

# Dietrich: legal aid re-defined by High Court

The High Court recently considered whether an indigent accused had a right to legal representation at the public expense (*Dietrich v The Queen*; unreported decision 13 November 1992). The Court's examination of this issue, including the concept of a fair trial, raises important ramifications for the provision of legal aid.

## Background

Dietrich had applied to the Victorian Legal Aid Commission for legal assistance to defend charges relating to serious criminal drugs offences. Assistance was refused to defend the charges and was granted only for representation for a plea of guilty. An appeal to a legal aid review committee was unsuccessful. All avenues for legal assistance were exhausted before the trial and Dietrich himself was without the means or money to secure that representation. He appeared unrepresented, and was found guilty by a jury of importing not less than a traffickable quantity of heroin and sentenced to seven years imprisonment. He was acquitted of a charge of possession of a prohibited import, namely heroin.

An appeal to the Full Court of the Supreme Court of Victoria was unsuccessful and Dietrich sought special leave to appeal to the high Court on the ground that he should not have been required to stand trial without legal representation.

A majority of the High Court (5:2; Brennan and Dawson JJ dissenting) were of the view that special leave to appeal should be granted, the appeal allowed, the conviction set aside and a new trial ordered. Brennan and Dawson JJ concluded that special leave to appeal should be granted but the appeal should be dismissed.

by GRAEME DURIE\*

## Right to a fair trial

The Court unanimously concluded that Australian law did not recognise the right of an indigent person to publicly funded legal assistance even where on trial for a serious criminal offence. On the other hand, an accused did have a right to a fair trial<sup>(1)</sup>. While the concept of a fair trial was impossible to formulate comprehensively or exhaustively in advance<sup>(2)</sup>, it was clear that where an accused appeared unrepresented there was a greater likelihood of a defect arising in the course of the trial as a result of which there was a miscarriage of justice<sup>(3)</sup>. This is not a novel statement. However, the Court has now gone significantly further in this decision in emphasising the significance of legal representation to the conduct of a fair trial.

The majority of the Court concluded that where an indigent accused appeared, through no fault of his or her own, unrepresented in a serious criminal matter, the trial judge should (in the absence of exceptional circumstances) grant a sought stay or adjournment of the proceedings until legal representation was obtained as the accused was otherwise likely to be denied a fair trial<sup>(4)</sup>.

Toohy J noted that the advantages to an accused of legal representation were well recognised (at 60)<sup>(5)</sup>. It was clearly in the best interest of the accused and also of the administration of justice than an accused be represented, particularly in relation to a serious criminal offence<sup>(6)</sup>.

While the judge may extend a "helping hand" to an unrepresented accused and the prosecution had a duty to act fairly, the assistance of these

persons can clearly only be limited and may well interfere with the proper performance of their true functions in the proceedings<sup>(7)</sup>.

## The dissenting position

Dawson J, although dissenting, acknowledged that "it is undeniable that if trials were to move closer to the attainment of perfect justice, every accused would be represented by competent counsel" (at 51). However, he pointed out that the interests of justice cannot be pursued in isolation (at 56). It required the reconciliation of competing demands on the public purse and the funds available for legal aid were necessarily limited (at 56). The determination of this funding was not an appropriate function for the courts. Their function was to ensure that the accused received "the fairest possible trial in all the circumstances" (at 56)<sup>(8)</sup>. "[A]lthough the absence of competent representation is an obstacle in the way of a fair trial, it is an obstacle to be overcome by the trial judge however burdensome the task" (at 51).

The requirements of a fair trial "presently do not, and cannot in a practical world, include the availability of representation for an accused at public expense" (at 56). While lack of legal representation because of impecuniosity of the accused might render a defect in the course of some trials more likely and consequently a miscarriage of justice, of itself that lack of representation cannot be said to be unfair (at 49-50).

Brennan J also concluded that there was no miscarriage of justice arising simply from the fact that the accused was without legal representation (at 29). While his Honour considered that "[i]f public funds are not available to provide legal representation in serious criminal cases, the administration of criminal justice will not be,

or at least will not be seen to be, evenhanded," he concluded that it was for the legislature and the executive and not the courts to allocate appropriate public resources to the provision of legal aid (at 29)(9).

