



## **Occasional Paper No. 4 – September 1998**

### **REAL JUSTICE OR JUST JUSTICE? THE RETREAT FROM FUNDAMENTAL LEGAL PROTECTIONS**

#### **Introduction**

This paper will examine some of the elements which are essential to enable a fair trial to occur. It will also outline some of the protections which exist for citizens and measures which threaten to undermine the delivery of justice.

A criminal justice system with a sentencing philosophy of vengeance and punishment, which does not afford an adequate opportunity for people to protect themselves against unjustified attack holds out little hope for those who may be capable of rehabilitation or who are treated unfairly by reason of their being a minority, poor or disadvantaged, and prone to come under the watchful eye of the law. The Church's social teachings state that human dignity must be recognised and protected in community, and that in order to promote justice, these rights are to be respected and protected by all institutions of society.

#### **1. Defining the notions of "due process" and a "fair trial"**

"Due process" and a "fair trial" are interwoven and interdependent. Without due process, a trial would lack the hallmark of being 'fair'. Due process involves principles of natural justice and the exercise of processes in accordance with the rule of law applied equally to all people in all circumstances. "Due" connotes elements of what is fair, and the entitlements to be accorded. Dictionary definitions<sup>1</sup> refer to "adequate, fitting, properly, rightly and attributable". Due process, however, appears to have different shades of meaning depending on the circumstances before the court and the different attitudes of members of the judiciary. At common law, rules of evidence<sup>2</sup> and procedure have been formulated to reduce the risk of innocent people being convicted<sup>3</sup> and accordingly, to create additional guarantees that due process and a fair trial will be accorded.

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<sup>1</sup> Collins English Dictionary and Oxford English Dictionary.

<sup>2</sup> Janet Hope, "A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System." (1996) 24 Federal Law Review 173 at 175

<sup>3</sup> Mason CJ in *Jago v District Court of New South Wales* (1989) 168 CLR 23, at 29 states, "The right to a fair trial is more commonly manifested in rules of law and of practice designed to regulate the course of the trial... But there is no reason why the right should not extend to the whole course of the criminal process and it is inconceivable that a trial which could not fairly proceed should be compelled to take place on the grounds that such a course would not constitute an abuse of process."

Due process in the criminal jurisdiction incorporates notions of a fair trial as they have been delineated in the common law. In the absence of a fair trial, miscarriages of justice are more likely to occur.<sup>4</sup> Mason CJ, in *Dietrich's* case, comments that there has been no judicial attempt to "list exhaustively the attributes of a fair trial."<sup>5</sup> Duggan J<sup>6</sup> notes that despite many references to the concept of a "fair trial," prior to the 1980s, it was most often only looked at in passing. Duggan J states "the general notion of fairness which has transpired much of the traditional criminal law of this country defies analytical definition."<sup>7</sup>

In *McKinney and Judge*<sup>8</sup> Brennan J stated, "fairness involves the evenhanded submission of the issues of fact for consideration by the jury as the constitutional arbiters of fact." Sir Anthony Mason states<sup>9</sup> "The notion of what is fair is not written in stone for all time. The ideal of continually refining our concept of what is fair, to which our courts attempt to conform, has been described by Brennan J as 'the onward march to the unattainable end of perfect justice'." Mason CJ in *Dietrich* notes, however, that various international instruments have defined the concept 'fairly' more broadly. Toohey J in the same decision warns that the absence of a fair trial most often occurs where procedural irregularities occur.<sup>10</sup>

In *Barton v The Queen*<sup>11</sup> it was stated that the courts possess the necessary judicial powers to prevent an abuse of process so as to ensure a fair trial. Lord Devlin in *Connelly v DPP*<sup>12</sup> stated, "...the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what is fair and just was done between prosecutors and the accused."

