

# Fair trial and fair hearing rights

## Public sector guidance sheet

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### Disclaimer

This material is provided to persons who have a role in Commonwealth legislation, policy and programs as general guidance only and is not to be relied upon as legal advice.

Commonwealth agencies subject to the *Legal Services Directions 2005* requiring legal advice in relation to matters raised in this Guidance Sheet must seek that advice in

## What are fair trial and fair hearing rights?

The right to a fair and public criminal trial or a fair and public hearing in civil proceedings is one of the guarantees in relation to legal proceedings. Fair trial and fair hearing rights include:

- that all persons are equal before courts and tribunals
- the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

The other guarantees are the presumption of innocence, and minimum guarantees in criminal proceedings, such as the right to counsel and not to be compelled to self-incriminate. For more information on the other guarantees in article 14 of the ICCPR, see the Guidance Sheets on the [Presumption of innocence \(/node/1425\)](#) and [Minimum guarantees in criminal proceedings \(/node/1426\)](#).

## Where do fair trial and fair hearing rights come from?

Australia is a party to seven core international human rights treaties. Fair trial and fair hearing rights are contained in article 14 of the [International Covenant on Civil and Political Rights \(ICCPR\)](#) (<http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/8B8C6AF11AFB4971CA256B6E0075FE1E>).

See also article 40 of the [Convention on the Rights of the Child \(CRC\)](#)

(<http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/E123F4F71DCAE3E7CA256B4F007F2905>) and article 13 of the [Convention on the Rights of Persons with Disabilities \(CRPD\)](#)

(<http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/636560118784755BCA25726C0007D2AC>).

## When do I need to consider the right to a fair trial and fair hearing?

You will need to consider the right to a fair trial and/or fair hearing when you are working on legislation, a policy or a program that:

- creates a new court or tribunal

- regulates the appointment, remuneration or removal of judges or tribunal members from office
- alters the jurisdiction of courts or tribunals, including by restricting the powers of courts to review administrative decisions
- regulates the rules of evidence in courts or tribunals
- provides for special procedures for witnesses to give evidence
- limits the requirement of a court or tribunal to accord fair trial and/or fair hearing rights, for instance in relation to the disclosure of evidence to the accused
- regulates the way in which the media may report on proceedings, for instance by authorising grants of suppression orders or closing court proceedings to the public, or
- provides international legal assistance or cooperation, including development of legislation and/or strengthening criminal justice systems.

This list should not be regarded as exhaustive.

## **What is the scope of the right to a fair trial and a fair hearing?**

The right to a fair trial and a fair hearing applies to both criminal and civil proceedings, and in cases before both courts and tribunals. It also applies to military disciplinary hearings. The right is concerned with procedural fairness, rather than with the substantive decision of the court or tribunal.

### **Equality**

What constitutes a fair hearing will require recognition of the interests of the accused, the victim and the community (in a criminal trial) and of all parties (in a civil proceeding). In any event, the procedures followed in a hearing should respect the principle of 'equality of arms', which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings. The UN Human Rights Committee has found a violation of article 14(1) in a case in which a right of appeal was open to the prosecution but not to the accused.

### **The right to a public hearing**

The right to a public hearing incorporates the principle that justice should not only be done, but be seen to be done, by subjecting legal proceedings to public scrutiny. However, pre-trial decisions

decisions may be made 'on the papers', rather than on the basis of a public hearing. This will not breach the right to a public hearing if the material on which the court bases its decision is publicly available, as is the decision itself. The requirement in article 14(1) that decisions be made public is based on the principle that legal proceedings be subject to public scrutiny.

Some methods whereby witnesses give evidence, for example by video link, or where the witness is shielded from the accused, may raise issues regarding the right to a public hearing.

Proceedings may also be closed to the public in the interests of national security. However, while each case should be considered on its merits, such measures are likely to be permitted, given their legitimate objectives.

## Independent and impartial

In Australia, the requirement of an independent and impartial court is underpinned by the doctrine of the separation of judicial power from executive and legislative power under the *Constitution*. The principle of judicial independence ensures that disputes between people, and between people and governments, are resolved by courts and judges who are impartial and are not subject to improper control or pressure, whether governmental or private. The requirement of impartiality also means that proceedings must be free from bias and the objective perception of bias.

A number of federal tribunals and other bodies have been established to deal with review of administrative decisions and actions taken by government officials. Tribunals are independent bodies which provide 'merits review'. Merits review is the process by which a person or body, other than the primary decision maker, reconsiders the facts, law and policy aspects of the original decision and determines the 'correct or preferable decision'. In a merits review, the whole decision is made again on the facts.