### The majority view

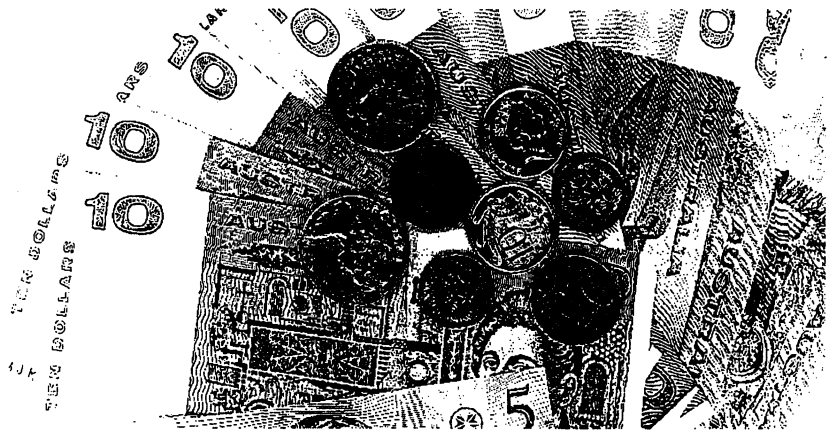
Toohy J agreed that "a court cannot control the allocation of government funds such as those provided for a legal aid scheme," but pointed out that "once an accused appears before a court, the unavailability of legal representation does become a matter for the court" (at 64)(10). The court must assess whether this affected the ability of the accused to receive a fair trial and, therefore, whether the trial should proceed.

Mason CJ and McHugh J, in a view that represented the majority of the Court, concluded that "the desirability of an accused charged with a serious offence being represented is so great...that the trial should proceed without representation for the accused in exceptional cases only" (11).

Gaudron J referred to the fact that "every judge in every criminal trial has all powers necessary or expedient to prevent unfairness in the trial" (at 71-72). In view of this power, the majority concluded that "a trial judge who 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" should, in the absence of exceptional circumstances, adjourn, postpone or stay the trial until legal representation is available. If the application is refused, the resulting trial would normally be unfair and, if so, "any conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice" (12).

### Implications for provision of legal aid

The High Court's decision raises a number of important issues for the provision of legal aid in Australia. One of the unfortunate features is that in many respects the ambit of the



principle enunciated by the Court is unclear with the consequence that its impact cannot be accurately predicted.

Issues arising from the decision in a legal aid context include:

- \* the nature of the 'exceptional circumstances' in which the lack of legal representation will not of itself render the proceedings unfair;
- \* the nature of an indigent accused;
- \* the nature of the legal representation necessary;
- \* the impact of the decision on the application of a merit test in serious criminal matters by legal aid commissions and expensive criminal cases guidelines; and
- \* the need for additional funding for the provision of legal aid.

### Exceptional circumstances

Some idea of the nature of the 'exceptional circumstances' envisaged by the majority may be gained from the judgment of Deane J. His Honour gave examples of those circumstances where a criminal trial will be relevantly fair although the accused appeared unrepresented (13). The most obvious category he considered was where the accused wished no representation or persistently neglected or refused to take advantage of representation available.

Deane J also identified two other exceptional circumstances. These were where the accused decided not to use his or her own financial means available to obtain legal representation and (arguably) those categories of criminal proceedings where the lack of representation would not render the trial unfair. He suggested that as an

example of these categories "there is much to be said for the view that proceedings before a magistrate or a judge, without a jury, for a non-serious offence would not be rendered inherently unfair by reason of inability to obtain full legal representation." Nevertheless, his Honour noted that it was not necessary to pursue this question as the present case involved serious offences.

### Serious criminal offences

None of their Honours adverted in any detail to these offences. Nevertheless, Deane J gave consideration to the concept of a "non-serious offence: which he described as involving "no real threat of deprivation of personal liberty" (at 42).

### Indigent accused

It is not clear from the judgment that a person would be judged impecunious according to the same standards that operate in relation to the means tests applied by commissions.

Some indication of what is to be understood to be an indigent accused is to be gathered from the judgment of Deane J. His Honour considered that one category of case in which a criminal trial will be relevantly fair notwithstanding that the accused is unrepresented was where that person had the financial means to obtain legal representation but determined to incur the expense (at 41-42). He concluded that: "...in the context of the current level of legal fees, it is arguable that no accused should be required to devote a substantial part of

his possessions to obtaining legal representation in resisting a prosecution for an alleged offence of which the law presumes him to be innocent. Nevertheless, it appears to me that it cannot be said that a trial is unfair by reason of lack of legal representation in a case where the accused possesses the means to obtain such representation but elects not to utilise them."

Commenting upon the problems that would flow from recognition of a right to publicly funded counsel, Mason CJ and McHugh J noted that the ad hoc development of procedures according to which judges determined whether a person was impecunious for the purposes of that right was "unwise and undesirable" (at 14). Such a concern would appear to arise equally in relation to the assessment of impecuniosity for the purposes of the minority decision.