Deane J in *Dietrich's* case<sup>13</sup> demonstrates the manner in which according due process and the exercise of judicial power can also translate into effecting a fair trial when he states, "...the courts are entitled and obliged to take steps to ensure that their processes are not abused to produce what our system regards as a grave miscarriage of justice, namely, the adjudgment and punishment of alleged criminal guilt...". Gaudron J, also in *Dietrich's* case, illustrates that the definition of an unfair trial does not arise from a trial that is less than perfect but rather it involves a risk that an accused may be improperly convicted.<sup>14</sup>

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<sup>4</sup> Powerfully illustrated in the English film surrounding the trial of the Guilford Four entitled, "In the Name of the Father."

<sup>5</sup> *Dietrich v The Queen* (1992) 177 CLR 291, at 300

<sup>6</sup> Hon. K.P Duggan, "Reform of the Criminal Law with Fair Trial as the Guiding Star" (1995) 19 Criminal Law Journal 258, at 260

<sup>7</sup> Hon. K.P. Duggan, "Reform of the Criminal Law with Fair Trial as the Guiding Star" (1995) 19 Criminal Law Journal 258, at p261

<sup>8</sup> (1991) 171 CLR 468, at 486

<sup>9</sup> Sir Anthony Mason, "Fair Trial" Keynote address to the Fifth Annual Criminal Law Congress, Sydney, 26 September 1994. February, 1995 Criminal Law Journal 7

<sup>10</sup> *Dietrich v The Queen* 1992 177 CLR 291, at 353

<sup>11</sup> (1980) 147 CLR 75

<sup>12</sup> (1964) AC 1254, at page 1347

<sup>13</sup> (1992) 177 CLR 291 at 331

<sup>14</sup> *Dietrich v The Queen* 1992 177 CLR 291, at 365

The court in *Jago*<sup>15</sup> also examined the notion of a "fair trial". Mason CJ acknowledged that it is an entrenched right, which is not only manifested in rules of law and practice, but a right which extended to the whole course of the criminal process. In this case it would seem that where a fair trial is at stake, issues of not just a procedural but also a substantive nature can be taken into account. This may become complicated for an appellate jurisdiction given how far the court may need to inquire into matters such as efforts made to secure legal aid, and so on.

Mason CJ in *Dietrich's* case reiterated the point made in *Jago* that the accused's right 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.<sup>16</sup> This paper will not be examining the evidentiary issues that give arise concerning the fairness of a trial.<sup>17</sup>

## **2. Does A Constitutional Right to A Fair Trial Exist?**

Issues which had been unclear surrounding notions of equality before the law were largely resolved in *Kruger v The Commonwealth*<sup>18</sup>. Dawson and McHugh JJ, forming part of the majority, found that the Constitution contained no guarantee of due process of law. They noted that while there were provisions in the Constitution affording protection against executive or legislative action that disregarded individual rights, this did not constitute a guarantee. They held there was a notion of "equality before the law" merely meaning that the law should apply equally to all persons. The outcome in *Kruger* was that the application of the law could apply differently to different people.

There is a need for clarification regarding what elements are necessary to guarantee individual rights in order to avert a miscarriage of justice. A wait and see approach as the patchwork unfolds is all that can be afforded unless the legislature intervenes explicitly to delineate the approach the court can take. Even then the legislature and executive will be required to take into account the parameters of Chapter III of the Constitution in any action it takes.

Duggan J has noted<sup>19</sup> that *Dietrich* continued a trend in *Jago's* case which declared "that the courts were not prepared to leave it to the executive to ensure that the process of law was not abused."

## **3. The Judiciary's Role in according a fair trial**

The capacity for the judiciary to exercise its judicial power and act according to the rule of law is a critical element in according a fair trial.

