

Chapter 4

[Inquiry into the Australian Legal Aid System](#)

Chapter 4

Implications of the *Dietrich* decision

Introduction

4.1 Term of reference 8 requires the Committee to inquire into and report on the following matter:

The implications, if any, for the Legal Aid system that arise from the High Court Dietrich decision.

4.2 Accordingly, in this Chapter the Committee briefly examines the *Dietrich* decision. It then reviews the evidence to the inquiry on the implications of the decision for the legal aid system in Australia. Finally, it notes some of the responses by governments to these implications.

The decision

4.3 Olaf Dietrich was charged in Victoria with four heroin-related offences. He pleaded not guilty to the charges. He sought legal aid to defend the matters without success from the Legal Aid Commission of Victoria, although it offered to assist him with a guilty plea. He was subsequently unsuccessful in obtaining legal aid from the Commonwealth Attorney-General.

4.4 As a result Dietrich was unrepresented at his trial in 1988, which lasted some forty days. He was convicted on the first and most serious charge, that of importing a trafficable quantity of heroin in contravention of the Customs Act 1901 (Cth), and was sentenced to a term of seven years imprisonment. The second and third charges were alternatives to the first, and so no verdict was required. He was acquitted on the fourth charge, which related to possession of heroin.

4.5 During his trial Dietrich emphasised on several occasions the difficulties he was under in conducting his own defence, and the Crown did not later dispute that these were real difficulties. Dietrich was refused leave to appeal by the Victorian Court of Criminal Appeal. He then sought special leave from the High Court to appeal to it on the ground that his trial had miscarried because he had not been provided with legal representation.

4.6 In November 1992, a majority of the High Court, in *Dietrich v The Queen*, [1] decided that where an indigent defendant [2] is charged with a serious criminal offence and, through no fault of his or her own, is unrepresented, a trial judge should normally grant a stay or an adjournment if the accused requests one. The purpose of the stay is to allow the accused the opportunity to seek legal representation. This is the basis of what is commonly referred to as "the Dietrich principle".

4.7 It should be noted that the Court explicitly recognised that there is no "right" to legal representation at public expense. However, the Court's decision was premised on the common law right that an accused receive a fair trial and that legal representation is a component of a fair trial for a serious criminal offence. The reasoning of the majority is reflected in the following passage from the judgment of Mason CJ and McHugh J:

it should be accepted that Australian law does not recognise that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial. Such a finding is, however, inextricably linked to the facts of the case and the background of the accused. [3]

4.8 Mason CJ and McHugh J also set out the approach a trial judge should take if faced with an unrepresented indigent accused charged with a serious criminal offence:

In view of the differences in the reasoning of the members of the Court constituting the majority in the present case, it is desirable that, at the risk of some repetition, we identify what the majority considers to be the approach which should be adopted by 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. 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. [4]

4.9 The Dietrich principle has been widely applied in Australian courts. In addition to its application in indictable proceedings in District and Supreme Courts, it has been held by the South Australian Supreme Court that there is no reason why the Dietrich principle should not apply in a hearing of a serious criminal offence in summary proceedings before a Magistrate. [5]

Implications of *Dietrich*

4.10 Most submissions and witnesses welcomed the principles enunciated in the Dietrich decision. However, several specific concerns were raised about its implications for the legal aid system. The Committee has identified the following main areas of concern. These are:

- its potential to direct legal aid funding to criminal law matters at the expense of civil and family law matters;
- its impact on the legal aid assessment criteria for determining an applicant's means and the merits of his or her case;
- its potential to increase the incentive for an accused to defend charges rather than plead guilty;
- the consequential impact of these points on legal aid funding; and
- the associated impacts on the administration of justice.

Directs funding to criminal law matters

4.11 Several witnesses maintained that the Dietrich principle has a significant implication for the legal aid system in Australia because it directs more expenditure to one specific area, that is to serious criminal law matters. In a funding situation in which resources are limited, this in turn is said to produce a proportionate reduction in the funding available for other types of cases. [6] It was argued that these other cases, including civil and family law cases, have implications for the participants which are just as serious as the imprisonment which may result from criminal law matters.

