Dietrich, the High Court and Unfair Trials Legislation: A Constitutional Guarantee?

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THE DECISION IN *DIETRICH*

In 1988, Mr Dietrich was convicted by a jury in the County Court of Victoria on one count of importing not less than a traffickable quantity of heroin in contravention of s 233B (1)(b) of the *Customs Act* 1901 (Cth), and acquitted on a charge of possession of heroin. The accused was unrepresented at the trial due to a lack of means or money and was refused legal aid under the *Legal Aid Commission Act* 1978 (Vic) for more than a guilty plea. He ultimately made an application to the High Court of Australia from orders of the Court of Criminal Appeal of the Supreme Court of Victoria. With a majority of 5:2 the High Court ruled that where a person charged with a serious offence who cannot obtain legal representation, by his or her own means or out of public expense, makes an application to the trial judge, then in the absence of exceptional circumstances that trial should be adjourned, postponed or stayed until legal representation can be found.

The judgment in *Dietrich* v *R*[1] raises the arguments concerning fairness of trial; its sources, extent and ramifications. It is stated by Mason CJ and McHugh J:

> In our opinion, and in the opinion of the majority of this court, the common law of Australia does not recognise the right of an accused to be provided with counsel at public expense. However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system.[2]

This concept is crucial to the development by this High Court of certain implied rights and guarantees which are found in or constructed from the *Commonwealth Constitution* 1901 (Cth) or the common law of the Commonwealth, and the decision in this case is an excellent example of the extent and inadequacies of these protections. It is a powerful decision with potentially far-reaching consequences. It will force governments within this country to rethink the legal aid system as it now stands and to re-assess its funding allocation, and it will also carry ramifications for indigent persons accused of serious crimes who are unable to obtain legal representation by their own means or through an application for legal aid.

The interests of accused persons, the courts, the government, legal aid bodies, victims, the legal system in general and the community at large will all

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1 (1992) 109 ALR 385.

2 at 386.

potentially be affected by the decision in *Dietrich*, and it is the purpose of this article to examine closely the decision and some of these ramifications.

The Majority Judgments

The fact that Mr Dietrich was acquitted on the charge of *possession* is extremely important to the joint judgment of Mason CJ and McHugh J, and forms the basis for distinguishing *McInnis* v *R*.[3] In that case Mason J (as he then was) constituted one of the four majority judges[4] who rejected the applicant's claim and held that no right to legal representation at public expense existed, and that a trial would not miscarry merely because an accused who desired representation but did not obtain it was forced to trial anyway. The High Court found that the case against Mr McInnes was so strong that he could not possibly have mounted a successful defence to the charges against him, and so no injustice had been done by forcing him to trial without representation.

The failure of one of the charges against Mr Dietrich and an appraisal of the evidence against him lead their Honours to conclude that the trial judge in fact erred in not granting the accused an adjournment, and as such he received an unfair trial. Such a finding as to fairness or unfairness of trial is said to be 'inextricably linked to the facts of the case and the background of the accused'.[5] Their Honours refer to the applicant's wish not to go to trial unrepresented, his state of emotional and psychological instability and the rejection by the trial judge of the use of a 'McKenzie Friend'.[6] However, for Mason CJ and McHugh J the telling reason which distinguishes this case from *McInnis*, and render the trial judge's non-exercise of his discretion to adjourn a miscarriage of justice, is the 'not guilty' verdict returned by the jury on count four:

> The evidence against the applicant appears strong on all counts but, in circumstances where the jury found him not guilty on one count, how can this court conclude that, even with the benefit of counsel, the applicant did not have any prospect of acquittal on count one, of which he was then deprived by being forced to trial unrepresented?[7]

In direct contrast to this, Mason J (as he then was) found that Mr McInnis had no chance whatsoever of acquittal on the particular facts of his case and in view of the strength of the Crown's case against him.

