Legal aid
Right or privilege?

Karen Fletcher

The right to representation recently recognised by the High Court may be no more than international covenants require.

In *Olaf Dietrich v The Queen* the Australian High Court confirmed that the right to a fair trial is a '. . . fundamental prescript of the law of this country'[1] and, in serious criminal cases and in the absence of 'exceptional circumstances', an accused person who is unable to afford legal representation must be provided with counsel at public expense.

Cases in which such a person is not provided with counsel should, according to the majority High Court decision in *Dietrich*, handed down on 13 November 1992, be adjourned until legal representation is provided, indefinitely if necessary.

Olaf Dietrich was refused legal aid, for his trial before the Victorian County Court in May of 1988, by the Victorian Legal Aid Commission for a plea of not guilty, although he was offered assistance for a plea of guilty. The High Court has set aside his conviction on the grounds of a miscarriage of justice arising from the failure of the County Court judge to exercise his discretion to adjourn proceedings until Dietrich was provided with legal assistance at public expense.

In May of 1988 Dietrich presented his own defence in the Victorian County Court to an indictment containing four counts relating to the importation and possession of a trafficable quantity of heroin in December 1986.

Dietrich was unrepresented at the trial because of his lack of means and the rejection of his applications for legal assistance. The trial was lengthy and complex, especially in relation to the admissibility of evidence. Dietrich requested that the trial be adjourned until he was assigned legal assistance. He protested that he was unable to defend himself adequately, due to his lack of knowledge of the legal process and his stressed mental state. His submissions on this question were, effectively, ignored.

The trial proceeded for a total of 40 days, and Dietrich remained unrepresented. At the conclusion of the trial the jury found him guilty on one of the four counts.

Dietrich appealed against his conviction to the Victorian Court of Criminal Appeal in May 1989 on the ground, among others, that 'every person charged with an indictable offence in [Victoria] is entitled to counsel provided at the expense of the State and that failure to appoint counsel to defend [Dietrich] was a breach of the "due process" requirements of the . . . unwritten Constitution of the State of Victoria and the application of Division 3 of the *Imperial Acts Application Act* 1980.'[2] The appeal was unsuccessful on this and all other grounds.

Dietrich's subsequent application for leave to appeal to the High Court against the decision of the Victorian Court of Criminal Appeal was heard in March 1992. The appeal was grounded, primarily, on a claim that an accused person, charged with a serious crime, punishable by imprisonment, who cannot afford counsel, has a right to be provided with counsel at public expense.

The application accepted that the decision sought would involve an overruling of the decision in the leading Australian case on the right to counsel, *McInnis v R* (1979) 143 CLR 575. Counsel for Dietrich argued that Australia's international obligations in relation to providing a fair trial have changed since the decision in *McInnis*.

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The decision in *McInnis* was handed down in December 1979. On 13 August 1980, Australia ratified the International Covenant on Civil and Political Rights. The Optional Protocol was ratified on 25 December 1991.

The argument based on Australia's international obligations under the Convention raised by counsel for Dietrich has been previously noted by commentators on Australian human rights law:

> At the time of the hearing of *McInnis* the Commonwealth had not ratified the ICCPR and so the obligations in Article 14 did not apply. It is the view of the author that, even if the High Court was correct in 1979, it should now note the fact that Australia is a party to the ICCPR and follow the lead given by Murphy J in *McInnis*.[3]

In his dissenting judgment in *McInnis*, Justice Murphy recommended that special leave to appeal against the conviction of McInnis for deprivation of liberty and rape, should be granted and the conviction and sentence set aside for a substantial miscarriage of justice.

McInnis, like Dietrich, was unable to afford legal representation and was unsuccessful in his applications for free legal aid. There was, however, some chance that he may have been able to obtain money from his family in order to retain counsel, and there were some channels of appeal, within the legal aid system, which he had not yet explored. His barrister withdrew from his case one day before the trial. McInnis was forced to present his own defence.

Murphy J supported his dissenting views with an exposition of what he considered to be fundamental Australian common law principles on the rule of law and the right to counsel. He also examined international precedents, especially in United States cases, and cited Article 14 of the International Covenant on Civil and Political Rights, to which Australia was then a signatory but which had not then been formally ratified by Australia.