4.12 In the past, criminal law matters have received a significant proportion of the legal aid funding provided through legal aid commissions. National Legal Aid advised the Committee that over the last five years, the percentage of criminal law matters as part of the overall case-mix of legal aid commission work has steadily increased. National Legal Aid added:

Criminal law currently accounts for 74% of approvals, family law for 19% and civil law for 7%. Over the five year period [from December 1990 to September 1995], approvals in grants of aid for criminal law matters have increased 9.2%, family law matters have decreased by 0.3% and civil law matters have increased by 2.9%. [7]

4.13 The Committee was told that the Dietrich principle has been used by accused persons in a number of complex and lengthy white collar criminal prosecutions. [8] Mr Alan Cameron, the Chairman of the Australian Securities Commission, noted that there have been particular problems with certain defendants in Corporations Law prosecutions resorting to Dietrich stays of proceedings through want of legal assistance. Mr Cameron observed:

Major prosecutions under the Corporations Law tend to be regarded by the Courts as the kind of cases which no one can be expected to defend without legal assistance. Applying the Dietrich principle, the Courts have ruled that individuals who ought to have legal assistance to defend themselves, and do not have that assistance, can seek a permanent stay of the proceedings against them. [9]

Impact on legal aid assessment criteria

4.14 In assessing a person's eligibility to receive legal aid, the funding body generally applies a means test and a merits test. The former assesses the ability of the applicant to pay or contribute to the cost of their legal representation. The latter assesses the merits of the case the applicant wishes to present in court and, for example leads to a denial of funding if the prospect of the case succeeding is assessed as minimal. The use of merits tests aims to ensure that scarce legal aid funds are directed to the most meritorious cases.

4.15 The concern has been expressed that in two respects the Dietrich principle does not fit into the existing assessment criteria. Firstly, it is not altogether clear whether the criteria in the means tests are identical with the requirements to determine "indigence" under the Dietrich principle. Secondly, and more seriously, the Dietrich principle does not contain any equivalent to the merits test. On this point, National Legal Aid told the Committee:

Those LACs previously imposing a merits test on applicants are effectively no longer able to continue this practice, particularly in cases where a trial is stayed along Dietrich lines, where the refusal to fund is based on merit. [10]

4.16 The Legal Services Commission of South Australia stated in its submission to the Committee:

The Dietrich decision has, perhaps subliminally, resulted in a watering down of the Legal Services Commission's merits test, in that we have tended to fund indigent accused, faced with serious charges for trial, where the merits as they are presented to the Legal Services Commission, have been equivocal, and very borderline in terms of satisfying the merits test. This has been done in an effort to avoid prolonged examination of merits, protracted correspondence and dialogue, and the wasted resource of a partial or full Dietrich hearing, in cases where it is quite clear that the discretion of the Director would subsequently have to be invoked to approve funding for trial. [11]

Increased incentive to plead not guilty

4.17 The Committee was told that the Dietrich principle may provide an incentive for indigent people accused of serious crime to defend charges rather than to plead guilty. For example, National Legal Aid states:

While there are still incentives for people to plead guilty, for example, sentence indication for early pleas in NSW, more accused persons may be likely to defend charges, rather than pleading guilty, knowing that the Courts will virtually insist on Legal Aid being made available. This would result in an increased cost to LACs... [12]

Increased pressure on funding

4.18 The Committee received submissions and heard evidence that the Dietrich principle is likely to significantly increase pressure on legal aid commission budgets and more generally, the costs to the criminal justice system. [13]

4.19 The Committee received conflicting evidence on the actual effect so far of the Dietrich principle on legal aid budgets. For example, the Legal Services Commission of South Australia estimated in its submission to the Committee's inquiry that as of May 1996, Dietrich's case has caused it to fund approximately \$250,000 worth of matters that it would have not funded according to its guidelines and to expend approximately \$150,000 in administration costs. [14] The Legal Aid Commission of Tasmania similarly observed that the "Dietrich decision has resulted in more cases being funded for trial than might have been the case." [15]

4.20 On the other hand, the submission from the Victorian Government stated "the initial concerns expressed by some people about Dietrich and the operation of s. 360A and their effect on the legal aid budget have, so far, not come to pass". [16] The submission from Victoria Legal Aid noted:

Although there was concern that this provision [section 360A of the Crimes Act 1958] would have a significant impact on the Legal Aid Fund which Victoria Legal Aid could not predict or control, that has not in fact proven to be the case (so far). There have been less than 25 orders made under this section. Almost all of them have been made for trials of two weeks or less duration where VLA had been prepared to grant assistance for a plea in any event (but not a contest).

