

Briefing Note M-in-S



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Legal Aid and the High Court's
Decision in *Dietrich v R*

No 002/93

In considering any changes to the Legal Aid Commission and the provision of legal aid, the decision of the High Court in *Dietrich v R*¹ may have to be taken into account.

¹ (1992) 109 ALR 385.

The Facts of the Case:

The defendant was charged with the importation of heroin. After his arrival at Melbourne Airport from Bangkok, he was followed by members of the Australian Federal Police to premises in St Kilda. In a search of the premises, a quantity of heroin was found in a plastic bag. The defendant was charged and taken to an isolation ward at Pentridge Prison. The next day, 66.4 grams of heroin was found in condoms which the defendant had allegedly passed during the night.

The defendant wished to plead Not Guilty to the charges. An application for legal aid was refused as was an appeal against, and a review of, that decision. The Commission's view was that legal aid would only be provided for a plea of Guilty, which the applicant would not consider. An application was also made under the **Judiciary Act** for counsel to be appointed. This was refused as the application has been made out of time. An application for legal assistance made to the Commonwealth was also refused.

At the trial, the defendant appeared unrepresented and sought an adjournment. This was refused. After a 40 day trial, the defendant was convicted. He appealed on the ground that the failure to give him legal representation denied him a fair trial.

The Decision:

A majority of the Court² held that the conviction should be quashed and a new trial ordered. In so doing, the Court decided that:

- * Where an indigent³ accused charged with a serious offence, who through no fault on his or her part is unable to receive legal representation, applies to the trial judge for an adjournment or stay, 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

² Mason CJ, Deane, Toohey, Gaudron and McHugh JJ, (Brennan and Dawson JJ dissenting).

³ ie, an "impoverished" accused.

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 may 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.⁴

The Court stressed that the common law of Australia does not recognise the right of an accused to be provided with counsel at public expense. However, the courts possess the power to stay criminal proceedings which would result in an unfair trial. In this case, *"the applicant is entitled to succeed because his trial miscarried by virtue of the trial judge's failure to stay or adjourn the trial until arrangements were made for counsel to appear at public expense..."*⁵

Mason CJ and McHugh JJ, part of the majority, said:

"For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained. While in some jurisdictions, judges once had the power to direct the appointment of counsel for indigent accused, this power has been largely overtaken by the development of comprehensive legal aid schemes in all States and, as such, trial judges cannot now be asked to appoint counsel in order that a trial can proceed. However, even in those cases where the accused has been refused legal assistance and has unsuccessfully exercised his or her rights of review of that refusal, *it is possible perhaps probable, that the decision of a Legal Aid Commission would be reconsidered if a trial judge ordered that the trial be adjourned or stayed pending representation being found for the accused.*⁶ [Emphasis added]

"In the absence of more extensive factual, statistical and economic evidence..., it is difficult for this court to assess the full practical implications [of this decision]... No argument was put to the court that recognition of such a right for the provision of counsel at public

⁴ From the Headnote to the reported decision, p. 385.

⁵ p. 386.

⁶ p. 397.

expense would impose an unsustainable burden on government. *In these circumstances, we should proceed on the footing that, if a trial judge were to grant an adjournment to an unrepresented accused on the ground that the accused's trial is likely to be unfair without representation, that approach is not likely to impose a substantial financial burden on government and it may require no more than a re-ordering of the priorities according to which legal aid funds are presently allocated.*"⁷ [Emphasis added]

The policy implications of this decision are better seen when the contrary view is examined. Brennan J said:

"Although the desirability of according legal aid is manifest, the critical legal question ... is whether this court can and should translate the desirability into a rule of law ... In my ... opinion, this court cannot properly create such a rule."⁸

"The provision of adequate legal representation ... is a function which only the Legislature and the Executive can perform. No doubt, demands on the public purse other than legal aid limit the funds available. If the limitation is severe, the administration of justice suffers. ... [T]his court [cannot] declare the existence of a common law entitlement to legal aid when the satisfaction of that entitlement depends on the actions of the political branches of government. [T]o declare such an entitlement without power to compel its satisfaction amounts to an unwarranted intrusion into legislative and executive functions. ... If the court were to declare the existence of a common law entitlement to legal aid, the only remedy available to enforce it would be an order for adjournment until legal aid is provided and, if it were not provided, an indefinite adjournment ... But an indefinite adjournment is tantamount to a refusal to exercise jurisdiction. Such a remedy would bring the administration of justice to a halt until public funds were made available."⁹

Commentary

The decision has implications for legal aid funding but it is difficult to

⁷ p. 397.

⁸ p. 401

⁹ p. 406.

be precise as to the effect. The ambit of the new principle is somewhat unclear in that the notions of "exceptional circumstances" and "serious criminal offences" are yet to be defined. At face value, the decision will appear to require a specific allocation of funds to be made to defend serious criminal matters. Unless this is an additional allocation, rather than a "re-ordering of priorities", there may well be an effect on the capacity to fund, for example, civil actions and family law cases.

The decision will have greater implications for those jurisdictions (other than NSW) which apply the "merit test" to funding. Under a merit test, funding would be offered for a plea of guilty only, where the claim (ie, the defence) was assessed to be without merit. It may well be that the merit test has no application at least for serious criminal matters.

Furthermore, as the courts may now adjourn a serious criminal matter until funding for counsel is provided, the role of the review and appeal bodies within Legal Aid Commissions may have to be re-assessed, at least for serious criminal matters.

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