THE RIGHT NOT TO BE TRIED UNFAIRLY WITHOUT COUNSEL: *DIETRICH v THE QUEEN*

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HIS HONOUR: I want to understand this, Mr Dietrich - if you will listen to me - that I have no power to give you legal representation.

ACCUSED: You have the power to adjourn the matter, sir.

HIS HONOUR: I don't propose to adjourn the matter. The matter is an alleged offence, which occurred the year before last, and it is desirable that the matter proceed to trial.

ACCUSED: Desired by whose side?

HIS HONOUR: Desirable to the community.

ACCUSED: The community has got no interest in it. If the community is aware that they're putting people in front of court without representation, the community would be aghast.[1]

In Australia an accused person has the right to be represented by counsel,[2] but no right to be provided with counsel at public expense, even where the offence charged is serious.[3] Judges have neither the power to distribute legal aid funds for the appointment of defence counsel, nor the power to conscript members of the bar for that purpose. There is no unqualified right to legal aid but at most an entitlement to full and proper consideration of an application for legal aid. A trial judge may, however, in the exercise of discretion, stay the proceedings pending the appointment of counsel. Traditionally, Austral-

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1. *R v Dietrich*, County Court, Victoria, 23 May 1988, 152/1988, transcript, 99.
2. (Cth) Judiciary Act 1903 s 78; (Vic) Crimes Act 1958) s 397: (NSW) Crimes Act 1900 s 402; (Qld) Criminal Code s 616; (WA) Criminal Code s 634; (SA) Criminal Law Consolidation Act 1935 s 288; (Tas) Criminal Code 1924 s 368.
3. *McInnis v The Queen* (1979) 143 CLR 575 Barwick CJ, 579; Mason J (as he then was), 581; *Hanias* (1976) 14 SASR 137, 142; *Bicanin* (1976) 15 SASR 20, 25.

ian courts have adopted a conservative approach to the exercise of that discretionary power.[4] The shameful consequence is that it has been customary (and all too common) to force a person who cannot afford legal representation to go to trial undefended, even in cases of serious crime. In *Dietrich v The Queen*[5] ("*Dietrich*") the Full Bench of the High Court of Australia, in a dramatic majority decision,[6] signalled that it was time for a new approach to the issue of legal representation.[7] In doing so, the Court adopted, in essence, the view of Justice Murphy expressed some 13 years ago in his dissenting judgment in *McInnis v The Queen*.[8]

The majority judgments in *Dietrich* may be summarised as follows. An accused has a right not to be tried unfairly.[9] Trial courts possess the power to make appropriate orders, and where necessary, stay proceedings, in order to ensure that a person is not subjected to an unfair trial. Unless there are "exceptional circumstances", experience shows that the trial of an unrepresented accused on a serious charge will result in an unfair trial. It follows that, an adjournment should be granted to enable the accused to obtain representation. In determining whether exceptional circumstances exist, the court should consider not only the interests and wishes of the accused, but also the interests of the community in the prosecution and punishment of offenders.

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4. This is well illustrated by *McInnis v The Queen*, ibid. D was charged with rape and S agreed to represent him. On the day before the trial, S was told that the Legal Aid Commission had lost the relevant papers. The Commission then considered the application as a matter of urgency and rejected the application. S promptly withdrew from the case. D's request for an adjournment to enable representation to be obtained was refused. The Court of Criminal Appeal dismissed an appeal against conviction (Burt CJ dissenting). On appeal to the High Court, held, (Murphy J dissenting) that whether or not the trial judge was correct to refuse an adjournment, no substantial miscarriage of justice had occurred. Mason J (as he then was) agreed with this conclusion although he thought that the trial judge should have adjourned the proceedings, having attached insufficient importance to the need for representation.
5. Unreported, Full Bench of the High Court of Australia 13 November 1992. In these proceedings the author appeared as junior counsel to Mr David Grace LLM, of Grace & Macgregor, Melbourne.
6. Brennan and Dawson JJ dissenting.
7. Surprisingly, despite the major implications for legal aid funding in all jurisdictions, only the Commonwealth and South Australia intervened in the proceedings before the High Court.
8. Supra n 3, 592. His Honour, in a lone dissenting judgment, stated: "If a person on a serious charge, who desires legal assistance but is unable to afford it, is refused legal aid, a judge should not force him to undergo trial without counsel. If necessary, the trial should be postponed until legal assistance is provided, and in an extreme case, the accused, if not already on bail, should be granted bail".
9. *Jago v District Court (NSW)* (1989) 168 CLR 23 Mason CJ, 29; Deane J, 56; Toohey J, 72; Gaudron J, 75.

