Human Rights in the Administration of Justice: *Dietrich v The Queen*

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In *Dietrich v The Queen*[1] the High Court was faced with a similar problem to that it confronted 13 years beforehand in *McInnis v The Queen*.[2] Should it allow a conviction for a serious criminal charge to stand where the defendant, due to a lack of means and an inability to obtain legal aid, had not been represented at his trial? In *McInnis* the High Court decided by a majority of 4-1 (not surprisingly, Murphy J was the lone dissent) that although it was preferable that in serious criminal charges defendants were represented, this was not a legal right, and thus under the circumstances there had been no miscarriage of justice.

Not surprisingly, human rights lawyers and civil libertarians were highly critical of the High Court's decision in *McInnis*.[3] In fact, it was often used as the outstanding example of the lack of legal rights in our common law to support the argument for the introduction of a domestic Bill of Rights.[4] The unsatisfactory state of the law after *McInnis* continued throughout the 1980s, evidenced by the fact that the High Court was called upon to set out the trial judges role in the course of a criminal trial where an accused was not represented.[5] Such 'solutions' were clearly unsatisfactory.[6]

The importance of criminal procedure to human rights

The manifest unfairness of placing someone on trial without legal representation is apparent:

> Under the adversary system, where each side in large measure has the carriage of its case, the defendant is pitted against the power, resources and professionalism of the Crown. The unrepresented defendant, who is often poorly educated and with few financial resources is at an obvious and gross disadvantage in such a contest. The growing professionalism of police and prosecution and the increasing complexities of evidence and procedure have served merely to highlight this essential disparity.[7]

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1 (1992) 177 CLR 292.

2 (1979) 143 CLR 575.

3 See B Gaze and M Jones *Law, Liberty and Australian Democracy* (1990) 1st ed Law Book Co, 32–38 and P Bailey *Human Rights: Australia in an International Context* (1990) 1st ed Butterworths, 302–3.

4 See M Wilcox *An Autstralian Charter of Rights?* (1993) 1st ed Law Book Co, 220.

5 See *MacPherson v The Queen* (1981) 147 CLR 512, 546–7 per Brennan J.

6 Some writers have suggested that in the absence of legal representation for the accused, the criminal trial should move away from the adversarial model. See M Findlay, S Odgers and S Yeo *Australian Criminal Justice* (1994) 1st ed Oxford University Press, 134–5.

7 P Sallman and J Willis *Criminal Justice in Australia* (1982) 1st ed Oxford University Press, 144.

Given that the criminal justice system is the most conspicuous area of the law in terms of the power of the state to restrict the liberty of its citizens,[8] criminal procedure is of vital, if not paramount, importance to human rights lawyers. The incorporation of international human rights norms into the domestic Australian legal system would be likely to have the greatest effect on the law relating to the administration of criminal justice. The impact of the American Bill of Rights, for example, has been most dramatic in the law of criminal procedure. An impressive body of rules has built up which substantially limits the power of the American Federal government and individual State governments to reduce the evidentiary and procedural rights of defendants found in the Bill of Rights, as interpreted by the courts. Similarly, empirical evidence in Canada has shown that about three quarters of the cases where breaches of the *Canadian Charter of Rights and Freedoms* have been alleged concern the criminal justice system.[9]

For these reasons, human rights lawyers looked forward to the decision of the High Court in *Dietrich v The Queen,* not only as a chance to overrule *McInnis,* but also to set an important precedent in the area of human rights in the administration of justice. However, while the High Court's decision in *Dietrich* attracted much academic comment,[10] it entertained only a mixed reaction from human rights advocates. In order to properly make sense of this response, a more detailed examination of the decision needs to be undertaken.

The decision in *Dietrich*

In 1986 Olef Dietrich was charged with illegally importing heroin[11] and three counts of illegally possessing heroin. Having exhausted all possible means by which he could obtain legal aid,[12] except on the basis of a guilty plea,[13] he was forced to appear by himself at his trial in the Victorian County Court in May 1988. This was despite Dietrich's many pleas for legal representation, or in the absence of this, an adjournment.[14] After a complex trial lasting forty days, Dietrich was

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8 There are many other areas of the law which provide for a State to restrict the liberty of the people. For example, laws that confine people to mental health institutions, quarantine laws and immigration laws that allow people to be detained.

9 See discussion of two separate studies conducted firstly by Monahan and secondly by Morton Russell and Withney in M Wilcox, 184–86.