It seems odd that their Honours would find such import in the conclusion of the jury as to the charge of possession and formulate this as a primary ground for distinguishing *McInnis*. Their Honours state that the evidence against Dietrich 'appears strong on all counts', and as such their own appraisal seems contrary to that of tne jury, yet they give such deference to the institution of

[3] (1979) 143 CLR 575.
[4] The others were Barwick CJ, Aickin and Wilson JJ, Murphy J dissenting.
[5] (1992) 109 ALR 385, 396.
[6] *McKenzie* v *McKenzie* [1971] P 33 (CA). In this case the accused was allowed to have the services of a friend to assist at trial in defending charges laid against him, and in the absence of legal representation.
[7] (1992) 109 ALR 385, 399.

the jury that they are able to conclude that it is possible the applicant could have been acquitted on the importation charge also. If the reason for this is that good (or at least adequate) counsel could have assisted Dietrich's case to the extent of a full acquittal, why could not Mason J in *McInnis* have found that the provision of counsel to the accused could have assisted him in convincing the jury of partial or complete innocence? The majority of the court in that case found the evidence against the accused, to use Chief Justice Barwick's words, 'very strong indeed'. Mason J himself stated:

> The question is primarily to be resolved by looking to the nature and strength of the Crown case and the nature of the defence which is made to it. If the Crown case is overwhelming then the absence of counsel cannot be said to have deprived the accused of a prospect of acquittal.[8]

Clearly Mason J had found the evidence 'overwhelming'. In *Dietrich* he found the evidence 'strong on all counts'. Putting aside for the moment any possible distinction between the two statements in terms of degree, the sole criterion for a ruling either way on the relative strengths of the Crown cases is the findings of the juries. This deduction raises two concerns. First, his Honour has already addressed the vital importance of assistance from counsel in presenting a case to the jury:

> For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only.[9]

This being so, it is widely accepted that good representation can have enormous impact upon a jury in the trying of facts and arriving at a verdict.

The second point, closely connected to the first, is that juries are notoriously unpredictable in the way they try facts and the conclusions they reach. Jury selection itself is somewhat of a finger-crossing exercise by defence and crown alike based upon cultural stereotypes (such as the selection of young blue collar males for a pro-defence rape trial). Therefore, the decision of the jury to convict on one count and acquit on another carries imperfect empirical toll upon the real weight of evidence against the accused and the strength, 'overwhelming' or 'strong', of the crown case.

It is submitted that a combination of these factors leads one to strongly doubt the distinction drawn by Mason CJ and McHugh J between the cases of *Dietrich* and *McInnis*. It is unclear whether the 'exceptional circumstances' referred to by their Honours relates to the argument on weight of evidence or other unmentioned factors, however it is possible that distinguishing these two cases is in fact an artificial exercise to avoid overruling a recent decision by the same court and an inelegant turn-around by the now Chief Justice. It is submitted that Justice Gaudron's judgment in *Dietrich* holds the greatest appeal with regard to this issue, as did Justice Murphy's dissenting judgment in *McInnis*.

[8] (1979) 143 CLR 575, 583.
[9] (1992) 109 ALR 385, 396.

THE DISSENT IN *McINNIS*

Murphy J states in *McInnis*:

> 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.[10]

Murphy J goes on to cite a number of United States cases and Article 14(3) of the International Bill of Human Rights in support of the right to representation being essential to achieve a fair trial. An accused is in no position to present a case against a fully funded and experienced prosecution. Furthermore, the nature and object of an adversarial criminal law system precludes the assistance of Crown and judge as being any substitute for experienced legal representation.

Murphy J is adamant that the strength of evidence against the accused should not in any way influence an appellate court as to whether the failure of a trial judge to grant an adjournment where the accused has no legal representation, is a miscarriage of justice or not. His Honour states that deference to this argument means that if an appellate court thinks the accused is so guilty that it would not make any difference whether he or she receives a professional defence, then the conviction will stand.

