A CONSTITUTIONAL RIGHT TO A FAIR TRIAL? IMPLICATIONS FOR THE REFORM OF THE AUSTRALIAN CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

In the past decade problems of expense and delay in the administration of criminal justice have been the subject of numerous expressions of concern.[1] In several Australian jurisdictions, legislative measures designed to improve the administrative efficiency of the criminal justice system so that cases can be disposed of more quickly and cheaply have been introduced.[2] In many cases such legislation has had the effect of diminishing the protections available to accused persons.

The laws which govern the conduct of criminal proceedings in our society reflect the policy that it is preferable for a guilty person to go unpunished than for an innocent person to be convicted. On this basis, as a matter of legal principle, an accused person must be presumed innocent until proven guilty beyond reasonable doubt. It follows that an accused person should not be obliged to help the prosecution establish its case and that no penalty should be imposed in relation to a crime until after a defendant has been convicted. Legislation which interferes with these basic principles affects the interests not only of those citizens who are actually accused of crime but of all those who might be — that is, everyone. For this reason there is a strong community interest in ensuring that any legislative encroachment upon the right of an accused person not to be convicted except after a fair trial according to law (a right which may

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1 A Barnard and G Withers, *Financing the Australian Courts* (1989); N Brunton, I Freckelton and G Waghorn, "Opinion: Law and Order Developments in Victoria" (1993) 18 *Alt L J* 102; P Byrne, "Criminal Law and Justice" (1989) 63 *ALJ* 426; "Court Delays" [1989] *Reform* 94; J Dowd, "Committal Reform: Radical or Evolutionary Change?" (1990) 2 *Current Issues in Criminal Justice* 10; J Giddings, "Legal Aid in Victoria: Cash Crisis" (1993) 18 *Alt L J* 130; National Crime Authority, *National Complex White Collar Crime Conference (15-17 June 1992)* (1993); Shorter Trials Committee, *Report on Criminal Trials* (1984); G J Samuels, "The Economics of Justice" (1991) 1 *JJA* 114; F H Vincent, "The High Court v the Trial Judge?" in *Convention Papers, 28th Legal Convention (26-30 September 1993)* Vol 2 at 263; M Weinberg, "Complex Fraud Trials — Reducing Their Length and Cost" (1992) 1 *JJA* 151.

2 Below nn 96 to 103.

conveniently be referred to in positive terms as "the right to a fair trial") is properly justified.[3]

Although many of the protections which we would now regard as essential to a fair trial have been introduced only relatively recently, the principle itself has long been recognised at common law. Like all common law rights, the right to a fair trial is liable to impairment or abrogation by the legislature without special justification.[4] However, the line of reasoning adopted by the High Court in several recent decisions relating to the authority of courts to stay criminal proceedings on grounds of abuse of process has led two judges to suggest that the right to a fair trial is constitutionally entrenched. If that view came to be accepted by a majority of the High Court, governments would be prevented from interfering with the right to a fair trial without demonstrating that such interference is justified. Moreover, some legislation already introduced might turn out to be invalid.

This article examines first the evolving doctrine of abuse of process at common law and then the arguments in support of a constitutional right to a fair trial, with a view to understanding how these developments might influence future strategies for reform of the criminal justice system. It will be argued that although the establishment of a sound legal basis for the implication of a constitutional right to a fair trial seems quite feasible, the uncertainty and inflexibility likely to be associated with a constitutional right as distinct from the established common law right are such that continued development of the law in this direction cannot be expected to promote the interests of justice.

PART ONE

Abuse of process and the common law right to a fair trial

At common law, rules of evidence and procedure have been developed to minimise the risk that innocent people will be convicted as a result of the imbalance of power between the Crown as prosecutor and the individual defendant.[5] The enforcement of these rules is a matter for the trial judge. In the most extreme case, where the conduct of the prosecutor amounts to an abuse of the court's processes, the trial judge has always had the authority to order a stay of proceedings if no other remedy will

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3 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 56-7 per Deane J; *Dietrich v R* (1992) 177 CLR 292 at 299 per Mason CJ and McHugh J.

4 This is the traditional view of common law rights (G Williams, "Civil Liberties and the Constitution — a Question of Interpretation" (1994) 5 *PLR* 82). A more radical view will be considered in Part Two below.

5 These include specific rules relating to the right to silence and the admissibility of confessions, improperly obtained evidence, identification evidence, similar facts, evidence as to bad character and evidence given by accomplices or prison informers. They also include the rules governing the more general duties of the trial judge when conducting the trial of an unrepresented accused and those relating to evidence which is or could be unfairly prejudicial to the accused. More detailed references can be found in K P Duggan, "Reform of the Criminal Law with Fair Trial as the Guiding Star" in *Proceedings of the Supreme Court and Federal Court Judges' Conference, Adelaide 1995* (1995); J Badgery-Parker, "The Criminal Process in Transition: Balancing Principle and Pragmatism — Part I" (1995) 4 *JJA* 171 at 172-5; and see generally P Waight and C R Williams, *Evidence: Commentary and Materials* (4th ed 1995).

suffice.[6] However, in recent years the range of circumstances in which the court will regard a stay of proceedings as the appropriate remedy has expanded as the result of a shift in focus from the particular rules which go to make up the right to a fair trial to the right itself.

In *Jago v District Court of New South Wales*,[7] the High Court considered whether the power of a court to protect itself from abuse of process in criminal proceedings was confined to traditional notions of abuse of process, a question which had been raised but not decisively answered in the earlier case of *Barton v R*.[8] The majority took the view that a court's power to stay proceedings for abuse of process was not so confined: it extended beyond the enforcement of particular rules to include a general power to prevent unfairness. In arriving at this conclusion, all the majority judges emphasised the importance of an accused's right to a fair trial. Mason CJ said:

> [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 did not constitute an abuse of process.[9]

In *Jago*, the complaint was one of undue delay. While the High Court accepted the idea that extreme delay could, without more, create unfairness amounting to an abuse of process, the question whether the power to order a stay of prosecution could operate to prevent unfairness arising from other sources was left open. Since *Barton's* case, in which several judges had hinted at the broad interpretation of abuse of process later adopted by the Court,[10] prosecutions had been stayed in the Supreme Courts of the States on a number of grounds, including faulty or absent preliminary hearings, misuse of extradition powers, breach of undertakings by a prosecutor and entrapment, as well as delay.[11] But it was not until *Dietrich v R*[12] in 1992 that the High Court specifically endorsed the use of the power to grant a stay or adjournment to prevent unfairness arising otherwise than from undue delay.

Olaf Dietrich was charged before the Victorian County Court with importing heroin contrary to the provisions of the Customs Act 1901 (Cth). At the time his case came to trial, Dietrich had exhausted all possible means of obtaining legal assistance. His application for an adjournment was refused by the trial judge on the grounds that he had no prospect of securing legal representation with or without an adjournment. Following his conviction, Dietrich sought and obtained special leave to appeal to the High Court on the ground that his trial had miscarried due to lack of legal representation.

The decision of the majority (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) was summarised by Mason CJ and McHugh J:

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6 A Choo, *Abuse of Process and Judicial Stays of Proceedings* (1993) at 2-7.
7 (1989) 168 CLR 23.
8 (1980) 147 CLR 75 at 96-7 per Gibbs and Mason JJ.
9 (1989) 168 CLR 23 at 29.
10 Ibid at 24 per Stephen J, at 25 per Murphy J and at 26 per Wilson J.
11 R Fox, "*Jago's Case*: Delay, Unfairness and Abuse of Process in the High Court of Australia" [1990] *Crim L R* 552 at 553.
12 (1992) 177 CLR 292.

> [If a] trial judge... is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation...[then] in the absence of exceptional circumstances, the trial... should be adjourned, postponed or stayed until legal representation is available. If in those circumstances an application that the trial be delayed is refused and by reason of the lack of representation... the resulting trial is not a fair one, any conviction must be quashed.[13]

Such a stay would be effectively permanent where (as in the case of Dietrich himself) there is no prospect of legal representation ever becoming available.

In reaching this decision, the majority of the High Court again laid special emphasis on the right to a fair trial. This time they went a little further towards explaining the relationship between fairness and legality in the conduct of criminal proceedings. Justice Brennan in his dissenting judgment drew a distinction between fairness according to community values (which courts were not obliged to uphold) and fairness in the sense of the trial having taken place in accordance with the law (which they were).[14] Justice Gaudron specifically rejected this view. In her opinion a trial could be relevantly unfair even though conducted strictly in accordance with law: the requirement of fairness, she thought, is "independent from and additional to" the requirement of legality.[15]

Justice Deane did not go quite so far. He acknowledged that, strictly speaking, the requirement that the trial of a person accused of a crime be fair, being a legal one, is encompassed by the requirement that such a trial be in accordance with law. But he went on to say:

> Nonetheless, it is desirable that the requirement of fairness be separately identified since it transcends the content of more particularised legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law.[16]

It is submitted that this analysis accords with the views expressed by the other majority judges.