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<sup>15</sup> (1989) 168 CLR 23, at 311

<sup>16</sup> *Dietrich v The Queen* (1992) 177 CLR 291, at 299

<sup>17</sup> These are discussed in the following cases, *Cleland v The Queen* (1982) 151 CLR 1 at 9 (confessions), *Bunning v Cross* (1978) 141 CLR 54 (illegally obtained evidence), *Phillips v The Queen* (1985) 159 CLR 45 at 64 (cross examination as to bad character) and *Donnini v The Queen* (1972) 128 CLR 114 (cross-examination). See Hon. Justice K.P.Duggan, "Reform of the Criminal Law With Fair Trial as the Guiding Star" (1995) 19 Criminal Law Journal 258 at 260

<sup>18</sup> (1997) 71 CLR 991

<sup>19</sup> Hon. K.P. Duggan, "Reform of the Criminal Law with Fair Trial as the Guiding Star." (1995) 19 Criminal Law Journal 258, at 261

Leaving the executive with the means to withdraw the capacity for a fair trial through the absence of representation or inadequate resourcing in serious cases could strike at the heart of the High Court's effective exercise of judicial power vested under Chapter III.

The connection between the appellate jurisdiction of the High Court and the jurisdiction of the State courts to determine whether there has been a miscarriage of justice are so linked that the failure to provide adequate representation at one level may impact upon the exercise of judicial power of the superior court in its role of averting a miscarriage of justice created by the shortcomings at trial. It could, as Deane J has described,<sup>20</sup> serve to render as "mockery" the judicial process or render, as Gaudron J states "palm tree justice."<sup>21</sup> The majority judgement in *Dietrich* has left the court with scope to determine the issues based on the circumstances surrounding each case.

Janet Hope<sup>22</sup> notes the recent emergence of legislation designed to promote economic efficiency in the administration of criminal justice by removing some of the protections available to suspects and accused persons which have been cornerstones of the common law. She provides instances where legislatures have attempted to reduce court time by overriding principles relevant to a fair trial at common law and where the grounds for defence have been limited by the enactment of strict liability offences.<sup>23</sup> Such measures are clearly within the purview of the executive's policy-making domain, but in certain circumstances may also effect the capacity of a court to ensure due process. Hence the relationship between executive enactment and judicial activity has the potential to give rise to tensions.

#### **4. The Burden of Proof**

Under Australian law it is incumbent on the prosecution to prove its case. This is founded on the principle that everyone is innocent until proven guilty by the State. The presumption of innocence also accords a right to be treated in accordance with fundamental principles and safeguards to protect the innocent and guard against the excesses of State power. Intrinsic to this notion is that public authorities must refrain from prejudging the outcome of a trial especially as evidence can often elicit facts not readily anticipated.

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<sup>20</sup> *Polyukhovich v The Queen* (1991) 177 CLR 292 at 335

<sup>21</sup> *Kable v Director of Public Prosecutions NSW* (1996) 138 ALR 577 at 615

<sup>22</sup> Janet Hope, "A Constitutional Right to a Fair Trial? Implications for Reform of the Australian Criminal Justice System" (1996) 24 Federal Law Review 173 at 189

<sup>23</sup> *The Road Safety Act 1986* (Vic). In addition Hope notes on p190 of Janet Hope, "A Constitutional Right to a Fair Trial? Implications for Reform of the Australian Criminal Justice System" (1996) 24 Federal Law Review 173 enactments designed to prohibit certain grounds of defence, sanctions for non co-operation at investigation stage *Crimes (Amendment) Act 1993: Telecommunications(Interception) (State Provisions) Act 1988* (C'mth). In addition, the writer would add mandatory sentencing laws which prevent judges from exercising their discretion or taking into account circumstances surrounding an offence. These were introduced in November 1996 in Western Australia, in March 1997 in the Northern Territory and there is some discussion in the Department of Premier and Cabinet in Victoria about the possible introduction of such laws. It is noted that these laws take effect only after trial. Such measures make it imperative that fair trials be accorded.