> From this theme, it follows that because the appellate court is satisfied of the accused's guilt, it is immaterial whether he had a fair trial. I find this unacceptable.[11]

It is submitted that Justice Murphy's judgment is compelling in drawing the conclusion that in no circumstances should such an appraisal of the merits of a criminal appeal of this nature have a bearing upon whether the accused indigent has received a fair trial. It is surely not possible for a court of appeal to obtain from the transcript a genuine feel for the weight of evidence, the credibility of witnesses and all the nuances of a criminal trial which are part of the trying of fact and determination of guilt.

His Honour postulates the hypothesis of a person convicted after a criminal trial at which he was unrepresented because his counsel died just before trial and adjournment was refused or the trial judge arbitrarily refused to let his counsel appear for him.

> This would be a miscarriage of justice. No one would inquire about the strength of the prosecution's case or whether the accused defended himself competently. Why is this case essentially different when Mr. McInnis without his fault suddenly found himself without counsel whom he could not afford to pay? The crucial difference is the acceptance of unequal justice, unequal because it depends on an accused's financial circumstances.[12]

[10] (1979) 143 CLR 575, 583.
[11] Id 591.
[12] Ibid.

Gaudron J in *Dietrich* comes to the same ultimate conclusion. For her Honour, the fundamental right to a fair trial is derived from Chapter III of the Commonwealth Constitution and, as Murphy J held in *McInnis*, so too Gaudron J finds that 'the absence of legal representation constituted a serious miscarriage of justice.'[13] Her Honour delivers the only judgment which tackles the decision of the majority in *McInnis* and concludes that there are three matters which favour reconsideration of that case.

The first is an awareness that criminal investigation is often less than perfect, and in such circumstances a fair trial is the only real protection that our system provides against a person being convicted of an offence which he or she did not commit. This is an odd ground for justifying reconsideration of *McInnis*, for it was not contended by any of the judges in that case that an unfair trial would ever be accepted as anything less than a miscarriage of justice, only that a fair trial in the circumstances had not been denied, and justice had not miscarried.

Justice Gaudron's second point relates to the effluxion of time which often leads to judgments on legal matters closely connected with community values and standards becoming outdated. Her Honour contends that the notion of 'fairness' is not absolute; it is one that may change in context as times change.[14] This is in reference to the community expectation which has changed with the proliferation and importance of the legal aid schemes, providing 'strong evidence of current and widespread community expectation that an accused person who cannot afford a lawyer should not be forced to stand trial unrepresented.'[15] At the time *McInnis* was decided, the systems of legal aid were only in their infancy, and there was not yet an expectation that those who had committed a serious crime but could not afford legal representation would be provided with legal assistance at the public expense.

It is possible that this may not be a powerful argument against *McInnis* for the very reason Gaudron J relies upon. It is possible that in the light of the budgetary crisis which legal aid commissions are currently embroiled in, community expectations might again change to a less compassionate non-libertarian one. The marriage, if possible, of the views of Gaudron and Brennan JJ[16] might provide the better approach: that there are 'relatively permanent values of the Australian community', including one which has arisen as a result of the proliferation of legal aid, and the growing awareness of civil rights in light of police coercion and impropriety in the investigation and interrogation of serious crime. The High Court over the last ten years has recognised and given legal force to a multiplicity of rights and guarantees within the constitution and at common law.[17] There can be no doubt that these rights are entrenched values of the Australian community and that their

[13] (1992) 109 ALR 385, 443.

[14] Cf Brennan J id 403: 'The contemporary values which justify judicial development of the law .... are the relatively permanent values of the Australian community.'

[15] Id 444.

[16] Supra, fn 14.