It is clear from the decision in *Dietrich* that the majority of the High Court now adopts a broad view of the notion of the right to a fair trial, a view which takes into account not only matters arising in the course of the trial itself but also decisions made long before the trial begins, by police, prosecutors, legal aid commissions and the executive government itself. This is confirmed by other decisions of the Court in cases not directly involving the concept of abuse of process, such as *McKinney and Judge v R*,[17] *Pollard v R*[18] and *Foster v R*,[19] all of which concerned the admissibility at trial of confessional evidence obtained by the police. Coupled with this broad view of the concept of fairness is a re-affirmation of the power of a trial judge to stop a trial which he or she considers unfair, even if the prosecutor is acting in good faith and according to law.

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13 Ibid at 315.
14 Ibid at 325.
15 Ibid at 362-3.
16 Ibid at 326.
17 (1991) 98 ALR 577.
18 (1992) 110 ALR 385.
19 (1993) 113 ALR 1.

Practical problems

In *Barton*,[20] *Jago*[21] and *Dietrich*,[22] the High Court recognised that delay and expense in the administration of criminal justice often result in unfairness to individual defendants. Responsibility for the development and implementation of appropriate policies to deal with this unfairness belongs to the government, which has the difficult task of striking a proper balance between reforming those elements of the criminal justice system which are shown to be inefficient and ensuring that the civil liberties of citizens who come into contact with the system are not impaired. The developments discussed in the previous section interfere with this task in two ways.

First, the threat of a stay of prosecution in cases of delay or failure to provide legal representation puts extra pressure on the government to reform the criminal justice system in order to avoid allegations of unfairness arising out of administrative inefficiency.[23] The effects of a permanent stay of proceedings, especially in relation to serious offences, should not be underestimated. Apart from the waste of time and money expended in bringing the alleged offender to trial, there is a real danger that public confidence in the government's ability to protect its citizens from the effects of serious crime will be eroded.

At the same time, a broadened notion of the right to a fair trial effectively limits the available options for reform by setting a higher standard for the protection of civil liberties. Not only must potential solutions conform to the legal requirements which together constitute a "trial according to law", they must also meet a separate criterion of "fairness". To make matters worse, the courts have declined to give any indication of the content of the fairness requirement, holding that:

> [T]he concept of a fair trial is one that is impossible, in advance, to formulate exhaustively or even comprehensively. Only a body of judicial decisions gives content to the concept.[24]

Even decisions which are directly relevant to the question of fairness may not be of much use, since "the practical content of the requirement" may be expected to "vary with changing social standards and circumstances",[25] and "what might be fair in one case might be unfair in another".[26] It is not necessary to an appreciation of this point to suppose that the case-by-case exposition of the fairness requirement will proceed in an unprincipled manner. However sound each step in the process may be, the final outcome cannot be predicted for the very reasons just mentioned.

In practical terms, governments have two choices: try to change the present criminal justice system so that it functions more economically, at the (incalculable) risk of creating new sources of unfairness which could lead to further stays; or divert a larger proportion of limited public resources to the administration of criminal justice, away from other areas such as health, housing, education and employment, in which greater expenditure might help to achieve a lower rate of crime.

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20 (1980) 147 CLR 75.
21 (1989) 168 CLR 23.
22 (1992) 177 CLR 292.
23 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 49 per Brennan J.
24 *Dietrich v R* (1992) 177 CLR 292 at 353 per Toohey J.
25 Ibid at 328 per Deane J.
26 Ibid at 364 per Gaudron J.

Curial and executive functions in the administration of justice

It has been argued that the increasingly frequent resort to the abuse of process doctrine in cases where its application cannot be justified by reference to its underlying rationale constitutes a threat to the exclusive power of the executive to determine whether a given matter ought to come before the courts.[27]

Justice Brennan, in his dissenting judgment in *Jago*, drew attention to what he considered an improper intrusion by the court on legislative and executive functions arising out of the invocation of a broad power to stay proceedings for abuse of process.[28] He pointed to two reasons for maintaining a strict division between the executive power to bring alleged offenders to trial and the judicial power to hear and determine criminal proceedings. First, such a division ensures that the branch of government which must answer politically for decisions relating to the detection, investigation and prosecution of crime takes sole responsibility for making those decisions. Second, it ensures that the impartiality of the courts is not compromised by concern with matters extraneous to the fair determination of the issues. In *Dietrich*, Dawson J joined Brennan J in dissent, saying that the determination of what funds are to be made available for the administration of criminal justice is "not a function which the courts can or should perform".[29]

The majority judges in *Barton*, *Jago* and *Dietrich* were well aware of constitutional objections to their approach. But they insisted that refusal to permit court processes to be employed in a manner which gives rise to unfairness cannot amount to an intrusion into the legislative or executive sphere. In *Jago*, Mason CJ referred to a passage in Lord Devlin's speech in the English case of *Connelly v Director of Public Prosecutions*[30] in which his Lordship said:

> Are the courts to rely on the executive to protect their processes from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them?... The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.[31]

Whichever view is preferable, it is clear that the questions of what constitutes a fair trial and what remedies are appropriate to enforce the right to a fair trial raise important issues concerning the proper roles of governments and the courts with respect to the administration of criminal justice. It is also clear that the answers to those questions can be expected to have a profound impact on the implementation of urgently needed reforms. In the light of these observations, I now turn to the question of whether the right to a fair trial is a constitutional as well as a common law right.

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27 D Paciocco, "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991) 15 *Crim LJ* 315.

28 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 39.

29 *Dietrich v R* (1992) 177 CLR 292 at 349-50; see also *McKinney v R* (1991) 98 ALR 577 at 586 per Brennan J.

30 [1964] AC 1254.

31 Ibid at 1354.

PART TWO

A constitutional right to a fair trial?

In *Dietrich*,[32] the High Court considered the source of the right to a fair trial. While the majority of judges agreed that the right existed at common law, Deane and Gaudron JJ went further. In their opinion the right to a fair trial, at least in relation to federal offences, is entrenched in the Commonwealth Constitution.[33]

Neither the Commonwealth Constitution nor any of the State constitutions contains an express right to a fair trial. Therefore, if such a right exists, it must be implied. There are a number of ways in which this might be done. The following sections set out several arguments for the existence of an implied constitutional right to a fair trial. The discussion will not be confined to the Commonwealth sphere, for the simple reason that the States are responsible for most criminal law. Reform of the administration of criminal justice is as much a matter for the States as the Commonwealth; in fact, the only comprehensive legislation designed to overcome the problem of administrative inefficiency in the criminal justice system so far introduced in Australia has been produced by a State government.[34]

Before the two main arguments for a constitutional right to a fair trial are examined, it is worth noting the existence of two other arguments which, but for the present state of the authorities, might have had considerable persuasive value. The first of these arguments is based on s 80 of the Commonwealth Constitution, which provides: "The trial on indictment of any offence against any law of the Commonwealth shall be by jury..." The argument is that the guarantee of a jury trial carries an implied guarantee of procedural fairness, at least in relation to trials on indictment for Commonwealth offences.

There are two reasons why such an argument could not be expected to succeed. The first is that the High Court, in a series of decisions since 1928, has taken a highly literal view of s 80, to the effect that although that section guarantees trial by jury on indictment, there is nothing to prevent Parliament from providing that even the most serious offence is to be tried summarily.[35] By itself this might not prevent a new High Court from taking a more purposive view of the section. Almost from the beginning, minority judges have expressed strong disagreement with the majority's narrow approach to s 80,[36] and in recent times decisions of the High Court concerning other express constitutional guarantees which have also been narrowly interpreted in the past have indicated a willingness to extend the scope of such provisions in the interests

32 (1992) 177 CLR 292.

33 Ibid at 326 per Deane J and at 362 per Gaudron J.

34 Crimes (Criminal Trials) Act 1993 (Vic); see C Corns, "Anatomy of Long Criminal Trials: a Preliminary View" in *Proceedings of the 14th Annual Conference of the Australian Institute of Judicial Administration* (1995).

35 *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556; *Kingswell v R* (1985) 159 CLR 264.

36 See *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 580-2 per Dixon and Evatt JJ, and the judgments of Deane and Brennan JJ in *Kingswell v R* (1985) 159 CLR 264.

of protecting individual rights.[37] However, there is a second obstacle, which is that even if s 80 came to be regarded as a substantive guarantee of trial by jury, it is unlikely that a right to trial by jury would be seen as encompassing or implying the existence of a right to a fair trial. Although it is widely recognised that the presence of a jury helps to ensure that minimum standards of fairness are met, the two concepts are generally regarded as quite distinct. As one judge has remarked, "[T]he right to a fair trial is one thing; the right to a jury trial is another".[38]

The second of the two unpromising arguments relies on the fact that the grants of power in s 51 of the Commonwealth Constitution are accompanied by the words "for the peace, order and good government of the Commonwealth", while grants of power to all the State legislatures except Victoria are accompanied by the same or an equivalent formula ("peace, welfare and good government").[39] There have been a number of attempts, some of which have been received favourably by judges, to argue that these words constitute a restriction on legislative power.[40] In relation to the right to a fair trial, the argument would be that Commonwealth or State legislation which purported to interfere with established protections afforded to the accused in a criminal trial would be *ultra vires* because such legislation could not possibly be for the peace, order or good government (or peace, welfare or good government) of the Commonwealth or State.