There are probably two main reasons for the limited application of this section:

- First, the courts have applied it with care. Judges have applied VLA's means test to assess whether an accused could afford legal representation and then have made orders on VLA's usual terms and conditions of assistance.*
- Secondly, there are other significant barriers in Victoria which prevent defendants frivolously contesting charges brought against them ... [including] the provisions of the Sentencing Act which require courts to take a guilty plea into account in fixing a sentence. [17]*

4.21 The implications of the *Dietrich* principle for legal aid were succinctly summarised by the Chief Justice of the Supreme Court of Western Australia, the Hon David Malcolm AC, when he appeared before the Committee. He told the Committee:

It would seem to me that resort to the Dietrich principle is likely to become much more frequent as a result of the cutbacks in legal aid, unless there is some compensating source of funding which is made available to meet the Commonwealth cutbacks. Let me explain it in this way: the Legal Aid Commission in Western Australia had put a \$20,000 cap on funding of criminal trials. I understand that is being reduced to \$10,000. That is going to mean that any trial which will last more than a few days is going to become the subject of a Dietrich application. There are many of those trials, so inevitably there will be

an increase in Dietrich applications. There is also a risk that it will simply become a delaying tactic which will be adopted by people. They are perfectly entitled to make the application. There will have to be a hearing about whether they are indigent or not. [18]

4.22 The Commonwealth Attorney-General's Department noted:

If governments are concerned to ensure that prosecutions proceed and are not frustrated by Dietrich applications it is up to them to provide ways for legal assistance to be granted without adversely affecting LAC's budgets. This occurs in Western Australia, where, if the LAC is not prepared to grant aid and a Dietrich application is successful, the State Government provides special funds for representation which are administered by the LAC but do not come from the LAC's budget. [19]

Associated impacts on the administration of justice

4.23 The Committee's terms of reference relate to the implications of the Dietrich decision for legal aid. In this section it briefly notes some of the other implications of the decision that were identified in the evidence it received.

4.24 In the event that legal representation is not available from any quarter, the initially temporary Dietrich stay has the potential to act as quasi permanent stay of the criminal prosecution. The Committee heard evidence that this might have an adverse impact on the credibility of the justice system.

4.25 The New South Wales Director of Public Prosecutions, Mr Nicholas Cowdery QC, stated in his submission to the Committee's inquiry that if there is no legal aid for indigent accused charged with serious criminal offences:

People who have committed serious crimes, including murder and rape – perhaps dangerous people – will have to be released (at least on bail) and the community will be at risk from their reoffending. Victims of their crimes will live in fear. [20]

4.26 The Victorian Government observed that where legal aid pursuant to the Dietrich principle is not available at the time of trial, the trial may have to be adjourned. It then commented:

Delays to trials and summary hearings undermines the credibility of the legal system. Where witnesses and defendants find themselves the subject of repeated systemic delay, the "trust" they feel in the system may be severely eroded. Such delays, and in particular permanent stays of proceedings based on the decision in Dietrich v R, also reduce community confidence in the ability of the system to deal with serious crime. [21]

Living with the Dietrich principle

4.27 The thrust of the evidence received by the Committee was to support the Dietrich principle. Many witnesses praised the decision as an important procedural safeguard for accused persons and considered the principle for which the case stands a desirable one. [22] The Queensland Bar Association, for example, observed that the Dietrich decision recognises the fundamental significance of legal representation in a democratic society:

There can be no argument with the concept that citizens (no matter how heinous the allegation against them) whose liberty is at issue are deserving of legal representation. In cases where such citizens do not have sufficient means to arrange their own representation it is a fundamental obligation of our society to provide it from the public purse. To contend otherwise would be to deny the free and democratic basis upon which our society operates. [23]

4.28 A number of witnesses also praised the Dietrich decision because it complements Australia's international human rights obligations. [24]

4.29 The majority of the evidence to the Committee favoured an approach that sought to overcome the consequential problems it may have raised, rather than seeking simply to overturn the High Court decision. However, the Committee was told that the options for overcoming the consequential problems raised by Dietrich were very limited. [25] The Committee notes that attempts to overcome the consequential problems have involved:

- legislation by Victoria;
- consideration by the Standing Committee of Attorneys-General; and
- revised procedures by the legal aid commissions.