Although never incorporated in its entirety into Australian law, Australia is a signatory to the *International Covenant on Civil and Political Rights* (ICCPR). It is fair to assume that the signing of an International Convention conveys an intention on the part of the signatory to be bound otherwise it becomes merely "window dressing". *The International Covenant on Civil and Political Rights* in Article 14 (2) provides that anyone charged with a criminal offence shall be "presumed innocent until proven guilty according to law." Article 14 (3) provides that people accused of crimes may not be compelled to confess guilt or testify against themselves. The Human Rights Committee has stated: "By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt."<sup>24</sup>

## 5. Representation of an accused

In the August 1996 Federal Budget, legal aid was cut significantly. Since this time, many persons have had to represent themselves in the absence of legal aid assistance.<sup>25</sup> The issue as to whether a fair trial necessitates representation by counsel is a matter of contention in contemporary debate.<sup>26</sup> Some judges argue this may depend on the circumstances of the individual case before the courts.<sup>27</sup> Other commentators see it as an integral component in ensuring there is no miscarriage of justice. In 1979 Lord Devlin stated, "Indeed, where there is no legal representation, and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down."<sup>28</sup> Murphy J in *McInnes' v The Queen*<sup>29</sup> noted that an unrepresented accused is always at a disadvantage, not merely because they might lack sufficient knowledge or skills but because they cannot assess their case with the same dispassionate objectivity as the Crown.

The President of the Law Council of Australia,<sup>30</sup> in the context of a discussion of the need for a defence to detail the defence and the need for the prosecution to reveal its case to the defence at an early stage, sounded a warning that moves designed to save time and money should be made in the context of a time when the management of

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<sup>24</sup> Extracted from the Amnesty International Update on the United Kingdom Right to Silence, November 1993

<sup>25</sup> For further discussion see "*Justice – A Commodity or Something More Fundamental?*" Catholic Commission for Justice, Development and Peace Occasional Paper no. 2 – April 1998

<sup>26</sup> The Victorian Parliament in response to Dietrich's case exercised its Parliamentary sovereignty by enacting the Crimes (Criminal Trials) Act 1993 (Vic.) which amends the crimes Act 1958 (Vic.) so that section 360A states that where an accused person has been refused legal assistance in respect of a trial this is not a ground for an adjournment or a stay of the trial, but if the court is satisfied that it would be unable to give an accused a fair trial without representation it may order legal aid to provide assistance. On 5 June 1998, the Managing Director of Victoria Legal Aid stated when explaining the limited funds for legal aid, 'It's not a question of trying to do things the same way with less money. The whole system has got to rethink what its doing.', *The Age*, 4 June 1998 p 3

<sup>27</sup> The High Court decision of Mason CJ and McHugh J in *Dietrich* stated that Australian law does not recognise that an indigent accused on trial for a serious criminal offence has a right to provision of counsel at public expense but that an accused has a right to a fair trial and that this will depend on the circumstances of the particular case. *Dietrich v The Queen* (1992) 177 CLR 291 at 311

<sup>28</sup> *The Judge* (1979) p 67 cited by Mason CJ in *Dietrich* (1992) 177 CLR 291 at 302

<sup>29</sup> (1979) 143 CLR, 575 at 590

<sup>30</sup> *The Australian*, 25 March 1998

criminal trials ought be fully considered and the effects of the government's cuts to legal aid were being felt.

Suzanne Shipard<sup>31</sup> refers to *R v Krounos v Hunt*<sup>32</sup> where Wilson J held that "indigent" means lacking in what is requisite (to fund his defence in this very long trial), wanting, deficient; and does *not* mean "lacking in the necessities in life, needy, poor." She notes that the courts have not clarified to what extent accused persons must impoverish themselves to fund legal representation. The recent publicity around the case of *R v Milat*<sup>33</sup> (popularly known as the Backpacker case) highlights the difficult tensions that can arise in issues of a fair trial and according an "indigent" person representation when there is a lot of media interest and public outrage. Tests as to Milat's impecunity or pecunity received much public attention. Cases such as this are often used by the executive arm of government to fuel arguments about the 'excesses of legal aid' and to argue for the overriding of fundamental principles involved in the delivery of a fair trial.<sup>34</sup>

Mason CJ in *Dietrich's* case states that, in cases where the accused is unrepresented, the judge becomes counsel for him or her, extending a "helping hand" to guide the accused throughout the trial<sup>35</sup> and that this is inadequate for the same reason that self representation is generally inadequate. He states that a trial judge and defence counsel have such different functions that any attempt by the judge to fill the role of the latter is bound to cause problems. These points are reinforced by Vincent J.<sup>36</sup>