If the trial proceeds, and the accused is convicted, the power of appeal courts to quash the conviction depends upon a finding that there has been a substantial miscarriage of justice. Justice has miscarried if the accused has lost a chance, which was fairly open, of being acquitted. On a serious charge, the loss of an opportunity for acquittal will almost invariably be found in the absence of legal representation.

In short, where an accused person appears before a court on a serious charge without legal representation, and she or he wishes to be represented, proceedings should be adjourned, postponed or stayed to enable legal representation to be obtained, unless there are exceptional circumstances why the trial should proceed. This rule applies where (1) the offence charged is imprisonable or otherwise "serious"; (2) the court is satisfied that the accused lacks the financial means to pay for legal representation; and (3) the accused wishes to be represented.

EXCEPTIONAL CIRCUMSTANCES

It it not possible to list exhaustively the "exceptional circumstances" which will justify a refusal to adjourn proceedings but it can be said that factors other than the interests of the accused may need to be considered. Justice Toohey observed:

> It is not possible to say that the trial judge must adjourn the trial for there are other considerations to be taken into account. Counsel for the applicant is not right in suggesting that only the interests of the accused are relevant. The situation of witnesses, particularly the victim, may need to be considered as well as the consequences of an adjournment for the presentation of the prosecution case and for the court's programme generally. But ordinarily the requirement of a fair trial will be the prevailing consideration. Therefore, in the absence of compelling circumstances, a trial should be adjourned where an indigent accused charged with a serious offence lacks legal representation, not due to any conduct on the accused's part.[10]

If the trial proceeds in those circumstances without defence counsel, and the accused is convicted, the conviction will almost certainly be quashed. Justice Deane noted: "The conviction without a fair trial necessarily involves substantial miscarriage [of justice]".[11] The notion that a trial judge (or the prosecution) may he able to give a helping hand to the accused, so as to avoid an unfair trial, is illusory and bound to cause problems in the course of the trial.[12]

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10. Supra n 5, 63; and see Deane J, 41.
11. Ibid, 44.
12. Ibid, Mason CJ and McHugh J, 5; Toohey J, 60. As Murphy J noted in *McInnis*, supra n 3, 592: "In an adversary system, it is not [the judge's] function to assist one party. An

Justices Brennan and Dawson dissented. Justice Brennan was not prepared to accept an equation between unfairness arising from a lack of representation and a miscarriage of justice. He argued that because the Court had no power to appoint counsel to represent the defence, the only remedy available to prevent unfairness would be a stay of proceedings. This would be tantamount to a refusal to exercise jurisdiction, and would bring the criminal law to a halt until public funds were made available: "To grant an indefinite adjournment in cases where there is no abuse of process of the courts is inconsistent with their constitutional duty."[13] Whilst a stay would be granted to prevent an abuse of process, not every case of unfairness amounted to an abuse of process, and the two concepts were distinct.[14] Justice Dawson also rejected the reasoning of the majority, saying that there "cannot be a miscarriage of justice merely because an accused is unrepresented when he has no entitlement to representation".[15]

THE FACTS

The applicant was charged in the County Court of Victoria on four counts. The first three counts related to importation or, alternatively, possession of a trafficable quantity of heroin. A fourth charge of possession was laid in relation to a separate quantity of heroin. The offences were punishable by "imprisonment for life or for such period as the Court things appropriate."[16] The applicant applied for legal aid, but the Legal Aid Commission indicated that aid would only be provided for a plea of guilty. An application for aid under section 69(3) of the Commonwealth Judiciary Act 1903 was dismissed as being out of time.

The trial duly proceeded without defence counsel, despite the applicant's strenuous and incessant objections. The meanderings of the forty day trial were punctuated, like Jesus' sojourn in the Wilderness, by constant requests for the intervention of higher authority, of which the excerpt at the beginning of this Note is typical. The applicant was convicted on the first count and acquitted on the fourth. An appeal to the Victorian Court of Criminal Appeal

attempt to do so generally serves only to gloss over procedural injustice..."

13. Ibid, 28.
14. His Honour's conservative approach in *Dietrich* is, at least on the surface, difficult to reconcile with his bold rejection of previous authorities in *Mabo v Queensland* (1992) 107 ALR 1 concerning native title to land, for which his Honour has been publicly criticised, for example, by Justice Meagher of the NSW Court of Appeal for "inventing a new law": see Sydney Morning Herald 20 November 1992, 1.
15. Supra n 5, 49.
16. (Cth) Customs Act 1901, s 235(2).

was dismissed. Special leave to appeal to the High Court was sought on the basis that the Court of Criminal Appeal erred in law:

(i) in holding that the applicant did not have a right to be provided with Counsel at public expense; and/or

(ii) in not holding that by reason of the applicant being unrepresented, a miscarriage of justice had occurred in the circumstances of this case and of the applicant.