10 See P Fairall 'Trial without counsel: *Dietrich v The Queen*' (1992) 4 *Bond Law Review* 235; P Fairall 'The right not to be tried unfiarly without counsel: *Dietrich v The Queen*' (1992) 22(2) *University of Western Australia Law Review* 396; K Fletcher 'Legal aid: right or privilege' (1993) 18(1) *Alternative Law Journal* 21; S Odgers casenote 'Dietrich' (1993) 17 *Criminal Law Journal* 102; G Boas '*Dietrich*, the High Court and unfair trials legislation: a constitional guarantee?' (1993) 19(2) *Monash Unviersity Law Review* 256; G Zdenkowski 'Defending the Indigenous Accused in Serious Cases: A Legal Right to Counsel?' (1994) 18 *Criminal Law Journal* 135.

11 Contrary to *Customs Act 1901* (Cth) s 233B(1)(b).

12 Under the procedures of the *Legal Aid Commission Act 1978* (Vic) Part 6 and *Judiciary Act 1903* (Cth) s 69(3).

13 This is because the Victorian Legal Aid Commission's guidelines specify that if they believe there is "no reasonable prospect of acquittal", legal aid will only be granted for a guilty plea. Dietrich was not prepared to accept a guilty plea.

14 See the exchange between the trial judge and Dietrich, referred to by Mason CJ and McHugh J (1992) 177 CLR 292, 314.

convicted of the importing charge. Two of the possession counts were not considered, whereas he was found not guilty of the other possession count. As will be shown, this acquittal was to become a matter of significance.

His appeal against his conviction to the Victorian Court of Criminal Appeal was rejected, and he was given leave to appeal to the High Court on the ground that he should not have been required to stand trial without legal representation.[15]

The High Court ruled by a 5-2 majority[16] that the trial judge should have adjourned the proceedings until such time as Dietrich obtained legal representation. The majority thus allowed the appeal, set the conviction aside and ordered a retrial. Mason CJ and McHugh J (the only joint judgment of the majority) stated at the outset:

> In our opinion, and in the opinion of the majority of this Court, the common law of Australia does not recognize the right of an accused to be provided with counsel at public expense. However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central 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 an accused is charged with a serious offence.[17]

This quote encapsulates the most important positive and negative features of *Dietrich* for human rights lawyers. On the one hand, *Dietrich* strengthens the right to a fair trial, a right found in nearly all international human rights instruments.[18] On the other hand, none of the High Court justices were prepared to acknowledge that this meant that there was a right to legal representation at public expense for accused persons charged with a serious criminal offence. The rest of this casenote expands upon both the positive and negative aspects of the *Dietrich* decision, and concludes by arguing that the right of legal representation in serious criminal matters should be an essential part of the Australian legal system.

Positive aspects of the Dietrich decision

The first positive aspect of *Dietrich* is that, in general, a criminal trial for a serious matter will be stayed until the accused obtains legal representation. While Mason CJ and McHugh J in the above quotation stated that this would occur in "most cases", the majority later clarified that the only time this would not take place would be in "exceptional circumstances" (see later). In practice, the effect of the decision will be to ensure that those charged with serious criminal offences

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15 Interestingly, as the appeal involved an important legal question, as opposed to Dietrich's liberty, legal aid was granted.

16 Brennan and Dawson JJ dissenting.

17 (1992) 177 CLR 292, 297–98.

18 See *Universal Declaration of Human Rights* Article 10; *International Covenant on Civil and Political Rights* (ICCPR) Article 14; *Canadian Charter of Rights and Freedoms* Article 11(d); *European Convention for the Protection of Human Rights and Fundamental Freedoms* Article 6. See also D Harris 'The right to a fiar trial in criminal proceedings as a human right' (1967) 16 *International and Comparative Law Quarterly* 352.

will have legal representation at their trial.[19] Although the majority did not attempt to define a 'serious offence' (clearly Dietrich's conviction was serious), Deane J stated that an example of a non-serious offence was one where "there is no real threat of deprivation of personal liberty".[20] This has been a major issue in the American legal system, where the right of legal representation is firmly entrenched.[21] In Australia, the precise dividing line as to what is a 'serious' offence will need to be articulated in future court decisions.[22]

The second positive aspect of *Dietrich* is that it further strengthens the right of a fair trial. While this right has been recognised internationally in many human rights instruments,[23] it has also been upheld by the High Court in many previous decisions[24] as being a fundamental common law right. However, *Dietrich* perhaps takes this even further. Two justices (Deane and Gaudron JJ) were also able to extract the authority for the right to fair trial not just from the common law, but also as an implied constitutional right deriving from Part III of the Constitution. For example, Gaudron J states that:[25]

> The fundamental requirement that a trial be fair is entrenched in the Commonwealth Constitution by Ch III's implicit requirement that judicial power be exercised in accordance with the judicial process.