Despite the existence of a persuasive argument that the granted power would be characterised as plenary in nature even if these words were absent and that therefore, unless they are taken as violating the convention of drafting which prohibits the use of unnecessary words, they must have been intended as a general limit on legislative competence,[41] the High Court has shown itself clearly opposed to any interpretation of the phrase which would impose such a limit. In *Union Steamship Co of Australia Pty Ltd v King*,[42] the Court held that general phrases conferring law-making power did not give courts jurisdiction to strike down legislation on the ground that it did not promote or secure the peace, order and good government of either a State or the Commonwealth.

In the light of this decision, it is unlikely that an argument for the existence of a constitutional right to a fair trial based on the words "peace, order and good government" or "peace, welfare and good government" could succeed. However, it should be noted that the High Court in *Union Steamship* qualified its position by saying that "whether the exercise of ... legislative power is subject to some restraints by reference to rights deeply rooted in ... the common law... is another question which we

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37 For example, *Street v Queensland Bar Association* (1989) 168 CLR 461; *Leeth v Commonwealth* (1992) 174 CLR 455. See generally J Doyle and B Wells, "How Far Can the Common Law Go Towards Protecting Human Rights?" in P Alston (ed), *Towards an Australian Bill of Rights* (1994) 119.

38 J Badgery-Parker, above n 5 at 177.

39 I Killey, "'Peace, Order and Good Government': a Limitation on Legislative Competence" (1989) 17 *Melb Univ LR* 24 at 24-9.

40 For example, *Sillery v R* (1981) 35 ALR 227 at 234 per Murphy J; *Builders Labourers' Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 382-5 per Street CJ and at 421 per Priestley JA.

41 I Killey, above n 39 at 41-55.

42 (1988) 166 CLR 1 at 10.

need not explore".[43] I shall return to this issue in a later section. First it is necessary to consider the two major arguments which might be put forward in favour of an implied constitutional right to a fair trial.

Right to a fair trial by implication from the separation of judicial power

The separation of Commonwealth judicial power was suggested as the basis for an implied right to a fair trial by Deane and Gaudron JJ in *Dietrich.*[44] Neither elaborated upon this suggestion, and no comment was made as to the operation of such an implied right with respect to the States. In this section I shall look briefly at the history of implications from Chapter III of the Commonwealth Constitution in order to clarify the nature of the argument put forward by Deane and Gaudron JJ. The application of this argument in the State context will then be considered.

Implications from Chapter III of the Commonwealth Constitution

The Commonwealth Constitution does not expressly incorporate a doctrine of separation of powers. However, as a matter of construction, the organisation of provisions relating to legislative, executive and judicial powers into three distinct chapters has been taken as an indication that the common law doctrine is intended to operate as part of the Constitution.[45]

Although the common law doctrine of separation of powers permits an intermingling of legislative and executive powers, the High Court made it clear early on that the judicial power of the Commonwealth was to be kept strictly isolated. The essence of the Australian doctrine of separation of powers (which was invoked by the High Court in *New South Wales v the Commonwealth,*[46] refined in *R v Kirby; Ex parte Boilermakers' Society of Australia*[47] and reaffirmed in *Brandy v Human Rights and Equal Opportunity Commission*[48] and *Grollo v Palmer*[49]) is that federal judicial power, which is vested exclusively in Chapter III courts under s 71 of the Constitution, may not be conferred on any non-judicial body; conversely, there can be no mixing of judicial and non-judicial powers in a Chapter III court.

In *Boilermakers*, the emphasis was on the importance of the separation of judicial and non-judicial powers to the operation of the federal system. However, the role of an independent judiciary in the protection of individual liberties (particularly in relation to the conduct of trials) has not been overlooked. In *R v Quinn; Ex parte Consolidated Foods Corp,*[50] Jacobs J (with whom Gibbs CJ, Stephen and Mason JJ agreed) said:

> We have inherited a system of law which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the Parliament and the executive... . [T]he rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that

43 Ibid.
44 (1992) 177 CLR 292 at 326 per Deane J and at 362 per Gaudron J.
45 *Leeth v Commonwealth* (1992) 174 CLR 455 at 485 per Deane and Toohey JJ; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26 per Brennan, Deane and Dawson JJ.
46 (1915) 20 CLR 54 (the *Wheat* case).
47 (1956) 94 CLR 254 (the *Boilermakers'* case).
48 (1995) 69 ALJR 191.
49 Ibid at 724.
50 (1977) 138 CLR 1.

> independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example.[51]

More recently several judges have indicated that the protection referred to by Jacobs J is not limited to the prevention of interference with particular cases pending before the courts, but extends to the judicial process itself and the manner in which it is to be exercised. In *Re Tracy; Ex parte Ryan*, Deane J referred to s 71 as the Constitution's only general guarantee of due process.[52] Two years later, in *Harris v Caladine*, Gaudron J described the exercise of judicial power in accordance with "that process which is referred to as 'the judicial process'" as its "dominant and essential characteristic".[53] An even more explicit confirmation of the due process guarantee is to be found in Gaudron J's judgment *in Re Nolan; Ex parte Young*,[54] where her Honour said:

> Because it is an essential feature of the judicial power that it be exercised in accordance with the judicial process, Ch. III provides a guarantee, albeit only by implication, of a fair trial of those offences created by a law of the Commonwealth which must be tried in the courts named or indicated in s. 71.[55]

Other members of the High Court have also expressed support for this view. In *Polyukhovich v Commonwealth*, Toohey J remarked that any legislation enacted by the Commonwealth Parliament pursuant to s 51 of the Constitution which purported to require a Chapter III court to act otherwise than in accordance with the established principles of judicial decision-making would offend Chapter III.[56] In a joint judgment in *Nationwide News Pty Ltd v Wills*, Deane and Toohey JJ insisted that "no part of the judicial power of the Commonwealth can be exercised ... in a manner which is inconsistent with our traditional judicial process".[57] In *Leeth v Commonwealth*, Mason CJ, Dawson and McHugh JJ jointly expressed agreement with that proposition, holding that "any attempt on the part of the legislature to cause a court to act contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power".[58] These sentiments were echoed by Brennan, Deane and Dawson JJ in their joint judgment in *Chu Kheng Lim v Minister for Immigration*.[59] They said:

> Nor do those grants of legislative power [contained in s 51 of the Commonwealth Constitution] extend to the making of a law which requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power. ... There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and

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51 Ibid at 11. See also *Huddart, Parker & Co v Moorehead* (1909) 8 CLR 330 at 380 per O'Connor J; *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 346 per Barton J; *Hammond v the Commonwealth* (1982) 152 CLR 188 per Deane J; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1

52 (1989) 166 CLR 518 at 580.

53 (1991) 172 CLR 84 at 150.

54 Ibid at 461.

55 Ibid at 496. See also the judgments of Deane and Gaudron JJ in *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

56 Ibid at 685.

57 (1992) 177 CLR 1 at 69-70.

58 *Leeth v Commonwealth* (1992) 174 CLR 455 at 470; see also Deane and Toohey JJ at 485-487.

59 (1992) 176 CLR 1.

> exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth.[60]

It is apparent from these remarks that a majority of the present High Court — Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ — would be prepared to accept that interference by the legislature or the executive with the procedural rules which go to make up a fair trial would be prohibited under Chapter III of the Constitution in relation to Commonwealth offences.[61] The position with respect to State offences is not so clear. However, there are several ways in which an argument for the operation of such a prohibition at State level might be constructed.

Application of the separation of powers argument to the States[62]

The simplest way to construct such an argument would be to show that the State constitutions, like that of the Commonwealth, contain provisions, express or implied, which constitute a guarantee of judicial independence. Only the New South Wales constitution contains an express guarantee of judicial independence entrenched in accordance with manner and form requirements.[63] In relation to the other States, such a guarantee would have to be implied. If such a guarantee could be shown to exist, it would be necessary to demonstrate further that judicial independence at the State level implies a right to a fair trial in relation to State offences.

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60 Ibid at 27.

61 The case of *Kruger v Commonwealth*, which was heard before the High Court of Australia in Canberra on 12-15 February 1996, may provide an opportunity for one of the two recently appointed members of the High Court, Justice Gummow, to express his views on the subject of implied constitutional rights. The other recent appointee, Justice Kirby, did not hear the case. It is worth noting, however, that in his judgment in *Ngoc Tri Chau v Director of Public Prosecutions (Cth)* (1995) 132 ALR 430, a case in which the validity of a piece of New South Wales legislation was challenged on the grounds that it breached the constitutional guarantee of fair process in criminal proceedings referred to by Deane and Gaudron JJ in *Dietrich*, Justice Kirby, then President of the New South Wales Court of Appeal, remarked (at 445): "I have some sympathy for the notion of a constitutionally implied principle of equality of treatment in the application of the judicial power of the Commonwealth as discussed in *Leeth*". Moreover, all the members of the Court of Appeal in *Ngoc Tri Chau* were prepared to accept for the sake of argument that there exists a constitutional guarantee of due process in criminal cases based on Chapter III.