The Court allowed the appeal, set aside the conviction and ordered a new trial. Chief Justice Mason and Justice McHugh held that the applicant had been deprived of a real chance of acquittal. His acquittal on one of the four counts, despite his lack of representation, was "central to this conclusion". Their Honours summed up the majority's view by saying that when 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 that situation, in the absence of exceptional circumstances, the trial in such a case 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 of the accused, the resulting trial is not a fair one, any conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.[17]

The *Dietrich* ruling marks a significant departure from previous practice.[18] However, in terms of its juristic basis, it is not a radical decision. In particular, no member of the Court was prepared to fashion a constitutional right to state-funded counsel, despite the availability of various pegs upon which to base such a right. Thus, the "due process" provisions of various Imperial Statutes incorporated into Victorian law were rejected as a basis for the right, despite the appeal of the American experience.[19] Nor was the right to be found in section 397 of the Victorian Crimes Act 1958,[20] although Canadian Courts have opened a pathway in construing a similar provision of

17. Supra n 5, Mason CJ and McHugh J, 19.

18. Ibid. As Deane J noted, in forcing the accused to trial without counsel, the trial judge's view accorded with past practice.

19. See 28 Edw III, c 3 (1354) and 42 Edw III, c 3 (1368). The question is whether the applicant was imprisoned "without being brought in answer by due process of law" (1354) or "put to answer without presentment before justices, or matter of record, or by due process and writ original" (1368): see *Alder v District Court of New South Wales* (1990) 48 A Crim R 420, 430.

20. S 397 provides: "Every accused person shall be admitted after the close of the case for the prosecution to make full answer and defence thereto by counsel".

the Canadian Criminal Code.[21] Nor was the Court prepared to rely upon Article 14(3)(d) of the International Covenant on Civil and Political Rights[22] ("the Covenant") as a basis for implying a right to state-funded counsel. The Covenant enshrines the right to state-funded counsel where the interests of justice require. The Covenant was ratified by the Commonwealth Government in 1980, but the relevant provisions of the Covenant have not been implemented by legislation.[23] Australia has recently acceded to the Optional Protocol, which allows individual citizens to petition the Human Rights Committee of the United Nations in respect of alleged violations of the Covenant.[24] Counsel for the applicant accepted that none of these developments created rights in municipal law. However, he argued that the thrust of cases in the High Court of Australia and elsewhere is to recognise the importance of international agreements in developing and formulating the common law.[25] The Court disposed of this argument on the basis that there

21. Canadian Criminal Code s 577(3) provides that the accused has the right "to make full ... defence personally or by counsel": see *Re Ewing and Kearney v The Queen* (1974) 49 DLR (3d) 619, Seaton JA, 627; *Deutsch v Law Society of Upper Canada Legal Aid Fund* (1985) 48 CR (3d) 166; *R v Rowbotham* (1988) 41 CCC (3d) 1, 65-66; *Barrette v The Queen* (1976) 68 DLR (3d) 260 (SCC).

22. Article 14(3)(d) provides;

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
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> ...
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> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does have sufficient means to pay for it.

23. Legislation implementing the ICCPR was drafted in 1974 but lapsed with a change of Government in 1975. The Commonwealth has established a Commission under the Human Rights and Equal Opportunity Act 1986 with certain monitoring and recommendatory powers. The Covenant is annexed as Schedule 2 to the 1986 Act.

24. Brennan J noted that it was "incongruous" that Australia should adhere to the Covenant containing that provision unless Australian Courts recognise the entitlement and Australian governments provide the resources to carry that entitlement into effect; Supra n 5, 25. For a case illustrating the operation of the First Optional Protocol to the Covenant see *Frank Robinson v Jamaica*, CCPR/C/35/D/223/1987, reviewing the decision in *Robinson v The Queen* [1985] AC 956.

25. See *Mabo v Queensland* (1992) 107 ALR 1, Brennan J, 29; *R v Shrestha* (1991) 100 ALR 757, Deane, Dawson and Toohey JJ, 773; *Attorney-General v British Broadcasting Corporation* [1981] AC 303; *Derbyshire County Council v Times Newspapers Ltd* [1992] 3 WLR 28, 44,61; Kirby "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 ALJ 514, 530 the cases referred to in

was no ambiguity or uncertainty in the common law which needed to be clarified by reference to international agreements. The right to counsel in felonies was not introduced until 1836.[26] In short, the High Court was not prepared to create a new quasi-constitutional right to state-funded counsel.