If the above does become the viewpoint of the majority of the High Court, it would have far reaching consequences. It would place the right to fair trial in a similar category as other recent High Court decisions which also founded implied rights under the Constitution. The most well known is derived from the case of *Australian Capital Television Pty Ltd v Commonwealth*,[26] which held that an implied right in the Constitution existed in relation to freedom of expression in respect of public and political affairs. As a result, the High Court invalidated Federal legislation which would have imposed stringent limits on political broadcasting and advertising during Federal, State and local government elections. If in fact the right to a fair trial is a constitutionally protected right, then this would mean that at least any Federal legislation, administrative guidelines or exercise of governmental authority could be challenged and nullified in the courts if found to be infringing the right to a fair trial. A more complex issue is whether this would also extend to legislation, administrative guidelines and exercise of governmental

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19 See N O'Neill and R Handley *Retreat from Injustice: Human Rights in Australian Law* (1994) 1st ed Federation Press Sydney, 157.
20 (1992) 177 CLR 292, 336.
21 See S Krantz, C Smith, D Rossman, P Froyd and J Hoffman *Right to Counsel in Criminal Cases: The Mandate of Argersinger v Hamlin* (1976) Ballinger Publishing Co Cambridge Mass.
22 This will have important financial implications for the legal aid system but this should not be the sole, or even the primary, criterion. See Findlay, Odgers and Yeo, 148–50.
23 See footnote 18.
24 See *Bunning v Cross* (1977) 141 CLR 54; *Barton v R* (1980) 147 CLR 75; *William v R* (1986) 161 CLR 278; *Jago v District Court (NSW)* 168 CLR 23.
25 (1992) 177 CLR 292, 362. See also 326 per Deane J.
26 (1992) 177 CLR 106.

authority at the State or Territory level.[27] One writer has argued[28] that Victorian Government legislation[29] which has been enacted in response to *Dietrich* may well be unconstitutional on this basis.

The final positive aspect of *Dietrich* is the further recognition by the High Court of the influence of international human rights standards. Although the High Court correctly reiterated that international human rights norms are not automatically part of Australian domestic law,[30] it confirmed that they are relevant in interpreting our domestic law at least where it is ambiguous.[31] The fact that this was not the case in this particular circumstance, as under Australian law it was clear that no right to legal representation existed, does not detract from the importance of the greater recognition of international norms. Also of encouragement was the willingness by many of the High Court justices to analyse relevant decisions of American and Canadian courts, the European Court of Human Rights and the Human Rights Committee.[32] This modern approach of the High Court represents a significant break with its past jurisprudence, where non-Australian precedent consisted primarily of decisions from the United Kingdom.

Negative aspects of the *Dietrich* decision

Dietrich also presents human rights lawyers with a number of important concerns. While the strengthening of the right to fair trial is welcomed, 'fair' trial is clearly a subjective and elastic concept. After all, both the majority of the High Court in *McInnis* and the minority in *Dietrich* thought that their respective trials were 'fair'. The majority in *Dietrich* were not prepared to specify the content of a 'fair' trial,[33] or specify what the minimum standards of a fair trial should be.

This is in contrast to international law. While most international human rights instruments also refer to the requirement of a fair trial in a general sense, these overlay more specific guarantees. For example, the *International Covenant on Civil and Political Rights* (the ICCPR) states in Article 14 (1) that: " . . . everyone shall be entitled to a fair and public hearing . . . ." This establishes the overriding

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27 A majority of the High Court in *Australian Capital Television Pty Ltd v Commonwealth* held that the implication of freedom of communication contained in the Constitution extends to all political matters, including matters relating to all levels of government. However, whether this principle can be simply transferred to the right of fair trial is an intricate constituitonal leghal question beyond the scope of this casenote.

28 See Boas, 270–2.

29 *Crimes (Criminal Trials) Act 1993* (Vic), inserting s 360A into the *Crimes Act 1958* (Vic). See also J Lynch 'Section 360A and the Dietrich Dilemma' (1993) 67(9) *Victorian Law Institute Journal* 838.

30 This is because Australia adopts the 'incorporation' principle towards international law, ie, a specific legislative act must take place in order to incorporate an international legal norm into domestic law.

31 This was the opinion of most of the judges in *Dietrich*. See (1992) 177 CLR 292, 306 per Mason CJ and McHugh J, 348–9 per Dawson J and 360 per Toohey J. For a detailed discussion of these issues, see M Kirby 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol—A View from the Antipodes' (1993) 16 *University of NSW Law Journal* 363.