62 No attempt has been made in this article to address the question whether a right to a fair trial derived from the Commonwealth separation of judicial power would apply in the Territories. Since the decision of the High Court in *R v Bernasconi* (1915) 19 CLR 629, to the effect that the exercise of Commonwealth legislative power with respect to the Territories under s 122 of the Constitution is not restricted by s 80, there has been no clear indication whether and if so to what extent the provisions of Chapter III apply in the Territories. For a detailed discussion of this complex issue, see Z Cowen and L Zines *Federal Jurisdiction in Australia* (2nd ed 1978), ch 4. The relationship between s 122 and Chapter III was argued before the High Court in *Kruger v Commonwealth* (High Court of Australia, 12-15 February 1996).

63 Pursuant to the Constitution (Entrenchment) Amendment Act 1992 (NSW), which commenced in May 1995. For an outline of the legal basis for the ability of the Parliaments of the Australian States to bind their successor Parliaments in relation to constitutional matters, see G Carney, "An Overview of Manner and Form in Australia" (1989) 5 *QUTLJ* 70.

At both stages this argument comes up against the objection that implications cannot be drawn from the State constitutions because they are Acts of Parliament subject to amendment by the State legislatures at any time — subject, of course, to the Commonwealth Constitution and to any requirements of manner and form contained in the relevant State constitution. One answer to this objection is that the Commonwealth Constitution is also subject to amendment, in accordance with s 128, yet this has not prevented the High Court from holding that it contains implied provisions. Another more general answer is that implications are drawn from constitutions as they presently stand; it is irrelevant that they may be changed in the future. However, even if it is conceded that it is possible to draw implications from a State constitution, it could be argued that it is pointless to do so with respect to unentrenched provisions, because any such implication can be very easily over-ridden by the State legislature.[64]

A further difficulty with respect to the first stage of the argument described above is that the weight of authority appears to come down against the existence of a doctrine of separation of powers at State level.[65] However, it is worth noting that there has apparently never been any attempt to conduct a thorough and scholarly analysis of the law in this area.[66] It is quite possible that such an analysis would reveal a sound basis for the implication of a doctrine of separation of judicial powers with respect to one or more of the State constitutions.[67]

Given that this has not yet happened, two other arguments deserve attention. The first is that although the State constitutions may not themselves contain any doctrine of separation of powers, State institutions are nevertheless required to observe that doctrine by force of its existence at the Commonwealth level. This argument can be formulated by reference to either s 106 or s 109 of the Commonwealth Constitution. If formulated by reference to the former section, the argument is that s 106 (effecting rather than merely recognising the continuance of the State constitutions following

64 These arguments were referred to by Toohey J in *McGinty & Ors v State of Western Australia* (High Court of Australia, 20 February 1996, unreported).

65 *Nicholas v State of Western Australia* [1972] WAR 168; *Clyne v East* [1967] 2 NSWR 483; *Builders Labourers' Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372. See also R D Lumb, *The Constitutions of the Australian States* (5th ed 1991) at 132 and L Marquet, "The Separation of Powers Doctrine and the Constitution of Western Australia" (1990) 20 *UWALR* 445. In the light of developments in New South Wales (above n 63), it is difficult to assess the impact of the New South Wales authorities on arguments for the implication of a guarantee of judicial independence in the constitutions of other States. It could be argued that the introduction in New South Wales of a manner and form restriction on the enactment of legislation which interferes with the independence of the judiciary indicates that it would have been impossible to imply such a restriction in the New South Wales constitution as it stood before 1995. On the other hand, the 1995 manner and form legislation might be seen as merely a confirmation of a general principle which is contained, express or implied, in the constitutions of all the Australian States.

66 G Craven, "A Few Fragments of State Constitutional Law" (1990) 20 *UWALR* 353 at 359; see also J Thomson, "State Constitutional Law: the Quiet Revolution" (1990) 20 *UWALR* 311 at 314 and D Malcolm, "The State Judicial Power" (1991) 21 *UWALR* 7.

67 The implication of a restriction on State legislative power from the provisions of the relevant State constitution would not be without precedent: *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211. See also *McGinty & Ors v State of Western Australia* (High Court of Australia, 20 February 1996, unreported) transcript at 59 per Toohey J.

federation) makes the constitution of every State subject to the Commonwealth Constitution and that therefore, to the extent that the separation of judicial power in the Commonwealth Constitution acts as a restriction on grants of power to the Commonwealth Parliament, it must also restrict the legislative powers of the States.[68]

So expressed, this argument faces the special difficulty (with respect to an implied right to a fair trial based on the federal separation of powers) that Chapter III refers specifically to the judicial power of the Commonwealth and might therefore be regarded as expressly avoiding the imposition of a doctrine of separation of powers on the States.[69] A more sophisticated version of the same argument might run along the following lines: the words "subject to" in s 106 mean "if not inconsistent with or repugnant to".[70] Chapter III of the Commonwealth Constitution provides that federal judicial power may be conferred on State courts. State legislation which imposed a jurisdiction on a judge of a State court which was incompatible with the exercise of federal judicial power — for instance, because it required the judge to act otherwise than in accordance with the judicial process — would be inconsistent with or repugnant to the provision of Chapter III and therefore *ultra vires* by virtue of s 106.[71]

This version of the argument is very similar to an alternative formulation based on s 109, to the effect that State legislation which alters the nature of a State court by requiring it to exercise functions incompatible with federal judicial power — so that it is no longer a court for the purposes of Chapter III — is inconsistent with s 39 of the Judiciary Act 1903 (Cth), by which the Supreme Courts of the States are invested with federal jurisdiction on the basis that they are Chapter III courts, and is therefore invalid for inconsistency with a Commonwealth Act according to s 109 of the Commonwealth Constitution.[72]

The second of the two arguments referred to above derives from the existence of an integrated court system in Australia which gives the High Court ultimate appellate jurisdiction over all other courts: federal, State and Territory. The argument would be that any interference with the conduct of criminal trials at State level would inevitably constitute an interference with the Commonwealth judicial process. In the sense that the integrated nature of the Australian judicial system would preclude the co-existence of incompatible State and federal judicial powers, this second argument overlaps with the first. Both are reinforced by the decision of the Commonwealth Constitutional Commission's Advisory Committee on the Australian Judicial System not to recommend an express constitutional requirement of the separation of judicial power

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68 An equivalent argument was referred to in *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 at 155-6 per Brennan J, at 164-7 per Deane J and at 201-2 per McHugh J and in *McGinty & Ors v State of Western Australia* (High Court of Australia, 20 February 1996, unreported) per Toohey J in relation to the implied freedom of political speech first identified by the High Court in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

69 *"S" (a child) v R* (Supreme Court of Western Australia, 3 February 1995, unreported), in which an argument for the application of the separation of judicial powers argument to the States was considered and rejected.

70 *McGinty & Ors v State of Western Australia* (High Court of Australia, 20 February 1996, unreported) per Toohey J.

71 A similar argument was put forward by the plaintiff in *Kable v Director of Public Prosecutions (NSW)* (High Court of Australia, 7-8 December 1995).

72 Ibid per McHugh J.

in the States and Territories on the grounds that the integrity of the judicial process was sufficiently protected by the existing structure of the court system.[73]

In their joint judgment in *Theophanous v Herald & Weekly Times*, Mason CJ, Toohey and Gaudron JJ said, in relation to the operation of the implied freedom of political discussion in the States:

> The interrelationship of Commonwealth and State powers and the interaction between the various tiers of government in Australia [and] the constant flow of political information, ideas, and debate across the tiers of government ... make unrealistic any attempt to confine the freedom to matters relating to the Commonwealth government.[74]

Similar considerations apply in relation to the right to a fair trial in the Australian court system.[75]

Fundamental common law rights as a restriction on legislative power

It is apparent from the above discussion that the weak point in an otherwise strong argument for the implication of a constitutional right to a fair trial based on the separation of judicial power is its application to the States. It will be remembered that in *Union Steamship* the Court left open the question whether fundamental common law principles might operate as a restriction on legislative power.[76] One major attraction of an argument based on the common law is that because the common law applies in all Australian jurisdictions, the problem of importing an implied right into the State constitutions may not arise.

It is possible to identify two distinct theoretical positions from the literature dealing with the relationship between common law rights and the legislative power of Australian parliaments.[77] The first does not depend on the existence of entrenched

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73 Constitutional Commission, *Report of the Advisory Committee on the Australian Judicial System* (1987) at 68.

74 (1994) 182 CLR 104 at 122.

75 The plaintiff in *Kable v Director of Public Prosecutions* (NSW) (High Court of Australia, 7-8 December 1995) made the point that Chapter III seems to require a unified Australian judiciary.

76 (1988) 166 CLR 1 at 10.