[17] For example, *ACTV Pty Ltd* v *Commonwealth (No 2)* (1992) 108 ALR 577; *Street* v *Queensland Bar Association* (1989) 168 CLR 461; *Philip Morris Ltd* v *Commissioner of Business Franchises* (1989) 167 CLR 399.

recognition developed in recent years. Therefore, an appreciation of both judges' views seems adequate to recognise important community values and adapt the law where appropriate and efficacious, at the same time as reaching the conclusion Gaudron J reaches about *McInnis.*

The third matter favouring reconsideration is one connected with the constitutional source of the right to a fair trial, a right endorsed by a tide of international opinion. Gaudron J states it simply as 'the importance of legal representation — an importance which is not only recognised in our legal system but in those of other advanced countries.'[18] Her Honour refers to the United States Constitutional provision, Article I, 9, which has been construed as constituting an indigent's right to have counsel appointed to him or her in conducting a defence.[19] Furthermore, Australia is a signatory to the International Covenant of Civil and Political Rights (ICCPR), Article 14(3)(d) of which states:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> . . .
>
> (d) . . . to have legal assistance assigned to him, in any case where the interests of justice so require.

The ultimate conclusion that *McInnis* v *R* was wrongly decided may well be correct. At the very least it sits uncomfortably and incongruously with the increasing recognition by the present High Court of guarantees and freedoms of individuals within the Constitution, at common law, and as part of our wider international obligation to civil liberties and human rights; it sits uncomfortably with the clear community expectation of the fair treatment of persons charged with serious criminal offences; and it sits uncomfortably with the decision in *Dietrich* v *R.*

The right of an accused indigent to be convicted only after a fair trial is also the crux of Justice Deane's judgment.[20] His Honour refers from the outset to the case of *Barton* v *R*[21] which acknowledged 'an overriding common law requirement that a criminal trial be "fair"', and that the courts possess all power necessary to ensure that it is received, including a stay of proceedings where necessary.[22] His Honour eventually concludes, after considering exceptions to the principle that trial without representation is inherently unfair, that in

> the present case . . . the trial was a jury trial of alleged offences which were, by any standards, serious. It appears to me to be manifest that, in the absence of exceptional circumstances, the inability of an indigent accused to obtain legal representation from any source will have the consequence that such a trial is unfair.[23]

18 (1992) 109 ALR 385, 444.

19 Gaudron J id 444 refers to *Gideon* v *Wainright* (1963) 372 US 335, and *Argersinger* v *Hamlin* (1972) 407 US 25, 37.

20 The legal source of the judgment will be discussed below.

21 (1980) 147 CLR 75.

22 (1992) 109 ALR 385, 408–9.

23 Id 416.

In coming to this decision, Deane J refers, as does Gaudron J, to the international context of this issue. His Honour notes that in Ireland, India, Canada, the United States and the European Community (through the European Court of Human Rights) the right to a fair trial in criminal cases is a fundamental human right. Deane J refers to the judgment of Black J (Douglas and Murphy JJ concurring) in *Betts* v *Brady*:[24]

> A practice cannot be reconciled with "common and fundamental ideas of fairness and right", which subjects innocent men to increased dangers of conviction merely because of their poverty.

Deane J notes also that Australia is a party to the ICCPR and has enacted the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth). It is pointed out, however, by Mason CJ and McHugh J that these international agreements and instruments are not part of Australian domestic law,[25] and that although they may be utilised in the development of the common law where matters are unclear they are of no great force in this situation.[26]

Given that the right to a fair trial is an entrenched and fundamental precept of criminal law,[27] as the High Court clearly recognizes in *Dietrich*, it is necessary to determine when a criminal trial is unfair. In *Dietrich* it is where there is an absence of legal representation for the indigent accused of a serious criminal offence, subject to certain exceptions constituting 'exceptional circumstances'. Deane J is the only member of the court to go into any detail on this matter. His Honour states that in determining the practical content of the requirement of a fair trial, 'regard must be had "to the interests of the Crown acting on behalf of the community as well as to the interests of the accused"'.[28]

He goes on further to postulate three situations where the decision by a trial judge not to grant an adjournment in the absence of legal representation might not be a miscarriage of justice. First, where the accused desires to be unrepresented or persistently neglects or refuses to take advantage of legal representation which is available.[29] Secondly, where the accused has the financial means available to engage legal representation but decides against incurring the expense. Finally, his Honour states that where the offences alleged are of a non-serious nature a trial is not unfair merely by virtue of an inability to obtain full legal representation. The types of proceedings envisaged by Deane J are those before a magistrate or Judge, without a jury.[30]

24 (1942) 316 US 455, 476.