The dissent was a strong and impassioned one. In his opening paragraph Murphy said:

> Every accused person has the right to a fair trial, a right which is not in the slightest diminished by the strength of the prosecution's evidence and includes the right to counsel in all serious cases. This right should not depend on whether an accused can afford counsel. Where the kind of trial a person receives depends on the amount of money he or she has, there is no equal justice.[4]

The majority in *McInnis* (Barwick CJ and Mason, Aickin and Wilson JJ) took what has been seen as the opposite view to Murphy J, although their finding may not have been essential to the ultimate result, that:

> an accused in Australia does not have a right to present his case by counsel provided at public expense. However he does have the right to apply for legal aid under statutory procedures . . .[*McInnis* at 581]

The *Dietrich* majority, in 1992, stopped short of over-ruling *McInnis*.

Mason CJ and McHugh J, in a joint judgment, distinguish *McInnis* on the basis that the actual decision (that there had been no miscarriage of justice in McInnis's particular situation) did not turn on their assumption that an indigent accused does not have a right to be provided with counsel at public expense. They conclude that there is, therefore, no reason why the statements on the right to counsel in *McInnis* should not be reconsidered.

On reconsideration, however, they conclude that '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' (at 15).

The formulation they prefer is that used in the opening to this article: the right to a fair trial. Mason CJ and McHugh, Deane and Toohey JJ agree that this right implies a right not to be tried (i.e. to have the case adjourned) without the benefit of counsel in serious criminal cases unless there are 'exceptional' (Mason, McHugh and Deane) or 'compelling' (Toohey) circumstances indicating otherwise.

Toohey lists possible 'compelling circumstances' as '. . . the situation of witnesses, particularly the victim . . . consequences of the adjournment for the presentation of the prosecution case and for the court's programme generally' (at 63).

Gaudron J, whose judgment forms part of the majority in *Dietrich*, went much further than her fellow judges. She held, without qualification for either 'exceptional' or 'compelling' circumstances, that:

> . . . to the extent that it [*McInnis*] is authority for the proposition that legal representation is not essential for the fair trial of a serious offence [it] should no longer be followed. Instead, legal representation should be seen as essential for the fair trial of serious offences unless the accused chooses to represent himself [sic]. [at 83]

Legal aid and access to justice in Australia

The *Dietrich case* has come before the High Court at a time of intense debate in Australian legal, political and community sectors around the issues of access to justice, the cost of legal services and government legal aid funding.

The decision has already prompted Legal Aid Commissions throughout Australia to point to their financial inability to provide legal aid in all cases in which a 'fair trial' would require it and to call for an increase in federal and State funding to the Commissions.

Dawson J, in his dissenting judgment in *Dietrich*, states clearly and succinctly the reasoning behind the position which holds that legal assistance cannot be provided in all cases in which the interests of justice require it:

> . . . the interests of justice cannot be pursued in isolation. There are competing demands upon the public purse which must be reconciled and the funds available for the provision of legal aid are necessarily limited. [at 56]

This problem is not limited to the question of serious criminal cases but extends to the issue of access to justice in Australia generally.

The National Legal Aid Advisory Committee (NLAAC) in its report commissioned by the Federal Government included in its findings the advice that:

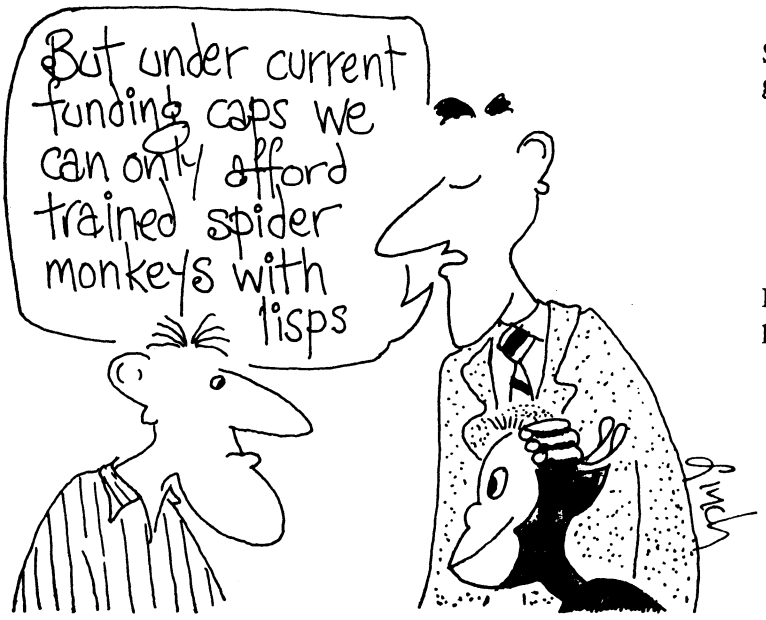
> The Committee has accepted as a working proposition that there are now serious problems in access to justice on the part of many people in the Australian community . . . The major practical consequence of barriers to access to justice is that many people in the Australian community are unable to adequately pursue or protect legal rights and interests or obtain access to the legal system.[5]