77 This section is not intended to cover all the issues raised by an argument for a constitutional right to a fair trial based on the common law. For a more detailed analysis, see: T R S Allan, "Constitutional Rights and Common Law" (1991) 11 *OJLS* 453; T R S Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 *CLJ* 111; G Brennan, "Courts, Democracy and the Law" (1991) 65 *ALJ* 32; G Craven, "After Literalism, What?" (1992) 18 *Melb Univ LR* 874; G Craven, "Cracks in the Facade of Literalism: Is There an Engineer in the House?" (1992) 18 *Melb Univ LR* 540; Sir Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation" in *Jesting Pilate* (1965) 203; M McHugh, "The Law-making Function of the Judicial Process" (1988) 62 *ALJ* 15 at 15-31 and 115-127; N O'Neill, "Blue-eyed Babies May be Murdered: Dicey's First Principle Upheld in the Court of Appeal" (1987) 12 *LSB* 2; D Smallbone, "Recent Suggestions of an Implied 'Bill of Rights' in the Constitution, Considered as Part of a General Trend in Constitutional Interpretation" (1993) 21 *F L Rev* 254; Justice Toohey's extra-curial speech, reported in B Virtue, "The End of Democracy?" (November 1992) *Aust Law News* 7; G Williams, above n 4; G Winterton, "Extra-constitutional Notions in Australian Constitutional Law" (1986) 16 *F L Rev* 223; L Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Syd LR* 166; L Zines, *The High Court and the Constitution* (3rd ed 1992), ch 15.

Commonwealth or State constitutions. It is based on the idea that the common law principle of parliamentary sovereignty is confined by other common law principles such as the rule of law, so that "when an Act of Parliament is against common right or reason or repugnant or impossible to be performed the common law will control it and adjudge such Act to be void".[78]

Despite assertions by Street CJ and Kirby P in the *Builders Labourers' Federation* case[79] to the effect that this notion did not survive the Glorious Revolution of 1688, it has been pointed out that the "doctrine of common law rights" was restated in the English courts several times in the course of the eighteenth century.[80] In modern times, certain remarks by Justice Toohey in *Polyukhovich v Commonwealth*[81] have been taken as implying agreement with the proposition that there might be "restrictions on legislative or executive power which are not found, express or implied, in the Constitution or some other binding superior law".[82] More explicit support for this proposition is to be found in the judgments of New Zealand's Sir Robin Cooke, who has held that "some common law rights ... lie so deep that even Parliament could not override them".[83]

The second argument for a constitutional right based on the common law depends on the existence and manner of creation of the Constitution itself. Sir Owen Dixon in *Australian Communist Party v Commonwealth*[84] remarked that "the Constitution is an instrument framed in accordance with many traditional conceptions", including the rule of law. Justice Murphy also relied on the existence of the Commonwealth Constitution and the nature of the "free and democratic society" which it established to imply an assumption that the rule of law is to operate, "at least in the administration of justice".[85]

More recently some judges have linked the idea that the existence of the Commonwealth established by the Constitution acts as a guarantee of certain fundamental principles, in particular the rule of law, with an emerging doctrine of the inherent legal equality of the Australian people as parties to the constitutional compact.[86] In their joint judgment in *Leeth v the Commonwealth*, Deane and Toohey JJ said:

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78 *Dr Bonham's case* (1609) 77 ER 638 at 652 per Coke J.

79 (1986) 7 NSWLR 372.

80 N O'Neill, above n 77 at 4; D Smallbone, above n 77 at 260.

81 (1991) 172 CLR 501 at 687.

82 L Zines, "A Judicially Created Bill of Rights?" above n 77 at 180.

83 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398; see also *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 347 at 390 and *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121. Note also the remarks of Gummow J in *Kruger v Commonwealth* (High Court of Australia, 12-15 February 1996) to the effect that it might be necessary to rethink the question of whether the British Parliament is constrained by fundamental common law rights in the light of the recent entry of the United Kingdom into the European Community.

84 (1951) 83 CLR 1 at 193.

85 *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 670; see also *R v Director of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369 at 388, *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 267, *Sillery v R* (1981) 35 ALR 227 at 234 and *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556.

86 Since the enactment of the Australia Acts (Australia Act 1986 (Cth); Australia Act 1986 (UK)) some judges have taken the view that the true legal basis of the Commonwealth

> The doctrine of legal equality... has two distinct but related aspects. The first is the subjection of all persons to the law... . The second involves the underlying... theoretical equality of all persons under the law and before the courts... . At the heart of [the obligation to act judicially which is imposed on the courts by the Constitution] is the duty of a court to extend to the parties before it equal justice, that is to say, *to treat them fairly and impartially* as equals before the law.[87]

It appears from these remarks that the right to a fair trial might well be regarded as included in the principle of equality or as part of the rule of law. Other judicial observations concerning the right to a fair trial suggest that the entitlement of an accused person to a fair trial according to law might qualify as a fundamental common law principle in its own right.[88] This is even more likely if "the common law" is taken to incorporate protections laid down in ancient statutes such as Magna Carta, Habeas Corpus and the Bill of Rights of 1688.[89]

A number of objections apply to both these arguments. The one most frequently raised is that restrictions on legislative power derived from fundamental common law rights whose existence must be determined by the courts would undermine the sovereignty of parliament. It is difficult to assess the strength of this objection, given the current controversy as to the ultimate source of Australian constitutional legitimacy.[90] However, at its heart lies the genuine concern that the identification of "fundamental principles" by judges is a process which, unless it takes place within the confines of a well-defined and rigorous methodology, must involve an undesirable degree of subjectivity.

In relation to the characterisation of the right to a fair trial as a fundamental common law principle, there is a further difficulty associated with the on-going expansion of the right at common law, discussed in Part One. The reference by Deane and Toohey JJ in *Nationwide News* to implied limitations on federal power "which flow from the fundamental rights and principles recognised by the common law *at the time the Constitution was adopted*" presumably does not include the broad right to a fair trial

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Constitution (and perhaps also the State constitutions) lies not in its validity as an Act of the Imperial Parliament but in its adoption and continuing acceptance by the Australian people (see, eg, *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 at 171 per Deane J; *McGinty & Ors v State of Western Australia* (High Court of Australia, 20 February 1996, unreported) transcript at 80 per McHugh J). If that view is correct, it must be presumed in the absence of unambiguous words to the contrary in the Constitution itself that the people, in conferring power to legislate with respect to various subject-matters on the Commonwealth Parliament, did not intend those grants of power to extend to invasion of fundamental common law liberties (see Justice Toohey's speech, above n 77).

87 (1992) 174 CLR 455 at 485-7 (emphasis added). See also *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 247-8 per Deane J and *Street v Queensland Bar Assocation* (1989) 168 CLR 461 at 554 per Toohey J.

88 See especially *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 541-2 per Isaacs J, quoted by Deane J in *Dietrich v R* (1992) 177 CLR 292 at 326.

89 Constitutional Commission, *Report of the Advisory Committee on Individual and Democratic Rights Under the Constitution* (1987) at 3; *Ex parte Walsh and Johnston: in Re Yeats* (1925) 37 CLR 36 at 79 per Isaacs J.

90 Above n 86; and see L Zines, "The Sovereignty of the People", paper delivered at the Conference on the Constitution and Australian Democracy, Canberra, 9-11 November 1995.

now being developed by the High Court.[91] Justice Brennan's comment in *Theophanous* highlights the uncertainty surrounding this issue:

> [W]hether the interpretation and operation of the Constitution might be affected by the development of common law doctrines is an interesting though hitherto hypothetical question which need not detain us here.[92]

A full discussion of the difficulties involved in recognising a constitutional right to a fair trial based on the common law and the means by which they might be overcome is beyond the scope of this article. However, whatever the weaknesses of the argument in favour of such a right there is reason to think that the various observations referred to above do at least constitute an invitation to counsel to argue along these lines, especially in relation to the right to a fair trial.[93] As to the application of the two arguments dealt with in this section to the State legislatures, the first does not differentiate between Commonwealth and State laws, while with respect to the second, it has been suggested that although the relevant *dicta* refer only to Commonwealth laws, the argument would apply equally well to the States as to the Commonwealth.[94]

This Part has been concerned with two major arguments for the existence of a constitutional right to a fair trial. The first of these builds on a long tradition of implications from Chapter III of the Commonwealth Constitution and is supported by a number of High Court *dicta*. It is somewhat weaker in its application to the States than to the Commonwealth, but an extension based on the existence of a unified judicial system in Australia could be expected to carry some weight. The second argument, based on the right to a fair trial as a fundamental common law principle (either in itself or as part of a broader notion of equality or the rule of law), is much more radical. However, it has the advantage of full application to the States, and a number of *dicta* support the idea that legislative and executive power may be restricted in the area of traditional liberties.

The conclusion to be drawn from the preceding discussion that it is at least arguable that the right to a fair trial is constitutionally entrenched at both Commonwealth and State levels. The next question is: what impact might the recognition of such an entrenched right have on government attempts to tackle the problems of cost and delay in the criminal justice system?