25 *Bradley* v *Commonwealth* (1973) 128 CLR 557, 582. See further fn 33 in *Dietrich* (1992) 109 ALR 385, 391.

26 (1992) 109 ALR 385, 392.

27 See *Jago* v *District Court of New South Wales* (1989) 168 CLR 23, 56–7 per Deane J.

28 (1992) 109 ALR 385, 415. This point is recognised by Mason CJ, McHugh, Brennan, Dawson and Toohey JJ in their judgments.

29 This exception is extremely important in answering some of the fears which have arisen in the aftermath of the *Dietrich* ruling, and will be discussed in depth below.

30 Presumably his Honour is referring solely to summary offences; otherwise a question as to the violation of s 80 of the Commonwealth Constitution, guaranteeing the right to a jury trial in indictable offences, might arise. In *Brown* v *R* (1986) 160 CLR 171 the High Court held that an accused who chose to go to trial without a jury (as was possible under

Clearly none of these exceptions operated in this situation. Mr Dietrich had been denied a fair trial, justice had miscarried, and there were no grounds for the operation of s 568(1) of the *Crimes Act* 1958 (Vic) which denies an appeal where 'no substantial miscarriage of justice has occurred'.

Toohey J also considers the various arguments mounted by the applicant, one of which is Australia's moral and legal obligations at international law under the ICCPR. His Honour notes that not only is this not part of Australia's municipal law, but that Article 14(3)(d) only requires legal assistance to be assigned to an indigent accused 'where the interests of justice so require'. His Honour goes on to state:

> In the end, such support as the applicant may derive from the international instruments mentioned takes him no further than the argument based on the right to a fair trial.[31]

Fortunately for Mr Dietrich, none of the arguments mounted on international obligation, s 397 of the *Crimes Act* 1958 (Vic), the Imperial *Trials for Felony Act* 1836, or other instruments were necessary to obtain a quashing of the conviction against him. The trial was unfair and that was all that was needed to be established in the circumstances.

The Minority Judgments

Brennan J, contrary to the majority judgments in *Dietrich*, contends that no Constitutional provision, express or implied, no statute, nor any rule at common law translates into 'an entitlement to legal aid':[32]

> Rights can be declared upon a construction of the Constitution or other organic laws, upon a construction of a statute, or by judicial development of the rules of the common law. In the present case, there is no constitutional or statutory provision which supports the applicant's case.[33]

With regard to the common law, Brennan J embarks on an intellectual odyssey which expresses in a radical fashion a conceptuality of the common law which is ostensibly conservative.[34] Justice Brennan's argument is that to infer a right to legal aid from the common law is to breach the doctrine of separation of powers and create judicial legislation. If it were necessary to construct an entitlement to legal aid out of the common law to achieve the decision in *Dietrich*, his Honour would undoubtedly be correct. The majority state, however, that the common law infers a right to a fair trial, and part of that is a right not to be forced to trial without access to legal representation in serious criminal matters. This is not an 'entitlement to legal aid' but rather an

the law in South Australia) could succeed in having his conviction quashed because the guarantee under s 80 could not be opted out of.

31 (1992) 109 ALR 385, 435.

32 Brennan J employs this phrase as an abbreviation for '[t]he entitlement of a person charged with a serious offence to be represented by counsel at public expense if he cannot afford to retain counsel himself', 401.

33 109 ALR 385, 401–2.

34 For an example of this, see the different attitudes of Gaudron and Brennan JJ toward the development of the common law in response to community values (supra fn 14).

entitlement to have proceedings adjourned, postponed or stayed until legal representation is available. The difference is significant.