Dawson J<sup>37</sup> leaves the dilemma of the unrepresented person in the hands of the trial judge as "an obstacle " for them to overcome. This position overlooks the possible perception to beholders of the court process that the judge is involved in the actual conduct of one side of the case, presumes that the defendant's case is able to be revealed and argued without proper investigation and conferring with a client, and ignores the inherent role of the judge as arbiter of the dispute. The risk of a perception that the judge is on "the side" of the accused can create perceptions of bias and a lack of independence which underpin confidence of the public in the legal system. They also potentially involve the judge in performing a function in an adversarial system, which goes beyond the judicial power bestowed by Chapter III of the Constitution.

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<sup>31</sup> "Fair Trial and the Indigent Accused" November 1995, Law Society Journal 64

<sup>32</sup> SACCA (1993) 171 LSJS 73

<sup>33</sup> NSW Supreme Court Unreported, 11 August 1995, Hunt CJ

<sup>34</sup> Similarly, when the executive in April 1995 sought to justify the discounting of procedural fairness in matters involving principles articulated in international conventions (*The Administrative Decisions Control of Instruments) Bill 1996*), Parliamentarians focussed on the demeanour of the 'drugs trafficker' Mr Teoh, rather than the broader picture of public policy as it would effect citizens after the proposed change to administrative decisions in the future. Recent controversy surrounding the introduction of mandatory sentencing in the Northern Territory has seen minor property offences become the offences subject to imprisonment. The rationale for the introduction of the laws was to reduce burglaries and other minor offences perpetrated by youth. For persons over the age of 17 for a first offence a mandatory term of imprisonment of 14 days applies, for a second offence a mandatory sentence of 90 days and for a third offence, 12 months. Judicial discretion has been taken away in the sentencing of accused persons.

<sup>35</sup> (1992) 177 CLR 291 at 302

<sup>36</sup> The Age, 4 June 1998

<sup>37</sup> *Dietrich v The Queen* (1992) 177 CLR 292 at 345

Other than in Victoria, elsewhere in Australia it appears that there is no guarantee unless in the circumstances of the case it could be shown that a miscarriage of justice is likely to result. It appears there can be no order for the provision of funding, merely a stay or adjournment<sup>38</sup>. In Victoria, the court may order the provision of legal aid under s.360 of The Crimes Act (Vic) 1958. This contrast between the position in the United States and Australia serves to highlight how insecure individual rights to a fair trial are in the absence of a Charter or Bill of Rights setting out the individual entitlements of poorer members of the community to a fair trial<sup>39</sup>.

## 6. Right to Silence

### a) Background

In Victoria, there is currently a Review of the right to silence being undertaken by the Victorian Parliament. The right to silence emerged in the seventeenth century arising from the use of inhuman and draconian measures used in the Star Chamber and the ecclesiastical courts to extract confessions. The right to silence also underpins fundamental elements of the justice system, the presumption of innocence until proven guilty, and that the prosecution must prove its case.<sup>40</sup>

What is the concept of "the right to silence"? M. Aronson states<sup>41</sup>: "The right to silence is in reality a bundle of rights which needs to be disentangled if productive discussion is to occur."

Many people believe that the right to silence is the same thing as the privilege against self incrimination. The right to silence has broader application. It is a reference to the right of a suspect - be they innocent or guilty, (for at the time of questioning neither can be assumed as no trial has occurred) to remain silent when being interrogated by authorities (usually the police) and up until trial. This right ties in with the onus of proving guilt that is put on the prosecution. It is not generally the role of the accused to prove or disprove his/her guilt.