Legislation by Victoria

4.30 In 1993, Victoria legislated in response to the Dietrich decision. It is the only jurisdiction to have done so, although the Committee was told that the South Australian Government has also been considering legislation. [26]

4.31 As a result, subsection 360A(2) of the Crimes Act 1958 (Vic) gives the court the power to direct Victoria Legal Aid to provide assistance to an indigent accused person, on any conditions specified by the court, if the court is satisfied that this is necessary to ensure a fair trial. The subsection gives the court the power to adjourn the trial until the assistance has been provided. Subsection 360A(1) states:

Subject to sub-section (2) and despite any rule of law to the contrary ... 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 the trial.

4.32 The effect of the legislation is that the judge directs that legal aid shall be provided as a condition of allowing the trial to proceed, thus bypassing the assessment that would otherwise be done by the legal aid authorities. Without the legislation, the judge before whom the Dietrich application was made out could only issue a stay order. It would then be up to the legal aid authorities to assess if legal aid would be granted, and this assessment might involve duplication of the work done by the judge in arriving at the decision to apply the Dietrich principle. The stay order would remain in effect until such time, if ever, as the legal aid authorities decided to grant the aid.

4.33 As noted above, the initial concerns held by some that the Victorian scheme would have unacceptable effects on the legal aid budget have not so far been realised.

Consideration by the Standing Committee of Attorneys-General

4.34 Issues arising from the Dietrich principle have been considered by the Standing Committee of Attorneys-General (SCAG) since February 1993. The Committee requested information from the Commonwealth Attorney-General's Department concerning the progress of SCAG's handling of the issues.

4.35 On 5 March 1997, the Department replied that the Dietrich matter:

was on the SCAG agenda in 1993. A Working Party reported to Ministers in June 1993 resulting in model legislation being prepared for consideration by SCAG in late 1993. No consensus was reached and no State nor Territory has made the changes recommended in 1993. These were that legal aid commissions' means tests be used to determine indigence and that commissions be allowed to be reimbursed from an accused's assets restrained under proceeds of crime legislation.

The Dietrich issue was relisted on the agenda for SCAG in July 1995 at the request of the Commonwealth following expressions of concern about the issue from several commissions' Directors. Further draft model legislation has been prepared for consideration by all jurisdictions. The Commonwealth is awaiting comments on the draft legislation. No jurisdiction has yet commented, despite the legislation having been put to SCAG at its July 1996 meeting. [27]

Revised procedures by the legal aid commissions

4.36 In some States, such as Western Australia, the procedure for handling Dietrich applications has become relatively settled. In Western Australia, it has been the practice of the State government to make funds available for an indigent person's defence after a successful Dietrich application. The person's legal representation will then be arranged by the Western Australian Legal Aid Commission as agent for the State government. Up to January 1997, there had been eleven cases stayed under the Dietrich principle. [28]

4.37 In other States, the State Attorneys-General have also, on occasion, intervened and made funds available to allow prosecutions to proceed. In NSW, the problem caused by lack of legal aid has been exacerbated by the policy of the Legal Aid Commission of NSW not to fund retrials and there have been a number of celebrated cases where there has been uncertainty over whether legal assistance would be available and whether the retrial would proceed. [29]

Conclusion and Recommendation Nos: 4 and 5

The Committee notes the evidence suggesting that the impact of the *Dietrich* principle will be severe for the budgets of the providers of legal aid. It also notes that this impact has not yet eventuated, and may not do so. It appeared to the Committee that precise information on the impact is not available.

The Committee **recommends** that the Commonwealth should ensure that the impact of the *Dietrich* principle on the legal aid system is monitored.

The Committee further **recommends** that the Attorney-General take up in the Standing Committee of Attorneys-General the need for it to complete its consideration of the impact of the *Dietrich* principle as a matter of priority.