More specifically NLAAC advised that:

> Existing and anticipated levels of overall funding of national legal aid programs are demonstrably insufficient to meet the reasonable needs of the Australian community for legal aid programs in the short, medium and long term.

Legal aid as a social service

State Legal Aid Commissions are the primary providers of government funded legal aid in Australia. They are relatively



new developments, most of them having been established between 1977 and 1981 to replace the Australian Legal Aid Office which was established in 1974.

The Commissions are quasi-independent bodies which comprise representatives of State and Federal Governments, the private legal profession, legally assisted persons and in some cases community groups. They administer a conglomeration of funds provided by both Federal and State Governments, by the private legal profession from interest earned on solicitors' trust funds, as well as other money by way of costs awarded for inhouse legal services and money collected from clients in the form of client contributions.

Former director of the Victorian Legal Aid Commission, Julian Gardner, recently commented that:

> . . . the establishment of Legal Aid Commissions in the 1970s, events that were applauded by many within the legal aid community as a major advance, have meant that these broadly representative bodies have a significant degree of control over the expenditure of their budgets. Unfortunately these are controlled budgets in contrast to the demand-led budgets in, say, criminal defence matters in the US or more broadly in the UK. In the latter the legal aid expenditure has burgeoned. During what is popularly seen as the fiscally severe Thatcher years, legal aid has been described as the fastest growing social service. Per capita expenditure has been estimated to be somewhat more than double that of NSW.[6]

NLAAC describes the history of funding for legal aid in the context of Australian social policy in the following terms:

> . . . it is significant that public funding of access to justice including national legal aid programs has not been included within the umbrella of funding and administration of the post-war federal social welfare state. Providing access to justice and legal services has remained primarily a 'private' matter for individuals and the private legal profession. This can be contrasted to other fields of social policy notably the secondary and tertiary education system and the provision of health services.[7]

In Australia there is always tension between recognition of the importance of adequate social services for the creation and maintenance of a just and democratic society and the question of availability of public funds for such purposes. Because of the unique historical position of legal aid this tension is even more severe.

For example, the present Federal Minister for Justice, Senator Michael Tate, is clearly well within the terms of his government's social justice policy when he says:

> . . . the very foundation of our pluralist democracy depends on the Rule of Law. I believe the Rule of Law is in jeopardy if a class of economically deprived citizens have not, because of that condition, got access to the legal advice and representation necessary to survive in our law ridden society.[8]

But equally clearly, Eric Thorne, finance officer in the Federal Department of Justice, describes the 'fiscal reality' perceived by government:

> Commonwealth budgeting in the years immediately ahead will be very tight — expenditures and proposed expenditures will be scrutinised very carefully . . . The art in putting together a budget is striking a balance between competing demands. There will always be more expenditures that a government would like to make, each expenditure being treated on its merits in isolation, than can be accommodated. Thus budgets must reflect priorities that are placed on particular areas of expenditure . . . in the legal aid area targeted assistance is a fact of life — with limited funding there is no alternative.[9]

Because of the unique semi-privatised structure for the provision and administration of legal aid in Australia the questions of determination of 'priorities' and 'targeting' of assistance are complex. They are not needs-driven, demand-driven or even law-driven, as in other areas of social welfare spending.

'Capped' legal aid funding

Legal Aid Commissions, not government, make the 'targeting' decisions on the basis of the fixed or 'capped' level of funding available to them. They have a responsibility to ensure that they do not overspend their fixed budgets. They must therefore restrict grants of legal assistance and other forms of legal aid (for example community legal education and law reform research) by some administrative method.

An example of such a method is the Means, Merit and Guidelines tests applied by most Commissions in their decision making on grants of legal aid in the narrow sense of legal assistance for particular disputes or proceedings.

