>288</sup>

There are differences between the serious crime and terrorism CO schemes. First, the serious crime COs applied under serious crime legislation are not as far reaching as those relating to terrorism.<sup>289</sup> Secondly, since the serious crime CO schemes are governed by state law, there is a different understanding of the separation of powers applies under the state constitutions. Hence, the cases can only serve as analogies. However, the inherent jurisdiction of the courts to regulate and protect the integrity of its judicial processes in order to prevent an abuse of process, as well as the duty to uphold procedural fairness through applying the principles of natural justice are likely the same under for all Australian Courts.<sup>290</sup> If anything, it is submitted that as the federal counter-terrorism CO scheme imposes more serious measures and is governed by a stricter understanding of the separation of powers under the federal Constitution, higher standards of fairness should be upheld in federal courts.

Although the High Court has not reviewed the use of secret evidence in counter-terrorism CO proceedings, it is likely that such legislation would *not* be viewed as limiting the discretion of the judges, thus upholding its constitutionality under Chapter

---

<sup>286</sup> For example Gabrielle Appleby and John Williams, “The anti-terror creep: law and order, the States and the High Court of Australia” in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (Routledge, 2010) 150, 159.

<sup>287</sup> See above at 7.3.1.

<sup>288</sup> See Dyzenhaus’ discussion on the veneer of legality in David Dyzenhaus, “Cycles of legality in emergency times” (2007) 18 *Public Law Review* 165.

<sup>289</sup> Gageler J indicated in *Pompano* that the requirements of natural justice can vary. *Cf Home Office v Tariq* [2011] UKSC 35 (13 July 2011) in the UK.

<sup>290</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013) [125].

III. As the High Court's approach in *Pompano* is likely indicative of the future development of the law in this area, it is disappointing that the judgment did not provide more guidance on what 'substantive fairness' precisely requires in this context.

### 7.3.3 – Conclusion

In Australia, the necessary safeguards for guaranteeing a fair trial in quasi-criminal procedures using sensitive information are assessed according to the standards of judicial integrity. Provided that the judge is in the position to act fairly and impartially, and retains control over the court process, there will be no violation of any constitutional principles. This reserved attitude towards potential violations of fairness and the lack of guidance included in the relevant statutes on what fairness demands means that, like in the case of balancing, the approach taken lacks consistency and leads to what can be termed 'ad hoc' justice.

Understandably, many members of the judiciary are uncomfortable with questioning the executive's assessments of sensitive information and prospective security risks. This can be seen in the approach taken to the use of secret evidence as well as to summaries of sensitive information, that are almost impossible for the controlee to challenge.

However, without such independent scrutiny, the effect of an impartial judge in ensuring fairness is seriously diminished. At the interim stage of the counter-terrorism CO regime, the RFT is significantly restricted. An iCO can be issued *ex parte* and sensitive information can be suppressed when setting out the reasons to the controlee. In determining whether to use secret evidence, the principle of fairness is completely overlooked and there are no additional 'compensating' safeguards. In order to preserve the legitimacy of the proceeding, the subsequent confirmation hearing must unambiguously compensate for the shortcomings of the iCO. But as the above analysis

demonstrates, although the use of secret evidence is not explicitly authorised at this later stage, there is uncertainty as to whether confirmation hearings can be characterised as truly adversarial. From a human rights perspective, some additional protection would be desirable, but as the ‘bikie’ cases reveal, the Australian Constitution does not require such protection. Adversariness of the trial is not a criterion for constitutionality.

The INSLM recommended to abolish the current CO regime altogether, as it is “not effective, not appropriate and not necessary”.<sup>291</sup> If it was to be retained, he suggested it should be restricted to CO ‘*Fardon*-type’ cases, hence only applied to convicted terrorists, who having served their sentences, but are still considered to be a danger to the community.<sup>292</sup> While the court in such hearings would still have to undertake a risk assessment as to the likelihood of future criminal conduct, the decision could be based upon the firm legal foundation of the previous commission of a serious criminal offence.<sup>293</sup> The risk assessment could further consider evidence of an unsuccessful rehabilitation process. Under such an approach, preparatory terrorist actions, including receiving and providing training, could be exclusively covered by the criminal law. While these modified COs would still encompass the *Hicks*-scenario, who had been convicted preceding the CO, the government would be prevented from ‘forum shopping’ as occurred in *Thomas*, where a prosecution lapsed due to inadmissible evidence. To date, the INSLM’s recommendations have been ignored.

The COAG Review did not recommend abolishing the regime, but advocated for additional safeguards “to ensure that a fair hearing is held”.<sup>294</sup> Their suggestions included a national special advocate scheme, and a guarantee that a minimum amount of

---

<sup>291</sup> Walker, above n 9, 4, 44.

<sup>292</sup> *Ibid*, 44. See *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 (1 October 2004).

<sup>293</sup> See above at 3.1.

<sup>294</sup> Council of Australian Governments, “Review of counter-terrorism legislation” (Final Report, 2013) [215], (Recommendation 26).

information be disclosed to the controlee.<sup>295</sup> Although the federal Criminal Code does not provide for the use of special advocates, as noted above, they may be still appointed under the courts' inherent jurisdiction to ensure a fair process.<sup>296</sup> However, precisely when this measure will need to be taken to protect the RTF against non-disclosure is unclear.

Finally, even if it is accepted that in some cases the effect of limiting information to a respondent may constitute an abuse of process, under the present law, the precise threshold triggering the remedy (stay of proceedings) remains unclear. The High Court has not been prepared to provide this guidance. And while state and federal legislation have withstood constitutional challenges, the CO regimes continue to suffer from a lack of (i) legitimacy (since the limitations to the RFT are not sufficiently justified), (ii) transparency (since information is withheld), and (iii) predictability and consistency (since consistent approaches to the use of secret evidence and risk assessment processes to justify intrusive CO measure have not been developed).

---

<sup>295</sup> *Ibid*, Recommendations 30 and 31.

The proposed *Counter-Terrorism Legislation Amendment Bill (No. 1) 2015* (Cth), allowing the use of secret evidence also at the confirmation CO hearing, does not include an obligation to provide the controlee with a minimum of information. While the COAG Report seems to recommend such a requirement, the new INSLM, Roger Gyles, did not support such a recommendation, but placed more trust in the judicial oversight to safeguard the fairness of the proceedings. See Gyles, above n 61, Part 9.

<sup>296</sup> This possibility was mentioned by Whealy J in *R v Lodhi* [2006] NSWSC 586 (21 February 2006). Although this was a criminal trial, this obiter is generally understood as applying to all proceedings dealing with suppressed information; see also Kirby J in *Thomas v Mowbray* (2007) 233 CLR 307, 435; and Council of Australian Governments, "Review of counter-terrorism legislation" (Final Report, 2013) 60, (Recommendation 30).

#### 7.4 - Comparative observations

In both Australia and the UK, administrative counter-terrorism measures have been introduced, enabling the executive to impose coercive measures on individuals to prevent anticipated terrorist attacks. While the main mechanisms work in a similar fashion, the regimes differ considerably in how judges safeguard the RFT, which impacts upon the admissibility of secret information, as well as the standing of the individual within the proceedings. The following comparative observations can be made:

##### *Judicial tools*

In CO-type proceedings, the different human rights frameworks in the UK and Australia determine the tools available to the judiciary to ensure the fairness of trials using secret evidence. In the UK judges apply the HRA, and thus values, previously considered to be common law in nature, that are now widely regarded as constitutional. The judicial interpretation of ‘minimum standards’ of fairness under domestic law is further guided by ECtHR’s case law, which places the individual’s RFT as the starting point of any fairness analysis. By contrast, fairness in Australia is exclusively determined by the courts (applying legislation and common law), and is only protected indirectly through the constitutional principle of the separation of powers. Rather than focusing on the impact of legislation on the individual, the Australian approach seeks to shield institutions of government, specifically the independence and impartiality of the judiciary. While these criteria are important to protect procedural fairness, the institutional approach is necessarily narrower in scope than the individual approach to the RFT.

In Australia, the implications of these differences are apparent in the High Court decision of *Thomas* and subsequent cases relating to serious and organised crime



legislation. These cases demonstrate that there is a gap between what is protected under constitutional law and what may be required to uphold the individual's RFT. This area is subject to the judges' discretion and lacks clear guidance either through legislation or case law, which promotes an *ad hoc* approach to fairness.

In the UK, the judiciary's recognition of constitutional rights and values has not only strengthened the position of the individual, but has also established a common vocabulary and framework upon which Parliamentary Committees, independent reviewers, NGOs and the media can rely when debating the essential attributes of fairness and the necessity and scope for compensatory measures. A similar debate is missing in Australia, which has not adjusted its understanding of fairness to a new security environment.

### *The role of the judge*

These differences have also impacted on the roles that judges have assumed in defining the extent to which secret evidence can be used, as well as developing and improving mechanisms to protect procedural fairness. UK judges have expressed their competence and responsibility in the area by reading down the provisions in the CO legislation rather than declaring it to be incompatible with the ECHR. By interpreting legislation in the light of the requirements of art 6 ECHR, the courts have significantly reshaped the regime of secret evidence.

In Australia, the constitutional framework arguably prevents judges from playing an overt role in developing and applying substantive standards of fairness. The scope for judicial development is therefore constrained, leaving the courts with limited tools (beyond statutory interpretation) to restrict the use of secret evidence. Consequently,

such a system relies upon prospective parliamentary vigilance to ensure that proposed legislation respects the RFT. This however has not occurred and Australian CO legislation now allows for the largely unrestricted use of secret evidence at the interim stage, and is highly ambiguous as to its use at the confirmation stage. The role of upholding fairness has fallen predominantly to the judges, who thus far have refrained from elaborating further rules that might interfere with the will of Parliament. In rejecting the use of a special regime providing for the use of secret evidence in CO hearings, the Australian regime was perceived to be less severe than its UK counterpart. However subsequent developments have challenged this assessment. While UK judges have tempered the original scheme by gradually inserting additional fairness safeguards, the Australian system remains stuck with its original design and flaws.

#### *The level of adversariness*

Both Australia and the UK have been challenged by the need to reconcile pre-emptive counter-terrorism measures, which rely heavily upon secret evidence, with established standards of adversarial justice.<sup>297</sup> The UK jurisprudence has now established that the state must appoint a special advocate in closed hearings as well as provide a ‘gist’ of the content of the secret evidence to the controlee. These counter-balancing measures allow the proceedings to maintain a minimum of adversariness and as such a core irreducible minimum of fairness to the controlee at the review hearing. In Australia, the one-sided nature of the interim stage of the proceeding is said to be counter-balanced by an adversarial confirmation hearing. Not only has the analysis above demonstrated that there must be serious doubt about the adversarial character of these proceedings, but in relation to serious crime legislation COs, it has been held that adversariness *per se* is not

---

<sup>297</sup> Tulich, above n 210, 346-347.

determinative for the fairness of the proceedings.<sup>298</sup> As such, despite the practical difficulties that the government faces in providing a ‘gist’ of the sensitive information to the controlee, the UK provides a much clearer minimum standard of protection for the individual’s RTF.

Given the prominence of the judge in ensuring the fairness of the proceedings, the Australian position bears strong resemblance with some of the opinions expressed in earlier the UK cases of *MB*<sup>299</sup> and *AF*.<sup>300</sup> There, it was discussed whether judicial supervision – even when assisted by a special advocate – can be a sufficient safeguard.<sup>301</sup> While accepted in these early decisions, this has been ultimately rejected in the UK as a violation of the *individual* RFT.<sup>302</sup> Hence, even in cases where a gist might not provide the controlee with a solid chance to challenge the evidence, in the UK, keeping the controlee informed is regarded as an important independent value. The same cannot be said for the Australian position.

#### *General comparison and potential for improvement*

Thus far, my analysis may appear to favour the UK model governing the use of secret evidence. This is certainly true in terms of its general approach to acknowledging the RFT, clearly defining its guiding principles, and according greater respect to the individual. However, the use of secret evidence in the UK has now become commonplace in CO hearings notwithstanding the fact that mandatory safeguards are in place to mitigate any negative impact upon the fairness of the trial.

---

<sup>298</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013).

<sup>299</sup> *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46 (31 October 2007).

<sup>300</sup> *Secretary of State for the Home Department v AF and Others* [2008] EWCA Civ 1148 (17 October 2008).

<sup>301</sup> See above 7.2.1.

<sup>302</sup> *Secretary of State for the Home Department v AF & Another (No 3)* [2009] UKHL 28 (10 June 2009).

In Australia, although flaws in the statutory scheme may allow secret evidence to affect a decision to confirm an interim control order, this seems to be an unintentional feature of the legislation. While this affords the judge a wider discretion of protecting the controlee from the use of secret evidence, the fairness of the trial becomes entirely reliant upon the proper exercise of judicial oversight. As such, there are compelling reasons to clarify the legislation and incorporate additional safeguards to effectively protect values of fairness as well as the integrity of proceedings from the misuse of secret evidence. So far the use of sensitive information has not had any impact on the Australian CO decisions. However, this should not be a reason for refraining from introducing necessary improvements.

Although there is equally a scope for improvement in the UK, the system has incrementally incorporated safeguards into SIAC proceedings, which appear to be working reasonably well. This workability of the system now depends heavily on the actors involved (lawyers, special advocates and judges) to keep secret evidence to a minimum. At this stage, an alternative seems to be either a wide-scale review and reform of the scheme, or its abandonment, instead reinstating the previous PII doctrine. Both options are highly unlikely in the current climate.

## **Chapter 8: The Future of disclosure of sensitive information in Australia and the United Kingdom**

The present Chapter ties together the conclusions of the two case study Chapters with the theoretical discussion in the first part of the thesis. The concluding analysis will first make some general comparative observations between the approaches to non-disclosure of sensitive information in Australia and the United Kingdom (UK). Based on the findings of the thesis, it will then make some proposals for the improvement of non-disclosure regimes with reference to those two jurisdictions.

### **8.1 General comparative observations**

Some of the differences in the approach to disclosure decisions and safeguards between Australia and the United Kingdom – as described in the previous two Chapters – may be explained by reference to the distinct human rights regimes operating in those two jurisdictions. In particular, the *Human Rights Act 1998* (UK) (HRA) in the UK now requires the express protection of the *individual* right to a fair trial (RFT) under art 6 ECHR, which admits scope for the European Court of Human Rights (ECtHR) case law to shape the development of domestic law: as a result, UK law applies a proportionality *sui generis* approach, which crucially requires the counter-balancing of the limitations suffered by the individual in order to avoid a violation of art 6 ECHR. This sophisticated approach, which aims to maximise the individual RFT, has no analogue in Australia. In Australia, the protection of fairness derives from the common law, which focuses on the protection of the integrity of the court, rather than the rights of the

individual. This emphasis may also explain why the balancing approach, which had been adopted by the common law in disclosure decisions and which is now also required by the relevant legislation on disclosure, has not evolved under this common law model. Hence, the only real safeguard for the defendant in Australia lies with the inherent judicial power to stay its proceedings as an abuse of process – a drastic and rarely used remedy.

But examining the available legal sources ('law in books') alone does not explain the judicial behaviour ('law in action').<sup>1</sup> This thesis has identified a number of UK decisions where the courts relied on the common law rather than ECHR.<sup>2</sup> This preference for using the common law underscores the authority of the *English* common law as a foundational source of individual rights, as well as asserting the continuity of the UK's autonomous system of rights protection distinct from those 'imported' from the ECHR.<sup>3</sup>

Of course, the common law sources would be equally accessible for the judges in Australia as part of its British legal inheritance. While they are not binding upon Australian courts, they can certainly be persuasive. Furthermore, Australian judges could rely on the rule of law and the common law constitution (CLC), which crucially support the importance of fairness of the legal process, as potential sources for the ongoing development of the law governing non-disclosure decisions.<sup>4</sup>

However, this trend of gradual convergence is not inevitable. There is a diverging understanding of the constitutional duties of the courts. In the UK, the HRA has

---

<sup>1</sup> This gap between the 'law in books' and 'law in action' was first identified by American Legal Realist, Roscoe Pound in his influential article, "Law in Books and Law in Action" (1910) 44 *American Law Review* 12.

<sup>2</sup> See for example *A and others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004) [42] (Lord Bingham) as discussed above at 4.2.1.

<sup>3</sup> See for example *R v Horncastle and Others* [2010] 2 AC 430 (9 December 2009).

<sup>4</sup> See David Dyzenhaus, "Cycles of legality in emergency times" (2007) 18 *Public Law Review* 165, 184.

Chapter 8: The Future of disclosure of sensitive information in Australia and the United Kingdom

provided courts with a reason to consider the implicit constitutional values in their decisions.<sup>5</sup> For example, in relation to counter-terrorism legislation, the courts have become involved in the process of fine-tuning the level of rights protection, engaging in an ongoing dialogue with parliament.<sup>6</sup> Examples of such dialogue relevant to this thesis are the general rules of non-disclosure and the law of anonymous witnesses. This dialogue in UK has had more impact in promoting legislative amendment than the numerous reviews and recommendations of independent review bodies and parliamentary committees,<sup>7</sup> which only seem to provide supporting footnote references in leading judgments.<sup>8</sup>

In Australia, the case law on the NSIA and ‘anti-bikie laws’ have clearly demonstrated that the High Court does not recognise a comparable constitutional duty to uphold the individual’s RFT. Neither the Constitution nor other relevant statutory provisions impose such a duty on Australian courts or provide such protection for individual rights. Rather, within Australian law, there are few judicial constraints imposing on Parliamentary supremacy, as well as general resistance amongst politicians and the wider population towards an entrenched bill of rights.<sup>9</sup> While there are many examples where Australian courts show concern for the fairness of the trial, judicial respect (or deference) for the political branches means that the level of judicial protection is a baseline *minimum* standard necessary to ensure the fairness of the trial. The thesis has demonstrated that the balancing test applied by the courts for determining disclosure

---

<sup>5</sup> See for example *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004).

<sup>6</sup> While there is certainly a lively debate on this topic and about the characterisation of the institutions, there is also some judicial recognition of a constitutional supremacy as counterweight to Parliamentary supremacy: see for example *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 (22 February 2002) [71] (Lord Laws).

<sup>7</sup> Numerous reports pointing to weaknesses had been ignored for years. See also above at 5.1.1.

<sup>8</sup> See for example *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004); or *Secretary of State for the Home Department v MB* [2007] UKHL 46 (31 October 2007).

<sup>9</sup> See above at 5.2.1.

will defer to the executive's expertise in national security matters (the rule) *unless* in the particular case fairness requires otherwise (the exception). Deference, not balancing, is a more accurate description of this judicial behaviour.<sup>10</sup> Judges claim to have the duty to uphold the RFT, which is said to be an evolving standard, yet do not engage in a dialogue with other branches of government, as has occurred in the UK.

It would be wrong to argue that the Australian position is inherently worse. It simply means that Parliament and the executive bear greater responsibility in protecting human rights according to their proclaimed commitment as a liberal democracy. However, there is a risk. If Parliament is mainly driven by other concerns or interests – in this case national security concerns about sensitive information – it may neglect or sacrifice the protection of individual rights – in this case, the RFT. In Australia, the NSIA provides an example of the government's intention to widen the options for non-disclosure, while at the same time ensuring the fairness of the proceedings. This was done by tilting the balance towards non-disclosure, without further defining the requirements necessary for protecting the RFT. The courts have read down this approach, as they did not consider themselves limited in terms of their decision-making powers. However, the wording of the NSIA does not suggest that Parliament intended to legislate for a 'balanced' procedure in relation to sensitive information. It simply preserved, as is customary in many statutes that interfere with rights, the common law power of the court to stay proceedings in order to avoid miscarriage of justice. And even this was done in an ambiguous fashion.<sup>11</sup> In this regard, the Australian constitutional design, as described above, which puts the political branches in charge of ensuring human rights

---

<sup>10</sup> See for example *Alister v R* (1984) 154 CLR 404, 435 (Wilson and Dawson JJ): "Questions of national security naturally raise issues of great importance, issues which will seldom be wholly within the competence of a court to evaluate. It goes without saying in these circumstances that very considerable weight must attach to the view of what national security requires as is expressed by the responsible Minister."

<sup>11</sup> See above at 6.2.3.3.



compatibility of statutes, has failed. Neither the Independent National Security Legislation Monitor (INSLM) nor the Parliamentary review mechanisms had an impact on the development of the *National Security Information Act 2004* (Cth) (NSIA).

The ruling in *Lodhi* that the NSIA survived constitutional challenge – and did not infringe Chapter III - may be viewed as a success for the Executive and Legislature concerned to protect national security, but the ruling also signalled that judges ultimately retained powers and remedies for protecting the fairness of their proceedings. A concern is of course that without courts engaging more robustly and directly with the threats to the RFT, this approach will provide only for a minimum level of protection – a ‘vener’ of legality - for the RFT.<sup>12</sup>

There are also further downsides where judges do not actively engage in the development of human rights protections. One is that it reduces the strength of the system of a checks and balances. As argued in Chapter 4, checks and balances may provide for a better control of the use of power than the concept of separation of powers. Here, it may be important to note again that in the UK the courts still do not have the power to overrule Parliament. And as we have seen in the case of absent witnesses, the courts went to great length to defend UK legislation against the application of the ‘sole or decisive’ rule, as applied by the ECtHR at the time.