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# Can the right to a fair trial and fair hearing be limited?

## Derogation

Under article 4 of the ICCPR, countries may take measures derogating from certain of their obligations under the Covenant, including the right to a fair trial and fair hearing 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'. Such measures may only be taken 'to the extent strictly required by the exigencies of

the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'.

The UN Human Rights Committee has indicated that strict limitations would apply to any derogation under article 14.

## Limitation

Article 14(1) provides that the press and the public may be excluded from all or part of a trial for reasons of morals, public order, national security, the privacy of the parties, or when in the opinion of the court publicity would prejudice the interests of justice. Suppression orders or closed hearings may be justified in order to protect particularly vulnerable witnesses (for example, child victims of sexual assault).

Article 14 provides that the requirement that decisions be made public does not apply where the interests of children require otherwise, for example, in family law matters.

## Which domestic laws relate to fair trial and fair hearing rights?

Chapter III of the *Constitution* establishes the High Court of Australia, defines its jurisdiction and sets parameters for its composition. The Constitution also sets parameters for the vesting of jurisdiction and appointment, tenure, remuneration and removal of judicial officers for each of the federal courts (including the High Court).

The *Judiciary Act 1903* makes provision for numerous matters regarding the exercise of the jurisdiction and judicial power of the Commonwealth. The *Federal Court of Australia Act 1976* establishes the Federal Court of Australia and makes provision for the composition, management, jurisdiction and other operations of the Federal Court. The *Family Law Act 1975* contains provisions governing these matters for the Family Court and the *Federal Magistrates Act 1999* provides for these functions for the Federal Magistrates Court.

The High Court has held that the right to a fair trial may be called into question if certain minimum guarantees in criminal proceedings such as the absence of legal representation where the accused faces a serious criminal charge are not met. See further detail in the Guidance Sheet on [Minimum guarantees in criminal proceedings \(/node/1426\)](#).

The *Administrative Decisions (Judicial Review) Act 1977* enables the review of certain administrative decisions on grounds including that a decision was not procedurally fair. There are also common law procedural fairness protections which may apply.

The *Evidence Act 1995* sets out the rules of evidence that apply in proceedings in federal courts. The *Crimes Act 1914* also makes provision regarding the admissibility of evidence in particular types of cases.

Part 1AD of the Crimes Act contains special provisions for the giving of evidence by child witnesses in some legal proceedings. It also restricts the publication of the identity of child witnesses. Part 1AE of the Crimes Act provides for the giving of evidence by video link in terrorism cases.

Section 121 of the Family Law Act creates an offence punishable by imprisonment for up to one year for publishing or otherwise disseminating to the public information that identifies a party to family law proceedings.

The *National Security Information (Criminal and Civil Proceedings) Act 2004* prevents the disclosure of information in criminal and civil proceedings that would be likely to prejudice national security. Among the matters that a court is required to consider in exercising powers under the Act is the defendant's right to receive a fair hearing.

## What other rights and freedoms relate to fair trial and fair hearing rights?

Circumstances giving rise to consideration of the right to a fair trial and fair hearing may also raise the other rights in relation to legal proceedings contained in article 14 of the ICCPR, namely the presumption of innocence, and minimum guarantees in criminal proceedings, such as the right to counsel (if necessary to secure a fair trial) and not to be compelled to self-incriminate.

These circumstances may also be relevant to:

- the prohibition on retrospective criminal laws in article 15 of the ICCPR
- the right of members of the media to freedom of expression, and the right to receive information from the media under the right to freedom of expression in article 19 of the ICCPR
- the right to challenge the lawfulness of detention under article 9(4) of the ICCPR
- the right to challenge decisions regarding the expulsion of aliens in article 13 of the ICCPR.

# Articles from relevant Conventions

## International Covenant on Civil and Political Rights

### Article 14(1)

- All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

See also: CRC article 40; CRPD article 13.

## Where can I read more about fair trial and fair hearing rights?

- United Nations, Office of the High Commissioner for Human Rights (OHCHR), Human Rights Bodies (<http://www2.ohchr.org/english/bodies/treaty/index.htm>) (human rights treaty bodies that monitor implementation of the core international human rights treaties)
- UN Human Rights Committee General Comment No 32 ([http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GC/32ts.htm](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GC/32ts.htm))

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