PART THREE

Potential impact of a constitutional right to a fair trial on legislative reforms

The existence 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 throughout the criminal process has already been noted.[95] For example, there exist numerous provisions at both State and Commonwealth levels which reverse the presumption of innocence by placing the

91 (1992) 177 CLR 1 at 69-70 (emphasis added).
92 *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 at 142.
93 L Zines, *The High Court and the Constitution* n 77 at 337.
94 L Zines, "A Judicially Created Bill of Rights?" n 77 at 183.
95 In the Introduction.

persuasive or evidentiary burden of proof on the defendant,[96] by introducing new offences of strict liability or by prohibiting certain grounds of defence in relation to some offences.[97] Other provisions conflict with the principle that an accused person should not be forced to assist in his or her own prosecution (sometimes referred to rather inaccurately as the "right to silence") by allowing inferences to be drawn at trial from the silence of the defendant, by offering a suspect or accused person various immunities, indemnities or undertakings by prosecuting authorities in return for answering questions or producing documents,[98] or by imposing sanctions for non-cooperation at either the investigation stage[99] or the preliminary hearing.[100] Provisions which impose penalties without proof of guilt to the criminal standard include State and Commonwealth legislation which provides for the indefinite detention of certain offenders[101] and legislation which allows the imposition of severe financial penalties in civil proceedings.[102] This list is by no means exhaustive.[103]

The most drastic consequence of the recognition of a constitutionally entrenched right to a fair trial would be that the validity of such legislation would become

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96 See Human Rights Commission, *Review of Crimes Act 1914 and other Crimes Legislation of the Commonwealth* (Report No 5, 1983); Commonwealth Attorney-General's Department, *Review of Commonwealth Criminal Law Final Report* (1991); Law Reform Commission of Tasmania, *Research Paper on Statutory Provisions Imposing a Burden of Proof on Defendants* (1985); Legal and Constitutional Committee of Victoria, *Report to Parliament on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights* (1987) at 57.

97 The Road Safety Act 1986 (Vic) prohibits certain grounds of defence to persons charged with having more than the prescribed concentration of alcohol in their blood.

98 M Findlay, "International Rights and Australian Adaptations: Recent Developments in Criminal Investigation" (1995) 17 *Syd LR* 278 at 286-9.

99 Sections 56(2) and 60, Road Safety Act 1986 (Vic); Crimes (Custody and Investigation) Act 1988 (Vic); Telecommunications (Interception) (State Provisions) Act 1988 (Cth); Crimes (Blood Samples) Act 1989 (Vic); Crimes (Amendment) Act 1993 (Vic). See J Clough, "Will Mercy Season Justice? An Analysis of Victorian Proposals Relating to the Physical Examination of Suspects (1990) 16 *Mon LR* 251; D Sandor and R White, "Police Powers Extended" (1993) 18 *Alt L J* 299; Editorial (1984) 8 *Crim L J* 349; Editorial, (1987) 20 *ANZJ Crim* 193; D Lane, "The Crimes (Custody and Investigation) Act 1988: New Rules on Questioning Suspects" (1989) 63 *Law Inst J* 384-6.

100 Sections 15 and 26 of the Crimes (Criminal Trials) Act 1993 (Vic) impose sanctions (in the form of a comment to the jury or a longer sentence, respectively) on an accused for unreasonable failure to co-operate with the pre-trial disclosure process provided for in s 11 of the Act.

101 See Human Rights Commission, above n 96 for Commonwealth provisions allowing for the indefinite detention of "habitual criminals" and the Sentencing (Amendment) Act 1993 (Vic) for similar provisions at the State level in relation to prisoners convicted of any of over sixty different offences who are considered to constitute a "serious danger to the community".

102 See comments on the Drug Trafficking (Civil Proceedings) Act 1990 (NSW) in T Nym, "Drug Trafficking (Civil Proceedings) Act: Concern Over Access to Legal Representation" (1990) 28 *Law Soc J* 38

103 Other developments which could adversely affect the rights of accused persons include calls for the abolition of committal proceedings, the proliferation of various forms of "inquiry" into criminal activities in which the privilege against self-incrimination does not apply but which can lead to criminal prosecutions, and the creation of serious offences triable summarily.

vulnerable to challenge. If some or all of the above provisions were to be found invalid, substantial disruption of the day-to-day workings of the criminal justice system would result. To assess the likelihood of such a decision in relation to every piece of legislation just mentioned it would be necessary to examine in detail the relationship between each provision and the right to a fair trial. It is therefore appropriate to focus on a single provision in order to illustrate the types of issues which could be expected to arise in the course of such an examination.

Section 360A of the Crimes Act 1958 (Vic) was inserted by s 27 of the Crimes (Criminal Trials) Act 1993. The purpose of the 1993 Act was to "encourage the speedy resolution of complex criminal trials, to streamline the entire criminal justice system and allow for the effective delivery of justice in Victoria".[104] Of all its provisions, the new s 360A provoked the biggest outcry.[105] It was problematic for a number of reasons, some of which have been commented upon elsewhere.[106] In relation to Part One of this paper, s 360A is relevant because, in so far as it represents an attempt by the Victorian government to define and limit the grounds on which courts may grant a stay or adjournment, the provision provides a dramatic illustration of the perceived threat to executive freedom implicit in the High Court's expansion of the notion of abuse of process. However, this Part is concerned with the possibility, suggested by several observers, that s 360A infringes the right to a fair trial as laid down in *Dietrich*.[107]

Section 360A provides:

360A. Adjournment or stay of trial

(1) Subject to subsection (2) and despite any rule of law to the contrary, if–

(a) a person is committed for trial; or

(b) a presentment has been filed–

the fact that an accused has been refused legal assistance in respect of a trial is not a ground for an adjournment or stay of a trial.

(2) If a court is satisfied at any time before or during a trial that–

(a) it will be unable to ensure that the accused will receive a fair trial unless the accused is legally represented in the trial; and

(b) the accused is in need of legal assistance because he or she is unable to afford the full cost of obtaining from a private practitioner legal representation in the trial–

the court may order the Legal Aid Commission of Victoria to provide assistance to the accused, on any conditions specified by the court, and may adjourn the trial until such assistance has been provided.

(3) Despite anything in the *Legal Aid Commission Act* 1978, the Legal Aid Commission of Victoria must provide legal representation in accordance with an order under subsection (2).

Section 360A has been selected as a representative example because it was enacted with the express purpose of achieving greater economy of time and money in the

104 Vic LA Deb 1993, Vol 411 at 1360.

105 K Fletcher, "Legal Aid: Right or Privilege?" (1993) 18 *Alt L J* 21; J Giddings above n 1.

106 J Lynch, "Section 360A and the Dietrich Dilemma" (1993) 67 *Law Inst J* 838; F H Vincent, above n 1.

107 Observers include K P Duggan, above n 5 at 19; G Zdenowski, "Defending the Indigent Accused in Serious Cases: A Legal Right to Counsel?" (1994) 18 *Crim L J* 135.

administration of criminal justice and in response to a particular decision of the High Court which, by effectively declaring a right to publicly funded legal assistance in all but exceptional cases, seemed to create yet another obstacle to the prosecution of serious offenders in a State where "law and order" had become a highly politicised issue. Should the High Court declare an implied constitutional right to a fair trial, the validity of the provision would depend on a number of considerations.

What constitutes a fair trial?

The question of what constitutes a fair trial raises issues of content and scope. Obviously, these issues are closely related: for example, the content of the fairness requirement may vary according to the stage of the criminal process at which legislative interference takes place or the type of offence involved. For the sake of clarity the two matters will be dealt with separately.

(i) Content. The High Court has made it clear that, whether the right to a fair trial is regarded as grounded in the common law or entrenched in the Constitution, the content of the fairness requirement must depend upon the facts of the particular case.[108] Therefore, questions of content are essentially about the weight to be attached to particular rights or protections in determining whether a trial has been or is likely to be fair.

Because s 360A deals with the availability of legal assistance, the appropriate question must be: in what circumstances will the unavailability of legal representation result in an unfair trial? At first glance, the question of content is relatively easily answered in this case by reference to the judgments of Deane and Gaudron JJ (both of whom characterised the right to a fair trial as a constitutional right) in *Dietrich*.[109] Both agreed with Mason CJ and McHugh J that "the desirability of an accused charged with a serious offence being represented is so great" that a trial should proceed in the absence of representation only in exceptional circumstances.[110] This view does seem to give a great deal of weight to the availability of legal representation. However, all the majority judges thought the general proposition that the trial of an unrepresented accused will necessarily be unfair should be qualified in the following specific ways: first, the accused must be "indigent"; second, the offence charged must be "serious"; and third, the inability of the accused to obtain legal representation must involve no "fault" on his or her part. The Court also introduced a general limitation in the phrase "in the absence of exceptional circumstances".[111]

Since *Dietrich's* case a good deal of literature has been produced exploring the various interpretations which might be given to the terms "indigent", "serious" and "fault" and attempting to define "exceptional circumstances".[112] There have been a few,

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108 Above nn 25 and 26.

109 *Dietrich v R* (1992) 177 CLR 292 at 337 per Deane J and at 371 per Gaudron J.

110 Ibid at 311.

111 Ibid at 315 per Mason CJ and McHugh J, summarising the position of the majority.

112 See J Badgery-Parker, above n 5; W F Braithwaite, "Dietrich: Practical Application" presented at the Law Society of South Australia Criminal Law Conference, October 1994; "Dietrich v the Queen" (1993) 147 *ACT Law Soc Gazette* 47; K P Duggan, above n 5; G Durie "No Fair Trial Without Representation: New Trial Ordered for Indigent Accused" (March 1993) *Law Soc J* 48; P A Fairall, "Trial Without Counsel: Dietrich v the Queen" (1992) 4 *Bond L R* 41; P Rofe, "Fair Trial and Reform of Criminal Law" (1995) *Law Soc SA CLE*; S Tilmouth,

but only a few, decisions on these matters.[113] This is not the place to further that discussion; however, it is worth noting that even where there exists a convenient High Court decision relating directly to the question of content to be determined, the practical details remain hazy. How much more difficult for legislatures to determine in advance the relative importance of other elements of a fair trial!