While it is possible that in certain cases the outcome is the same in UK and Australian courts, it is submitted that the Australian standard will be lower over the long term.

Hence, the logical question is how to improve the Australian legislation regime to

---

<sup>12</sup> A judicial strategy that upholds the appearance of legality while not actually engaging with the issue directly avoids establishing negative precedents for the future. Dyzenhaus described this as the “powder dry” approach: Dyzenhaus, above n 4, 167; David Dyzenhaus, *The constitution of law: legality in a time of emergency* (Cambridge University Press, 2006) 18.

incorporate or better protect the fairness values examined by this thesis while respecting its distinct legal tradition?

## 8.2 Propositions for the improvements of non-disclosure regimes

When it comes to judicial non-disclosure decision of sensitive national security information, the courts have always stressed that consideration has to be afforded to both national security interests and the fairness of the legal procedures.<sup>13</sup> These valuable interests are often difficult to reconcile and challenge the judges in balancing what has been deemed incommensurable interests.<sup>14</sup>

What makes these decisions particularly difficult are the risks and uncertainties associated with the disclosure of national security information. Furthermore, there is a widespread argument – held both by politicians and judges - that the judiciary should simply not interfere with security decisions. While some of these concerns may be overstated, there are nonetheless certain realities about security, which have an influence on non-disclosure decision-making and must be taken into consideration by the courts. At the same time, there are also principles of fairness, which are vulnerable to being reduced to mere rhetoric. A sophisticated legislative regime to accommodate between the various interests at play must certainly pay genuine respect to both security and fairness.

### 8.2.1 Political realities of security and the principle of fairness

As Chapter 3 has demonstrated, correctly assessing the true value and potential consequences of disclosing sensitive information can be difficult. This difficulty stems from a number of reasons, which must be considered as political realities. These include:

---

<sup>13</sup> *Sankey v Whitlam* (1978) 142 CLR 1 (9 November 1978).

<sup>14</sup> “It is like asking whether one object is longer than another object is heavy.” James Jacob Spigelman, “The principle of open justice: a comparative perspective” (2006) 29(2) *University of New South Wales Law Journal* 147, 158.

**First**, the executive is highly protective of sensitive information. On the one hand, this stems from the objective to guarantee the future flow of information, which often comes from foreign agencies and may be described as an ‘international comity’ between security agencies. On the other hand, it reflects an attitude best expressed by the mosaic theory, which assumes “[a] scrap of information which, in itself, might seem to have no bearing on national security may, when put together with other information, assume a vital significance.”<sup>15</sup>

**Secondly**, most national security experts are placed within the Executive. Assessing risk is a highly complex process, which has been developed in intelligence organizations and thus requires a particular skill-set.

**Thirdly** and closely related, since judges often lack or are said to lack this skill-set, they seem less equipped to either make or evaluate effectively risk assessments.<sup>16</sup> As they are equally aware of the security risks and the need to prosecute and convict, they are generally reluctant to challenge the Executive’s decisions in this area.<sup>17</sup> However, without properly assessing the relative weight of any security risk, it can be difficult to assess its importance and impact on the trial.

Equally, there are some important principles of fairness, established over centuries that should not be abrogated without proper justification.

**First**, while judges experience difficulties in assessing security issues, they are better equipped to rule on matters of procedural fairness and uphold traditional liberties and

---

<sup>15</sup> *Church of Scientology v Woodward* (1982) 154 CLR 25, 51; *Watson v AWB Limited (No 2)* [2009] FCA 1047 (17 September 2009) [33].

<sup>16</sup> This assumption is also not always accurate as judges can equally acquire the appropriate skills.

<sup>17</sup> See for example *R v Lappas & Dowling* [2001] ACTSC 115 (26 November 2001) [26]: “If that is the view taken by the appropriate government representative, I have no reason to go behind it.”

freedoms. As judges have repeatedly noted, “Courts are specialists in the protection of liberties.”<sup>18</sup> Moreover, courts have a constitutional duty in a liberal democracy to protect liberties against unjustified coercive measures of the state.<sup>19</sup> Therefore any decision about the (un)fairness of the process should entirely rest in their hands.<sup>20</sup>

**Secondly**, from a judicial perspective a trial can only be assessed to be either fair or unfair in the particular circumstances of the case. The latter is considered a miscarriage of justice, underscoring the importance of courts ensuring that a minimum of fairness be observed. In Australia, no free standing RFT has been accepted under the Constitution.<sup>21</sup> However, the courts have always required proceedings to be fair in order to protect the integrity of their own processes (abuse of process doctrine). And under the common law, there is no positive RFT, but rather an institutional duty on the court to prevent the defendant being subject to an unfair trial.<sup>22</sup> This is a higher standard than a duty to make the trial *as fair as possible* within the procedural and evidential limitations established by the legislature and executive, which potentially does not deliver a fair trial!

**Thirdly**, under the law of evidence it has been described as the ‘golden rule’ that material evidence should always be disclosed.<sup>23</sup> Any deviation from that rule carries the

---

<sup>18</sup> *RJR-MacDonald Inc v Attorney General of Canada* [1995] 3 SCR 199, 277, which has been cited with approval in *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004) 178 (Lord Rodger).

<sup>19</sup> See for example *R v Davison* (1954) 90 CLR 353, 380-381 (Kitto J); *R v Looseley* [2001] UKHL 53 (25 October 2001) [1] (Lord Nicholls). For the relationship between Parliament and an independent judiciary see for example Peter Bailey, *The human rights enterprise in Australia and internationally* (LexisNexis Butterworths, 2009) 110; Ahron Barak, *The judge in a democracy* (Princeton University Press, 2006) 56; Lord Steyn, “Dynamic interpretation amidst an orgy of statutes” (2004) 35(2) *Ottawa Law Review* 163, 165.

<sup>20</sup> *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004) [39] (Lord Bingham), [178] (Lord Rodgers).

<sup>21</sup> *Lodhi v Regina* [2007] NSWCCA 360 (20 December 2007) [74] (Spigelman CJ).

<sup>22</sup> *Dietrich v The Queen* (1992) 177 CLR 292 (13 November 1992).

<sup>23</sup> *R v H and C* [2004] 2 AC 134, 147.

risk of miscarriages of justice.<sup>24</sup> Hence, the suppression of material information should be considered an exception to this golden rule, and requires justification. The onus of whether sensitive information should not be disclosed rests with the party claiming non-disclosure and thus generally with the Government. Although s 130 of the *Evidence Act 1995* (Cth) is not explicit, the provision is generally understood in the same way.<sup>25</sup> This is also in line with more general liberal principles that any limitations upon the liberties of the individual by the state needs to be justified and kept to its absolute minimum. Without denying or belittling current risks to national security, this area should not be excluded from this principle. As Lucia Zedner pointed out, it is important not to forget that security itself is simply a means to create liberty.<sup>26</sup>

### 8.2.2 Consequences for a non-disclosure regime

These realities and principles have the following consequences for any non-disclosure regime seriously committed to fair proceedings:

**First**, as outlined above, judges may face difficulties in determining the risks associated with the disclosure of sensitive information. At the same time, they have a constitutional duty in a liberal democracy to prevent arbitrary acts of the state.

Therefore, judges find themselves in a difficult situation, particularly when legislation explicitly favours national security over fairness. The result can be ‘legal grey holes’, ie situations where the impression is created that proper judicial oversight is provided, but there is actually none.<sup>27</sup> Hence, legislation - typified by the s 31(8) NSIA - should

---

<sup>24</sup> *Ibid*; See also *Edwards v the United Kingdom* [ECtHR] Application no 13071/87 (16 December 1992) [36].

<sup>25</sup> Stephen Odgers, *Uniform Evidence Law* (Lawbook, 8<sup>th</sup> ed, 2009) 655. (referring to *Sankey v Whitlam* and *Fernando v Minister for Immigration & Multicultural & Indigenous Affairs*).

<sup>26</sup> Lucia Zedner, “Seeking security by eroding rights: the side-stepping of due process” in Benjamin Gould and Liora Lazarus (eds), *Security and human rights* (Hart Publishing, 2007) 257, 258.

<sup>27</sup> See Dyzenhaus, above n 12, 50.

refrain from directing that the balance should favour security over other interests. Such an approach does not only tip the balance, but removes any balance entirely with the aim to achieve a particular outcome, a strategy that has provoked judicial backlash.<sup>28</sup>

Simply because judges are challenged in how they should attach weight to national security assessments, it does not follow that this task should be entirely removed from the judges' hands. In line with the analysis in Chapter 4, judges should rather be in a position where they are able to 'defer as respect', which then also retains a functioning system of checks and balances. In order to be in such a position, a legislative regime is needed that adapts regular procedures to assist judges in fulfilling these duties.<sup>29</sup>

One way to provide such assistance to the judicial decision-makers to evaluate these assessments is through the appointment of Security Review Advisors (SRA). Inspiration and guidance for the roles, characteristics and qualities of such advisory positions can be gained from examining the operation of related positions such as the Canadian Security Intelligence Review Committee (SIRC)<sup>30</sup> and the British Special Immigration Appeals Commission (SIAC).<sup>31</sup> SRAs must have substantial experience in the field of national security and intelligence. They are security cleared to the necessary level and possess all the necessary understanding of, and experience in, evaluating the information and arguments of why non-disclosure is necessary, including the propriety of the intelligence-gathering methods. Crucially, they enjoy a certain level of independence from the current administration. Members could be drawn from retired

---

<sup>28</sup> See above at 6.2.3.3.

<sup>29</sup> See above at 4.4.

<sup>30</sup> Website of the Canadian Security Intelligence Review Committee: [www.sirc-csars.gc.ca/index-eng.html](http://www.sirc-csars.gc.ca/index-eng.html).

<sup>31</sup> Website of the British Special Immigration Appeals Commission: [www.justice.gov.uk/tribunals/special-immigration-appeals-commission](http://www.justice.gov.uk/tribunals/special-immigration-appeals-commission). SIAC members are drawn from different backgrounds providing different skill sets to the commission. "As specified in the *Special Immigration Appeals Commission Act 1997* (UK), the SIAC panel consists of three members. One must have held high judicial office; and one must be - or have been - a senior legally-qualified member of the Asylum & Immigration Tribunal (AIT). The third member will usually be someone who has experience of national security matters."

police, security and intelligence personal, and in particular from former or current Inspector Generals for Intelligence and Security.<sup>32</sup> These positions share similarities to a system of internal review, and there is a danger that, given that SRAs are closely connected to the executive branch of government,<sup>33</sup> such advisory positions within the court structure conflict with traditional understandings of the separation of powers. However, the judge still has the final say on the evaluation of the intelligence products, and this approach reassures the defendant that decisions, which cannot be made publicly for security reasons, are not arbitrary and have been subject to *informed* judicial independent scrutiny. It is submitted that a successful approach guaranteeing both security and liberty entails strong cooperation between the branches of government and is guided by the same values of a liberal democracy.<sup>34</sup>

**Secondly**, since limitations on civil liberties should be justified in a liberal democracy, and the general rule of the law of evidence is that all material information should be disclosed, it follows that fairness needs to be maximised. This claim has two aspects: one is that the suppression of such information should be limited to only what is reasonably necessary; the other is that any limitations of fairness ought to be compensated as much as possible.<sup>35</sup>

In relation to the first aspect, it must be accepted that judges sometimes have only a limited capacity to increase disclosure of sensitive information. This is not only due to their judicial capacities, but also that they are dependant on the proper functioning of the disclosure processes, a function that rests with both the police and prosecution.<sup>36</sup>

---

<sup>32</sup> Website of the Inspector General for Intelligence and Security: [www.igis.gov.au](http://www.igis.gov.au).

<sup>33</sup> This connection is generally based on prior professional association and thus also extend to similar backgrounds, attitudes, operational culture etc.

<sup>34</sup> Barak, above n 19, 40.

<sup>35</sup> In relation to this second aspect, a number of measures, which may compensate for the limitation of the equality of arms will be discussed further below at 8.2.4.

<sup>36</sup> See above at 6.1.



But as the suppression of information relevant to the defence can lead to serious injustice,<sup>37</sup> in particular when there is political pressure to secure a particular result, further external safeguards may be considered necessary. For example, comparable to the criminal offence for disclosing sensitive information covered by the Attorney-General's certificate under the NSIA, it is submitted that the legislature should enact a criminal offence – directed primarily to law enforcement officials and prosecutors – who knowingly suppress information that is 'material' to a criminal trial. Although it may be difficult to enforce such an offence - as it would generally require an internal investigation, and the word 'material' is open to interpretation – this offence sends a clear message that those public officials responsible for (non)disclosure decisions should proceed with an 'abundance of caution', and that the degree of disclosure (or conditions imposed) should be a matter for the courts and not solely the executive. Furthermore, the enactment of this offence as an 'obstruction of justice' would reinforce as a *criminal law* obligation the already existing ethical and professional obligation to disclose all material evidence. Without such enactment, there could not be an offence carrying a penalty for non-compliance. In the UK further sanctions for disclosure failures on behalf of the prosecution have been considered in an enquiry, but were ultimately rejected.<sup>38</sup>

---

<sup>37</sup> See for example the miscarriage of justice cases in the UK during the 1980s and 90s. These included most prominently the cases of the Guildford 4, the Maguire 7 (See Sir John May, "Interim Report on the Maguire Case: The Inquiry into the circumstances surrounding the convictions arising out of the bomb attacks in Guildford and Woolwich in 1974" (9 July 1990)) the Birmingham 6 and Judith Ward; see above at 6.1.

<sup>38</sup> Lord Justice Gross and Lord Justice Treacy, "Further review of disclosure in criminal proceedings: sanctions for disclosure failure" (Judiciary of England and Wales, November 2012) 9-11. The authors considered that staying proceedings in order to avoid an abuse of process, as well as the measures of adjournment, exclusion of evidence under s 78 of the *Police and Criminal Evidence Act 1984* (UK) and the attribution of costs to the prosecution to be sufficient. See above at 6.3.1.1.

**Finally**, the role of the trial judge is crucial for the fairness of the trial. It is now generally accepted that the judge needs to be in charge at all stages of the proceedings.<sup>39</sup> This enables the judge to determine the appropriate level of fairness and ultimately stay proceedings if necessary.

However, in any part of the proceedings in which the defence is excluded, it is submitted that these judicial duties must be extended. This is particularly suggested for type III hearings in the UK.<sup>40</sup> Acknowledging that the adversarial character of the proceeding has been disturbed, the judge must assume a more active inquisitorial role in order to compensate for the inequality of arms. This should not replace any appointment of a special advocate, but should rather serve as an additional safeguard. It is also important to stress that this should not be an alternative for an otherwise open trial, but limited to questions of whether sensitive information is material to the case and the extent of its disclosure.

While there are some individual members of the judiciary, who have embraced such an attitude in criminal or quasi-criminal proceedings,<sup>41</sup> the majority of the judges in both Australia and the UK is likely to resist such a changes. In the common law world, inquisitorial proceedings are generally conceived as being non-judicial or administrative processes. Thus the introduction of ‘inquisitorial powers’ would potentially challenge the traditional understanding of the judicial role.<sup>42</sup>

Despite such a general attitude there are also a number of examples, where

---

<sup>39</sup> See for example *Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000) [56]; *Fitt v the United Kingdom* [ECtHR] Application no 29777/96 (16 February 2000) [49]; *Rowe and Davis v the United Kingdom* [ECtHR] Application no. 28901/95 (16 February 2000) [58]. Although the current NSIA regime requires a number of proceeding to be held mandatorily in private, which goes against such full discretion of the judge, the issue concerns the principle of open justice and thus is only related to the main concern of this thesis.

<sup>40</sup> See above at 6.2.2.2.

<sup>41</sup> See for example *Secretary of State for the Home Department v AE* [2008] EWHC 132 (Admin) (01 February 2008) [27]

<sup>42</sup> See for example *Laker Airways Ltd v Department of Trade* [1977] 2 All ER 182 (15 December 1976) [208]; *R v Apostilides* (1984) 154 CLR 563 (19 February 1984) 576.

‘inquisitorial’ approaches – in the continental European sense of ‘investigatory’ - have been adopted or suggested within common law systems. In Canada, for example, the Supreme Court in *Charkaoui* discussed the adoption of a ‘pseudo-inquisitorial role’ of the Federal Court in reviewing the *in camera* and *ex parte* hearings under the immigration regime of the time.<sup>43</sup> The court valued the active role of the judge positively and rejected claims that such an approach would endanger their position of impartiality. However, it had concerns about the accuracy of the decisions given that the court was not provided with the full powers of an inquisitorial court or any adversarial challenge.<sup>44</sup> This is why the relevant procedures were held unconstitutional<sup>45</sup> and a regime of special advocates was introduced as a consequence.<sup>46</sup>

In Israel, the courts have adopted a ‘judicial management model’ in administrative detention cases, where only limited information is disclosed:<sup>47</sup> “In the framework of these proceedings the judge is required to question the validity and credibility of the administrative evidence that is brought before him and to assess its weight.”<sup>48</sup>

Moreover, the judge has a duty to consider the material from the defendant’s perspective, who is excluded from the proceedings.<sup>49</sup>

Another example of inquisitorial judges in the common law world stems from Northern Ireland. As a consequence of the Diplock trials, there was the concern that a judge sitting without a jury would alter the adversarial character of the trial. Jackson and Doran demonstrated that judges in Diplock courts ‘compensated’ for the loss of the jury

---

<sup>43</sup> *Charkaoui v Canada* [2007] 1 S.C.R. 350.

<sup>44</sup> *Ibid*, at [50]-[51] and [63].

<sup>45</sup> *Ibid* at [65].

<sup>46</sup> Of course it has to be kept in mind that *Charkaoui* was an immigration case and thus the court was not limited to questions of disclosure, but decided on the matter.

<sup>47</sup> For a discussion see Daphne Barak-Erez and Matthew Waxman, “Secret evidence and the due process of terrorist detentions” (2009) 48(3) *Columbia Journal of Transnational Law* 3, 18.

<sup>48</sup> CrimA 6659/06 - *A et al. v. The State of Israel* [2008] at [43]

<sup>49</sup> *Ibid*. See also Shiri Krebs, “The secret keepers: judges, security detention and secret evidence” in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning rights: comparative judicial engagement* (Hart Publishing, 2014) 179.

by adopting a more inquisitorial approach to its functions.<sup>50</sup> While the authors were unable to quantify the trend precisely, their empirical study clearly showed an increased level of judicial questioning and intervention than ordinarily occurred in a normal jury trial. Interestingly, concerns were expressed that although the character of the trial changed, the roles of the judge formally remained the same.<sup>51</sup> Hence, in a legislative non-disclosure regime, it would be preferable to signal explicitly that judges were under a duty to adopt a more inquisitorial role within *ex parte* hearings. It could also be mentioned that inquisitorial powers are also not entirely alien to Australian judges. However, cases where judicial bodies have been provided with formal or informal inquisitorial powers limited to certain Commissions, Tribunals<sup>52</sup> and the Coroners Courts.<sup>53</sup>

These examples demonstrate that a more inquisitorial approach in non-disclosure proceedings is feasible. It is also clear that any advantages from such an approach must be weighed against weakening the ‘purity’ of a legal system based on adversarial justice, and that significantly altering the well-established role of parties to the judicial process may create some damage to public confidence. However, as long as they are limited to situations where the regular principles of adversariness are disturbed anyway, the advantage of an additional safeguard becomes more convincing.

---

<sup>50</sup> Their findings were based on an empirical study into the behaviour of judges in Northern Ireland conducting ordinary trials and Diplock trials. This was possible because the two systems ran parallel – depending on the offence – and each judge in Northern Ireland had to take on some Diplock trials. John Jackson and Sean Doran, “Conventional trials in unconventional times: the Diplock Court experience”, (1993) 4(3) *Criminal Law Forum* 503. See also John Jackson, Sean Doran and Michael Seigel, “Rethinking adversariness in nonjury criminal trials” (1995) 23(1) *American Journal of Criminal Law* 1 and John Jackson and Sean Doran, *Judge without jury: Diplock trials in adversary system* (Oxford University Press, 1995) 287.

<sup>51</sup> Jackson and Doran (1993), above n 50, 520.

<sup>52</sup> Narelle Bedford and Robin Creyke, *Inquisitorial processes in Australia's tribunals* (Australian Institute of Judicial Administration Incorporated, 2006).

<sup>53</sup> Brian Mills, *The criminal trial* (Federation Press, 2011) 7.