Footnotes

- [1] (1992) 177 CLR 292. Mason CJ, Deane, Toohey, Gaudron and McHugh JJ in the majority. Brennan and Dawson JJ in the minority.
- [2] According to *Black's Law Dictionary* (Fifth Edition, West Publishing Company, 1979) the term "indigent defendant" means a "person indicted or complained of who is without funds or ability to hire a lawyer to defend him". This interpretation was confirmed in a recent South Australian decision *R v Lucas* (1993) 78 A Crim R 480. There is also a developed jurisprudence concerning indigence in the United States, see for example, *US v Robinson* 718 F.Supp. 1583 (M.D. Ga 1989).
- [3] *Dietrich v The Queen* (1992) 177 CLR 292, p. 311.
- [4] *Dietrich v The Queen* (1992) 177 CLR 292, p. 315.
- [5] *Weinel v Fedchelshen* (1995) 65 SASR 156.
- [6] See, for example, *Submission No. 108*, Australian Law Reform Commission, p. 1551; *Submission No. 88*, National Legal Aid, p. 1090E; *Evidence*, Victorian Government, p. 395.
- [7] National Legal Aid, 'Meeting Tomorrow's Needs with Yesterday's Budgets: The Undercapacity of Legal Aid in Australia', paper appended to *Submission No. 88*, National Legal Aid, p. 1096.
- [8] *Submission No. 127*, Commonwealth Attorney-General's Department, p. 1831; *Submission No. 23*, Australian Securities Commission, p. 202.
- [9] *Submission No. 23*, Australian Security Commission, p. 204.
- [10] *Submission No. 88*, National Legal Aid, p. 1090E.
- [11] *Submission No. 44*, Legal Services Commission of South Australia, p. 411.
- [12] *Submission No. 88*, National Legal Aid, p. 1090E.
- [13] For example, *Submission No. 52*, Law Society of South Australia, p. 489; *Submission No. 113*, ACT Attorney-General's Department, p. 1496; *Submission No. 104*, Combined Community Legal Centres Group, p. 1496, *Submission No. 149*, Victorian Government, p. 2172.
- [14] *Submission No. 44*, Legal Services Commission of South Australia, p. 411.
- [15] *Submission No. 43*, Legal Aid Commission of Tasmania, p. 383.
- [16] *Submission No. 149*, Victorian Government, p. 2172.
- [17] *Submission No. 35*, Victoria Legal Aid, p. 293.
- [18] *Evidence*, Chief Justice of the Supreme Court of Western Australia, pp. 1208–09. See also *Submission No. 155*, NSW Director of Public Prosecutions, p. 2458.
- [19] *Submission No. 127*, Commonwealth Attorney-General's Department, p. 1822.
- [20] *Submission No. 155*, Director of Public Prosecutions NSW, p. 2457.
- [21] *Submission N. 149*, Victorian Government, p. 2172.
- [22] See, for example, *Submission No. 125*, Commonwealth Director of Public Prosecutions, p. 1728; *Submission No. 132*, Human Rights and Equal Opportunity Commission, p. 1973, *Submission No. 90*, National Association of Community Legal Centres, p. 1186.
- [23] *Submission No. 102*, Bar Association of Queensland, p. 1435.
- [24] The Committee notes however that Australia's international obligations may extend beyond the provision of legal aid to indigent defendants charged with serious offences, in particular to trials involving children and to some civil matters. Furthermore, the international obligations may extend beyond the right to a fair trial to legal representation at public expense. See Chapter 3 above. See also, for example, *Submission No. 120*, Victorian Council for Civil Liberties, p. 1681.
- [25] *Submission No. 47*, Justice Research Centre, p. 449.
- [26] *Answers to Questions on Notice*, Commonwealth Attorney-General's Department, 5 March 1997, p. 3.
- [27] *Answers to Questions on Notice*, Commonwealth Attorney-General's Department, 5 March 1997, p. 3.

[\[28\]](#) *Submission No. 150*, Legal Aid Western Australia, p. 20.

[\[29\]](#) See for example: 'Why a suspected drug baron may not face court', *Sydney Morning Herald*, 5 February 1997.

[Top](#)