That said, the High Court has given some indication of which elements will be regarded as important to a fair trial by reference to the provisions contained in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[114] As was pointed out in *Dietrich*, these provisions do not form part of our domestic law.[115] However, it seems reasonable, in view of the increasing willingness of Australian courts to consider international conventions and decisions of the European Court of Human Rights, to suppose that international norms will contribute to the development of the content of the right to a fair trial.[116]

(ii) Scope. The issue of the likely scope of a constitutional right to a fair trial raises a number of questions. For example, at what point in the criminal process will non-compliance with particular aspects of the fairness requirement necessarily result in an unfair trial? And what counts as a trial for the purposes of the right (in particular, does it apply to trials for non-serious offences)?

Neither of these questions is likely to be crucial to the validity or invalidity of s 360A, since it is concerned specifically with representation at the trial itself and purports to cover all types of criminal offences. However, in this sense s 360A is perhaps atypical; much of the legislation which has given rise to civil liberties concerns relates to earlier stages of the criminal process — for example, investigation by the police — or else deals with what might be regarded as less serious offences (which nevertheless carry quite heavy penalties). At present it is impossible to say whether legislative encroachments on the right to silence or the presumption of innocence in these circumstances could be held invalid as infringing the right to a fair trial.

"Legal Aid in Australia" in *Convention Papers, 28th Legal Convention (26-30 September 1993)* Vol 2; G Zdenowski, above n 107.

113 Relevant decisions include *R v Helfenbaum* (1993) 65 A Crim R 264; *Fuller v Field and South Australia* (1994) 62 SASR 112 (special leave refused, 26 August 1994); *New South Wales v Cannellis* (1994) 124 ALR 513; *R v Small* (1994) 33 NSWLR 575; *South Australia v Judge and Russell* (1994) 62 SASR 288; *State of South Australia v Russell and Craig* (1994) 176 LSJS 84; *R v Kouronos* (District Court of South Australia, 17 June 1993, unreported)

114 *Dietrich v R* (1992) 177 CLR 292 at 305 per Mason CJ and McHugh J.

115 It is clear that even those protections which are included in Article 14 and are regarded as deeply ingrained in the common law would not necessarily be seen as essential elements of an implied constitutional right to a fair trial. For example, the privilege against self-incrimination, which is found in Article 14(3)(g) of the ICCPR and which has been described as a "cardinal principle" of the administration of Australian criminal law (*Sorby v Commonwealth* (1983) 152 CLR 281 at 294 per Gibbs J), is certainly liable to modification or abrogation by the legislature: *Sorby v Commonwealth* (1983) 152 CLR 281; *Reid v Howard* (1995) 69 ALJR 863 per Toohey, Gaudron, McHugh and Gummow JJ.

116 K P Duggan, above n 5 at 29; M Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol — a View From the Antipodes" (1993) 16 *UNSWLJ* 363; P Mathew, "International Law and the Protection of Human Rights in Australia: Recent Trends" (1995) 17 *Syd LR* 151.

One point which is worth noting in this context is that the relative weight of factors going to the scope of a constitutional right to a fair trial might well be influenced by the nature of the argument by which the right is shown to exist. For example, the stage of the criminal process at which legislative interference takes place may be of greater relative importance in relation to a right based on the separation of judicial power than in relation to a right based on fundamental liberties. On the other hand, if the type of offence is the relevant consideration, the likely consequences of conviction might carry more weight with respect to a right based on the protection of fundamental liberties than with respect to a right designed to protect the integrity of the judicial process. In the latter case, the degree of interference with the conduct of the trial is likely to be the primary concern.

Counsel for the applicant in *Dietrich* suggested that the experience of other countries such as Canada and the United States might provide some guidance as to the existence or non-existence of a common law right to legal representation.[117] The majority rejected this suggestion on the grounds that such experience had been shaped by the terms of constitutional provisions which had no parallel in Australia.[118] However, if the High Court were to recognise a constitutional right to a fair trial, there would be no need to discount the American cases, which contain a large amount of potentially useful material concerning the scope of the right to a fair trial.[119] This argument is supported by the willingness of Deane J (who did recognise a constitutional basis for the right), to have regard to overseas judgments which are "concerned to identify the practical content of the notion of a fair trial by reference to standards which are common to the legal systems of this country, the United States and many other common and civil law countries".[120] More recent High Court decisions indicate that the scope of the Australian common law right to a fair trial is likely to develop more narrowly than the constitutional right recognised in the United States.[121] If that prediction is correct, the question of scope could represent at least a potential point of divergence between the common law right to a fair trial which has already been recognised by Australian courts and the constitutional right now under discussion.

Is the provision in question to be construed as infringing the right to a fair trial?

Obviously, questions of construction can only be answered in relation to particular legislative provisions. It should be noted, however, that even if a piece of legislation is construed so as to remove a right or privilege traditionally available to an accused, that would not be enough to invalidate the legislation unless it could also be shown that such removal would be likely to result in unfairness. Similarly, even if the legislation

117 *Dietrich v R* (1992) 177 CLR 292 at 293.

118 Ibid at 307.

119 For examples of United States cases which are relevant to the scope of the right to counsel, see A Mason, "Fair Trial" (1995) 19 *Crim L J* 7 at 9.

120 *Dietrich v R* (1992) 177 CLR 292 at 333.

121 See *New South Wales v Cannellis* (1994) 124 ALR 513, in which it was decided that legal representation need not be provided to witnesses to a Royal Commission who were at risk of prosecution as a result of giving evidence, and *Fuller v Field and South Australia* (1994) 62 SASR 112, in which the High Court refused special leave to appeal from a South Australian Supreme Court decision to the effect that the majority ruling in *Dietrich* did not apply to committal proceedings. See A Mason, above n 119.

does not interfere with an established element of the right to a fair trial, such as the right of cross-examination or the right of an accused to be present at trial, it might still be invalid if it affects the overall process in such as way as to create unfairness.

With respect to s 360A, the question of construction is whether the circumstances in which a court is entitled to grant a stay or adjournment on the grounds that the accused will be unrepresented at trial are narrower under s 360A than under the High Court's test in *Dietrich*.[122] At first glance, it would seem that if an applicant can satisfy the requirement in para (2)(a) (which courts will presumably interpret by reference to the *Dietrich* decision), that should be enough, so that any additional requirement such as that in para (2)(b) could constitute an infringement of the right to a fair trial. However, on closer inspection it is hard to imagine a situation in which an applicant would be able to satisfy the *Dietrich* test, with its requirement of "indigence", without also being able to satisfy the seemingly less stringent financial requirement in para (2)(b).[123]

It is submitted that s 360A could be construed so as not to interfere with the right to a fair trial. This conclusion demonstrates the importance of matters of construction in determining whether or not a particular piece of legislation is likely to be found invalid in the face of a constitutional right to a fair trial. Even if the subject-matter of a provision can be shown to coincide exactly with the content and scope of the right, the provision itself will not necessarily constitute an infringement.

What is the nature of the "right" to a fair trial?

Had the discussion above led to the opposite conclusion (in other words if s 360A was to be construed as infringing the right to a fair trial), the next question would be whether the otherwise invalid provision might be allowed to stand on the grounds that it is supported by "compelling reasons".[124] Presumably if the validity of legislation designed to improve the administrative efficiency of the criminal process were to be challenged before the High Court, the government concerned would argue that the urgent need for reform of the criminal justice system constitutes sufficient justification for any infringement of the rights of accused persons. Whether or not such an argument would be likely to be accepted by the Court would depend on the exact nature of the implied constitutional right to a fair trial.

The nature of implied constitutional rights and freedoms is the subject of an emerging debate. Much of this debate relates specifically to the implied freedom of political communication mentioned earlier and may therefore not be directly relevant to the right to a fair trial. However, one of the most important questions raised in that context is relevant here — that is, whether an implied guarantee is to be regarded

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122 (1992) 177 CLR 292.

123 This issue is further complicated by a recommendation of the working party set up by the Standing Committee of Attorneys-General to report on action to be taken in light of the *Dietrich* decision, to the effect that each jurisdiction should enact legislation equating the relevant Legal Aid Commission's assessment as to means with the concept of indigence for the purposes of the *Dietrich* principle. See Commonwealth Director of Public Prosecutions, *Annual Report* (1992-3) at 85-6.