### 8.2.3 Questions of security and questions of fairness in non-disclosure decisions

In 2004 the Australian Law Reform Commission's (ALRC) Report on sensitive information<sup>54</sup> suggested that in particular situations the Attorney-General's certificate should be conclusive, and that it is then for the court to decide what the consequences of non-disclosure would be.<sup>55</sup> In this context, Palmer has commented

“[A]s the ALRC's proposals recognise, and the as *R v Lappas* demonstrated, the question as to whether information should be disclosed, and the question as to whether – if the information is not to be disclosed – the accused can receive a fair trial, are fundamentally separate questions.”<sup>56</sup>

Given the different nature of these questions and recognising the respective expertise and competence of the two branches of government, it is submitted that in any non-disclosure decision the court must clearly distinguish between two types of questions:

(a) *security questions*, which relate to the necessity (and the extent) of the non-disclosure. Here it has to be accepted that only a very basic level of judicial scrutiny is applied; and

(b) *liberty questions*, which deal with the consequences of any non-disclosure for the fairness of the trial. Being guided by the concept of proportionality *sui generis*, the aim should be to minimise the impact on the fairness of the trial by installing appropriate safeguards. At this stage the judges are in charge and no level of deference should be applied.

---

<sup>54</sup> Australian Law Reform Commission, *Keeping secrets: The protection of classified and security sensitive information* (Report 98, May 2004).

<sup>55</sup> *Ibid*, [11.166]-[11.167].

<sup>56</sup> Andrew Palmer, “Investigating and prosecuting terrorism: the counter-terrorism legislation and the law of evidence” (2004) 27(2) *University of New South Wales Law Journal* 373, 394. Palmer referred to Australian Law Reform Commission, *Protecting classified and security sensitive information* (Discussion Paper 67, January 2004) and *R v Lappas & Dowling* [2001] ACTSC 115 (26 November 2001). See also Gaegler J approach in *Pompano* discussed above at 7.3.2.

Such a view rejects that security and liberty can be sensibly balanced against each other. Rather than creating a ‘black box’ of decision-making, distinguishing between these two types of questions provides a clear structure for the decision-making, promoting more considered and consistent outcomes. This distinction is arguably more important for the Australian balancing approach, but it is equally informative for the UK approach, where decision-making is guided by principles.

***(a) The security question and the need to suppress sensitive information***

Unlike the ALRC Report, the thesis does not support the position that the Attorney-General’s certificate should be conclusive. In order to safeguard against arbitrary decisions, checks and balances are still required. As under the current regime, judges should review the information in question to determine whether it is withheld for legitimate reasons.<sup>57</sup> This is a prerequisite for any a non-disclosure order. In order to strengthen the capability of the judges, as suggested above, a SRA or the like should support the trial judges in this inquiry. The onus would still rest with the party claiming non-disclosure and thus generally with the Government. However, it is assumed that this is not a heavy burden to discharge.<sup>58</sup>

The question of what constitutes a legitimate reason for non-disclosure remains. Not only has it been accepted that certain types of information or particular witnesses deserve protection where a credible and serious danger or threat has been established, but that protection should also apply where information has been received from foreign intelligence agencies and where information could expose the methods (*modus operandi*) used by intelligence agencies. In those particular cases, the risk to national security by disclosure may be remote, but non-disclosure would nevertheless be

---

<sup>57</sup> See *Alister v R* (1983) 154 CLR 404 (13 February 1984).

<sup>58</sup> Also *ibid*, 435 (Wilson and Dawson JJ).

regarded by the state as vital to the continuation/sustainability of the work of Australia's security agencies internationally. Hence, it seems that the threshold is rather low.

Illegitimate reasons for non-disclosure could be adduced in cases where the information is already public, withheld for political reasons (for example to avoid political embarrassment), or for other *mala fides* or bad intentions. However, even in these cases, specialist expertise is still needed to evaluate the material. In the UK, the threshold for non-disclosure is already set higher requiring a 'real risk' to security.<sup>59</sup> However, what this threshold means in practice is hard to say. In particular, it seems likely that judges would be challenged to distinguish between a 'risk' and a 'real risk' without some informed opinion from security experts (for example SRAs). Despite potential assistance from SRAs, it is important for the trial judge to review all relevant information periodically in order to assess its importance for the question of fairness, which can also change over the course of the trial.<sup>60</sup> For example, the need for protecting certain information may disappear, for example, because a particular operation has been completed.

***(b) The liberty question and determining the fairness of the trial***

Considering the principles described above, which seek to maximise the fairness of the trial and establish a minimum threshold of fairness that cannot be balanced away, determining the impact on the fairness of a trial of a (potential) non-disclosure involves addressing two questions: the first question relates to safeguarding the fairness of the trial – including *ex parte* hearings - and thus how to limit the impact of the non-disclosure. These safeguards should be at the disposal of the judge and will be discussed further below. The second question is whether – given any non-disclosure with or without the additional safeguards – the overall fairness of the trial continues to be

---

<sup>59</sup> *R v H and C* [2004] 2 AC 134, 155 [36(3)]

<sup>60</sup> This is already a requirement in the UK.

guaranteed. In other words, whether the limited disclosure of information requires a stay of proceedings. This second aspect is not exclusively related to a non-disclosure order of a particular piece of information, but needs to be monitored continuously throughout the process.<sup>61</sup>

The crucial aspect is of course the importance of the information for the case. On the extreme end is that the information is not material at all. Certainly this is a question that can be addressed before thinking about non-disclosure.<sup>62</sup> However, thematically, this question fits here, as *a priori* there will be no issue for fairness arising in cases where the information does not need to be disclosed. On the other end of the spectrum are cases where the information is crucial in proving innocence or guilt. A fair trial seems difficult to imagine without disclosure of such material. Either the prosecution has to drop the charges or the judge has to stay the proceedings. More difficult are cases where information is found to be material, but it is unclear to what extent. Sir Richard Scott commented in this context:

“As to documents which appear to have *the potential to assist the defence*, could a situation ever arise in which disclosure could be refused on PII grounds? This is, to my mind, a fundamental but conceptually simple, question. The answer to it, both on authority and on principle should, in my opinion, be a resounding 'No'. In the context of a criminal trial how can there be a more important public interest than that the defendant should have a fair trial and that documents which might assist him to establish his innocence should not be withheld from him.”<sup>63</sup>

---

<sup>61</sup> See *R v H and C* [2004] 2 AC 134, 155-56.

<sup>62</sup> This concerns only cases where the information is requested by the defence.

<sup>63</sup> Richard Scott, “The use of public interest immunity claims in criminal cases” (1996) 2 *Web Journal of Current Legal Issues*. (emphasis added). Sir Richard Scott was the author of “The Report of the Inquiry in to the Export of Defence Equipment and Dual Use Goods to Iraq and Related Prosecutions” (HC 115,



In Australia, given that the NSIA intended to allow the use of edited sensitive information, the question of whether such a use of information contributes to or hampers the fairness of the process adds another layer of complexity. In particular, it emphasises the use of safeguards and requires constant judicial monitoring of the overall fairness of the trial.<sup>64</sup>

This independent judicial enquiry into the standard of fairness has also been mentioned by the INSLM in his report on the NSIA. There the Monitor described the power of the courts in relation to making non-disclosure orders under s 31 NSIA, which is worth citing in length:

“[T]his independent power of the court is not, in the opinion of the INSLM, in the nature of non-merits judicial review, but is rather the full power to consider all relevant evidence, weigh all relevant considerations and exercise judicial discretion as to the appropriate outcome. It is not an inquiry into whether the Attorney-General was justified or not in giving a certificate, but rather an inquiry into whether there should be disclosure or not, and if so on what if any restricted basis.”<sup>65</sup>

#### **8.2.4 Safeguards for the individual to maintain an equality of arms**

A number of measures have been developed under the common law or through legislation in order to compensate for any limitations upon the fairness of the trial, either during *ex parte* hearings or in cases when sensitive information is used in edited

---

1995-96), commonly referred to as the Scott Report. One of the issues of concern identified during the inquiry was the use of PII certificates.

<sup>64</sup> Without the overall fairness in mind, there would be the risk that pieces of sensitive information, which were individually authorized to be suppressed, collectively still render the trial unfair.

<sup>65</sup> Bret Walker, “Independent National Security Legislation Monitor’s Annual Report” (7 November 2013) 135.

form. However, their effectiveness is not always guaranteed. In the following section, a few aspects will be addressed, which seem particularly important and should be part of comprehensive legislation.

#### 8.2.4.1 Special advocates

One of the most frequently discussed safeguard measures in relation to *ex parte* hearings is the use of special advocates. The use of security-cleared lawyers arguing for an excluded party was first used in Canada and then imported and developed in the UK. Even in Australia, the use of special advocates has been mentioned as an option by Whealy J, but has never been adopted. In *Lodhi*, it was described as a means of ‘last resort’ and not considered necessary in that case. Other than this cursory examination, the use of special advocates has not been a major point of discussion in Australia.<sup>66</sup> And in none of the control order (CO) cases the defendants were excluded from the proceedings.<sup>67</sup>

In the UK, where special advocates were used regularly in control order cases as a fixed component of securing the rights of the defendant, those barristers acting as special advocates have highlighted numerous issues.<sup>68</sup> The major complaint about the regime is that special advocates, with few exceptions, are not allowed to talk to the defendant after they have seen the classified information. This restriction has been considered so

---

<sup>66</sup> There is now a special advocates scheme proposed in relation to CO for young people. However, the legislation has not passed at the time of writing. See *Counter-Terrorism Legislation Amendment Bill (No. 1) 2015* (Cth) Schedule 2.

<sup>67</sup> In two prominent CO cases of Hicks and Thomas a lot of information had already been public (see above at 7.3.1). See also Roger Gyles, “Independent National Security Legislation Monitor Inquiry into control order safeguards: Part 1” (29 January 2016) 4.

<sup>68</sup> Constitutional Affairs Committee, “The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates” (7<sup>th</sup> Report of Session 2004–05, HC 323-I, 3 April 2005) Parts 4 and 5; The Committee interviewed a number of special advocates for the report; see also Martin Chamberlain, “Special advocates and procedural fairness in closed proceedings” (2009) 28(3) *Civil Justice Quarterly* 314; and Martin Chamberlain, “Update on procedural fairness in closed proceedings” (2009) 28(4) *Civil Justice Quarterly* 448.

severe that many commentators have not recommended an equivalent regime in Australia.<sup>69</sup> The Bret Walker as INSLM commented that “[i]t is a fallacy to suggest a special advocate could represent the accused”,<sup>70</sup> the new INSLM, Roger Gyles, appears to be open to the introduction of a special advocate scheme in light of the proposed legislative amendments to the CO regime.<sup>71</sup>

However, it is submitted that a ‘new and improved’ special advocate regime could be an important safeguard for an *ex parte* hearing, including those used in criminal trials. Improvements could include the following adjustments. First, in situations where a defendant is excluded, a special advocate should always be mandatory on request of the defence, as it is already the case in UK TPIM proceedings. Secondly, the special advocate should be able to contact the defendant after the closed hearings under certain conditions. Although some sort of oversight could be allowed, the main responsibility should rest with the special advocate. Thirdly, the special advocate should be able to call witnesses, have access to their own experts,<sup>72</sup> and thus have similar rights to a defence lawyer. Although making sufficient funding available for special advocates can solve many of the issues, the question of communication has turned out to be a stumbling block for improving the current regime in the UK. The risk that sensitive information could be communicated to the defendant (and potentially to other members of criminal organisations) after a special advocate has accessed such information must be acknowledged. But this risk does not seem insurmountable. It is submitted that special advocates would have a task very similar to those of police officers who in the

---

<sup>69</sup> Walker, above n 65, 151; Sue Donkin, *The Evolution of Pre-emption in Anti-Terrorism Law: A Cross-Jurisdictional Examination* (Doctor of Philosophy thesis, Griffith University, Brisbane, 2011).

<sup>70</sup> Walker, above n 65, 152. This is also why the INSLM did not recommend the adoption of a special advocate regime in the NSIA.

<sup>71</sup> Roger Gyles, “Independent National Security Legislation Monitor Inquiry into control order safeguards: Part 2” (13 April 2016) Part 8 and 9. For the proposed changes see also above at 7.1, n 29.

<sup>72</sup> Martin Chamberlain, “Special advocates and procedural fairness in closed proceedings” (2009) 28(3) *Civil Justice Quarterly* 314, 326.

course of an investigation is apprised of national security material. They face similar issues on a regular basis, when they conduct interviews in which they aim to retrieve new information from a suspect or witness without disclosing information they have already received. Presumably, special advocates are highly trained and have experience with handling sensitive information. At the least, such criteria should be considered when appointing a person as a special advocate. Most importantly, it must be added that special advocates should not have any interest in disclosing sensitive information to the defendant. It is part of the definition of a special advocate that they are not acting *for* the defendant (in the sense of the lawyer-client relationship), but only represent the interest of the defendant in closed hearings. Rather, special advocates have particular obligations to ensure that the fairness of the trial is maintained in closed hearings for the benefit of the defendant. Hence, they are still installed and funded by the government and remain at all times responsible to the court. These professional duties of the special advocate would need to be clearly delineated in legislation and professional codes.

Therefore, it is important to distinguish clearly between special advocates and other actors intended to improve the adversariness and thus fairness of the *ex parte* hearing.

(a) Security cleared lawyers: under the NSIA defence lawyers can apply for security clearance in order to be allowed to participate in *ex parte* hearings. While they have the advantages of knowing the case very well, and being able to contact and continue to represent the defendant, the regulation has been criticised for creating an ethical dilemma for the lawyers. While they still represent their client, they are limited in what they can discuss (and threatened with a criminal offence if disclosing sensitive information). As a consequence many lawyers have chosen not to apply for security

clearance or not to participate to avoid this situation.<sup>73</sup> Special advocates do not face this dilemma, as they are not exercising a representative role for the client.<sup>74</sup>

Furthermore, special advocates could be presumed to have more experience dealing with sensitive information and thus are less likely to be deterred by disclosure offences.

(b) Public interest monitors: While the nature of statutory public interest monitors (PIMs) differ across various jurisdictions, these positions do not have any direct or close contact with defendant. In *Pompano*, Gageler J pointed out that the Queensland PIM's presence alone could not guarantee fairness.<sup>75</sup> While PIMs have access to all the information and are able to make submissions, they rather their task is predominantly to 'monitor' the proceedings as a whole.<sup>76</sup>

(c) SRA: a security review panel as suggested above is also different from the task of a special advocate. It does not argue for disclosure, rather it helps the judge to understand the risks involved in relation to national security.

Given their different functions and characteristics, the various actors discussed above, should be designed to work in an integrated and coordinated manner. This would optimise the best of their abilities, and avoid executing various tasks concurrently. However, such an approach has the consequence that these actors occupy the same 'regulatory' space, running in parallel according to the requirements of the particular trial. Hence, it is submitted that while defence lawyers should be committed to their clients, special advocates, with their different obligations to the court, should have

---

<sup>73</sup> Stephen Donaghue, "Reconciling security and the right to a fair trial: The *National Security Information Act* in practice" in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 87, 92.

<sup>74</sup> The COAG review recommended a national system of special advocates for control order hearings. Council of Australian Governments, "Review of counter-terrorism legislation" (Final Report, 2013) 60.

<sup>75</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013) [208] (Gageler J).

<sup>76</sup> See above at 7.3.2.

wider powers to fulfil their function of ensuring an adversarial element to the *ex parte* proceedings.<sup>77</sup> The evidence provided by special advocates suggests that they are still crucial for challenging non-disclosure decisions and thus increasing the legitimacy of closed hearings.<sup>78</sup>

#### 8.2.4.2 Jury instructions and ‘loophole reports’

Whenever edited or summarised evidence is used in a legal proceeding, there is a risk that this information will appear vague and misleading. This is because the information presented is either incomplete or certain parts are emphasised. This can be a problem for jurors in criminal trials. Of course, the jury, assuming that it discharges its tasks faithfully, may be left with sufficient doubt about that evidence and disregard it entirely. However, when viewed against the background of national security concerns, jurors might be tempted to ‘fill in the gaps’, interpreting parts that are not disclosed in a particular way or assume that there is more credible material which cannot be disclosed without prejudicing national security. How should jurors value such evidence?

In such situations, it is crucial that as soon as any edited or summarised information is used the judge is obliged, as a matter of fairness, to give the jury directions about such dangers. The topic has been discussed on appeal in the *Lodhi* case.<sup>79</sup> Warnings, which are presently optional under s 165 *Evidence Act 1995* (Cth), should be mandatory in such circumstances.

---

<sup>77</sup> See also Lisa Burton and George Williams, “What future for Australia's control order regime?” (2013) 24 *Public Law Review* 182, 205.

<sup>78</sup> For example special advocates are able to point out inconsistencies, demonstrate that information is already in the public domain or arguing for the importance to the case.

<sup>79</sup> *Lodhi v R* [2006] NSWCCA 101 (4 April 2006) [23].

Another tool to enable jurors to have greater confidence in the edited or summarised evidence is making an explanatory report available. The prosecution together with the special advocate could be requested to compose this explanatory report, to be read alongside a specific edited document or summary, that points out the extent of information excised and assesses the risks associated and the reliability of the edited document. The judge would oversee the process of the report writing. This process is comparable to DPP guidelines governing the use of police informers whose identity cannot be disclosed. If possible, the defendant should be informed about the motivation of the persons providing the information, their mental health, whether they were paid or otherwise rewarded for the information, whether they were imprisoned at the time and other issues in relation to their credibility. An obligation to prepare such a report would also discourage the prosecution from too readily using edited evidence unless it is material, and not likely to mislead the jury.

Placing such edited or summarised evidence before the tribunal or jury may of course also be in the interests of the defendant, who will at least gain some access to sensitive information potentially relevant to their defence. Hence, it really depends on the specific use of the information and thus needs to be closely monitored by to judge.

#### **8.2.4.3 Limited use of edited information**

As Glidewell LJ pointed out in *Ward*, any “[n]on-disclosure is a potent source of injustice”.<sup>80</sup> While this is an important warning and reminder, it does not solve the issue that sometimes the suppression of information is necessary. What should be taken from Glidewell LJ’s statement is that non-disclosure must be kept to a minimum. This is even

---

<sup>80</sup> *R v Ward* [1993] 1 WLR 619, 642 (Glidewell LJ). And the quote continued: “and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence.”

more pertinent in a case where edited evidence constitutes the basis of a conviction in a criminal trial. For this reason, a ‘golden rule’ should apply in the sense that no conviction should be solely or predominantly based on edited or summarised evidence. This is due to the risks of distortion and the limitations to testing evidence in the regular adversarial manner.<sup>81</sup> While in the UK, the Supreme Court has defended the current legislation allowing for exceptions to this rule in relation to absent and anonymous witnesses, it seems that cases where such exceptions would apply are so extraordinary that their application is very unlikely. Including the exceptions in the legislation only renders the law unnecessarily complex and confusing and thus must be characterised as undesirable. Admitting such exceptions rather creates the danger of a slippery slope in cases where the evidence is not strongly reliable or material, but the security aspect is nevertheless deemed to be too important to sacrifice at the altar of the fair trial.

Reform in this area of law – the use of sensitive material in legal proceedings – can only be realised once other related areas have been reviewed and amended. For example, the rules and regulations to avoid over-classification of material must be addressed. In particular, procedures have to be put in place to increase the possibility of disclosing information that stems from foreign intelligence organisations and is only classified because of those origins. Furthermore, intelligence organisations have to become more aware that information they supply to Australia may be used in court, and adjust their operating protocols and ‘rules of engagement’ accordingly.

---

<sup>81</sup> See also Australian Law Reform Commission, *Keeping secrets: The protection of classified and security sensitive information* (Report 98, May 2004) 502[Recommendation 11-11] and 509 [Recommendation 11-42]. *Van Mechelen and others v the Netherlands* [ECtHR] applications nos 21363/93, 21364/93, 21427/93 and 22056/93 (23 April 1997) [55].



#### 8.2.4.4 Conclusion

In sum, unless there are appropriate safeguards or ‘compensating’ measures, criminal trials should *not* proceed where information that has the potential to assist the defence is not disclosed. However, this issue of non-disclosure should not be finally determined unless the procedure allows the defendant to be confident that his/her side of the argument has been duly considered. This minimum requirement for the ‘equality of arms’ echoes the ECtHR’s approach to counter-balancing, which must at least to some extent include the defendant. Lord Kerr has famously expressed a similar position in *Al Rawi*:

“The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced.”<sup>82</sup>

Where there is no challenge possible to non-disclosure, compensation measures must still be introduced, not only for the sake of the individual (and the defendant’s right to a fair trial), but also in the broader interests of justice, which include preserving public confidence and legitimacy in the administration of justice.

