

## COMMONWEALTH OF AUSTRALIA

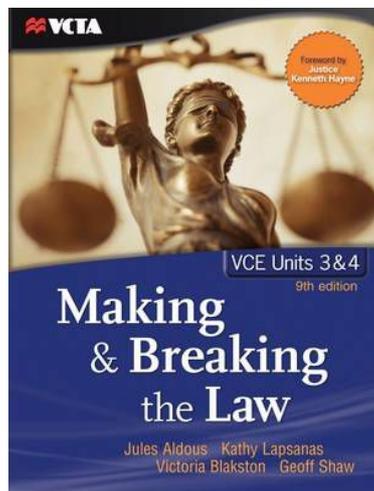
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Aldous, J., Lapsanas, K, Blakston, V. & Shaw, G. (2010). *Making and breaking the law*. South Yarra: VCTA.



pleads guilty. This provision aims to conserve the scarce legal aid dollar. However, it also places VLA in the difficult position of having to judge the guilt or innocence of a defendant before the case goes to court.

- **The lifestyle guideline** considers any conflict between the information provided by the person in their application and their actual lifestyle. For example, there would be a conflict if an applicant claims to have no assets and very little income, but drives an expensive car.

Victoria Legal Aid has set the maximum amounts it will pay in certain types of cases. These are called ceiling costs. For instance, the ceiling costs in family law matters are \$10000.

#### *Legal Aid and the Dietrich Case*

Dietrich was charged with four drug offences relating to the trafficking and possession of heroin. Before the trial, the accused had applied for assistance but had not been successful. The Legal Aid Commission of Victoria advised him that they would only represent him if he pleaded guilty.

Under section 69(3) of the *Judiciary Act 1903* (Cth) the accused made an application for the provision of legal assistance. Under this Act a judge has the power to request that the attorney-general arrange for representation for the accused. The judge can do this if it is considered to be in the interests of justice. There are time limits within which these applications must be made.

Dietrich did not make his application within the appropriate time. As a result, the application was dismissed by a judge of the Supreme Court. So, despite the fact that Dietrich was unable to afford legal representation, at the time his trial commenced he was unrepresented.

#### *The trial*

At the start of the trial Dietrich complained about not having a lawyer to represent him. On several occasions during the trial he complained that he was unable to represent

himself, that he did not understand what was going on and that he did not feel capable of arguing his case. The judge insisted that the trial continue and Dietrich was found guilty.

### *The appeals*

Dietrich appealed to the Victorian Court of Criminal Appeal, claiming that:

- a person charged with an indictable offence was entitled to legal representation at the expense of the state
- the failure of the trial judge to appoint a legal representative resulted in a miscarriage of justice.

Based on the earlier High Court decision in *McInnis v. The Queen* (1979) 143 CLR 575, the appeal was dismissed. In the earlier decision, the High Court had already determined that legal aid was not a right. As there was no right to legal aid, there was no duty imposed on the judge to appoint a legal representative. Consequently, the second appeal was also dismissed.

### *The High Court decision*

Dietrich appealed to the High Court. The High Court decided 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 undoubted power to stay criminal proceedings that will result in an unfair trial, the right to a fair trial being the pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which the accused is charged with a serious offence.*

Dietrich was successful in this appeal.

The *Dietrich* decision had two important implications for the provision of legal aid. These are:

- access to legal representation is fundamental to the effective operation of the criminal justice system
- governments have a responsibility to provide sufficient funds for legal services and their failure to do so may result in an indefinite stay of proceedings in trials for serious criminal offences.

A consequence of the *Dietrich Case* is that legal aid is forced to fund some cases that it would not otherwise support. The County Court and the Supreme Court can order legal aid to fund cases. This means that there is less funding for other cases.

### *Impact of the funding crisis*

Limited legal aid funds result in people going to court without legal representation. Consider the effect of not having legal representation in the following case.

#### **Legal aid denied**

Mathew stole a car to raise \$500 to pay for his mother's hospital operation for cancer. He was caught by police and charged. He was denied legal aid for a bail application and taken to court the following day. He was faced with the decision of either pleading guilty or spending a number of weeks in remand waiting for another hearing. Mathew, who admitted to previous offences, was jailed for six months. If legal aid had been granted for the bail application, the case would have been adjourned for a few weeks. During this time a case could have been prepared.

Legal aid is forced to fund some cases and this limits funds for other matters.

Another consequence of the lack of legal aid funding is that some people suspected of committing serious criminal offences may not face trial.

Without legal aid, there is a rise in the number of self-represented litigants. There is a fundamental inequity in access to representation. The failure of funding to match the real costs in providing legal services has resulted in a significant withdrawal of experienced lawyers from legal aid work.

The courts are also disadvantaged by the growth in self-represented litigants. Funding legal representation is likely to result in cost savings to the court system and to the justice system as a whole.

In particular, without legal representation, individuals are under greater pressure to plead guilty or abandon cases. Lack of funding means that lawyers face a serious ethical dilemma. Lawyers who want to provide legal representation for disadvantaged clients cannot do so within the ceiling costs set by legal aid.

### *Delays contribute to the costs*

Delays add to the costs of legal action.

Unrepresented litigants create delays in the court system because they:

- are more likely not to comply with court directions and procedures due to their lack of familiarity with the operation of our courts
- place increased demands on court officials.

Unrepresented litigants also place stress on judges in the adversary system. Judges may find it difficult to remain impartial in the delivery of justice. The combined effect of these factors is an increase in costs to the courts and to represented parties.

### *Possible reforms*

Over the past decade there has been considerable concern about the increased costs of legal action and the operation of the legal system. In response to these concerns, several inquiries have been established. Recommendations to reduce the costs of legal advice and assistance include:

Possible reforms include increased legal aid funding, reducing court fees and providing more free information and advice.

- increasing funding for legal aid for civil and family matters
- reviewing court and tribunal fees
- increasing the range of legal work that can be done by paralegals
- increasing funding for duty lawyer services to ensure that there are enough duty lawyers available at our courts
- reviewing legal aid fee scales
- changing the tests used for granting legal aid
- providing assistance to self-represented litigants or allowing the judge greater discretion to assist
- increasing the availability of dispute resolution methods in community centres.

Increased funding would overcome some problems in relation to the provision of legal services. Other changes are necessary to improve access to the law. They include:

- expanding community legal education programs—for example, police visits to schools—and raising the community's awareness of the existence of obligations and rights, and the availability of services
- providing visiting legal advice services to hospitals, aged care homes and retirement villages
- providing legal assistance for the most disadvantaged in the community when they are faced with minor civil claims, such as motor vehicle property claims or fence disputes.