32 This is the body set up under the United Nations to monitor State compliance with the ICCPR.

33 See (1992) 177 CLR 292, 300 per Mason CJ and McHugh J, 328–9 per Deane J, 353 per Toohey J and 364 per Gaudron J.

entitlement to a fair trial. However, the ICCPR then proceeds to set out the minimum content of a fair trial. Article 14 (3) states: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . ." A list of seven different minimum requirements [(a) to (g)] are then set forth. McGoldrick comments on the relationship between paragraphs (1) and (3) of Article 14 in the following manner:

> Clearly paragraphs 1 and 3 are related, the latter being the minimum, though not exhaustive, preconditions of a fair criminal trial. As the Human Rights Committee stated in its general comment, "the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by article 1". In this sense then the concept of a fair hearing is a residual one.[34]

The concern surrounding the majority judgment in *Dietrich* with respect to the issue of fair trial is that without specifying a minimum content of a fair trial, as does Article 14 (3) of the ICCPR, the concept lacks real teeth. It is thus too easily dependent on subjective interpretation, as evidenced by the decision of the majority in *McInnis* and the minority in *Dietrich.*

On the other hand, one could argue that as the majority in *Dietrich* did require that there must be legal representation for a serious criminal trial to proceed "unless there are exceptional circumstances", this effectively specifies a minimum content of a 'fair' trial. The words "exceptional circumstances" seem to suggest that it would be a very rare case indeed where absence of legal representation would amount to a fair trial. However, a closer reading of the majority judgments unfortunately do not support this conclusion.

According to the majority's jurisprudence, the question should simply have been: were there exceptional circumstances in this case? Instead, the judgments looked towards the particular circumstances of Dietrich's trial in order to conclude that the trial was unfair. In particular, the court attached a large degree of importance to the fact that Dietrich was acquitted of one charge, and had presented his evidence poorly. The majority did not speculate if they would have come to an opposite conclusion had these factors not been present. In this respect their reasoning was not dissimilar to the majority in *McInnis.* Although the actual outcome of that case was the opposite of *Dietrich,* the High Court had also based its decision on the particular circumstances of the trial. The majority held that McInnis essentially did receive a fair trial as "the material against the applicant was very strong indeed", and thus the accused had not been deprived of his chance of an acquittal.[35]

Some judges in the majority tried to provide a more precise definition of "exceptional circumstances". The clearest statement was provided by Gaudron J,

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34 D McGoldrick *The Human Rights Committee: Its Role in the Development of the ICCPR* (1994) 1st ed Clarendon Press Oxford, 405.

35 (1979) 143 CLR 575, 579 per Barwick CJ.

who simply stated that a defendant must be represented unless they choose to represent themselves.[36] Deane J also supplied some tentative examples where a trial would be fair despite the accused not being represented.[37] However, a careful analysis of their judgments indicate that the reasoning they used to conclude that Dietrich's trial was unfair reveals that they also relied upon the individual circumstances of Dietrich's trial.

While the fact that Dietrich had been acquitted on the charge of possession seems to form a large basis for the reasons why the High Court was able to distinguish *Dietrich* from *McInnis,* this is a dubious basis. Thus one writer has commented that: "it is possible that distinguishing these cases is in fact an artificial exercise to avoid overruling a recent decision by the same court".[38] Certainly the majority, except for Gaudron J,[39] were not prepared to state explicitly that they were overruling *McInnis.* This is particularly disappointing to human rights lawyers given the vast changes that have occurred since 1979 with respect to the acceptance by Australia of international human rights legal norms.[40]

However, there is an even more disquieting aspect of the majority's approach to the issue of "exceptional circumstances". Most of the justices in *Dietrich* referred to the need for a 'balancing' process to take place whenever an Appeal Court is called upon to review whether a trial has been 'fair'. For example, Toohey J stated that:

> 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.[41]

This type of utilitarian approach is similar to the majority approach in *McInnis,* where the High Court also said that the interests of parties other than the accused must be taken into account in assessing whether or not there had been a miscarriage of justice. These arguments are dangerously wrong, as they ignore the *qualitative* differences between what is at stake for the defendant, and what is at stake for other parties[42] during the criminal trial. The interests of other parties, while not unimportant, cannot compare to the interests of the defendant in not being unjustly deprived of their liberty by the state. Some writers[43] have referred to this argument as an 'unprincipled utilitarian perspective', and criticise the