Another implication of this research is that this standard should be applied to civil and administrative proceedings, as well as criminal proceedings and trials. This is because civil/administrative proceedings often have serious potential consequences for the liberty of a person (for example COs/preventive detention), functioning as quasi-criminal proceedings.<sup>83</sup> In fact, maintaining respect for due process in proceedings where there is use of edited or secret evidence is fundamental, irrespective of the

---

<sup>82</sup> *Al Rawi & Ors v Security Service & Ors* [2011] UKSC 34 (13 July 2011) [93]; see also *R v Ward* [1993] 1 WLR 619, 642 (Glidewell LJ).

<sup>83</sup> *Secretary of State for the Home Department v AF & Another (No 3)* [2009] UKHL 28 (10 June 2009) [57] (Lord Phillips).

characterisation of the proceedings as civil or criminal. The British approach of requiring a ‘gist’, ie providing the defendant with enough information to meet the case and instruct a special advocate, must be regarded as the absolute minimum standard for ensuring the fairness of proceedings.<sup>84</sup>

---

<sup>84</sup> See *Ibid.* It should be pointed out that *AF* was a control order case and thus according to this submission should have deserved a higher level of due process. Furthermore, the new *Justice and Security Act 2013* (UK) does not require the defendant to be provided with a gist. It remains to be seen whether the courts will accept the lowering of the standard even in civil proceedings.

## **Conclusion: Sensitive information and the right to a fair trial**

Fairness is a highly valued principle in legal proceedings. In some jurisdictions this finds expression as a general constitutional right, while in others, such as the United Kingdom (UK) and Australia, the courts and legislatures have fashioned rules and remedies that give protection in specific contexts. In relation to both forms of expression, it is difficult to determine what fairness requires in proceedings where it is seriously challenged, as revealed in cases involving the use and suppression of sensitive information. Notwithstanding the general rhetoric emphasising the importance of respecting the right to a fair trial (RFT), only in *specific* contexts fairness may be so diminished that the particular proceedings constitute a miscarriage of justice. The thesis argues that given the importance of the RFT, which can be deduced from its historical development and evidenced by its broad articulation across various legal domains, the legal system must do more than adopt a *de minimis* position, that a trial must proceed *unless* tainted by blatant unfairness. Rather than approaching fairness from the perspective of determining ‘what is unfair’ (which is a negative and residual approach), fairness should be approached as a positive guarantee, which places restrictions on erosions to fairness that will be permitted only where demonstrably necessary and justifiable. Whereas the latter positive conception aims at maximising fairness, the former negative conception runs the risk that fairness is found in the residue left after the countervailing public interest such as security have been taken into account. This is particularly apparent in cases reviewed in this thesis, where sensitive information is used or suppressed. The blurring of evidence and intelligence post 9/11 era has clearly caused some challenges for the fairness of counter-terrorism proceedings. While no one

Conclusion: Sensitive information and the right to a fair trial

doubts the seriousness of the threat that stems from terrorists, the importance of fairness as a basic value of a liberal democracy must be respected to the greatest extent possible.

The thesis started from the premise that, while it is impossible to define what is fair in the abstract, it is possible to define with precision the legal methods and processes for securing a fair hearing. These methods and processes are dependant on both positive law (as found in the constitution, legislation or case law) and the rights respecting legal culture. In other words, a robust human rights legal framework must be supported by a culture of respecting rights within the courts, executive or legislature. The divergence between jurisdictions analysed in this thesis reveals useful contrasts and comparison. Australia and the UK share a legal heritage, but have diverged from one another in terms of how to protect human rights and thus how to deal with conflict of interests concerning the RFT.

Following the trend of ‘pre-crime’ intervention by the state and the increased use of sensitive information both countries have enacted new legislative exceptions to the ‘golden rule’ of disclosure. Guided by the European Court of Human Rights’ approach of proportionality *sui generis*, the UK now uses a principled approach to non-disclosure decisions. This aims not only at maximising the RFT, but also requires a minimum of adversariness through counter-balancing the limitations put on an individual. Australia in comparison has formally retained a public interest balancing approach to non-disclosure decisions, although this thesis argues that behind the façade of the balancing test, judges apply a rule and exception in favour of non-disclosure. In this process the RFT is generally reduced to the requirement that a trial cannot be conducted if it is unfair. This common law approach emphasises the integrity of the court, rather than placing strong value on adversariness as a means of ensuring fairness. In fact, the Australian case law suggests that adversariness is not a defining criterion at all when it

Conclusion: Sensitive information and the right to a fair trial

comes to the overall fairness of the trial. Admittedly, in practice the results of the two approaches can be identical since judges must ultimately decide what is fair or what is not. But in cases where the security interest should be accorded less weight, under a principled approach, only minimal limitations to the RFT would be proportionate. Furthermore, the thesis argues that even with a similar result, a principled approach enjoys a higher amount of legitimacy in the broader community, as well as supporting rule of law values of clarity and predictability.

It would be too simplistic to reduce the differences in protecting fairness to the application of legal form. However, this does affect the judges' understanding of their role within the state. For example, it is clear that the UK courts have been closely involved in developing and shaping the current non-disclosure regime through challenges under the *Human Rights Act 1998* (UK). In Australia, the judges do not perceive themselves as competent to develop rights, which may constitute an interference with the will of Parliament. Rather, Australian courts see their roles as backstop. This is evident in the cases where the courts resist legislative direction how to prioritise and strike a balance between fairness and non-disclosure interests. Hence, while in the UK the judicial power was expanded and the courts entered in to a 'dialogue' with the other organs of government, in Australia, the courts upheld the strict separation of powers, and granted significant deference to the other organs of government in relation in security matters.

While the UK judges have demonstrated that the common law is not hostile to including principles in relation to non-disclosure decision, the thesis does not suggest that Australian judges should simply adopt such an approach. Understanding the Australian constitutional setting, law reform to address any deficiencies should be primarily driven by Parliament.

Conclusion: Sensitive information and the right to a fair trial

Given the constitutionality of the principle of fairness, the duty to guarantee fairness is not merely one that is imposed upon the courts. Rather all branches have an obligation to take it into consideration. Any legislation on the topic should therefore support judges in making non-disclosure decisions that are guided by clear principles and are evidence-based. Reflecting the values put forward in this thesis, this would mean to provide judges with safeguards to maximise fairness and retain as much as possible the adversariness of the process. It may include additional responsibilities for the executive to justify the suppression of sensitive information, resource for an effective system of checks and balances, training opportunities and procedural amendments that support the judiciary in dealing with questions of security. Over time all of these measures would also shape the cultures within all branches of government towards a heightened awareness of the requirements of fairness.

While these suggestions may appear to only advance an Australian non-disclosure regime, many of the propositions made in the thesis of how to think about non-disclosure and safeguards to promote fairness are equally useful to the UK, where closed material proceedings are more common and steadily increasing.

## 10 References

### 10.1 Articles, books, chapters, governmental reports, lectures

Alan Travis, "UK terrorism arrest fall" (The Guardian, 5 June 2014) available at [www.theguardian.com/uk-news/2014/jun/05/uk-terrorism-arrests-fall-2013](http://www.theguardian.com/uk-news/2014/jun/05/uk-terrorism-arrests-fall-2013) (last visited 15 July 2016).

Alexy, Robert, *A theory of constitutional rights* (Translation Julian Rivers, Oxford University Press, 2009).

Allan, T R S, "Human rights and judicial review: a critique of 'due deference'" (2006) 65(3) *Cambridge Law Journal* 671-695.

Allan, T R S, "Judicial deference and judicial review: legal doctrine and legal theory" (2011) 127(1) *Law Quarterly Review* 96-117.

Allan, T R S, "Text, context and constitution: the common law as public reason" in Douglas Edlin (ed), *Common law theory* (Cambridge University Press, 2007) 185-203.

Allan, T R S, "The concept of fair trial", in Elspeth Attwooll and David Goldberg (eds), *Criminal Justice* (Franz Steiner Verlag, 1995) 27-41.

Alston, Philip (ed), *Promoting human rights through bill of rights: comparative perspectives* (Clarendon Press, 1999).

Aly, Waleed, "Axioms of aggression: counter-terrorism and counter-productivity in Australia" (2008) 33(1) *Alternative Law Journal* 20-26.

Ananian-Welsh, Rebecca, "Preventative detention orders and the separation of judicial powers" (2015) 38(2) *University of New South Wales Law Journal* 756-91.

Anderson, David QC, "A question of trust" (Report of the Investigatory Powers Review by the Independent Reviewer of Terrorism Legislation, June 2015), available at <https://terrorismlegislationreviewer.independent.gov.uk/a-question-of-trust-report-of-the-investigatory-powers-review> (last visited 20 April 2017).

Anderson, David QC, "Control orders in 2011" (Final report of the Independent Reviewer on the *Prevention of Terrorism Act 2005*, March 2012).

Anderson, David QC, "Examination of witness" (Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, HC 495-I, 11 July 2012).

Anderson, David QC, "Terrorism Prevention and Investigation Measures in 2013" (Second report of the Independent Reviewer on the operation of *Terrorism*

## References

- Prevention and Investigation Measures Act 2011*, March 2014), available at <https://terrorismlegislationreviewer.independent.gov.uk/2014-tpims-report> (last visited 15 July 2016).
- Anderson, David QC, “Terrorism Prevention and Investigation Measures in 2014” (Third report of the Independent Reviewer on the operation of *Terrorism Prevention and Investigation Measures Act 2011*, March 2015), available at <https://terrorismlegislationreviewer.independent.gov.uk/tpims-in-2014-march-2015> (last visited 15 July 2016).
- Anghie, Anthony, “The war on terror and Iraq in historical perspective” (2005) 43(1)(2) *Osgoode Hall Law Journal* 45-66.
- Appleby, Gabrielle, and John Williams, “The anti-terror creep: law and order, the States and the High Court of Australia” in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (Routledge, 2010) 150-169.
- Ashworth, Andrew, “Crime, community and creeping consequentialism” (1996) Apr *Criminal Law Review* 220-230.
- Ashworth, Andrew, “Criminal proceedings after the *Human Rights Act*: the first year” (2001) November *Criminal Law Review* 855-72.
- Ashworth, Andrew, “Four threats to the presumption of innocence” (2006) 10 *International Journal of Evidence and Proof* 241-78.
- Ashworth, Andrew, “Security, terrorism and the value of human rights” in Benjamin Goold and Liora Lazarus (eds), *Security and human rights* (Hart Publishing, 2007) 203-226.
- Ashworth, Andrew, and Lucia Zedner, *Preventive justice* (Oxford University Press, 2014).
- Ashworth, Andrew, *Human rights, serious crime and criminal procedure* (Sweet and Maxwell, 2002).
- Attorney General’s Department, “Equipping Australia against emerging and evolving threats” (Discussion paper, July 2012) available at [www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=ajcic/nsl2012/additional/discussion%20paper.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ajcic/nsl2012/additional/discussion%20paper.pdf) (last visited 15 July 2016).
- Audrey Gillan, “Lawyers attack Blunkett anti-terror plan” (The Guardian, 7 February 2004) available at [www.guardian.co.uk/politics/2004/feb/07/september11.terrorism?INTCMP=SRCH](http://www.guardian.co.uk/politics/2004/feb/07/september11.terrorism?INTCMP=SRCH) (last visited 15 July 2016).



## References

- Australian Law Reform Commission, *Evidence: Volume 1* (Report 26 (Interim), 1985).
- Australian Law Reform Commission, *Keeping secrets: The protection of classified and security sensitive information* (Report 98, May 2004).
- Australian Law Reform Commission, *Protecting classified and security sensitive information* (Background Paper 8, July 2003).
- Australian Law Reform Commission, *Protecting classified and security sensitive information* (Discussion Paper 67, January 2004).
- Bachmann, Sasha-Dominik, and Matthew Burt, "Control orders post 9/11 and human rights in the United Kingdom, Australia and Canada: a Kafkaesque dilemma?" (2010) 15(2) *Deakin Law Review* 131.
- Bagaric, Mirko, "Editorial: The revived Kable doctrine as a constitutional protector of rights?" (2011) 35 *Criminal Law Journal* 197-201.
- Bailey, Peter, "'Righting' the Constitution without a Bill of Rights" (1995) 23 *Federal Law Review* 1-36.
- Bailey, Peter, *The human rights enterprise in Australia and internationally* (LexisNexis Butterworths, 2009).
- Baker, Nancy, "National Security versus civil liberties" (2003) 33(3) *Presidential Studies Quarterly* 547-567.
- Baldino, Daniel (ed), *Democratic oversight of intelligence services* (Federation Press, 2010).
- Bammer, Gabriele (ed), *Dealing with uncertainties in policing serious crime* (ANU EPress, 2010).
- Barak Obama, "Remarks by the President at the National Defense University" (Speech at the National Defense Force University, Fort McNair, Washington, D.C., 23 May 2013) available at [www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university](http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university) (last visited 15 July 2016).
- Barak-Erez, Daphne, and Matthew Waxman, "Secret evidence and the due process of terrorist detentions" (2009) 48(3) *Columbia Journal of Transnational Law* 3-58.
- Barak, Aharon, "Human rights and their limitations: the role of proportionality" (Annual lecture in law and society, The Foundation for Law, Justice and Society, Oxford, 9 June 2009).
- Barak, Aharon, *Human dignity: the constitutional value and the constitutional right* (Cambridge University Press, 2015).

## References

- Barak, Aharon, *Proportionality: constitutional rights and their limitations* (Cambridge University Press, 2012).
- Barak, Aharon, *The judge in a democracy* (Princeton University Press, 2006).
- Bates, Ed, “Anti-terrorism control orders: liberty and security still in the balance” (2009) 29(1) *Legal Studies* 99-126.
- BBC online, “Human Rights Act versus a British Bill of Rights” (11 May 2015) available at [www.bbc.co.uk/newsbeat/article/32692758/human-rights-act-versus-a-british-bill-of-rights](http://www.bbc.co.uk/newsbeat/article/32692758/human-rights-act-versus-a-british-bill-of-rights) (last visited 15 July 2016).
- Bedford, Narelle, and Robin Creyke, *Inquisitorial processes in Australia's tribunals* (Australian Institute of Judicial Administration Incorporated, 2006).
- Beeson, Ann, “The secrecy trump” in Richard Leone and Greg Anrig (eds), *Liberty under attack: reclaiming our freedom in an age of terror* (Public affairs, 2007) 235-256.
- Bell, J Boyer, *The Irish Troubles: a generation of violence 1927-1992* (St Martins Press, 1993).
- Bingham, Lord, “The rule of law” (2007) 66(1) *Cambridge Law Journal* 67-85.
- Blair, Tony (PM’s press conference, 5 August 2005, National Archives), available at <http://webarchive.nationalarchives.gov.uk/20060715135117/number10.gov.uk/page8041> (last visited 15 July 2016).
- Bloody Sunday Inquiry, “Report of the Bloody Sunday Inquiry” (Saville Report, 29 January 1998).
- Bogdanor, Vernon, *The new British Constitution* (Hart Publishing, 2009).
- Bottomley, Stephen, and Simon Bronitt, *Law in Context* (Federation Press, 3<sup>rd</sup> ed, 2006).
- Brennan, Frank, “The practical outcomes of the National Human Rights Consultation” (Address to Judicial Conference of Australia Colloquium, Sydney, 12 October 2013).
- Brennan, Gerald, “Human rights, international standards and the protection of minorities” in Peter Cane (ed), *Centenary essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 333-55.
- Brennan, Gerald, “The Parliament the executive and the courts: roles and immunities” (1997) 9(2) *Bond Law Review* 136-148.
- British Special Immigration Appeals Commission (website): [www.justice.gov.uk/tribunals/special-immigration-appeals-commission](http://www.justice.gov.uk/tribunals/special-immigration-appeals-commission) (last visited 15 July 2016).

## References

- Brodeur, Jean-Paul, "High and low policing in post-9/11 times" (2007) 1(1) *Policing* 25-37.
- Brokenshire, James, "National security and civil liberties: getting the balance right" (Speech to National Security Summit at Queen Elizabeth Conference Centre, London, 3 July 2013) available at [www.gov.uk/government/speeches/national-security-and-civil-liberties-getting-the-balance-right](http://www.gov.uk/government/speeches/national-security-and-civil-liberties-getting-the-balance-right) (last visited 15 July 2016).
- Bronitt, Simon, "Balancing security and liberty: critical perspectives on terrorism law reform", in Miriam Gani and Penelope Mathew (eds), *Fresh perspectives on the war on terror* (ANU EPress, 2008) 65-83.
- Bronitt, Simon, "Constitutional rhetoric v criminal justice realities: unbalanced responses to terrorism?" (2003) 14 *Public Law Review* 76-80.
- Bronitt, Simon, "Preface" in Gabriele Bammer (ed), *Dealing with uncertainties in policing serious crime* (ANU EPress, 2010) ix-xii.
- Bronitt, Simon, "Ten years on: critical perspectives on terrorism law reform in Australia" (CEPS Public Lecture, Griffith University, 9 September 2011).
- Bronitt, Simon, "The common law and human dignity: Australian perspectives" in Jürgen Bröhmer (ed) *The German Constitution turns 60: Basic Law and Commonwealth Constitution - German and Australian Perspectives* (Peter Lang, 2011) 77-88.
- Bronitt, Simon, and Bernadette McSherry, *Principles of criminal law* (Thomson Reuters, 3<sup>rd</sup> ed, 2010)
- Bronitt, Simon, and Sue Donkin, "Australian responses to 9/11: new world legal hybrids?" in Aniceto Masferrer (ed), *Post 9/11 and the state of permanent legal emergency: security and human rights in counter terrorism* (Springer, 2012) 223-39.
- Brown, Lord, "The unaccountability of judges: surely their strength not their weakness" in Christopher Forsyth *et al* (eds), *Effective judicial review: a cornerstone of good governance* (Oxford University Press, 2010) 208-215.
- Brown, Simon, "Public interest immunity" (1994) Winter *Public Law* 579-95.
- Brysk, Alison, "National insecurity and human Rights", in Alison Brysk and Gershon Shafir (eds), *National insecurity and human rights: democracies debate counterterrorism* (University of California Press, 2007) 1-13.
- Brysk, Alison, and Gershon Shafir (eds), *National insecurity and human rights: democracies debate counterterrorism* (University of California Press, 2007).
- Burnside, Julian, "The Dreyfus affair" (2006) 137 *Victorian Bar News* 29-32.

## References

- Burton, Lisa, and George Williams, "What future for Australia's control order regime?" (2013) 24 *Public Law Review* 182-208.
- Burton, Lisa, Nicola McGarrity and George Williams, "The extraordinary questioning and detention powers of the Australian Security Intelligence Organisation" (2012) 36 *Melbourne University Law Review* 415-469.
- Byrnes, Andrew, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009).
- Cain, Frank, "Australian intelligence organisations and the law: a brief history" (2004) 27(2) *University of New South Wales Law Journal* 296-318.
- Campbell, Colm, and Ita Connolly, "Making war on terror? Global lessons from Northern Ireland" (2006) 69 *Modern Law Review* 935-957.
- Campbell, Tom, "Emergency strategies for prescriptive legal positivists: anti-terrorist law and legal theory", in Victor Ramraj (ed), *Emergencies and the limits of legality* (Cambridge University Press, 2008) 201-28.
- Campbell, Tom, "Human rights: a culture of controversy" (1999) 26 *Journal of Law and Society* 6-26.
- Campbell, Tom, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting rights without a Bill of Rights: institutional performance and reform in Australia* (Ashgate, 2006).
- Canadian Security Intelligence Review Committee (website): [www.sirc-csars.gc.ca/index-eng.html](http://www.sirc-csars.gc.ca/index-eng.html) (last visited 15 July 2016).
- Carnell, Ian, and Neville Bryan, "Watching the watchers: how the Inspector-General of Intelligence and Security helps safeguard the rule of law" (speech at the Safeguarding Australia 2005 Conference, Canberra, July 2005).
- Cavanaugh, K A, "Emergency rule, normalcy exception: the erosion of the right to silence in the United Kingdom" (2002) 35 *Cornell International Law Journal* 491-513.
- Chamberlain, Martin, "Special advocates and procedural fairness in closed proceedings" (2009) 28(3) *Civil Justice Quarterly* 314-326.
- Charlesworth, Hilary, "The Australian reluctance about rights" (1993) 31 *Osgoode Hall Law Journal* 195-232.
- Charlesworth, Hilary, "The High Court and human rights" in Peter Cane (ed), *Centenary essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 356-369.