An interesting question raised by the appeal relates to the relevance of American and Canadian decisions which turn on the scope and meaning of various constitutional instruments. The right to state-funded counsel is not expressly enshrined in the United States Constitution. The right, which was recognised in capital cases in *Powell v Alabama*[27] and extended to all cases involving possible loss of liberty, both State and Federal, in a series of landmark decisions, culminating in *Argersinger v Hamlin*,[28] is the product of judicial reasoning and interpretation. Similarly, there is no unqualified right to state-funded counsel contained within the Canadian Charter of Rights and Freedoms but a limited right has been distilled from a series of more general rights, such as section 7 (right not to be deprived of liberty except in accordance with the principles of fundamental justice) and section 11(d) (right to a fair and public hearing).[29] The logical process is one of defining the specific content of general rights. The Australian Commonwealth Constitution contains no express guarantees similar to the US Constitution's Sixth Amendment (right to counsel) or Fourteenth Amendment (due process). However Justice Deane argued that the American cases cannot be dismissed as turning on constitutional provisions. They are, in essence, concerned with the concept of a fair trial:

> The reasoning in those United States judgments is, in my view, compelling in its analysis of the significance of lack of legal representation by reason of poverty to the law's fundamental requirement that a criminal trial be fair. Similar reasoning has prevailed in the highest courts in the common law jurisdictions of the Republics of Ireland and India. It should now be accepted and applied in this Court.[30]

The relevance of these cases in the present context derives from a shared common law base, the essential similarity of the adversarial proceedings and

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26. The right to counsel was recognised in treason in 1696. Until 1836 an accused was entitled to be represented in misdemeanours and in civil proceedings and, on a charge of felony, on questions of law only. The (Imp) Trial for Felony Act 1836 established the right to representation in relation to felony; see G Chowdharay-Best "The History of Right to Counsel" (1976) 40 Journal of Criminal 275.
27. 287 US 45 (1932).
28. 407 US 25 (1972).
29. See *Deutsch v Law Society of Upper Canada Legal Aid Fund* (1985) 48 CR (3d) 166, 173-174; *R v Rowbotham* (1988) 41 CCC (3d) 1, 61, 66.
30. Supra n 5, 40.

the identical nature of the disadvantages faced by unrepresented counsel. There is also a growing consensus within the world community, and certainly amongst the signatories to the International Covenant on Civil and Political Rights, as to the basic requirements of procedural justice. Whether the decision will put greater pressure on governments to honour international obligations in the matter of providing legal aid remains to be seen. Certainly, with the present contracting funding base, the allocation of scarce legal aid moneys will have to be carefully monitored.

UNRESOLVED ISSUES

Aspects of the ruling in *Dietrich* remain to be worked out in practice. Trial judges may have to confront administrative issues relating to the assessment of means. Justice Deane's dictum[31] that a person who chooses not to utilise personal assets to pay for legal representation has no ground for complaint will cause no joy for the middle classes, who gain little assistance from the present means tested system. Will the house, car and family silver have to go before the rule in *Dietrich* may be prayed in aid? Other issues abound. Those exercising prosecutorial discretion will not be able to ignore the question of legal representation. The position regarding summary offences and offences punishable only by way of fine will need to be clarified. New ways of providing legal aid must be found. Greater use of *McKenzie* friends[32] and possibly even law students[33] should be considered. This may not be enough if, after all, it is essential to the fairness of the adversarial system that the facilities available to the opposing camps should be approximately equal. This ideal may not be attainable in practice, but *Dietrich* indicates that gross iniquities will no longer be tolerated. As Justice Murphy wrote in *McInnis*: "Putting an accused to trial in a serious case without a lawyer is barbarous."[34]

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31. Ibid, 42.
32. *McKenzie v McKenzie* [1971] P 33.
33. As to law students being used as para-legals: see *Argersinger v Hamlin*, (1972) 407 US 25, Brennan, Douglas and Stewart JJ, 40-41; "Law students as well as practising attorneys may provide an important source of legal representation for the indigent... Given the huge increase in law school enrolments over the past few years ... I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision." Clearly, there are difficulties with this proposal in the Australian context, not the least of which would be persuading the accused to accept representation from a student. In superior courts, there would be practical hurdles associated with admission requirements. In summary proceedings, the problems may be less intractable: see *O'Toole v Scott* [1965] AC 939; *Shales v Thompson* (1984) 12 A Crim R 371.
34. Supra n 3, 588; Douglas *The Great Rights: The Bill of Rights is Not Enough* (1963), 151.

The High Court has indicated that if the practice is not "barbarous", it must at least be recognised as unacceptable in the vast majority of cases.