### Level of legal representation

Another of the problems identified by Mason CJ and McHugh J, in commenting upon recognition of a right to publicly funded counsel, were the questions of what particular degree of experience would be necessary and how could a trial judge properly monitor this (at 14). Again, such a concern would appear to arise equally in relation to the majority principle.

### Merit testing

The application of the merit test in serious criminal matters by some legal aid commissions (NSW does not have a merit test) results in funding only for a plea of guilty where the matter is assessed to be without merit. It can be expected that in the future a significant number of these proceedings may result in the applicant proceeding unrepresented and successfully obtaining and adjournment, or ultimately permanent stay (14), pending the availability of legal representation. One possible practical result of the decision could be the abandonment of merit testing for the trial of serious criminal offences. Certainly, Mason CJ and McHugh J noted that as a result

of the decision, although a legal aid commission may have refused an application for legal aid and the accused had been unsuccessful on review of that decision, "it is possible, perhaps probable, that the decision of [the commission] would be reconsidered if a trial judge ordered that the trial be adjourned or stayed pending representation being found for the accused" (at 15).

On the other hand, there is the possibility that legal aid commissions, their funds already severely stretched, will take no action upon the decision to increase the allocation of those funds to criminal matters. This possibility was publicly canvassed by the chairman of the Victorian Legal Aid Commission, Peter Gandolfo, in the *Herald Sun* (14 November 1992 at page 2), who indicated that as the Commission had no available resources the decision would have "no practical result."

### Expensive criminal cases guidelines

Similar considerations arise in relation to the adoption by legal aid commissions of expensive criminal case guidelines. The Victorian Legal Aid Commission has such a guideline, which provides that where the total cost of providing legal assistance for a criminal case may exceed \$200,000 the Commission will not provide legal assistance in the absence of additional funding for the purposes of the case.

### Additional funding

Gaudron J encapsulated the majority view in acknowledging that the decision "may [have] consequences for governments in relation to the funding of [legal aid] schemes," but concluded that "whatever the cost, it is for the courts to decide what is or is not fair in a criminal trial" (at 73).

In this respect, Mason CJ and McHugh J point to the fact that only the Commonwealth and South Australian Attorneys-General opted to intervene in the proceedings and that no argument was put that the recogni-

tion of the asserted right to publicly funded counsel would impose an unsustainable financial burden on government. In view of these considerations, their Honours considered that the "should proceed on the footing that [the majority approach] is not likely to impose a substantial financial burden on government and it may require *no more than a reordering of the priorities according to which legal aid funds are presently allocated*" (at 16) (emphasis added).

In order to ensure legal representation for the purposes of the majority principle, there would clearly be a need for a potentially substantial reallocation of legal aid commission funds to criminal matters. Clearly this reallocation of even further funds to criminal matters would have an enormous impact on the degree to which legal aid commissions would be able to continue funding non-criminal matters in the absence of a quite substantial increase in funding.

### NOTES:

(1) Mason CJ and McHugh J at 3, 15; Deane J at 36; Toohey J at 59; Gaudron J at 70. (2) Mason CJ and McHugh J at 3; Toohey J at 59. See also Deane J at 33-34; Gaudron J at 72. (3) Dawson J at 49. (4) See *infra* n.19 (5) See also Brennan J at 21; Deane J at 41; Dawson J at 51; Gaudron J at 76, 81. (6) Mason CJ and McHugh J at 5. (7) Mason CJ and McHugh J at 5-6; Deane J at 40-41. See also Toohey J at 60; Gaudron J at 78. (8) See also Brennan J at 29; Gaudron J at 73. (9) See further Brennan J at 21; 25-27. (10) See also Gaudron J at 73. (11) Judgment at 15. See also Deane J at 43; Toohey J at 69; Gaudron J at 87, 83 (although her Honour's comments at 78 leave open the application of this principle in any criminal matter). (12) This majority position is set out in the judgment of Mason CJ and McHugh J at 15 ("likely to be unfair"); Deane J at 43 ("as a general proposition and in the absence of exceptional circumstances"); Toohey J at 69 ("appellate court would be slow to conclude...is not likely to have led to the loss of a chance of acquittal"); Gaudron J at 78 ("difficult to accept...is a fair trial"), 83 ("legal representation is essential for the fair trial of serious offences"). Toohey J at 63 qualifies the obligation to adjourn the trial with reference to matters other than merely the interests of the accused, such as the situation of witnesses, consequences for the presentation of the Crown case and the court's programme generally. (13) Judgment at 41-42. (14) See, for example, Deane J at 36-37. Brennan J at 28 criticises this position.

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