## References

- Cherney, Adrian, and Kristina Murphy, "Policing terrorism with procedural justice: the role of police legitimacy and law legitimacy" (2013) 46(3) *Australian and New Zealand Journal of Criminology* 403-421.
- Chernichenko, Stanislav, and William Treat, "The right to a fair trial: Current recognition and measures necessary for its strengthening" (Final report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1994/24, 3 June 1994).
- Chirinos, Alexandra, "Finding the balance between liberty and security: the Lord's decision on Britain's *Terrorism Act* (2005) 18 *Harvard Human Rights Journal* 265-276.
- Chu, Victor, "Tinkering with the right to silence: the *Evidence Amendment (Evidence of Silence) Act 2013* (NSW)" (2013) 17 *University of Western Sydney Law Review* 25-40.
- Churches, Steven, "How closed can a court be and still remain a common law court?" (2013) 20 *Australian Journal of Administrative Law* 117-120.
- Churches, Steven, and Sue Milne, "Kable, K-Generation, Kirk and Totani: validation of criminal intelligence at the expense of natural justice in Ch III courts" (2010) 18 *Australian Journal of Administrative Law* 29-43.
- Clarke, John, "Report of the inquiry into the case of Dr Mohamed Haneef" (21 November 2008).
- Claus, Laurenz, "Montesquieu's mistakes and the true meaning of separation" (2005) 25(3) *Oxford Journal of Legal Studies* 419-51.
- Clayton, Richard, "Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the *Human Rights Act 1998*" (2004) *Spring Public Law* 33-47.
- Cobain, Ian, "Tony Blair knew of secret policy on terror interrogations" (The Guardian, 18 June 2009), available at [www.theguardian.com/politics/2009/jun/18/tony-blair-secret-torture-policy](http://www.theguardian.com/politics/2009/jun/18/tony-blair-secret-torture-policy) (last visited 15 July 2016).
- Cobain, Ian, and Fahria Karim, "UK linked to notorious Bangladesh torture centre." (The Guardian, 17 January 2011), available at [www.theguardian.com/world/2011/jan/17/uk-link-bangladesh-torture-centre](http://www.theguardian.com/world/2011/jan/17/uk-link-bangladesh-torture-centre) (last visited 15 July 2016).
- Cohen-Eliya, Moshe, and Iddo Porat, "Proportionality and the culture of justification" (2011) 59 *American Journal of Comparative Law* 463-490.
- Cole, David, "Enemy Aliens" (2002) 54 *Stanford Law Review* 953-1004.

## References

- Cole, David, "Their liberties, our security: democracy and double standards" (2003) 31 *International Journal of Legal Information* 290-311.
- Commission on a Bill of Rights, "A UK Bill of Rights? The choice before us" (Paper, Volume 1, December 2012) available at <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf> (last visited 11 April 2017).
- Committee of Ministers of the Council of Europe, *Recommendations No R (97) 13 concerning intimidation of witnesses and the rights of the defence* (10 September 1997).
- Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29311 (Mr Ruddock).
- Constitutional Affairs Committee, "The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates" (7<sup>th</sup> Report of Session 2004–05, HC 323-I, 3 April 2005).
- Constitutional Affairs Committee, "The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates" (7<sup>th</sup> Report of Session 2004–05, HC 323-II, 3 April 2005).
- Cope, Nina, "Intelligence led policing or policing led intelligence?" (2004) 44 *British Journal of Criminology* 188-203.
- Corker, David, and Stephen Parkinson, *Disclosure in criminal proceedings* (Oxford University Press, 2009).
- Cornall, Robert, "The effectiveness of criminal laws on terrorism" Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 50-58.
- Cotterrell, Roger, "Comparative law and legal culture" in Mathias Reiman and Reinhard Zimmerman (eds), *The Oxford handbook of comparative law* (Oxford University Press, 2008) 709-739.
- Council of Australian Governments, "Australia's counter-terrorism strategy: strengthening our resilience" (2015) available at [www.nationalsecurity.gov.au/Media-and-publications/Publications/Documents/Australias-Counter-Terrorism-Strategy-2015.pdf](http://www.nationalsecurity.gov.au/Media-and-publications/Publications/Documents/Australias-Counter-Terrorism-Strategy-2015.pdf) (last visited 15 July 2016).
- Council of Australian Governments, "Review of counter-terrorism legislation" (Final Report, 2013) available at [www.ag.gov.au/Consultations/Pages/COAGReviewofCounter-TerrorismLegislation.aspx](http://www.ag.gov.au/Consultations/Pages/COAGReviewofCounter-TerrorismLegislation.aspx) (last visited 15 July 2016).

## References

- Dalla-Pozza, Dominique, *The Australian approach to enacting counter-terrorism laws* (Doctor of Philosophy Thesis, University of New South Wales, 2010).
- Dannemann, Gerhard, "Comparative law: a study of similarities or differences?" in Mathias Reiman and Reinhard Zimmerman (eds), *The Oxford handbook of comparative law* (Oxford University Press, 2008) 383-419.
- David Dixon, *The law in policing: legal regulation and police practices* (Clarendon Press, 1997).
- De Londras, Fiona, and Fergal Davis, "Controlling the executive in times of terrorism: competing perspectives on effective oversight mechanisms" (2010) 30(1) *Oxford Journal of Legal Studies* 19-47.
- Dennis, Ian, "Reconstructing the law of criminal evidence" (1989) *Current Legal Problems* 21-48.
- Dennis, Ian, "The right to confront a witness: meanings, myths and human rights" (2010) 4 *Criminal Law Review* 255-274.
- Dennis, Ian, *The law of evidence* (Sweet & Maxwell, 2<sup>nd</sup> ed, 2002).
- Department of Prime Minister and Cabinet, "Counter-Terrorism White Paper: Securing Australia – Protecting our Community" (2010).
- Dershowitz, Alan, "The torture warrant: a response to Professor Strauss" (2003) 48 *New York Law School Law Review* 275-294.
- Dershowitz, Alan, *Why terrorism works: understanding the threat, responding to the challenge* (Yale University Press, 2002).
- Dickson, Brice, *Human rights and the United Kingdom Supreme Court* (Oxford University Press, 2013).
- Dickson, Brice, *The European Convention on Human Rights and the conflict in Northern Ireland* (Oxford University Press, 2010).
- Diplock Commission, *Report of the Commission to consider legal proceedings to deal with terrorist activities in Northern Ireland* (Cmnd 5185, December 1972).
- Dolowitz, David, and David Marsh, "Learning from abroad: the role of policy transfer in contemporary policy-making" (2000) 13(1) *Governance* 5-24.
- Dolowitz, David, and David Marsh, "The future of policy transfer research" (2012) 10(3) *Political Studies Review* 339-345.
- Donaghue, Stephen, "Reconciling security and the right to a fair trial: The *National Security Information Act* in practice" in Andrew Lynch, Edwina MacDonald and

## References

- George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 87-95.
- Donkin, Sue, *The Evolution of Pre-emption in Anti-Terrorism Law: A Cross-Jurisdictional Examination* (Doctor of Philosophy thesis, Griffith University, Brisbane, 2011).
- Donohue, Laura, *Counter-terrorist law and emergency powers in the United Kingdom 1922-2000* (Irish Academic Press, 2001).
- Doyle, John, and Belinda Wells, "How far can the common law go towards protecting human rights" in Philip Alston (ed), *Promoting human rights through bill of rights: comparative perspectives* (Clarendon Press, 1999) 17-74.
- Dubber, Markus, "The criminal trial and the legitimation of punishment" in Anthony Duff *et al* (eds.), *The trial on trial (Volume 1): truth and due process* (Hart Publishing, 2004) 85-100.
- Duff, Antony *et al* (eds), *The trial on trial (Volume 1): truth and due process* (Hart Publishing, 2004).
- Duff, Antony *et al* (eds), *The trial on trial (Volume 2): judgement and calling to account* (Hart Publishing, 2006).
- Duff, Antony *et al*, *The trial on trial (Volume 3): towards a normative theory of the criminal trial* (Hart Publishing, 2007).
- Duff, Antony, *Trials and punishments* (Cambridge University Press, 1991).
- Dworkin, Ronald, "The threat of patriotism" (2002) 49(3) *New York Review of Books* 44-49.
- Dworkin, Ronald, *Justice for hedgehogs* (Harvard University Press, 2011).
- Dworkin, Ronald, *Taking rights seriously* (Duckworth, 1977).
- Dyzenhaus, David, "Cycles of legality in emergency times" (2007) 18 *Public Law Review* 165-85.
- Dyzenhaus, David, "Deference, security and human rights" in Benjamin Goold and Liora Lazarus (eds), *Security and human rights* (Hart Publishing, 2007) 125-55.
- Dyzenhaus, David, "Schmitt v Dicey: are states of emergency inside or outside the legal order?" (2006) 27(5) *Cardozo Law Review* 2005-2040.
- Dyzenhaus, David, "The compulsion of legality" in Victor Ramraj (ed), *Emergencies and the limits of legality* (Cambridge University Press, 2008) 33-59.



## References

- Dyzenhaus, David, and Rayner Thwaites, "Legality and emergency: the judiciary in a time of terror" Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 9-27.
- Dyzenhaus, David, *The constitution of law: legality in a time of emergency* (Cambridge University Press, 2006).
- Editorial, "Balancing security and liberty" (The Australian, 14 June 2013).
- Edlin, Douglas (ed), *Common law theory* (Cambridge University Press, 2007).
- Edlin, Douglas, "Introduction" in Douglas Edlin (ed), *Common law theory* (Cambridge University Press, 2007) 1-23.
- Eisgruber, Christopher, "Dimensions of democracy" (2003) 71 *Fordham Law Review* 1723-1747.
- Eisgruber, Christopher, *Constitutional self-government* (Harvard University Press, 2001).
- Elliott, Mark, "Developments: United Kingdom" (2003) 1(2) *International Journal of Constitutional Law* 334-44.
- Elliott, Mark, "Proportionality and deference: the importance of a structured approach", in Christopher Forsyth *et al* (eds), *Effective judicial review: a cornerstone of good governance* (Oxford University Press, 2010) 264-286.
- Emerton, Patrick, "Paving the way for conviction without evidence: a disturbing trend in Australia's 'anti-terrorism' laws" (2004) 4(2) *Queensland University of Technology Law Journal* 129-66.
- Emmerson, Ben *et al*, *Human Rights and Criminal Justice* (Sweet and Maxwell, 3<sup>rd</sup> ed, 2012).
- Ewing, K D, "The *Human Rights Act* and parliamentary democracy" (1999) 62 *Modern Law Review* 79-99.
- Feldman, David, "Human rights, terrorism and risk: the roles of politicians and judges" (2006) Summer *Public Law* 364-384.
- Feldman, David, "Terrorism, human rights and their constitutional implications?" (2005) 1 *European Constitutional Law Review* 531-552.
- Fenwick, Helen, "Designing ETPIMs around ECHR review or normalization of 'preventative' non-trial-based executive measures?" (2013) 76(5) *Modern Law Review* 876-908.
- Fenwick, Helen, "The *Anti-Terrorism, Crime and Security Act 2001*: a proportionate response to 11 September?" (2002) 65 *Modern Law Review* 724-62.

## References

- Fenwick, Helen, and Gavin Phillipson, "Covert derogations and judicial deference: redefining liberty and due process rights in counter-terrorism law and beyond" (2011) 56(4) *McGill Law Journal* 863-918.
- Fenwick, Helen, Gavin Phillipson and Roger Masterman (eds), *Judicial reasoning under the UK Human Rights Act* (Cambridge University Press, 2007).
- Fletcher, George, "Comparative law as a subversive discipline" (1998) 46 *American Journal of Comparative Law* 683-700.
- Forcesse, Craig, and Lorne Waldman, "Seeking justice in an unfair process: Lessons from Canada, the United Kingdom, and New Zealand of the use of "special advocates" in national security proceedings" (Report, August, 2007).
- Forst, Brian, *Terrorism, Crime and Public Policy* (Cambridge University Press, 2009).
- Foster, R F, *Modern Ireland 1600-1972* (Allen Lane, 1988).
- Fredman, Sandra, "The positive right to security" in Benjamin Goold and Liora Lazarus (eds), *Security and human rights* (Hart Publishing, 2007) 307-324.
- Galligan, Brian and F L Morton, "Australian exceptionalism: rights protection without a bill of rights" in Tom Campbell, Jeffery Goldsworthy and Adrienne Stone (eds), *Protecting rights without a Bill of Rights: institutional performance and reform in Australia* (Ashgate, 2006) 17-39.
- Gans *et al*, *Criminal process and human rights* (Federation Press, 2011).
- Gans, Jeremy, and Andrew Palmer, *Australian principles of evidence* (Cavendish Publishing Ltd, 2<sup>nd</sup> ed, 2004).
- Gardiner, Stephen, "A core precautionary principle" (2006) 14(1) *Journal of Political Philosophy* 33-60
- Gavin, Tarasha, "Extending the reach of *Kable: Wainohu v New South Wales*" (2012) 34 *Sydney Law Review* 395-410.
- Gill, Peter, "'Knowing the self, knowing the other': comparative analysis of security intelligence" in Loch Johnson (ed), *Handbook of intelligence studies* (Routledge, 2009) 82-90.
- Gleeson, Justin, "Getting the balance right: proportionality and the Constitution" (Speech at the AGS Constitutional Law Forum, 22 November 2013).
- Golder, Ben, and George Williams, "Balancing national security and human rights: assessing the legal response of common law nations to the threat of terrorism" (2006) 8(1) *Journal of Comparative Policy Analysis* 43-62.

## References

- Golder, Ben, and George Williams, "What is 'terrorism'? Problems of legal definition" (2004) 27 *University of New South Wales Law Journal* 270-295.
- Goldsworthy, Jeffrey, "Legislative sovereignty and the rule of law" in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical essays on human rights* (2001) 61.
- Goldsworthy, Jeffrey, "The myth of the common law constitution" in Douglas Edlin (ed), *Common law theory* (Cambridge University Press, 2007) 205-236.
- Goodman, Melvin, "9/11: the failure of strategic intelligence" (2003) 18(4) *Intelligence and National Security* 59-71.
- Goss, Ryan, "Balancing away Article 6 in *Home Office v Tariq*: fair trial rights in closed material proceedings" in Martin *et al* (eds), *Secrecy, Law and Society* (Routledge, 2015) 58-72.
- Gray, Anthony, "Due process, natural justice, Kable and organisational control legislation" (2009) 20 *Public Law Review* 290-305.
- Greer, Steven, "Human rights and the struggle against terrorism in the United Kingdom", (2008) 2 *European Human Rights Law Review* 163-172.
- Greer, Steven, "The admissibility of confessions under the Northern Ireland (Emergency Provisions) Act" (1980) 31(3) *Northern Ireland Legal Quarterly* 205-38.
- Greer, Steven, *Supergrasses: a study in anti-terrorist law enforcement in Northern Ireland* (Clarendon Press, 1995).
- Grimm, Dieter, "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *University of Toronto Law Journal* 383-97.
- Gross LJ and Treacy LJ, "Further review of disclosure in criminal proceedings: sanctions for disclosure failure" (Judiciary of England and Wales, November 2012).
- Gross LJ, "Review of disclosure in criminal proceedings" (Judiciary of England and Wales, September 2011).
- Gross, Oren, "Security vs. liberty: an imbalanced balance" (2009, Legal Studies Research Paper Series, No 09-42, University of Minnesota).
- Gyles, Roger, "Independent National Security Legislation Monitor Inquiry into control order safeguards: Part 1" (29 January 2016).
- Gyles, Roger, "Independent National Security Legislation Monitor Inquiry into control order safeguards: Part 2" (13 April 2016).
- Haig Patapan, *Judging democracy: the new politics of the High Court of Australia* (Cambridge University Press, 2000).

## References

- Hailsham, Lord, *The dilemma of democracy: diagnosis and prescription* (Collins, 1978).
- Head, Michael, "What the Haneef inquiry revealed (and did not)" (2009) 34(4) *Alternative Law Journal* 243-247.
- Heller, K J, and M D Dubber (eds), *The handbook of comparative criminal law* (Stanford University Press, 2011).
- Hewitt, Steve, *The British war on terror: terrorism and counter-terrorism on the home front since 9/11* (Bloomsbury Academic, 2008).
- Heydon, J D, "Judicial activism and the death of the rule of law" (2003) 23 *Australian Bar Review* 110-133.
- Hickman, Tom, "The courts and politics after the Human Rights Act: a comment" (2008) Spring *Public Law* 84-100.
- Hickman, Tom, "The substance and structure of proportionality" (2008) Winter *Public Law* 694-716.
- Hiebert, Janet, "Parliament and the Human Rights Act: can the JCHR help facilitate a culture of rights?" (2006) 4(1) *International Journal of Constitutional Law* 1-38.
- Hiebert, Janet, "Parliamentary review of terrorism measures" (2005) 68(4) *Modern Law Review* 676-680.
- Hill, Jonathan "Comparative law, law reform and legal theory" (1989) 9(1) *Oxford Journal of Legal Studies* 101-115.
- HM Government, "Consolidated guidance to intelligence officers and service personnel on the detention and interviewing of detainees overseas, and on the passing and receipt of intelligence relating to detainees" (London, July 2010).
- Ho, Hock Lai, "Liberalism and the criminal trial" (2010) 32 *Sydney Law Review* 243-256.
- Hocking, Jenny, *Terror laws: ASIO, counter-terrorism and the threat to democracy* (UNSW Press, 2004).
- Home Office (UK), "The Government response to the Report by David Anderson QC on Terrorism Prevention and Investigation Measures in 2013" (December 2014) available at <https://terrorismlegislationreviewer.independent.gov.uk/2014-tpims-report> (last visited 15 July 2016).
- Home Office (UK), *Review of Counter-Terrorism and Security Powers: Findings and Recommendations* (Cm 8004, January 2011).

## References

- Home Office (UK), *The Government Reply to the twenty-third Report of the Joint Committee on Human Rights 2008-09* (Cm 7714, October 2009).
- Hudson, John, and Bo-Young Kim, "Policy transfer using the 'gold standard': exploring policy tourism in practice" (2014) 42(4) *Policy & Politics* 495-511.
- Human Rights Committee, *General Comment No 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001).
- Human Rights Committee, *General Comment No 32*, UN Doc CCPR/C/GC/32 (23 August 2007).
- Hunt, Murray, "Sovereignty's blight: why contemporary public law needs the concept of 'due deference'" in Nicholas Bamforth and Peter Leyland (eds), *Public law in a multi-layered constitution* (Hart Publishing, 2003) 337-70.
- Hunt, Murray, "The impact of the *Human Rights Act* on the legislature: a diminution of democracy or a new voice for Parliament?" (2010) 6 *European Human Rights Law Review* 601-608.
- Huq, Aziz, Tom Tyler and Stephen Schulhofer, "Mechanisms for eliciting cooperation in counterterrorism policing: evidence from the United Kingdom" (2011) 8(4) *Journal of Empirical Legal Studies* 728-61.
- Husak, Douglas, "Preventative detention as punishment? Some possible obstacles" in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the limits of the criminal law* (Oxford University Press, 2013) 178-193.
- INSLM's website: [www.inslm.gov.au](http://www.inslm.gov.au) (last visited 15 July 2016).
- Inspector General for Intelligence and Security (website): [www.igis.gov.au](http://www.igis.gov.au) (last visited 15 July 2016).
- International Commission of Jurists, *Assessing damage, urging action: executive summary* (Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, 2009).
- International Commission of Jurists, *Assessing damage, urging action* (Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, 2009).
- Ip, John, "The rise and spread of the special advocate" (2008) Winter *Public Law* 717-41.
- Irvine of Lairg, Lord, "The impact of the *Human Rights Act*: parliament, the courts and the executive" (2003) Summer *Public Law* 308-325.
- Jackson, John and Sean Doran, "Conventional trials in unconventional times: the Diplock Court experience", (1993) 4(3) *Criminal Law Forum* 503-520.

## References

- Jackson, John and Sean Doran, *Judge without jury: Diplock trials in adversary system* (Oxford University Press, 1995).
- Jackson, John, "Curtailing the right of silence: lessons from Northern Ireland", (1991) June *Criminal Law Review* 404-15.
- Jackson, John, "Inferences from silence: from common law to common sense" (1993) 44(2) *Northern Ireland Legal Quarterly* 103-112.
- Jackson, John, "Many years on in Northern Ireland: the Diplock legacy", (2009) 60(2) *Northern Ireland Legal Quarterly* 213-29.
- Jackson, John, Sean Doran and Michael Seigel, "Rethinking adversariness in nonjury criminal trials" (1995) 23(1) *American Journal of Criminal Law* 1-59.
- Jacob, Joseph, *Civil justice in the age of human rights* (Ashgate, 2007).
- Jaconelli, Joseph, *Open justice: a critique of the public trial* (Oxford University Press, 2002).
- Jagers, Bronwen, "Anti-terrorism control orders in Australia and the United Kingdom: a Comparison" (Research Paper No 28, Parliamentary Library, Parliament of Australia, 29 April 2008).
- James, Oliver, and Martin Lodge, "The limitations of 'policy transfer' and 'lesson drawing' for public policy research (2003) 1(2) *Political Studies Review* 179-193
- Janis, Mark, Richard Kay and Anthony Bradley, *European human rights law: text and materials* (Oxford University Press, 3<sup>rd</sup> ed, 2008).
- Jarvis, Jeff, "Protecting the nation's national security: the Classified Information Procedures Act" (1995) 20 *Thurgood Marshall Law Review* 319-47
- Johnson, Loch (ed), *Handbook of intelligence studies* (Routledge, 2009).
- Johnson, Loch, "Introduction" in Loch Johnson (ed), *Handbook of intelligence studies* (Routledge, 2009) 1-14.
- Joint Committee of Human Rights (website):  
[www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/role/](http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/role/) (last visited 15 July 2016).
- Joint Committee on Human Rights, "Allegations of UK complicity in torture" (23<sup>rd</sup> Report of Session 2008-09, HL Paper 152/HC 230, 4 August 2009).
- Joint Committee on Human Rights, "Counter-terrorism policy and human rights: Draft Prevention of Terrorism Act 2005" (Continuance in force of sections 1 to 9) Order 2006" (12<sup>th</sup> Report of Session 2005-06, HC 915, 14 February 2006).