These tests can and do change as Commission budgets and the cost of legal services vary. For example, the number of people eligible for legal aid according to the means test may be varied by a variation of the income or assets levels prescribed by the test. Similarly, the types of legal proceedings for which legal assistance may be provided can be expanded or restricted by changes to the Guidelines set by the Commission. (For example, under the present Queensland Commission Guidelines legal assistance is not available in any case in which the amount in dispute is less than $5000.)

The merit test is more constant. Legal aid will not be granted to applicants in cases in which there is no reasonable chance of the applicant's success.

Debate on these tests rages within Commissions and in the broader legal aid community. In some Commissions the merit test has been abandoned in some categories of case because it may require a decision on the merits of a case by an administrative officer or committee without access to sufficient information to make such a determination, a sort of pre-judgment of the case with none of the procedural requirements observed in a court hearing. It was this test which denied Olaf Dietrich legal aid for the presentation of his defence.

It can be seen that the 'targeting' decisions made by Legal Aid Commissions are less driven by social justice or other policies of Federal or State Governments than they are by the availability of funds for Legal Aid Commissions from the various and varying sources.

These decisions are also certainly not law-driven. If the statements of the majority in *McInnis* in relation to the rights of an accused in a serious criminal case are a definitive statement of the law in Australia then, in contrast to social security, education, health care and other social services, Australian citizens have no guaranteed right to free or subsidised legal aid even in the most serious criminal cases. They only have a right to have their application considered by the officers or committees of the relevant Legal Aid Commission and determined according to the Guidelines adopted by that Commission. The law does not oblige the Commissions to grant legal aid in any specific circumstances.

The *Dietrich* decision does not, legally, compel Commissions to grant legal aid in any specific circumstances. However, it will have the significant practical effect that if aid is not granted to a person charged with a serious criminal offence, and unable to afford counsel, their case may be indefinitely adjourned.

A legal aid officer or review committee acting with the authority of a Commission may still decide not to grant legal aid in a serious criminal case, in which the accused stands in peril of deprivation of liberty for a substantial time, on the grounds that the applicant does not have a reasonable chance of success in defending the charge or charges.

Finance officer Eric Thorne explicitly defends the application of the merit test in such a situation in the context of financial considerations:

> I have observed that differing views are being expressed on whether the likely success of defending a serious criminal charge should be a factor in deciding whether legal aid should be granted for such a defence. How does the provision of public funding for legal aid in low probability of success cases stack up against other decisions on public funding inherent in the budget? In the health area, costs for medical treatment overseas for life-threatening conditions (where treatment is not available in Australia) are only met where the treatment has a reasonable probability of success. How appropriate is it to fund low probability cases in one area and not in another?"[10]

This comparison with health funding is an interesting one. It ignores the fundamentally different approach taken by government to legal aid funding in comparison with health funding. Whereas the provision of health funding is basically driven by the need in the community for health care, legal aid funding is capped.

The situations are not comparable, one being the provision of an adequate defence to a charge brought by the state in this country and the other being the provision of scientifically advanced medical procedures overseas. (It is interesting to note that, in Queensland, heart transplant operations are only available through the public health system. No amount of wealth can procure such an operation. Candidates are selected on purely medical criteria.)

Most significantly Mr Thorne's comments place legal aid funding in the same category as health funding, clearly identifying legal assistance as a social service, ignoring the legal, constitutional and political importance of equality before the law. Identifying this conception by government, especially the finance sectors of government, is a most important step. This is where the significance of *Dietrich's case* in relation to governmental responsibility for the provision of free and subsidised legal aid becomes most obvious.

As a member of the current High Court has only recently pointed out:

> We should not lose sight of the fact that there are rights and liberties which far exceed the value placed upon them by economic utilitarianism.[11]

Legal aid as a human right

The *Dietrich case* highlights a neglected aspect of the access to justice debate in Australia: access to justice and legal aid as civil rights under international human rights law.

While human rights law may be a relatively new concept in Australian public policy formulation on access to justice, it has been a feature of decision making with regard to legal services in Europe for some time, through the operation of the European Convention for the Protection of Human Rights.

Similarly, in the United States, access to justice strategies have been heavily influenced by the human rights guarantees in the American Constitution, particularly the sixth (the right to assistance by counsel in all criminal prosecutions under federal law) and fourteenth (the right to due process in all legal proceedings) amendments in the US Bill of Rights.