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36 (1992) 177 CLR 292, 374.
37 (1992) 177 CLR 292, 335–6.
38 Boas, 258.
39 (1992) 177 CLR 292, 374.
40 For example,Australia had set up the Human Rights Commission in 1981 (which was replaced by the Human Rights and Equal Opportunity Commission in 1986), ratified the ICCPR in 1980 and acceded to its First Optional Protocol in December 1991, and ratified many other important international treaties and conventions during the 1980s and early 1990s.
41 (1992) 177 CLR 292, 357.
42 Specifically, these arguments have often been used by advocates of victims of crime to assert that they should be accorded substantive rights during criminal trials. See S Garkawe 'The Role of the Victim During Criminal Court Proceedings' (1994) 17 *University of NSW Law Journal* 595.
43 Gaze and Jones, 38.

majority in *McInnis* for perceiving the central issue of the case to be whether the lower court had erred in its judgment, and not whether there is a right to legal representation. This critique is also applicable to the High Court's approach in *Dietrich*.

Conclusions and suggested future directions of the law in Australia

The above analysis has shown that the High Court's decision in *Dietrich* is a mixed blessing for human rights lawyers and civil libertarians. While the court was prepared to place more emphasis on the right of fair trial and upon international human rights norms and jurisprudence, ultimately it is still a conservative decision. No minimum content of a 'fair' trial was specified; even the right to legal representation in serious criminal offences was not unequivocally considered to be necessary for a fair trial. Furthermore, despite there being a different result, the unsatisfactory decision of *McInnis* was not categorically overruled, and the court used similar reasoning to the majority in *McInnis*.

Perhaps the ultimate effect of *Dietrich* will not really be known until some of the issues that it raises will be litigated upon in the future. For example, the question of what is a 'serious' criminal charge; the nature of 'exceptional circumstances' in which the lack of representation would not render a trial unfair; who exactly is an 'indigent' accused; and the issue of the standard of legal representation required.

The writer would argue that the right to legal representation, at public expense where necessary, should be an essential part of the Australian legal system. It is true that there is scope for debate as to *when* during the criminal process the right attaches (clearly it should at least attach during the trial); *what* criminal offences it should attach to; the definition of an *indigent* defendant; the *standard* of representation required; and finally the circumstances as to when a defendant may *waive* this right. These may not be easy questions to answer. However, not to allow a right of legal representation on the basis of the difficulty of these questions, as some of the reasoning of the High Court suggests,[44] is clearly unsatisfactory. After all, the American courts have been grappling with these issues for some time, and no one in America suggests that the right to representation at public expense should be removed due to the complexities of these questions.

Another argument used by the majority in *Dietrich* for denying a right to legal representation at public expense in Australia is that in none of the international instruments expressly provide for this right. This ignores the fact that much of the wording of these international instruments was deliberately drawn up in broad terms and were overly deferential to States' laws in order to achieve agreement for as wide a variety of societies as possible. They were also drafted with the

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44 See (1992) 177 CLR 292, 311 per Mason CJ and McHugh J.

awareness of the financial poverty of many governments in the world community, making a commitment to provide legal aid in each serious criminal case almost impossible for these countries. This hardly constitutes a basis for denying the right to representation in relatively affluent and liberal Australian society. Furthermore, the American Bill of Rights does not provide for a right of legal representation at public expense.[45] This right was only derived from later Supreme Court interpretations[46] of the Bill of Rights.

A final possible argument against the recognition of a right to representation at public expense is that it is not up to the courts to infringe upon the legislative and executive functions of governments by dictating what expenditure is needed for the running of the criminal justice system.[47] However, Gaudron J convincingly answers this argument:

> The question whether public funds should be allocated for the legal representation of persons charged with criminal offences is one for governments, not the courts. . . . But whatever the consequences and whatever the cost, it is for the courts to decide what is or is not fair in a criminal trial.[48]

In conclusion, the human rights of the people of Australia will never be adequately protected until the right to legal representation in serious criminal cases is recognised as an essential element of a fair trial. In this regard, it was unfortunate that the High Court in *Dietrich* was not prepared to acknowledge this fundamental truth.

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45 Article 6 of the Bill of Rights refers only to the right 'to have the assistance of Counsel for his defence'.

46 Starting from *Powell v Alabama* (1932) 287 US 45, and culminating in the seminal case of *Gideon v Wainwright* (1963) 372 US 335.

47 This was an argument put by Brennan J in his dissenting judgment. See (1992) 177 CLR 292, 323.

48 (1992) 177 CLR 292, 365.