## References

- Joint Committee on Human Rights, “Counter-Terrorism Policy and Human Rights” (Eighth Report): Counter-Terrorism Bill” (9<sup>th</sup> Report of Session 2007-08, HC 199, 7 February 2008).
- Joint Committee on Human Rights, “Counter-terrorism policy and human rights (seventeenth Report): Bringing human rights back in” (16<sup>th</sup> Report of Session 2009-10, HC 111, 25 March 2010).
- Joint Committee on Human Rights, “Counter–Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning” (19<sup>th</sup> Report of Session 2006-07, HC 394, 30 July 2007).
- Joint Committee on Human Rights, “Counter–Terrorism Policy and Human Rights” (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010” (9<sup>th</sup> Report of Session 2009-10, HC 395, 26 February 2010).
- Joint Committee on Human Rights, “Prevention of Terrorism Bill” (10<sup>th</sup> Report of Session 2004-05, HC 334, 4 March 2005).
- Joseph, Philip, “The demise of ultra vires: a reply to Christopher Forsyth and Linda Whittle” (2002) 8(2) *Canterbury Law Review* 463-79.
- Jowell, Jeffrey and Dawn Oliver (eds), *The changing constitution* (Oxford University Press, 7<sup>th</sup> ed, 2011).
- Jowell, Jeffrey, “Judicial deference: servility, civility or institutional capacity?” (2003) Winter *Public Law* 592-601.
- Jowell, Jeffrey, “Parliamentary sovereignty under the new constitutional hypothesis” (2006) Autumn *Public Law* 562-580.
- Jowell, Jeffrey, “The rule of law and its underlying values” in Jeffrey Jowell and Dawn Oliver (eds), *The changing constitution* (Oxford University Press, 7<sup>th</sup> ed, 2011) 11-34.
- Jung, Heike, “Nothing but the truth? Some facts, impressions and confessions about truth in criminal procedure” in Anthony Duff *et al* (eds.), *The trial on trial (Volume 1): truth and due process* (Hart Publishing, 2004) 147-156.
- Kahn-Freund, Otto, “On uses and misuses of comparative law” (1974) 37(1) *Modern Law Review* 1-27.
- Kavanagh, Aileen, “Constitutionalism, counterterrorism and the courts: changes in the British constitutional landscape (2011) 9(1) *International Journal of Constitutional Law* 172-99.
- Kavanagh, Aileen, “Defending deference in public law and constitutional theory”(2010) 126(4) *Law Quarterly Review* 222-250.

## References

- Kavanagh, Aileen, "Deference or defiance? The limits of the judicial role in constitutional adjudication" in Grant Huscroft (ed), *Expounding the Constitution: essays in constitutional theory* (Cambridge University Press, 2008) 184-215.
- Kavanagh, Aileen, "Special advocates, control orders and the right to a fair trial" (2010) 73(5) *Modern Law Review* 836-57.
- Keane, Bernard, "The winners from the war on terror" (Crikey, 17 June 2011) available at [www.crikey.com.au/2011/06/17/the-winners-from-the-war-on-terror-terrorists-and-property-owners/](http://www.crikey.com.au/2011/06/17/the-winners-from-the-war-on-terror-terrorists-and-property-owners/) (last visited 15 July 2016).
- Keene, David, "Principles of deference under the *Human Rights Act*" in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial reasoning under the Human Rights Act* (Cambridge University Press, 2007) 206-12.
- Keim, Stephen, "Dr Haneef and me (2008) 33(2) *Alternative Law Journal* 99-102.
- Keogh, Andrew, *Criminal Justice Act 2003: A guide to the new law* (Law Society Publishing, 2004).
- Keyzer, Patrick, and Bernadette McSherry, "The preventative detention of sex offenders: law and practice" (2015) 38(2) *University of New South Wales Law Journal* 792-822.
- Kiefel, Susan, "Proportionality: a rule of reason" (2012) 23 *Public Law Review* 85-93.
- Kirby, Michael, "Domestic implementation of international human rights norms" (1999) 5(2) *Australian Journal of Human Rights* 27.
- Kirby, Michael, "The Australian debt to the European Court of Human Rights" in Breitmoser *et al* (eds), *Human rights, democracy and the rule of law* (Dike, 2007) 391-410.
- Kirby, Michael, "The Australian use of international human rights norms: from Bangalore to Balliol – a view from the antipodes" (1993) 16(2) *University of New South Wales Law Journal* 363-93.
- Kleinig, John, "Ticking bomb and torture warrants" (2005) 10(2) *Deakin Law Review* 614-627.
- Kokott, Juliane, "The Inter-American system for the protection of human rights" in David Weisbrodt and Rüdiger Wolfrum (eds), *The right to a fair trial* (Springer, 1997) 133-162.
- Krebs, Shiri, "The secret keepers: judges security detention and secret evidence" in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning rights: comparative judicial engagement* (Hart Publishing, 2014) 179-206.



## References

- Lacey, Wendy, "Inherent jurisdiction, judicial power and implied guarantees under Chapter III of the Constitution" (2003) 31 *Federal Law Review* 57-86.
- Lafree, Garry, Laura Dugan and Raven Korte, "The impact of British counterterrorist strategies on political violence in Northern Ireland: comparing deterrence and backlash models" (2009) 47(1) *Criminology* 17-45.
- Law Council of Australia, *Anti-terrorism reform project* (Report, November 2008).
- Laws, John, "Beyond rights" (2003) 23(2) *Oxford Journal of Legal Studies* 265-80.
- Laws, John, "Law and democracy" (1995) Spring *Public Law* 72-93.
- Laws, John, "The constitution: morals and rights" (1996) Winter *Public Law* 622-35.
- Laws, John, "The good constitution" (Sir David Williams Lecture, Cambridge, 4 May 2012).
- Lazarus, Liora, "The right to security" in Rowan Cruft, S M Liao and Massimo Renzo (eds), *Philosophical foundations of human rights* (Oxford University Press, 2015) 423-441.
- Lazarus, Liora, Christopher McCrudden and Nigel Bowles (eds), *Reasoning rights: comparative judicial engagement* (Hart Publishing, 2014).
- Leeser, Julian and Ryan Haddrick (eds), *Don't leave us with the Bill: the case against an Australian Bill of Rights* (Menzies Research Centre, 2009).
- Leigh, Ian, "Public Interest Immunity" (1997) 50(1) *Parliamentary Affairs* 55-70.
- Leigh, Ian, "Reforming public interest immunity" (1995) 2 *Web Journal of Current Legal Issues*.
- Leigh, Ian, "The accountability of security and intelligence agencies" in Loch Johnson (ed), *Handbook of intelligence studies* (Routledge, 2009) 67-81.
- Leigh, Ian, "The standard of judicial review after the *Human Rights Act*", in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) 174-205.
- Leigh, Ian, and Roger Masterman, *Making rights real: the Human Rights Act in its first decade* (Hart Publishing, 2008)
- Leng, Roger, Richard Taylor and Martin Wasik, *Blackstone's Guide to the Crime and Disorder Act 1998* (Blackstone Press, 1998).
- Leone, Richard, and Greg Anrig (eds), *Liberty under attack: reclaiming our freedom in an age of terror* (Public affairs, 2007).

## References

- Lepsius, Oliver, "Liberty, security and terrorism: the legal position in Germany" (2004) 5(5) *German Law Journal* 435-460.
- Lester, Anthony, "Human rights and the British Constitution" in Jeffrey Jowell and Dawn Oliver (eds), *The changing constitution* (Oxford University Press, 7<sup>th</sup> ed, 2011) 70-101.
- Leveson, Brian, "Review of efficiency in criminal proceedings" (Judiciary of England and Wales, January 2015).
- Liberty, "Human Rights Act mythbuster", available at [www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/human-rights-act-mythbuster](http://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/human-rights-act-mythbuster) (last visited 15 July 2016).
- Liberty, *Liberty briefing on the Criminal Evidence (Witness Anonymity) Bill* (July 2008).
- Ligertwood, Andrew, and Gary Edmond, *Australian Evidence* (LexisNexis Butterworth, 5<sup>th</sup> ed, 2010).
- Louis Blom-Cooper, "What went wrong on Bloody Sunday: a critique of the Saville inquiry", (2010) January *Public Law* 61-78.
- Lowe, David, "The lack of discretion in high policing" (2011) 21(2) *Policing and Society* 233-47.
- Luban, David, "Eight fallacies about liberty and security" in Richard Wilson (ed), *Human rights in the 'War on Terror'* (Cambridge University Press, 2005) 242-257.
- Luizzi, Vincent, "Balancing of interests in courts" (1980) 20 *Jurimetrics Journal* 373-404.
- Lynch, Andrew, "Control orders in Australia: a further case study in the migration of British counter-terrorism law" (2008) 8(2) *Oxford University Commonwealth Law Journal* 159-185.
- Lynch, Andrew, "Legislating with urgency: the enactment of the *Anti-terrorism Act [No 1] 2005*" (2006) 30 *Melbourne University Law Review* 747-81.
- Lynch, Andrew, "Legislative and Executive branch vs. the Constitutional Court and the Judiciary: conflict or cooperation?" in Jürgen Bröhmer (ed) *The German Constitution turns 60: Basic Law and Commonwealth Constitution - German and Australian Perspectives* (Peter Lang, 2011) 167-84.
- Lynch, Andrew, "Terrorists and bikies: the constitutional licence for laws of control" (2009) 34(4) *Alternative Law Journal* 237-242.
- Lynch, Andrew, "*Thomas v Mowbray*: Australia's 'war on terror' reaches the High Court" (2008) 32 *Melbourne University Law review* 1182-1211.

## References

- Lynch, Andrew, and Alexander Reilly, "The constitutional validity of terrorism orders of control and preventative detention" (2007) 10 *Flinders Journal of Law Reform* 105-142.
- Lynch, Andrew, and George Williams, *What price security? Taking stock of Australia's anti-terror laws* (UNSW Press, 2006)
- Lynch, Andrew, Nicola McGarrity and George Williams, *Inside Australia's anti-terrorism laws and trials* (UNSW Press, 2015).
- Lynch, Andrew, Tamara Tulich and Rebecca Welsh, "Secrecy and control orders: the role and vulnerability of constitutional values in the United Kingdom and Australia" in David Cole, Federico Fabbrini and Arianna Vedashi (eds), *Secrecy, national security and the vindication of constitutional law* (Edward Elgar Publishing, 2013) 154-72.
- MacAskill, Ewan, and Jonathan Watts, "US intelligence spending has doubled since 9/11, top secret budget reveals" (The Guardian, 30 August 2013) available at [www.theguardian.com/world/2013/aug/29/us-intelligence-spending-double-9-11-secret-budget](http://www.theguardian.com/world/2013/aug/29/us-intelligence-spending-double-9-11-secret-budget) (last visited 15 July 2016).
- MacDonald, Edwina, and George Williams, "Combating terrorism: Australia's *Criminal Code* since September 11, 2001" (2007) 16 *Griffith Law Review* 27-54.
- MacDonald, Ian, "Police State?" (2005) 3 *Counsel* 16-17.
- Macken, Claire, "Preventative detention in Australian law" issues of interpretation (2008) 32(2) *Criminal Law Journal* 71-89.
- Manderson, Desmond, "Another modest proposal: in defence of the prohibition against torture", in Miriam Gani and Penelope Mathew (eds), *Fresh perspectives on the War on Terror* (ANU E Press, 2008) 27-43.
- Marcus, Gilbert, "Secret witnesses" (1990) Summer *Public Law* 207-23.
- Mares, Henry, "Balancing public interest and a fair trial in police informer privilege: a critical Australian perspective" (2002) 6 *International Journal of Evidence and Proof* 94-124.
- Martin, Greg, "*Pompano* and the short march to curial fairness" (2013) 38(2) *Alternative Law Journal* 118-119.
- Martínez-Peñas, Leandro, and Manuela Fernández-Rodríguez, "Evolution of British law on terrorism: from Ulster to global terrorism" in Aniceto Masferrer (ed), *Post 9/11 and the state of permanent legal emergency: security and human rights in counter terrorism* (Springer, 2012) 201-22.
- Mason, Anthony, "Fair Trial" (1995) 19 *Criminal Law Journal* 9-11.

## References

- May, John, "Interim Report on the Maguire Case: The Inquiry into the circumstances surrounding the convictions arising out of the bomb attacks in Guildford and Woolwich in 1974" (9 July 1990).
- McBarnet, Doreen, *Conviction: law, the state and the construction of justice* (Macmillan Press, 1984).
- McConville, Mike, Andrew Sanders and Roger Leng, *The case for the prosecution* (Routledge, 1991).
- McCrudden, Christopher, "Human dignity and judicial interpretation of human rights" (2008) 19(4) *The European Journal of International Law* 655-724.
- McCrudden, Christopher (ed), *Understanding human dignity* (Oxford University Press, 2013).
- McCrudden, Christopher, "Judicial Comparativism and human rights" in Esin Örüçü and David Nelken (eds), *Comparative Law: a handbook* (Hart Publishing, 2007) 371-397.
- McCullough, Angus *et al*, "Response to consultation" (Collective response to the "Justice and Security Green Paper" from special advocates, 2011) available at [http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09\\_Special%20Advocates.pdf](http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09_Special%20Advocates.pdf) (last visited 15 July 2016).
- McCullough, Angus, and Sharon Pickering, "Counter-terrorism: the law and policing of pre-emption", in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (Routledge, 2010) 13-29.
- McCullough, Angus, and Sharon Pickering, "Pre-crime and counter-terrorism: imagining future crime in the 'war on terror'" (2009) 49 *British Journal of Criminology* 628-45.
- McDonald, Bowcott and Mulholland, "Bloody Sunday report: David Cameron apologises for 'unjustifiable' shootings" (The Guardian, 15 June 2010) available at [www.guardian.co.uk/uk/2010/jun/15/bloody-sunday-report-saville-inquiry](http://www.guardian.co.uk/uk/2010/jun/15/bloody-sunday-report-saville-inquiry) (last visited 15 July 2016).
- McDonald, Geoff, "Control orders and preventative detention" why alarm is misguided" in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 106-115.
- McGarrity, Nicola, "'Testing' our counter-terrorism laws: the prosecution of individuals for terrorism offences in Australia" (2010) 34 *Criminal Law Journal* 92-127.
- McGarrity, Nicola, "From terrorism to bikies: control orders in Australia" (2012) 37(3) *Alternative Law Journal* 166-170.

## References

- McGarrity, Nicola, and Edward Santow, "Anti-terrorism laws: balancing national security and a fair hearing" in Victor Ramraj *et al* (eds), *Global anti-terrorism law and policy* (Cambridge University Press, 2<sup>nd</sup> ed, 2012) 122-150.
- McGarrity, Nicola, and George Williams, "When extraordinary measures become normal: pre-emption in counter-terrorism and other laws" in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (Routledge, 2010) 131-49.
- McGarrity, Nicola, Andrew Lynch and George Williams (eds), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (Routledge, 2010).
- McHugh, Michael, "Constitutional implications of terrorism legislation" (2007) 8 *The Judicial Review* 189–213.
- McHugh, Michael, "Does Chapter III of the Constitution protect substantive as well as procedural rights?" (2001) 21 *Australian Bar Review* 235-252.
- McSherry, Bernadette, "Expanding the boundaries of inchoate crimes: the growing reliance on preparatory offences" in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating deviance: the redirection of criminalisation and the futures of criminal law* (Hart Publishing, 2009) 141-64.
- McSherry, Bernadette, "Terrorism offences in the *Criminal Code*: broadening the boundaries of Australian criminal law" (2004) 27(2) *University of New South Wales Law Journal* 354-72.
- Mellifont, Kerri, *Fruit of the poisonous tree: evidence derived from illegal or improperly obtained evidence* (Federation Press, 2010).
- Metcalf, Eric, "Secret evidence" (Justice Report, June 2009).
- MI5 website: [www.mi5.gov.uk](http://www.mi5.gov.uk) (last visited 15 July 2016).
- Michaelsen, Christopher, "Balancing civil liberties against national security? A critique of counterterrorism rhetoric" (2006) 29 *University of New South Wales Law Journal* 1-21.
- Michaelsen, Christopher, "The proportionality principle, counter-terrorism and human rights: a German-Australian comparison" (2010) 1(2) *City University of Hong Kong Law Review* 19-43.
- Middleton, Ben, "Terrorism Prevention and Investigation Measures: constitutional evolution, not revolution?" (2013) 77 *Journal of Criminal Law* 562-82.
- Mill, John Stuart, *On liberty* (Longman, Roberts and Green, 1869).
- Mills, Brian, *The criminal trial* (Federation Press, 2011).

## References

- Möllers, Christoph, “Democracy and human dignity: limits of a moralized conception of rights in German constitutional law” (2009) 42(2) *Israel Law Review* 416-439.
- Mossberger, Karen, and Harold Wolman, “Policy transfer as a form of prospective policy evaluation (2003) 63(4) *Public Administration Review* 428-440.
- Mowbary, Alistair, *Cases and Material on the European Convention on Human Rights* (Oxford University Press, 2<sup>nd</sup> ed, 2007).
- Mueller, John, and Mark Steward, *Terror, security, and money: balancing the risks, benefits, and costs of homeland security* (Oxford University Press, 2011).
- Murphy, Cian, “Counter-terrorism and the culture of legality: the case of special advocates” (2013) 24(1) *King’s Law Journal* 19-37.
- Nelken, David, “Comparative law and comparative legal studies”, in Esin Örüçü and David Nelken (eds), *Comparative Law: a handbook* (Hart Publishing, 2007) 3-42.
- Nelken, David, “Defining and using the concept of legal culture” in Esin Örüçü and David Nelken (eds), *Comparative Law: a handbook* (Hart Publishing, 2007) 109-131.
- Niblett, John, *Disclosure in criminal proceedings* (Blackstone Press, 1997).
- Norton-Taylor, Richard, and Nick Hopkins, “How the shock of 9/11 made MI5 stronger” (The Guardian, 8 September 2011) available at [www.theguardian.com/world/2011/sep/07/911-spy-agencies-expansion](http://www.theguardian.com/world/2011/sep/07/911-spy-agencies-expansion) (last visited 15 July 2016).
- Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR commentary* (Engel, 2<sup>nd</sup> ed, 2005).
- O'Donnell, Guillermo, “The quality of democracy: why the rule of law matters” (2004) 15(4) *Journal of Democracy* 32-46.
- O'Neill, Nick, Simon Rice and Roger Douglas, *Retreat from injustice: human rights law in Australia* (The Federation Press, 2<sup>nd</sup> ed, 2004).
- O'Donnell, Kate and Simon Bronitt, “Philips’ brief: the Hilton bombing, calling out the troops and turning points in history” (2014) 38 *Criminal Law Journal* 59-62.
- O’Mahony, Conor, “There is no such thing as a right to dignity” (2012) 10(2) *International Journal of Constitutional Law* 551-74.
- Ober, Josiah, “Democracy’s dignity” (2012) 106(4) *American Political Science Review* 827–846.
- Odgers, Stephen, “The High Court on crime in 2013: analysis and jurisprudence” (2014) 38 *Criminal Law Journal* 4-15.