Mason CJ expressed the nature of the right to silence more eloquently in the High Court decision in *Petty and Maiden*<sup>42</sup> when he states:

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<sup>38</sup> See the earlier analysis in *Dietrich's case* (1992) 177 CLR 292

<sup>39</sup> In a recently released publication "Australian Poverty: Then and Now" Editors R. Fincher and J. Nieuwenhuysen, Melbourne University Press, Melbourne 1998. The authors using the Henderson Report's method for measuring poverty found that the levels of poverty had increased and had become more widespread. In the 1970s when the first major analysis was undertaken poverty was largely concentrated amongst elderly men. The recent research in the book revealed that poverty had extended to include young persons, women, migrants, people with a disability and the indigenous population. The book notes that over the past decade redistributive programs of the various governments had alleviated problems but that the trend was reversing in recent years given economic constraints, rising unemployment and the greater targeting of social services.

<sup>40</sup> Amnesty International states: "The right of a detained or accused person to remain silent during police questioning and at trial is an essential safeguard in accusatorial legal systems of two fundamental rights guaranteed by international standards: the presumption of innocence and the right not to be compelled to testify against oneself or to confess guilt." Amnesty International, The United Kingdom The Right to Silence – Update, November 1993

<sup>41</sup> "Complex Criminal Trials: Australian Institute of Judicial Administration Report (AIJA) (1992) 666 ALJ 825 at 827

<sup>42</sup> (102) ALR 129, at 130

"A person who believes on reasonable grounds that he or she is expected of having been a party to an offence is entitled to remain silent when questioned or asked simply to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the role which they played."

Viscount Dilhorne in *R v Davis*<sup>43</sup> further clarifies the right by stating: "Once the right is exercised an inference adverse to the accused on account of his exercise of the right to silence should not be made."

There are really two stages which operate in relation to the right to silence, although they are intertwined. The first is the right to silence at the preliminary stage of questioning by authorities. The second is the right to silence up until trial and at trial. The latter stage presumes that it is for the prosecution to prove guilt. This paper will concentrate on the preliminary stages of questioning by authorities.

### **b) Rationale for a right to silence at pre-trial stage**

The right to silence enables the suspect time to be initiated into the criminal justice system. The suspect is pitted against the resources and power of the State (Crown and police) with its structures, experience and wealth. To redress, in part, this power imbalance there exist protections, one of which is the right to silence. The right to silence is consistent with the liberal democratic view of the need to protect the individual against the State.<sup>44</sup>

It is the blurring of the distinction between the right to silence and the privilege against self incrimination which may lead people to assume that the exercise of a right to silence is a shield used by those who have something to hide, as opposed to a right to remain silent of a potentially innocent individual, during police questioning and up to trial. There is a risk that sections of the community, due to confusion about the right to silence, may not see its erosion as a significant loss to individual liberty.

The difficulties for a suspect are outlined in many articles.<sup>45</sup> Even though Odgers states<sup>46</sup> that the right to silence "stands as a disputed barricade to effective reform of the criminal justice system", he highlights the unpleasantness and predicaments a suspect can encounter during interrogation. He states: "In particular there are a number of reasons for silence consistent with innocence. The suspect may wish not to disclose conduct on his or another's part which, though non criminal, is highly embarrassing. He may wish to remain silent to protect other people. He may believe that the police will distort whatever he says so the best policy is to say nothing and stick rigidly to that policy... People accused of crime tend to be poorly educated, suspicious, frightened and suggestible, arguably not able to face up to and deal with police questioning, even if the questioning is scrupulously fair. They may misunderstand the true significance of the questions. People are commonly unable to

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<sup>43</sup> (1959) 43 Cr App. R 215 at p244

<sup>44</sup> See *Miranda v Arizona* (1966) 384 U.S. 436 at 460

<sup>45</sup> Including an article by Coldrey J called the "Right to Silence Reassessed" (1990) 74 Victorian Bar news 25 at 27 and in an article by Stephen Odgers entitled "Police Interrogation and the Right to Silence" (1985) 59 ALJ 78 at 93

<sup>46</sup> Stephen Odgers "Police Interrogation and the Right to Silence" (1985) 59 ALJ 78 at 93

sort out and state factual aspects of their problems clearly even after time for studied reflection and discussions with friendly financial advisers. These dangers are exacerbated where the only question was the state of mind of the accused person when he or she committed a particular act. Relying on the right to silence, such persons may think it safer to say nothing at all."