Australia does not have a Bill of Rights. It has, however, long been accepted in legal and political spheres, and indeed argued as a reason a Bill of Rights is unnecessary, that fundamental common law principles underlying the entire body of Australian law entitle Australian citizens to due process and equality before the law:

> The principles themselves cannot be found in expressed terms in any written Constitution of Australia, but they are inscribed in that great confirmatory instrument, 700 years old, which is the ground work for all constitutions — Magna Carta.[12]

The differing opinions of Murphy J and the majority in *McInnis* on the right to counsel in serious criminal cases is testament to the fact that although the existence of these principles is not controversial their ambit and application are unclear.

The application of the provisions of the ICCPR to domestic Australian law is also unclear. Unlike the sex and race discrimination conventions the provisions of the ICCPR have not been incorporated into domestic legislation. The covenant is a schedule to the *Human Rights and Equal Opportunity Commission Act* 1986, which establishes an administrative structure (the Commission) with complaint handling, inquiring and research functions.

Former Deputy Chairman of the Human Rights Commission (as it then was) Peter Bailey, describes the effect as follows:

> Scheduling the international human rights instruments to the legislation gives them a declaratory status: it means that they are not directly enforceable either by the Commission or by the courts, but operate to guide the Commission in its activities under the legislation . . . a complaint about human rights, not within the prescribed unlawful areas of discrimination, cannot lead to court enforcement either directly or indirectly. It leads to policy and political consideration.[13]

There are, therefore, at least two possible sources of human rights law applicable to Australia which impact upon the responsibilities of governments, both State and federal, to provide access to legal services sufficient to maintain due process and equality before the law. They are 1) international human rights law, especially the International Covenant on Civil and Political Rights, and 2) common law principles deriving from the rule of law.

The balance of this article is a brief examination of these two sources of human rights law, their interaction with each other and an outline of possible areas of governmental responsibility implied by them.

The rule of law

It has long been accepted that in order for Australia to be able to claim the mantle of 'democratic society', the rule of law must lie at the foundation of our legal system. This concept can be traced through the English origins of Australian law. It was to these same fundamental principles which Justice John Toohey of the High Court referred when in a recent public address he said:

> What good is a legal right if the person who holds it cannot afford to secure its enforcement? . . . If, as a society, we base our affairs upon the existence of the rule of law, we carry a responsibility to provide for its enforcement. If rights can only be enforced by the rich, then they are not rights but assets bought at a price. The rule of law then effectively becomes the privilege of the few.[14]

Such observations serve as vision statements or broad objectives for which a society might strive. They are virtually a re-statement, in modern language, of the words of the Magna Carta. That they need such re-statement raises the disturbing question whether societies such as Australia have progressed much beyond the days of medieval England when the wealthy could pay for a speedy trial, or for removal of their case to a more favourable court.

In *Dietrich* the majority of the court depended on the concept, strongly related to the 'rule of law' arguments, of a 'fundamental prescript' of the criminal law requiring that no conviction be allowed to stand which has been obtained through a trial which was not 'fair' and 'conducted according to law'.

In her judgment, Gaudron J points out that the requirements of fairness and legality are separate and that the expression 'fair and according to law' is not a tautology.

> . . . the law recognises that sometimes, despite the best efforts of all concerned, a trial may be unfair even though construed strictly in accordance with law. Thus, the overriding qualification and universal criterion of fairness. [at 70]

Despite protestations by the majority (with the exception of Gaudron J) that they have not refused to follow *McInnis*, I would submit that reliance on this 'fundamental prescript', rather than on black letter law, represents a significant departure from the approach of the majority in *McInnis* and accords strongly with the dissent of Murphy J in that case.

The International Covenant on Civil and Political Rights

The ICCPR was ratified by the Commonwealth of Australia in 1980. So far as is relevant to this discussion, Article 14 of the Covenant states:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law . . .
>
> 3. In the determination of any criminal charge against him everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (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 not have sufficient means to pay for it . . .