## References

- Odgers, Stephen, *Uniform Evidence Law* (Lawbook, 8<sup>th</sup> ed, 2009).
- Oliver, Dawn, “The Scott Report” (1996) Autumn *Public Law* 357-367.
- Oraá, Jaime, *Human rights in states of emergency in international law* (Oxford University Press, 1992).
- Ostrovsky, Aron, “What's so funny about peace, love, and understanding? How the margin of appreciation doctrine preserves core human rights within cultural diversity and legitimises International Human Rights Tribunals” (2005) 1(1) *Hanse Law Review* 47.
- Ovey, Claire, and Robin White, *Jacobs and White: the European Convention on Human Rights* (Oxford University Press, 4<sup>th</sup> ed, 2006).
- Packer, Herbert, “Two models of the criminal process” (1964) 113(1) *University of Pennsylvania Law Review* 1-68.
- Packer, Herbert, *The limits of the criminal sanction* (Stanford University Press, 1968).
- Palmer, Andrew, “Investigating and prosecuting terrorism: the counter-terrorism legislation and the law of evidence” (2004) 27(2) *University of New South Wales Law Journal* 373-97.
- Parliamentary Committee on ASIO, ASIS and DSD, *ASIO's questioning and Detention Powers* (Review of the operation, effectiveness and implications of Division 3 of Part III in the *Australian Security Intelligence Organisation Act 1979*, November 2005).
- Patapan, Haig, “Court's conception of democracy” in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford companion to the High Court of Australia* (Oxford University Press, 2001) 201-203.
- Phillips, William, “Great expectations, hard times: Reflections on the Parliamentary Joint Committee on human rights” (2015) 37(4) *Law Society of South Australia Bulletin* 28-29.
- Phythian, Mark, “In the shadow of 9/11: security, intelligence and terrorism in the United Kingdom” in Jon Moran and Mark Phythian (eds), *Intelligence, security and policing post-9/11: the UK's response to the 'war on terror'* (Palgrave Macmillan, 2008) 32-53.
- Podesta, John, “More secrets less security” in Richard Leone and Greg Anrig (eds), *Liberty under attack: reclaiming our freedom in an age of terror* (Public affairs, 2007) 87-104.
- Poole, Thomas, “Back to the future? Unearthing the theory of common law constitutionalism” (2003) 23(3) *Oxford Journal of Legal Studies* 435-454.

## References

- Poole, Thomas, "Constitutional exceptionalism and the common law", (2009) 7(2) *International Journal of Constitutional Law* 247-274.
- Posner, Eric and Adrian Vermeule, "Emergencies and democratic failure", (2006) 92(6) *Virginia Law Review* 1091-1146.
- Posner, Eric and Adrian Vermeule, *Terror in the balance: security, liberty, and the courts* (Oxford University Press, 2007).
- Pound, Roscoe, "Law in books and law in action" (1910) 44 *American Law Review* 12-36.
- Press Association, "Blunkett anti-terror proposals condemned" (The Guardian, 2 February 2004) available at [www.guardian.co.uk/uk/2004/feb/02/terrorism.september11](http://www.guardian.co.uk/uk/2004/feb/02/terrorism.september11) (last visited 15 July 2016).
- Quirk, Hannah, "The significance of culture in criminal procedure reform: why the revised disclosure scheme cannot work" (2006) 10 *International Journal of Evidence and Proof* 42-59.
- Ratcliffe, Jerry, *Intelligence-led policing* (Willan Publishing, 2008).
- Redmayne, Mike, "Criminal Justice Act 2003: (1) Disclosure and its discontents" (2004) June *Criminal Law Review* 441-62.
- Redmayne, Mike, "Hearsay and human rights: *Al-Khawaja* in the Grand Chamber" (2012) 75(5) *Modern Law Review* 865-93.
- Redmayne, Mike, "Theorizing the criminal trial" (2009) 12(2) *New Criminal Law Review* 287-313.
- Renwick, James, "The constitutional validity of preventative detention" in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 127-135.
- Requa, Marny, "Absent witnesses and the UK Supreme Court: judicial deference as judicial dialogue?" (2010) 14(3) *International Journal of Evidence and Proof* 208-231.
- Richardson, Louise, "Britain and the IRA" in Robert Art and Louise Richardson (eds), *Democracy and counter-terrorism: lessons from the past* (United States Institute of Peace Press, 2007) 63-104.
- Richardson, Louise, *What terrorists want* (Random House, 2007).
- Riley, Stephen, "Human dignity: comparative and conceptual debates" (2010) 6(02) *International Journal of Law in Context* 117-38.



## References

- Rivers, Julian, "Proportionality and variable intensity of review" (2006) 65(1) *Cambridge Law Journal* 174-207.
- Rix, Mark, "Counter-terrorism and information: the NSI Act, fair trials, and open, accountable government" (2011) 25(2) *Continuum* 285-297.
- Roach, Kent and Gary Trotter, "Miscarriages of justice in the war against terror" (2005) 109(4) *Penn State Law Review* 967-1041.
- Roach, Kent, "Ordinary laws for emergencies and democratic derogation from rights" in Victor Ramraj (ed), *Emergencies and the limits of legality* (Cambridge University Press, 2008) 229-57.
- Roach, Kent, "Secret evidence and its alternatives" in Aniceto Masferrer (ed), *Post 9/11 and the state of permanent legal emergency: security and human rights in counter terrorism* (Springer, 2012) 179-200.
- Roach, Kent, "The eroding distinction between intelligence and evidence in terrorism investigation" in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and beyond: the culture of law and justice after 9/11* (Routledge, 2010) 48-68.
- Roach, Kent, *The 9/11 effect: comparative counter-terrorism* (Cambridge University Press, 2011).
- Robertson, Geoffrey, "Fair trials for terrorists?" in Richard Wilson (ed), *Human rights in the 'War on Terror'* (Cambridge University Press, 2005) 169-183.
- Robinson, Patrick, "The right to a fair trial in international law with specific reference to the work of the ICTY" (2009) 3 *Publicist* 1-11.
- Rose, Jonathan, "The rule of law in the Western world: an overview" (2004) 35(4) *Journal of Social Philosophy* 457-70.
- Royal United Services Institute, "A democratic licence to operate" (Report of the Independent Surveillance Review, July 2015).
- Ruddock, Philip, "Law as a preventative weapon against terrorism" in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 3-8.
- Ruddock, Philip, "The Commonwealth response to September 11: the rule of law and national security" (Speech, National Forum in the War on Terrorism and the Rule of Law, New South Wales Parliament House, 10 November 2003).
- Salgado, Richard, "Government secrets, fair trials, and the *Classified Information Procedures Act*" (1988) 98 *Yale Law Journal* 427-446.

## References

- Scheinin, Martin, *Australia: study on human rights compliance while countering terrorism* (Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/HRC/4/26/Add.3, 14 December 2006).
- Scheuerman, William, "Survey article: emergency powers and the rule of law after 9/11" (2006) 14(1) *Journal of Political Philosophy* 61-84.
- Scott, Richard, "The acceptable and unacceptable use of public interest immunities" (1996) Autumn *Public Law* 427-44.
- Scott, Richard, "The use of public interest immunity claims in criminal cases" (1996) 2 *Web Journal of Current Legal Issues*.
- Scott, Sir Richard, "The Report of the Inquiry in to the Export of Defence Equipment and Dual Use Goods to Iraq and Related Prosecutions" (HC 115, 1995-96).
- Secretary of State for the Home Department, "CONTEST: the United Kingdom's strategy for countering terrorism" (Cm 8123, July 2011) available at [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97995/strategy-contest.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97995/strategy-contest.pdf) (last visited 15 July 2016).
- Shah, Sangeeta, "The UK's anti-terror legislation and the House of Lords: the first skirmish" (2005) 5(2) *Human Rights Law Review* 403-421.
- Shah, Sangeeta, and Thomas Poole, "The impact of the *Human Rights Act* on the House of Lords" (2009) April *Public Law* 347-371.
- Shaw, Malcolm, *International law* (Cambridge University Press, 5<sup>th</sup> ed, 2003).
- Sir Robin Auld LJ, "A review of the criminal courts in England and Wales" (2001), available at [www.criminal-courts-review.org.uk](http://www.criminal-courts-review.org.uk) (last visited 15 July 2016).
- Sottiaux, Stefan, *Terrorism and the Limitation of Rights: the ECHR and the US Constitution* (Hart Publishing, 2008).
- Spigelman, James Jacob, "The principle of open justice: a comparative perspective" (2006) 29(2) *University of New South Wales Law Journal* 147-166.
- Spigelman, James Jacob, "The truth can cost too much: the principle of a fair trial" (2004) 78 *Australian Law Journal* 29-49.
- Spjut, R J, "Internment and detention without trial in Northern Ireland 1971-75", (1986) 49 *Modern Law Review* 712-740.
- Stellios, James, *The federal judicature: Chapter III of the Constitution* (LexisNexi Butterworths, 2010).
- Steyn, Lord, "Deference: a tangled story" (2005) Summer *Public Law* 346-359.

## References

- Steyn, Lord, "Democracy through law" (2002 Robin Cooke Lecture, New Zealand Centre for Public Law, Occasional Paper No 12, 18 September 2002).
- Steyn, Lord, "Dynamic interpretation amidst an orgy of statutes" (2004) 35(2) *Ottawa Law Review* 163-177.
- Stone, Geoffrey, "National security v. civil liberties" (2007) 95 *California Law Review* 2203-2212.
- Strawson, John, "Islam and the politics of terrorism: aspects of the British experience" in Miriam Gani and Penelope Mathew (eds), *Fresh perspectives on the war on terror* (ANU EPress, 2008) 9-26.
- Stribopoulos, James, "Packer's blind spot: low visibility encounters and the limits of due process versus crime control" in François Tanguay-Renaud and James Stribopoulos (eds), *Rethinking criminal law theory* (Hart Publishing, 2012) 193-216.
- Tamanaha, Brian, "A critical review of the Classified Information Procedures Act" (1986) 13 *American Journal of Criminal Law* 277-328.
- Tamanaha, Brian, *On the rule of law: history, politics, theory* (Cambridge University Press, 2004).
- Taylor, Chris, "The courts and applications for public interest immunity: *R v H and C*" (2004) 8(3) *International Journal of Evidence and Proof* 179-85.
- Taylor, Richard, Martin Wasik and Roger Leng, *Blackstone's Guide to The Criminal Justice Act 2003* (Oxford University Press, 2004).
- Tham, Joo-Cheong, "Casualties of the domestic 'war on terror': a review of recent counter-terrorism laws" (2004) 28(2) *Melbourne University Law Review* 512-31.
- Thibaut, John, and Laurens Walker, *Procedural justice: a psychological analysis* (L. Erlbaum Associates, 1975).
- Thomas, Philip, "September 11<sup>th</sup> and good governance", (2002) 53 *Northern Ireland Legal Quarterly* 366-90.
- Thwaites, Rayner, *The liberty of non-citizens: indefinite detention in Commonwealth Countries* (Hart Publishing, 2014).
- Tolley, Michael, "Parliamentary scrutiny of rights in the United Kingdom: assessing the work of the Joint Committee on Human Rights" (2009) 44(1) *Australian Journal of Political Science* 41-55.
- Tomkins, Adam, "Justice and security in the United Kingdom" (2014) 47(3) *Israel Law Review* 305-330.

## References

- Tomkins, Adam, "National security and the role of the court: a changed landscape?" (2010) 126(October) *Law Quarterly Review* 543-67.
- Towney, Anne, "Proportionality and the Constitution" (Speech, ALRC Freedom Symposium, University of Sydney, 8 October 2015) available at <https://www.alrc.gov.au/proportionality-constitution-anne-twomey> (last visited 15 July 2016).
- Tulich, Tamara, "Adversarial intelligence? Control orders, TPIMs and secret evidence in Australia and the United Kingdom" (2012) 12(2) *Oxford University Commonwealth Law Journal* 341-369.
- Tyler, Tom, "What is procedural justice?: criteria used by citizens to assess the fairness of legal procedures" (1988) 22(1) *Law & Society Review* 103-35.
- Tyler, Tom, and Kristina Murphy, "Procedural justice, police legitimacy and cooperation with the police: a new paradigm for policing" (CEPS Briefing Paper, May 2011).
- Tyler, Tom, Stephen Schulhofer and Aziz Huq, "Legitimacy and deterrence effects in counterterrorism policing: a study of Muslim Americans" (2010) 44(2) *Law & Society Review* 365-402.
- Tyulkina, Svetlana, and George Williams, "Preventative detention orders in Australia" (2015) 38(2) *University of New South Wales Law Journal* 738-755.
- UN SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001)
- United Kingdom, *Parliamentary Debate*, House of Commons, 1 March 2010, vol 506, no 47, col 739 (Mr Andrew Dismore).
- United Kingdom, *Parliamentary Debate*, House of Commons, 26 June 2008, vol 478, no 119, col 523-524 (Mr Jack Straw).
- United Kingdom, *Parliamentary Debate*, House of Lords, 23 June 1997, vol 580, col 143 (Lord Lester of Herne Hill).
- United Kingdom, *Parliamentary Debate*, House of Lords, 5 October 2011, vol 730, col 1134 (Lord Henley, Minister of State).
- Vitkauskas, Dovydas, and Grigory Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights* (Council of Europe human rights handbook, 2012).
- Wade, William, and Christopher Forsyth, *Administrative law* (Oxford University Press, 10<sup>th</sup> ed by Christopher Forsyth, 2009).

## References

- Waldron, Jeremy, "A right-based critique of constitutional rights" (1993) 13 *Oxford Journal of Legal Studies* 18-51.
- Waldron, Jeremy, "How law protects dignity" (2012) 71(1) *Cambridge Law Journal* 200-220.
- Waldron, Jeremy, "Is dignity the foundation of human rights?" in Rowan Cruft, S M Liao and Massimo Renzo (eds), *Philosophical foundations of human rights* (Oxford University Press, 2015) 117-37.
- Waldron, Jeremy, "Security and liberty: the image of balance" (2003) 11(2) *Journal of Political Philosophy* 191-210.
- Walker, Bret, "Independent National Security Legislation Monitor's Declassified Annual Report" (20 December 2012).
- Walker, Bret, "Independent National Security Legislation Monitor's Annual Report" (7 November 2013).
- Walker, Clive, "Intelligence and anti-terrorism legislation in the United Kingdom" (2005) 44 *Crime, Law & Social Change* 387-422.
- Walker, Clive, "The pursuit of terrorism with intelligence" in Jon Moran and Mark Phythian (eds), *Intelligence, security and policing post-9/11: the UK's response to the 'war on terror'* (Palgrave Macmillan, 2008) 54-78.
- Walker, Clive, "The reshaping of control orders in the United Kingdom: time for a fairer go, Australia!" (2013) 37 *Melbourne University Law Review* 143-88.
- Walker, Clive, *Blackstone's guide to anti-terrorism legislation* (Oxford University Press, 3<sup>rd</sup> ed, 2014).
- Walker, Clive, *Terrorism and the law* (Oxford University Press, 2011).
- Walker, Kristen, "International law as a tool of constitutional interpretation" (2002) 28(1) *Monash University Law Review* 85-102.
- Waller, Mark, "Report of the Intelligence Services Commissioner for 2015" (HC 459, July 2016).
- Wark, Wesley, "Introduction: 'learning to live with intelligence'" (2003) 18(4) *Intelligence and National Security* 1-14.
- Warner, Michael, "Sources and methods for the study of intelligence" in Loch Johnson (ed), *Handbook of intelligence studies* (Routledge, 2009) 17-27.
- Watson, Alan, "Legal change: sources of law and legal culture" (1983) 131 *University of Pennsylvania Law Review* 1121-1157.

## References

- Watson, Alan, *Legal transplants: an approach to comparative law* (Scottish Academic Press, 1974)
- Weinberger, Jonathan, "Defining terror" (2003) Winter/Spring *Seton Hall Journal of Diplomacy and International Relations* 65-81.
- Weissbrodt, David, *The right to a fair trial under the UDHR and the ICCPR* (Martinus Nijhoff, 2001).
- Wesley, Michael, "The politicisation of intelligence" in Daniel Baldino (ed), *Democratic oversight of intelligence services* (Federation Press, 2010) 187-206.
- Whealy, Anthony, "Difficulty in obtaining a fair trial in terrorism cases" (2007) 81 *Alternative Law Journal* 743-759.
- Wheeler, Fiona, "Due process judicial power and Chapter III in the new High Court" (2004) 32(2) *Federal Law Review* 205-224.
- Wheeler, Fiona, "The doctrine of separation of powers and constitutionally entrenched due process in Australia" (1997) 23 *Monash University Law Review* 248-284.
- White House, "National Security Strategy" (May 2010) available at [www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf) (last visited 15 July 2016).
- White, Margaret "A judicial perspective: the making of preventative detention orders" in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 116-126.
- Williams, George and Reynolds, Daniel, "The operation and impact of Australia's parliamentary scrutiny regime for human rights" (2015) 41(2) *Monash University Law Review* 469-507.
- Williams, George, "A decade of Australian anti-terror laws" (2011) 35 *Melbourne University Law Review* 1136-1176.
- Williams, George, "Does Australia need new anti-terror laws?" (Lionel Murphy Memorial Lecture, Canberra, 22 October 2014).
- Williams, George, "The constitutional role of the courts: a perspective from a nation without a bill of rights" (2004) 2 *New Zealand Journal of Public and International Law* 25-46.
- Wilson, Richard (ed), *Human rights in the 'War on Terror'* (Cambridge University Press, 2005).
- Winterton, George, "The separation of judicial power as an implied bill of rights" in Geoffrey Lindell (ed), *Future directions in Australian constitutional law* (Federation Press, 1994) 185-208.

## References

- Wirtz, James, "Déjà vu? Comparing Pearl Harbor and September 11" (2002) 24(3) *Harvard International Review* 73-77.
- Wright, Andrea, "Casting a light into the shadows: why security intelligence requires democratic control, oversight and review", in Nicole LaViolette and Craig Forcese (eds), *The human rights of anti-terrorism* (Irvin Law, 2008) 327-67.
- Young, Alison, "In defence of due deference" (2009) 72(4) *Modern Law Review* 554-80.
- Young, Alison, "Is dialogue working under the *Human Rights Act 1998*?" (2011) October *Public Law* 773-800.
- Yowell, Paul, "Critical examination of Dworkin's theory of rights" (2007) 52 *American Journal of Jurisprudence* 93-137.
- Zedner, Lucia, "Fixing the future? The pre-emptive turn in criminal justice" in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating deviance: the redirection of criminalisation and the futures of criminal law* (Hart Publishing, 2009) 35-58.
- Zedner, Lucia, "Neither safe nor sound: the perils and possibilities of risk" (2006) 48(3) *Canadian Journal of Criminology and Criminal Justice* 423-434.
- Zedner, Lucia, "Pre-crime and post-criminology" (2007) 11(2) *Theoretical Criminology* 261-81.
- Zedner, Lucia, "Securing liberty in the face of terror: reflections from criminal justice" (2005) 32(4) *Journal of Law and Society* 507-33.
- Zedner, Lucia, "Seeking security by eroding rights: the side-stepping of due process" in Benjamin Goold and Liora Lazarus (eds), *Security and human rights* (Hart Publishing, 2007) 257-275.
- Zedner, Lucia, *Security* (Routledge, 2009).
- Zimmermann, Andreas, "The right to a fair trial in situations of emergency and the question of emergency courts" in David Weisbrodt and Rüdiger Wolfrum (eds), *The right to a fair trial* (Springer, 1997) 747-762.
- Zines, Leslie, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008).
- Zweigert, Konrad, and Heinz Kötz, *Introduction to comparative law* (translated by Tony Weir, Clarendon Press, 3<sup>rd</sup> ed, 1998).

## 10.2 Legislation, guidelines and international treaties

*Administration of Justice Act 1969* (UK).

*American Convention on Human Rights*, opened for signature 21 November 1969, 1144 *United Nations Treaty Series* 123 (entered into force 18 July 1978).

*Anti-social Behaviour, Crime and Policing Act 2014* (UK).

*Anti-Terrorism Crime and Security Act 2001* (UK).

*Attorney-General's Guidelines 1981* (UK).

*Attorney-General's Guidelines on Disclosure 2005* (UK).

*Australian Security Intelligence Organisation Act 1979* (Cth).

*Basic Law: Human Dignity and Liberty (1992)* [Israel].

*Canadian Charter of Rights and Freedoms* (1982).

*Charter of Human Rights and Responsibilities 2006* (Vic).

*Civil Procedure (Amendment No 3) Rules 2011* (UK).

*Civil Procedure Rules 1998* (UK).

*Classified Information Procedure Act 1980* (US).

Commonwealth Director of Public Prosecutions, *Statement on prosecution disclosure* (2006).

*Constitution of Sweden (1974)*

*Constitution of the Republic of South Africa* (1996)

*Constitutional Reform Act 2005* (UK).

*Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 *United Nations Treaty Series* 85 (entered into force 26 June 1987).

*Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 *United Nations Treaty Series* 222 (entered into force 3 September 1953).

*Coroners and Justice Act 2009* (UK).

*Corruption and Crime Commission Act 2003* (WA).

*Counter-Terrorism and Security Act 2015* (UK).



## References

*Counter-Terrorism Legislation Amendment Bill (No. 1) 2015* (Cth)

*Crime and Disorder Act 1998* (UK).

*Crimes (Criminal Organisations Control) Act 2012* (NSW).

*Crimes Act 1914* (Cth).

*Criminal Code Act 1899* (Qld).

*Criminal Code Act 1995* (Cth).