In submissions to the Victorian Parliamentary Scrutiny of Acts and Regulations Committee, which at the time of writing this paper is examining the right to silence, the Victorian Aboriginal Legal Service and the Federation of Community Legal Services have drawn attention to the difficulties that people from a non- English speaking background, the Indigenous, young persons, and people with a psychiatric or intellectual disability have in dealing with the legal system. The right to silence is extremely important to those who are vulnerable in the community.

Generally speaking the majority of people charged with offences plead guilty or, in the case of magistrates courts, do not bother attending. Of those who plead not guilty approximately half are convicted and half found not guilty. Overall about 90% of charged people are convicted either as a result of pleading guilty or being found guilty.<sup>47</sup> On these figures it would appear that the exercise of the right to silence is not a significant obstacle to the gaining of convictions by the prosecution.

A factor in all criminal trials is the inherent discretion of the judge or magistrate, which operates to exclude the receiving into evidence of anything unfair and prejudicial to the accused, for example evidence unlawfully obtained. The existence of and potential for the exercise of judicial discretion is enshrined in statute in Victoria: ss 391A, 391B Crimes Act 1958 (Vic.) and is a vital component in ensuring the integrity of the criminal trial process.

### **c) Developments elsewhere**

The Victorian Parliamentary Scrutiny of Acts and Regulations Committee is currently being asked to consider the implementing of the United Kingdom position in relation to the right to silence.<sup>48</sup>

The CCJD&P notes that the circumstances surrounding the supposed justification of the changes to the law in the United Kingdom pertained to the prevalence of terrorist activities in that country.<sup>49</sup> The law was changed after considerable public debate and with a guarantee that lawyers would be present prior to interviews as an added protection. It is important that before Victoria adopts the United Kingdom's position that the different contexts be recognised. In addition, the analysis of the situation in Victorian has been worked within a tight timeframe and much less public debate.

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<sup>47</sup> Based on statistics supplied by the Criminal Justice Statistics and Research Unit, Department of Justice Victoria on 8/9/98. See table on page 9.

<sup>48</sup> In Chapter 4 paragraph 82 of the United Kingdom Royal Commission on Criminal Justice Report July 1993 it is stated, "The majority of us believe that adverse inferences should not be drawn at the police station and recommend retaining the present caution and trial direction."

<sup>49</sup> Lee Bridges & Mike McConville "Keeping Faith With their own Convictions". The Royal Commission on Criminal Justice, Vol. 57, The Modern Law Review 75 and Amnesty International, United Kingdom, Fair Trial concerns in Northern Ireland November 1992

There has been comment in the media that there have been no problems with the curtailment of the right to silence in the United Kingdom. To the contrary, a recent decision of the European Court of Human Rights has criticised the curtailment of the right to silence in Northern Ireland, England and Wales.<sup>50</sup> In addition, the United Nations Special Rapporteur issued a report as a consequence of a fact finding mission to the United Nations on 1 April 1998 which highlighted the lack of safeguards accorded to suspects against intimidation.<sup>51</sup> Amnesty International in the context of the position of the United Kingdom has stated that the historically recognised right to remain silent both during police interviews and during trial should be reinstated and that curtailment of the right to silence violates ICCPR Article 14 (3) (g).<sup>52</sup>

The placement of a suspect in a position where they give evidence would shift the burden from the prosecution to an accused. Permitting the court or prosecution to ascribe guilt as a reason for silence or to draw adverse inferences from the exercise of a right which was legal at the time of making it also shifts the burden from the prosecution to the accused. Black J in *Betts v Brady*<sup>53</sup> stated: "A practice cannot be reconciled with 'common and fundamental ideas of fairness and right', which subjects innocent men to increased dangers of conviction because of their poverty."