The effect of these provisions on domestic Australian law depends on a large number of factors, such as the capacity of the Commonwealth to ratify the Covenant, the effect of any declarations and reservations made in relation to the Covenant, and the capacity of the Federal Government to legislate on the subject matter of the Covenant. Their effect will also depend on the existence and effect of law already in force which is within the subject matter of the Covenant, the effect of the Covenant on areas of State responsibility, the effect of the Covenant on areas of Legal Aid Commission responsibility and, finally, the ambit and application of the provisions contained within the Covenant.

On 21 November 1973, the then Attorney-General, Senator Lionel Murphy, unexpectedly introduced into the Senate the *Human Rights Bill* 1973. The Bill set out, in legislative form, most of the rights contained in the ICCPR (which had not at that time been ratified due to difficulties in negotiations with the States) including those set out in Article 14.

On the morning of 22 November 1973, the Prime Minister's office was '. . . humming with the reverberations of angry telegrams from almost all the Premiers'.[15]

Senator Murphy's attempt to give legislative force to the provisions of the ICCPR was thwarted when, 'recognising the heat of the response and the political difficulty that might result' Prime Minister Whitlam placed the Bill on hold. The Bill lapsed in 1974.[16]

In 1985 there was a second attempt to introduce federal legislation encapsulating the provisions of the ICCPR in the form of the *Australian Bill of Rights Bill* 1985. In 1986 this Bill also lapsed, after a period of heated political and community debate focusing on the issue of States rights and the incursion of

Commonwealth power into areas of State responsibility by the use of the External Affairs power in the Constitution. The then Premier of Queensland, Sir Joh Bjelke Petersen, referred to the intention of the Bill as 'socialism by stealth'.[17]

It is obvious from this that the issue of domestic legal effect for the provisions of the ICCPR in Australia has been extremely controversial.

At the Premier's conference in Canberra in October 1977, agreement was reached on procedures for ratification of, and responsibility under, international treaties. This agreement included undertakings by the Commonwealth to inform and consult with the States before entering into any treaty obligations which affect a legislative area traditionally regarded as being within the responsibilities of the States, to seek the insertion of a 'Federal Clause' in any such treaty and to refuse to become a party to treaties containing federal clauses until the laws of all States conform with the mandatory provisions of those treaties.[18]

Agreement from the States for ratification of the ICCPR in 1980 was obtained by use of a federal reservation which Gillian Triggs has argued may amount to a repudiation of the Convention.[19]

Irene Moss, currently the Federal Race Discrimination Commissioner, has suggested that:

> Legal aid programs could be seen as the principal measure by which the Australian Government ensures an effective remedy is available in respect of the rights to legal assistance provided in Article 14.[20]

and further that:

> [The provisions in Article 14.3 of the ICCPR] do not establish an absolute entitlement to legal aid in all cases but are standards which need to be observed at all levels of decision-making concerning legal assistance.[21]

Such arguments will only have legal (as opposed to moral or political) force if the particular provisions of the ICCPR which are being relied on can be shown to be part of Australian domestic law.[22] As has already been discussed, all attempts to legislate for the domestic application of the Covenant have so far been unsuccessful.

Nevertheless, it is possible to argue that ratification of the Covenant, and of the accompanying Optional Protocol, has had and will have a marked effect on Australian domestic law, and certainly on Australian public policy.

The force of the Covenant has been enhanced by Australia's ratification of the Optional Protocol which enables individuals who claim that any of their rights enumerated in the Covenant have been violated, and who have exhausted all available domestic remedies, to submit a written complaint to the International Human Rights Committee for investigation.

The effect of such an investigation, and the expression of the Committee's views, is not yet known in Australia as there are no precedents. It is clear, however that while the International Committee's views may be politically persuasive they will not, of themselves, carry the force of law.

It is submitted that because decisions in Australian human rights cases will be subject to review by the International Human Rights Committee, Australian politicians, public servants and the judiciary will pay greater attention to the provisions of the ICCPR.

Additionally, it may be argued that Article 14 of the ICCPR clarifies the existing Australian common law on the right to legal assistance, at least in relation to serious criminal cases, and possibly in relation to civil cases and in less serious criminal cases '. . .where the interests of justice so require'.