*Criminal Evidence (Northern Ireland) Order 1988* (UK).

*Criminal Evidence (Witness Anonymity) Act 2008* (UK).

*Criminal Evidence Act 1984* (UK).

*Criminal Justice Act 2003* (UK).

*Criminal Justice and Public Order Act 1994* (UK)

*Criminal Organisation Act 2009* (Qld).

*Criminal Organisations Control Act 2012* (Vic).

*Criminal Procedure Act 2009* (Vic).

*Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013  
No 10* (NSW).

*Criminal Procedure and Investigations Act 1996* (UK).

*Criminal Procedure Rules 2013* (UK).

*Criminal Procedures Act 1986* (NSW).

Crown Prosecution Service, *Disclosure Manual 2005* (UK).

Crown Prosecution Service, *The Director's guidance on witness anonymity 2009* (UK).

*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

*Corruption and Crime Commission Act 2003* (WA).

*Declaration of the Establishment of the State of Israel 1948*.

Director of Public Prosecutions, *Director's guidelines 2013* (Qld).

Director of Public Prosecutions, *Directors policy on disclosure 2014* (Vic).

Director of Public Prosecutions, *Guidelines 2005* (NT).

## References

- Director of Public Prosecutions, *Guidelines 2007* (NSW).
- Director of Public Prosecutions, *Prosecution policy 2005* (SA).
- Director of Public Prosecutions, *Statement of prosecution policy and Guidelines 2005* (WA).
- Drugs Misuse Act 1986* (Qld).
- Evidence Act 1977* (Qld).
- Evidence Act 1995* (Cth).
- German Basic Law* (Grundgesetz)
- Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
- Human Rights Act 1998* (UK).
- Human Rights Act 2004* (ACT).
- Intelligence Reform and Terrorism Prevention Act 2004* (US).
- International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 *United Nations Treaty Series* 171 (entered into force 23 March 1976).
- Justice and Security Act 2013* (UK).
- Liquor Licensing Act 1997* (SA).
- National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).
- National Security Information Legislation Amendment Act 2005* (Cth).
- Naval Discipline Act 1957* (UK).
- Northern Ireland (Emergency Provisions) Act 1973* (UK).
- Northern Ireland (Emergency Provisions) Act 1978* (UK).
- Northern Ireland (Emergency Provisions) Act 1987* (UK).
- Official Secrets Act 1989* (UK).
- Police and Criminal Evidence Act 1984* (UK).
- Police Powers and Responsibilities Act 2000* (Qld).
- Preamble to the Constitution of Ireland (1937)*.
- Prevention of Terrorism Act 2005* (UK).
- Regulation of Investigatory Powers Act 2000* (UK).

## References

*Serious and Organised Crime (Control) Act 2008* (SA).

*Serious Crime Control Act 2009* (NT).

*Sexual Offences Act 2002* (UK).

*Special Immigration Appeals Commission Act 1997* (UK).

*Special Powers Act 1922* (UK).

*Telecommunications (Interception and Access) Act 1979* (Cth).

*Terrorism Act 2000* (Explanatory memorandum) (UK).

*Terrorism Act 2000* (UK).

*Terrorism Act 2006* (UK).

*Terrorism Prevention and Investigation Measures Act 2011* (explanatory notes) (UK).

*Terrorism Prevention and Investigation Measures Act 2011* (UK).

*Youth Justice and Criminal Evidence Act 1999* (UK).

## 10.3 Cases law

*A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004).

*A and Others v Secretary of State for the Home Department* [2005] UKHL 71 (8 December 2005).

*A and others v the United Kingdom* [ECtHR] Application no 3455/05 (19 February 2009).

*A, X and Y, & Ors v Secretary of State for the Home Department* [2002] EWCA Civ 1502 (25 October 2002).

*Adam v The Queen* (2001) 207 CLR 96 (11 October 2001).

*AHK & Ors v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin) (2 May 2012).

*Air Canada v Secretary of State for Trade* [1983] 2 AC 394 (10 March 1983).

*Ajouaou and A & Ors v Secretary of State for the Home Department* [2003] UKSIAC 1/2002 (29 October 2003).

*Al Kateb v Godwin* (2004) 219 CLR 562 (6 August 2004).

## References

- Al Rawi & Ors v Security Service & Ors* [2011] UKSC 34 (13 July 2011).
- Al-Khawaja and Tahery v the United Kingdom* [ECtHR] Applications nos 26766/05 and 22228/06 (15 December 2011).
- Alister v R* (1984) 154 CLR 404 (13 February 1984).
- Arthur Stanley Smith* (1996) 86 A Crim R 308 (2 May 1996).
- Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (14 March 2013).
- Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1 (10 November 1947).
- AT v Secretary of State for the Home Department* [2012] EWCA Civ 42 (07 February 2012).
- Atlan v the United Kingdom* [ECtHR] Application no 36533/97 (19 June 2001).
- Attorney General's Reference No 4 of 2002* [2004] UKHL 43 (14 October 2004).
- Attorney-General (NSW) v Chidgey* (2008) 182 A Crim R 536 (28 March 2008).
- Australian Capital Televisions Pty Ltd v Commonwealth* (1992) 177 CLR 106 (30 September 1992).
- Beit Sourik Village Council v The Government of Israel* HCJ 2056/04 (2 May 2004).
- Benbrika & Ors v The Queen* [2010] VSCA 281 (25 October 2010).
- BM v Secretary of State for the Home Department* [2011] EWCA Civ 366 (05 April 2011).
- Botmeh and Alami v the United Kingdom* [ECtHR] Application no 15187/03 (7 June 2007).
- Britten v Alpogut* [1987] VR 929 (18 December 1986).
- Brogan and others v the United Kingdom* [ECtHR] Application nos 11209/84; 11234/84; 11266/84; 11386/85 (29 November 1988).
- Brown v Stott* [2003] 1 AC 681 (5 December 2000).
- Brown v The King* (1913) 17 CLR 570 (19 December 1913).
- Bunning v Cross* (1978) 141 CLR 54 (14 June 1978).
- Burmah Oil Co Ltd v Governor and Co of the Bank of England* [1980] AC 1090 (1 November 1979).
- Cain v Glass (No 2)* (1985) 3 NSWLR 230 (19 November 1985).

## References

- Cannon v Tahche* (2002) 5 VR 317 (13 June 2002).
- Chahal v the United Kingdom* [ECtHR] Application no 22414/93 (15 November 1996).
- Chapman v Luminis Pty Ltd [No 2]*(2000) 100 FCR 229 (28 July 2000).
- Charkaoui v. Canada (Citizenship and Immigration)* [2007] 1 SCR 350 (23 February 2007).
- Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 (8 December 1992).
- Church of Scientology v Woodward* (1982) 154 CLR 25 (19 November 1982).
- Commonwealth of Australia v Northern Land Council and another* (1993) 176 CLR 604 (21 April 1993).
- Conway v Rimmer* [1968] AC 910 (2 May 1968).
- Cullen v The King* [1949] SCR 658 (9 May 1949).
- D v The National Society for the Prevention of Cruelty to Children* [1978] AC 171 (2 February 1977).
- de Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others (Antigua and Barbuda)* [1998] UKPC 30 (30 June 1998).
- Delcourt v Belgium* [ECtHR] Application no 2689/65 (17 January 1970).
- Dietrich v The Queen* (1992) 177 CLR 292 (13 November 1992).
- Doctor Bonham's Case* (1610) 8 Co Rep 113b
- Dombo Beheer BV v the Netherlands* [ECtHR] Application no 14448/88 (27 October 1993).
- Donovan and another v R* [2012] EWCA Crim 2749 (29 November 2012).
- Doorson v. the Netherlands* [ECtHR] Application no 20524/92 (26 March 1996).
- Dowsett v the United Kingdom* [ECtHR] Application no 39482/98 (24 June 2003).
- Duncan v Cammell, Laird & Co Ltd* [1942] AC 624 (27 April 1942).
- Dyer v Watson* [2002] UKPC D1 (29 January 2002).
- Edwards v the United Kingdom* [ECtHR] Application no 13071/87 (16 December 1992).
- Engel and others v the Netherlands* [ECtHR] Application no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (8 June 1976).

## References

- English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 (30 April 2002).
- Environment Protection Authority v Caltex* (1993) 178 CLR 477 (24 December 1993).
- Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 (1 October 2004).
- Fitt v the United Kingdom* [ECtHR] Application no 29777/96 (16 February 2000).
- Fraser v State Services Commission* [1984] 1 NZLR 116 (21 December 1983).
- Gee v Magistrates Court (SA)* (2004) 89 SASR 534 (1 October 2004).
- Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (21 June 2004).
- Giorgianni v The Queen* (1985) 156 CLR 473 (18 April 1985).
- Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 82 ALJR 454 (7 February 2008).
- Heaney and McGuinness v Ireland* [ECtHR] Application no 34720/97 (21 December 2000).
- Home Office v Tariq* [2011] UKSC 35 (13 July 2011).
- Huang v Secretary of State for the Home Department* [2007] UKHL 11 (21 March 2007).
- Hulki Güneş v Turkey* [ECtHR] Application no 28490/95 (19 June 2003).
- Ibbotson v the United Kingdom* [ECtHR] Application no 40146/98 (21 October 1998).
- IJL, GMR and AKP v the United Kingdom* [ECtHR] Applications nos 29522/95, 30056/96 and 30574/96 (19 September 2000).
- Inter-American Court of Human Rights, “Habeas corpus in emergency situations” (Advisory Opinion OC-8/87 of 30 January 1987).
- Inter-American Court of Human Rights, “Judicial guarantees in states of emergencies” (Advisory Opinion OC-9/87 of 6 October 1987).
- International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 (22 February 2002).
- Ireland v the United Kingdom*, Application no. 5310/7 (18 January 1978).
- Jabbour v Hicks* (2007) 183 A Crim R 297 (21 Decemeber 2007).
- Jabbour v Hicks* [2008] FMCA 178 (19 February 2008).
- Jabbour v Thomas* (2006) 165 A Crim R 32 (27 August 2006).

## References

- Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1VR 84 (27 July 1994).
- Jasper v the United Kingdom* [ECtHR] Application no 27052/95 (16 February 2000).
- K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 (2 February 2009).
- Kable v Director of Public Prosecutions (NSW)* 189 CLR 51 (12 September 1996).
- Kartinyeri v Commonwealth* (1998) 195 CLR 337 (1 April 1998).
- Klass v Germany* [ECtHR] Application no 5029/71 (6 September 1978).
- Kostovski v the Netherlands* [ECtHR] Application no 11454/85 (20 November 1989).
- Laker Airways Ltd v Department of Trade* [1977] 2 All ER 182 (15 December 1976).
- Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (8 July 1997).
- Leeth v Commonwealth* (1992) 174 CLR 455 (25 June 1992).
- Leghaei v Director-General of Security* [2007] FCAFC 37 (23 March 2007).
- Liversidge v Anderson* [1942] AC 206 (3 November 1941).
- Lodhi v R* [2006] NSWCCA 101 (4 April 2006).
- Lodhi v R* [2007] NSWCCA 360 (20 December 2007).
- Lodhi v The Queen & Anor* [2008] HCA Trans 225 (13 June 2008).
- Luca v Italy* [ECtHR] Application no 33354/96 (27 February 2001).
- Mabo v Queensland (No 2)* (1992) 175 CLR 1 (3 June 1992).
- Mallard v R* (2005) 224 CLR 125 (15 November 2005).
- Marks v Beyfus* (1890) 25 QBD 494 (9 July 1890).
- McCloy v New South Wales* (2015) 89 ALJR 857 (7 October 2015).
- McInnes v HM Advocate* [2010] UKSC 7 (10 February 2010).
- McInnis v R* (1979) 143 CLR 575 (19 December 1979).
- McKeown v the United Kingdom* [ECtHR] Application no 6684/05 (11 January 2011).
- McKinney v The Queen* (1991) 171 CLR 468 (22 March 1991).
- Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (7 April 1995).
- Ministry of Transport v Noort* CA 369/91 [1992] 3 NZCA 51 (30 April 1992).

## References

- Miranda v Arizona* [1966] USSC 143 (13 June 1966).
- Mohamed (formerly CC) v Secretary of State for the Home Department* [2014] 1 WLR 4240 (2 May 2014).
- Mulcahy v The Queen* (1868) LR 3 HL 306 (10 July 1868).
- Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (30 September 1992).
- Nicholas v The Queen* (1998) 193 CLR 173 (2 February 1998).
- Papakosmas v The Queen* (1999) 169 CLR 297 (12 August 1999).
- Polyukhovich v Commonwealth* (1991) 172 CLR 501 (14 August 1991).
- R (Al-Fawwaz) v Governor of Brixton Prison* [2002] 1 AC 556 (17 December 2001).
- R (D) v Camberwell Green Youth* [2005] 1 WLR 393 (27 January 2005).
- R (on the application of Begum) v Denbigh High School* [2006] UKHL 15 (22 March 2006).
- R (on the application of Daly) v Secretary of State for The Home Department* [2001] UKHL 26 (23 May 2001).
- R (on the application of Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65 (10 February 2010).
- R v A* [2001] UKHL 25 (17 May 2001).
- R v Agar* (1990) 2 All ER 442 (21 July 1989).
- R v Akers* (1790) 6 Esp 127, 170 ER 850.
- R v Apostilides* (1984) 154 CLR 563 (19 February 1984).
- R v Benbrika & Ors* (No 20) [2008] VSC 80 (20 March 2008).
- R v Bersinic* [2007] ACTSC 46 (6 July 2007).
- R v British Broadcasting Corporation; ex parte ProLife Alliance* [2003] UKHL 23 (10 April 2003).
- R v Brown (Winston)* (1994) 1 WLR 1599 (15 June 1994).
- R v Brown (Winston)* [1998] AC 367 (24 July 1998).
- R v Bryant and Dickson* (1946) 31 Cr App R 146 (31 December 1946).
- R v Christie* [1914] AC 545 (7 April 1914).
- R v Davis* [2008] 1 AC 1128 (18 June 2008).



## References

- R v Davis, Rowe and Johnson* [1993] 1 WLR 613 (15 January 1993).
- R v Davison* (1954) 90 CLR 353 (10 September 1954).
- R v Governor of Brixton Prison, ex parte Osman* [1991] 1 WLR 281 (14 November 1990).
- R v H and C* (2003) 1 WLR 3006 (16 October 2003).
- R v H and C* [2004] 2 AC 134 (5 February 2004).
- R v Hallett* [1986] Crim LR 462 (17 March 1986).
- R v Halliday, ex parte Zadig* [1917] AC 260 (1 May 1917).
- R v Hennessey* (1978) 68 App R 419.
- R v Horncastle and Others* [2010] 2 AC 430 (9 December 2009).
- R v Horseferry Road Magistrates Court, ex parte Bennett* [1994] 1 AC 42 (24 June 1993).
- R v Hughes* [1989] 2 NZLR 129.
- R v Johnstone* [2003] UKHL 28 (22 May 2003).
- R v Keane* [1994] 1 WLR 746 (14 March 1994).
- R v Lambert* [2001] UKHL 37 (5 July 2001).
- R v Langford* [1990] Crim LR 653 (21 May 1990).
- R v Lappas & Dowling* [2001] ACTSC 115 (26 November 2001).
- R v Lodhi* [2005] NSWSC 1377 (23 December 2005).
- R v Lodhi* [2006] NSWSC 571 (7 February 2006).
- R v Lodhi* [2006] NSWSC 586 (21 February 2006).
- R v Lodhi* [2006] NSWSC 596 (15 March 2006).
- R v Lodhi* [2006] NSWSC 691 (23 August 2006).
- R v Looseley* [2001] UKHL 53 (25 October 2001).
- R v Mayers and others v R* [2009] 1 WLR 1915 (12 December 2008).
- R v Murphy and Maguire*, Northern Ireland Crown Court (April 1989, unreported).
- R v Oakes* [1986] 1 SCR 103 (28 February 1986).
- R v Reardon* (2004) 146 A Crim R 475 (23 June 2004).

## References

- R v Robertson, ex parte McAulay* (1983) 71 FLR 429 (2 June 1983).
- R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (8 July 1999).
- R v Secretary of State for Work and Pensions, ex parte Carson* [2005] 1 AC 173 (26 May 2005).
- R v Simon Lappas* [2003] ACTCA 21 (31 October 2003).
- R v Stipendiary Magistrate at Southport; ex parte Gibson* [1993] 2 Qd R 687 (9 December 1991).
- R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 (9 November 1923).
- R v Taylor and Crabb*, Court of Appeal Criminal Division (22 July 1994, unreported).
- R v Thomas* [2006] VSCA 165 (18 August 2006).
- R v Ward* [1993] 1 WLR 619 (4 June 1992).
- R v Watford Magistrates' Court, ex parte Lenman* [1993] Crim LR 388.
- R v X* (1989) 91 Cr App R 36.
- R v Young* (1999) 107 A Crim R 1 (7 July 1999).
- Re Guardian News and Media Ltd and others* [2016] EWCA Crim 11 (9 February 2016).
- Re Woolley* (2004) 225 CLR 1 (7 October 2004).
- Re: MB* [2006] EWHC 1000 (Admin) (12 April 2006).
- Rehman v Secretary of State for the Home Department* [2001] UKHL 47 (11 October 2001).
- Ridgeway v The Queen* (1995) 184 CLR 19 (19 April 1995).
- RJR-MacDonald Inc v Attorney General of Canada* [1995] 3 SCR 199.
- Roberts v Blass* (2002) 212 CLR 1 (12 December 2002).
- Roberts v Parole Board* [2005] UKHL 45 (7 July 2005).
- Rochfort v Trade Practices Commission* (1982) 153 CLR 134 (18 November 1982).
- Rowe and Davis v the United Kingdom* [ECtHR] Application no 28901/95 (16 February 2000).
- Rovens v Beljajev* [1995] 1 VR 533 (14 November 1994).

## References

*Sadak and others v Turkey* [ECtHR] Applications nos 29900/96, 29901/96, 29902/96 and 29903/96 (17 July 2001).

*Saïdi v France* [ECtHR] Application no 14647/89 (20 September 1993).

*Salabiaku v France* [ECtHR] Application no 10519/83 (7 October 1988).

*Sankey v Whitlam* (1978) 142 CLR 1 (9 November 1978).

*Saunders v the United Kingdom* [ECtHR] Applications no 19187/91 (17 December 1996).

*Schenk v Switzerland* [ECtHR] Application no 10862/84 (12 July 1988).

*Scott v Scott* [1913] AC 417 (5 May 1913).

*Secretary of State for the Home Department v AE* [2008] EWHC 132 (Admin) (01 February 2008).

*Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin) (30 March 2007).

*Secretary of State for the Home Department v AF & Another (No 3)* [2009] UKHL 28 (10 June 2009).

*Secretary of State for the Home Department v AF and others* [2008] EWCA Civ 1148 (17 October 2008).

*Secretary of State for the Home Department v AR & Ors* [2008] EWHC 2789 (Admin) (14 November 2008).

*Secretary of State for the Home Department v CC* [2013] 1 WLR 2171 (19 October 2012).

*Secretary of State for the Home Department v E and another* [2007] UKHL 47 (31 October 2007).

*Secretary of State for the Home Department v JJ and others* [2007] UKHL 45 (31 October 2007).

*Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140 (1 August 2006).

*Secretary of State for the Home Department v MB* [2007] UKHL 46 (31 October 2007).

*Secretary of State for the Home Department v Rehman* [2000] 3 WLR 1240 (23 May 2000).

*Smith & Others v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin) (3 May 2007).

## References

*Smith and Grady v the United Kingdom* [ECtHR] Applications nos 33985/96 and 33986/96 (27 September 1999).

*South Australia v Totani* (2010) 242 CLR 1 (11 November 2010).

*Taxquet v Belgium* [ECtHR] Applications no 926/05 (16 November 2010).

*Teixeira de Castro v Portugal* [ECtHR] Application no 25829/94 (9 June 1998).

*Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) (18 February 2002).

*Thomas v Mowbray* (2007) 233 CLR 307 (2 August 2007).

*Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1 (26 October 1988).

*Unterpertinger v Austria* [ECtHR] Application no 9120/80 (24 November 1986).

*Van Mechelen and others v the Netherlands* [ECtHR] applications nos 21363/93, 21364/93, 21427/93 and 22056/93 (23 April 1997).

*Vidal v Belgium* [ECtHR] Application no 12351/86 (22 April 1992).

*Wainohu v New South Wales* (2011) 243 CLR 181 (23 June 2011).

*Watson v AWB Limited (No 2)* [2009] FCA 1047 (17 September 2009).

*Welch v the United Kingdom* [ECtHR] Application no 17440/90 (9 February 1995).

*Windisch v Austria* [ECtHR] Applications no 12489/86 (27 September 1990).

*Woolmington v DPP* (1935) AC 462 (23 May 1935).

*YM v Secretary of State for the Home Department* [2014] EWCA Civ 1292 (10 December 2014).