124 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 267 per Murphy J.

merely as an immunity from legislative interference or as a source of positive rights.[125] The notion that a constitutional right to a fair trial might constitute a source of positive rights is radical. It would allow an accused person to enforce his or her entitlement to a fair trial through the courts against the state. Depending on the content of the fairness requirement, such a right would oblige governments to provide legal representation, interpreting facilities and possibly even compensation for lengthy pre-trial imprisonment or wrongful conviction.[126]

Clearly, the characterisation of the right to a fair trial as a source of positive rights would impose an enormous financial burden on government and for that reason would almost certainly be rejected by the High Court.[127] However, it is possible that the Court would be prepared to adopt a broad expression of the constitutional right to a fair trial which would extend beyond prevention of legislative interference with an accused person's right not to be tried unfairly (the only form of the right to a fair trial recognised at common law), to cover a right to be tried fairly.[128] This approach would affect the validity of legislation designed to reduce the number of cases coming before the courts, either by encouraging the accused to plead guilty or by introducing alternative procedures, such as offering the victim of crime the option of dealing with the suspected offender privately rather than through the court system.[129] These devices are certainly open to abuse and in some circumstances could constitute a threat to the civil liberties of the suspect or accused person; but as long as the right to a fair trial is interpreted as meaning only that if there is to be a trial at all, it must be fair, there is nothing to stop their proliferation.

One final point with respect to the nature of the right to a fair trial is that, like the scope of the right, it may depend to some extent on which of the two arguments discussed in Part Two is accepted by the Court. This point may be illustrated by reference to the entitlement of an accused person to waive his or her right to a fair trial. If the right to a fair trial is seen mainly as a protection of individual liberties, there would appear to be no reason why an accused person could not waive the right in an appropriate case. However, if its primary purpose is to maintain the independence of the judiciary, then its benefit to the accused could almost be described as incidental and waiver ought not to be permitted.[130]

CONCLUSION — "THE INTERESTS OF JUSTICE"

It is clear that even if a majority of the High Court were to adopt the view that the Australian Constitution contains an implied right to a fair trial, a great many questions about the content, scope and nature of that right would still need to be answered. Even

125 See *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 at 125 per Mason CJ, Toohey and Gaudron JJ.

126 The outcome of the case of *Kruger v Commonwealth* (High Court of Australia, 12-15 February 1996), in which the plaintiffs did claim damages for the breach of certain implied constitutional freedoms which they characterised as free-standing rights, is awaited with interest.

127 See the judgments of Brennan and Dawson JJ in *Dietrich v R* (1992) 177 CLR 292.

128 Above n 3.

129 See P Sallman and J Willis, *Criminal Justice in Australia* (1984) at 91-2.

130 See the discussion by L Zines of *Brown v R* (1986) 160 CLR 171 in *The High Court and the Constitution*, above n 77 at 328.

so, it would be a mistake to suppose that this issue is of purely academic interest. At least three criminal cases have been heard at Supreme Court level in which the validity of legislation (Commonwealth and State) has been challenged along the lines suggested by Deane and Gaudron JJ in *Dietrich*.[131] We may expect many more such challenges; but it is still early enough to inquire whether the characterisation of the right to a fair trial as a constitutional right would actually be likely to improve the quality of criminal justice in Australia.

The point has repeatedly been made by both judges and commentators that the interests of justice are not limited to the interests of the individual accused, but include the interests of victims of crime, of witnesses and jurors, and of the community in the punishment of crime, the protection of the innocent, the deterrence of future criminal conduct and the wise expenditure of public funds.[132]

While this is undoubtedly true, there is a danger that in emphasising the importance of other interests we will lose sight of the severe and irreversible impact of conviction on the life of the individual accused. Weighing up the interests of a particular defendant whose liberty is at stake against (for example) the interests of potential victims of future crimes is necessarily a somewhat artificial exercise; and the less concrete the other interests involved, the easier it is to manipulate the outcome for political purposes. A constitutional right to a fair trial would be valuable because it would provide a clear indication that fairness to the accused is the paramount consideration in any criminal trial and that the rights of the accused should be compromised only in the exceptional circumstances where such compromise is fully justified.

One of the difficulties associated with a common law right to a fair trial is that it allows governments to avoid the expensive, time-consuming and politically sensitive task of identifying the causes of problems in the administration of criminal justice. For example, much of the legislation referred to in the previous section seems to reflect the assumption that protecting the innocent from wrongful conviction is incompatible with economic and administrative efficiency. But this is not always the case. Some legislative measures designed to reduce cost may actually increase efficiency; for example, there is a convincing argument that it would be cheaper overall to provide legal representation to anyone who needs it than to pay for the longer trials which usually result when an accused person is forced to represent himself or herself.[133] Similarly, measures introduced by the courts in order to promote fairness can sometimes improve efficiency; for example, it seems that the indirect requirement laid down by the High Court in *McKinney*,[134] that police interviews be recorded, may reduce the number of cases going to trial by discouraging police from fabricating evidence, on the one hand, and encouraging the accused to plead guilty in cases where there has been a genuine confession, on the other. The existence of a proper record might also forestall the

131 (1992) 177 CLR 292: "*S*" *(a child) v R* (Supreme Court of Western Australia, 3 February 1995, unreported); *Commonwealth Director of Public Prosecutions v Phillip Andrew Bayly* (Supreme Court of South Australia, 4 November 1994, unreported); *Ngoc Tri Chau v Director of Public Prosecutions (Cth)* (1995) 132 ALR 430.

132 J Badgery-Parker, above n 5 at 172; see also *Barton v R* (1980) 147 CLR 75 at 101 per Gibbs ACJ and Mason J, quoted in *Dietrich v R* (1992) 177 CLR 292 at 335 per Deane J.

133 J Badgery-Parker above n 5 at 179

134 *McKinney and Judge v R* (1991) 98 ALR 577.

expense of a *voir dire* and lengthy cross-examination where the admissibility or probative value of confessional evidence is in dispute.[135] That said, it is important to realise that just as protecting the accused need not always result in inefficiency, measures adopted primarily to promote efficiency are not always harmful to the interests of the accused. This is because, as the High Court recognised in the abuse of process cases discussed in Part One, inefficiency itself often gives rise to unfairness through excessive expense or delay.

These observations demonstrate that reform of the administration of criminal justice will inevitably be a very complex and delicately balanced process. Given that this is so, it is arguable that there are real drawbacks to the characterisation of the right to a fair trial as a constitutional rather than a common law right. From the point of view of governments searching for the proper balance between protecting the interests of the individual accused and ensuring that the system itself does not collapse under the weight of complicated procedural rules, the threat of having legislation declared invalid on unpredictable grounds can only act as a general deterrent to introducing any changes at all, bad or good. The possibility that the Chapter III argument discussed in Part Two might be extended to the States exacerbates this problem. One of the advantages of the Australian federal system is the opportunity it provides for experimentation and innovation at State level, which can help to identify the best solutions to national problems. This is especially so in the area of human rights because of the greater flexibility of State constitutions relative to that of the Commonwealth.[136] It would be a pity if creative ideas for the improvement of the administration of criminal justice were to be stifled because of rigid constraints on State governments imposed by the High Court's interpretation of the federal Constitution.

There are also disadvantages from the courts' point of view. The development of a broad notion of fairness discussed in Part One was the result of judges' concern to avoid improper convictions. The value of such a broad notion for this purpose is its adaptability. It is possible that framing the right to a fair trial in constitutional terms might stunt its further development at common law, thereby making it less effective as a weapon against injustice in individual cases.

In summary, for both governments and the courts, the constitutionalisation of the right to a fair trial could mean the worst of both worlds: uncertainty, without flexibility. If that is true, then where is the way forward? The first and most important step is for those who are ultimately responsible for the administration of criminal justice — the judiciary and the executive — to recognise that they must work together in order to formulate a comprehensive and rational reform strategy. In the aftermath of *Dietrich*, it is clear that any attempt on the part of the judiciary to force the hand of the executive might well create more problems than it solves.[137] On the other hand, the

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135 J Badgery-Parker, "The Criminal Process in Transition: Balancing Principle and Pragmatism — Part II" (1995) 4 *JJA* 193 at 209.

136 Controversial areas in which State and Territory governments have recently taken the initiative include the introduction of legislation permitting voluntary euthanasia and the drafting of experimental Bills of Rights. Regarding the flexibility of State constitutions, see G Craven, "A Few Fragments of State Constitutional Law" (1990) 20 *UWALR* 353 at 355.

137 For example, the Australian Law Reform Commission has suggested that the decision in *Dietrich* has the potential to create a barrier to women's access to justice by directing legal aid funding away from family law matters to criminal matters: Australian Law Reform

courts have ready access to detailed empirical information about the everyday operation of the criminal justice system which the government urgently needs. The establishment over the last few years of collaborative research projects which draw on the resources of both governments and courts is a sign that the need for co-operation is beginning to be understood.[138] Such developments are to be encouraged, but there is a long way to go before the rhetoric of the "right to a fair trial" can be made to correspond with reality.[139]

Commission, *Equality Before the Law: Justice for Women* (Report No 69, 1994) at 97. See also F H Vincent, above n 1.

138 In August 1992 a special meeting of the Standing Committee of Attorneys-General adopted the recommendation of the National Crime Authority 1992 White Collar Crime Conference that it conduct research into the "anatomy" of long criminal trials. The Committee formally referred this project to the Australian Institute of Judicial Administration, which is currently supervising a number of research projects aimed at streamlining the conduct of criminal trials. See C Corns, above n 34.

139 See *Dietrich v R* (1992) 177 CLR 292 at 325 per Brennan J.