In Holland and in Germany (both Civil Code countries) provisions exist which enshrine a person's right to speak or to remain silent. In both countries no inferences unfavourable to an accused can be drawn by reason of the exercise of the right to silence. In Belgium (also a Civil Code system), although the right to silence is not enshrined in legislation, it is upheld by the courts. The International Law Commission of the United Nations, which is currently developing the parameters of the proposed new International Criminal Court with jurisdiction over war crimes, genocide and crimes against humanity, has also incorporated a right to silence in the draft statute.<sup>54</sup> This highlights that there is a level of consensus in the international community which supports the retention of the right to silence.

## **Concluding Remarks**

Mr Derek Bok in the Cardozo lecture stated,

"Access to the courts may be open in principle. In practice, however, most people find their legal rights severely compromised by the cost of legal services, the baffling complications of existing rules and procedures and the long, frustrating delays involved in bringing proceedings to a

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<sup>50</sup> The Guardian Weekly November 20, 1994 p.19 reported "The Economist, a generally conservative newspaper attached the right to silence change as "doing little or nothing to curb crime" while it is "quite likely to produce more convictions of innocent people, something for which the British justice system is already too well known."

<sup>51</sup> Amnesty International U.K. UN Report criticises Emergency Law Practices in Northern Ireland April 1998

<sup>52</sup> Amnesty International U.K. UN Report criticises Emergency Law Practices in Northern Ireland April 1998 and UN Report on the Mission of the Special Rapporteur to the U.K. para 83 where the Rapporteur recommends the right to silence be reinstated.

<sup>53</sup> (1942) 316 U.S 455 at 476

<sup>54</sup> Extracted from the Amnesty International Update on the United Kingdom Right to Silence, November 1993

conclusion...There is far too much law for those who can afford it and far too little for those who cannot."<sup>55</sup>

The absence of funding for legal representation and the inevitable pressures which will emerge as government seeks to reduce spending in the areas of criminal justice are cause for concern. The continued reduction and winding back of the fundamental protections accorded to citizens on the often spurious grounds of electoral advantage are all matters which the public must assess with attentive vigilance. Such eventualities can only place further pressure on courts' capacity to exercise their judicial power effectively, fairly and in accordance with due process.<sup>56</sup>

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*Friends of Social Justice are welcome to copy and distribute this paper.*

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<sup>55</sup> "The Law and its Discontents: A Critical Look at our Legal System", The Thirty-Seventh Annual Benjamin Cardozo Lecture, delivered New York, 9 November 1982

<sup>56</sup> The next Occasional Paper planned for October will consider the Independence of the Judiciary.

**TABLE****Higher Courts**

|                           | <u>1995</u> | <u>1996/97</u> |
|---------------------------|-------------|----------------|
| Pleaded Guilty            | 41          | 25             |
| <u>Pleaded Not guilty</u> | 42          | 40             |
| Proven Guilty             | 25          | 28             |
| Proven Not guilty         | 17          | 12             |
| Other                     | 8           | 3              |

**County Courts**

|                           | <u>1995</u> | <u>1996/97</u> |
|---------------------------|-------------|----------------|
| Pleaded Guilty            | 1,106       | 1,071          |
| <u>Pleaded Not guilty</u> | 356         | 374            |
| Proven Guilty             | 162         | 180            |
| Proven Not guilty         | 194         | 184            |
| Other                     | 138         | 152            |

**Magistrates' Courts**

|                           | <u>1996</u> | <u>1997</u> |
|---------------------------|-------------|-------------|
| Pleaded Guilty            | 56,988      | 56,215      |
| <u>Pleaded Not guilty</u> | 23,547      | 26,627      |
| Proven Guilty             | 11,901      | 13,283      |
| Proven Not guilty         | 5,048       | 8,500       |
| Other Outcome**           | 6,600       | 6,844       |
| Other                     | 22,401      | 18,040      |

Note:

\*\* Includes Consolidated, struck out and discharged cases

(1) Time scale is different between Higher Courts and Magistrates Court, due to data coming from different sources.

(2) Other includes pleas of ex parte, charges withdrawn, bench warrant issued, other finalisation and transferred between court levels