Further, it could be argued that the ratification of the Covenant by the Australian Government effectively resolved the ambiguities evident in the majority decision in *McInnis*. Indeed it was open to the High Court to take that line of argument in the *Dietrich* case. But the court did not take that course: Mason CJ and McHugh J 'assume' but do not 'decide' that Australian courts, like English courts, will 'presume that Parliament intended to legislate in accordance with its international obligations' (at 10) and use instruments such as the ICCPR to resolve ambiguities in statutes and common law. Like the rest of the majority, however, they conclude that there is no ambiguity in Australian law on the 'right to counsel':

> . . . in this case . . . we are being asked not to resolve ambiguity or uncertainty in domestic law but to declare that a right which has hitherto never been recognised should now be taken to exist. [at 10]

However, several of the judgments in *Dietrich*, both majority and minority, comment on the 'curiousness' of a situation in which '. . . the executive government has seen fit to expose Australia to the potential censure of the Human Rights Committee without endeavouring to ensure that the rights enshrined in the ICCPR are incorporated into domestic law . . .' (at 10). The ICCPR is also cited to support the majority's opinion that community conceptions of 'fairness' have changed since *McInnis* was decided in 1980.

A perusal of the decisions of the European Court on Article 6 of the European Human Rights Convention (a provision which is almost directly parallel with Article 14 of the ICCPR) indicates the breadth of the expansion in legal aid services and access to justice measures required in order to meet the challenge presented by Article 14.

For example, in *Airey v Ireland* (1979) 2 EHRR 305, Mrs Airey complained that she was unable to proceed with a divorce case because she could not afford counsel and legal aid was not available in divorce cases.

It was held that the right of access to court in Article 6(1), although it did not imply an automatic right to free legal aid in civil proceedings, did involve the obligation for the contracting states to make access to court possible by either giving the accused a compensation for their legal costs if they are unable to pay, or reducing the cost of the suit, simplifying the proceedings or providing free legal aid (*Airey v Ireland* at 316). Following the decision in that case, the Government of Ireland has made legal aid available in divorce cases and taken steps to simplify the divorce procedure and reduce its cost.[23]

To decline to give operation to the ICCPR in some meaningful way in Australia throws into doubt Australia's commitment to the maintenance of international standards of human rights. The *Dietrich case* may open the way for long overdue expansion of access to justice measures at all levels of Australian public policy and law making. If it does not do so, there are strong grounds to argue that Australian governments have a responsibility to overhaul these areas because of their international human rights obligations. It is the responsibility of all those with a commitment to social justice in the Australian legal system to make those arguments, and make them loudly and often.

References on p. 33

Government, of course, provides reasons for practices that would, in other circumstances, be illegal. The main reason given is drugs. Strip searches and urine testing are ostensibly designed to detect and stop drugs and other contraband.

Police and searches

The police power to strip search is based on the formation of a reasonable belief that a person is in possession of concealed drugs. The police are totally unaccountable in their use of strip searches. When the Victoria Police were asked to provide information on the number of strip searches done by police, they replied: 'There is no requirement for such searches to be centrally documented, therefore no statistical data exists'.

This power gives the police *carte blanche* to harass, abuse and assault women who they identify as deserving of such treatment. In particular, any woman walking in St Kilda, where street prostitution occurs, is fair game. These searches are rarely carried out in police stations. They occur in back lanes and in doorway recesses. Perhaps it is because of the poor lighting in these areas the police are taking a more 'hands-on' approach?

> I had to strip down to my undies. They made me go out the back of the light. I was a bit scared. I wet myself literally because I knew what they'd do next. Only one guy searched me internally, but he did me anally and vaginally. I had nothing on me. They told me to run off home.[4]

Internal searches are illegal, but what woman is going to be believed making such serious complaints against police? And who, working legally or illegally in the sex industry, can afford to stand up to police?

Strip searches, when they do happen in police stations, can go far beyond the legal indecent assaults. Reports of women being interviewed while naked and having photographs taken in front of groups of officers while naked are documented.[5]

Further, terror tactics and sexual assaults by police have been documented in a recently released book on police shootings in Victoria.[6] In that publication a woman disclosed that after being punched by police she had a shot-gun placed between her legs; in the same raid an 18-year-old man was punched, had his pants pulled down and a gun put up his behind.

Examples of police and prison officers' abuse of their powers must not focus on the 'few bad apples in the barrel' argument. Abuse of powers comes as no surprise to many citizens.

What we must acknowledge is that in giving officers the power to strip search and to use force, we are giving them the right to sexually assault. At the same time, we are removing any right of the victim to resist, to complain, and to have their experience of the assault legitimated.

If you don't agree with this, wait until you are strip searched.

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