The ramifications of this legal hypothesis is of major concern in the dissenting judgments in *Dietrich*. Brennan and Dawson JJ are concerned with how the rights espoused by the majority will affect the criminal law process and how it is to be afforded. However, it is also possible that comments made by their Honours indicate that they are perhaps concerning themselves overly with the practical administrative concerns which will unavoidably arise out of *Dietrich*.[35] Gaudron J states in her judgment:

> 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.[36]

Both views would claim adherence to the doctrine of the separation of powers and non-interference with the legislative and executive functions of government under Chapters I and II of the Commonwealth Constitution. It happens that the effect of the majority judgments is to create a practical wide-reaching impact upon the criminal law process with regard to the liberty of accused persons, the distribution of government expenditure on the criminal justice system and the allocation of available resources by legal aid bodies. These ramifications need to be identified and addressed more fully, as do the sources of law for the decision.

THE SOURCES OF LAW

The Right to a Fair Trial

> The fundamental prescript of the criminal law of this country is that no person shall be convicted of a crime except after a fair trial according to law.[37]

This statement by Deane J made in the opening of his judgment is echoed in all five majority judgments in *Dietrich*. The entrenchment of the right to a fair trial as a fundamental common law right is confirmed unanimously in the High Court judgment in *Barton* v *R*,[38] and later in *Jago* v *District Court of New South Wales*.[39] It is derived from a requirement of fairness providing 'the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law.'[40]

[35] See infra, the discussion concerning the effect upon legal aid and the *Crimes (Criminal Trials) Act* (1993).
[36] (1992) 109 ALR 385, 438.
[37] (1992) 109 ALR 385, 408 per Deane J.
[38] (1980) 147 CLR 75.
[39] (1989) 168 CLR 23.
[40] *Dietrich*, 408 per Deane J.

This concept of fairness is further said to be derived from Chapter III of the Commonwealth Constitution. This is referred to by Gaudron J in *Dietrich* somewhat cryptically as the 'implicit requirement that judicial power be exercised in accordance with the judicial process',[41] and by Deane J as 'the Constitution's requirement of the observance of judicial process and fairness that is implicit in the vesting of the judicial power of the Commonwealth exclusively in the courts which Chapter III of the Constitution designates.'[42]

It is therefore clearly held by their Honours that the requirement of fairness and, more specifically, the right to a fair trial, is firmly entrenched in Australian criminal law both constitutionally and in the common law of the Commonwealth. The concept of a common law of the Commonwealth is nothing new or startling. In *R* v *Kidman*,[43] Griffiths CJ held that there was a common law of the Commonwealth and included in that common law is an offence of Conspiracy to Defraud the Commonwealth. He also held that s 86 of the *Crimes Act* 1914 (Cth) was no more than a legislative enactment of that law. The concept is, however, an extremely important one. If an organic common law exists to embody Commonwealth offences and a right to a fair trial, then the scope of its application may extend much further to the protection of human rights, and thereby provide guarantees which were not previously thought to exist within the laws of Australia.

The right to a fair trial itself has far reaching ramifications. In *Barton* v *R*,[44] this requirement was held to equip the courts with the power necessary to ensure that an accused person is protected from the unlawfulness of an unfair trial, including an order to indefinitely stay proceedings. In *Jago* v *District Court of New South Wales*,[45] the right to a fair trial empowered the courts to stay proceedings where undue delay had compromised the accused's ability to obtain such. In *Dietrich* this fundamental right operated to quash the conviction of an accused person where, through no fault of his own, he was forced to proceed to trial without legal representation.

The extent to which the common law operates to protect the rights of individuals charged with criminal offences is an exciting area of the law which is yet to be fully explored.[46] However, the common law is tempered in its protection of individual rights by the doctrine of Parliamentary Sovereignty which may see the overriding of principles and guarantees developed throughout the history of the common law, by virtue of legislation to the contrary. It is therefore significant that Mason CJ, McHugh, Deane and Gaudron JJ in *Dietrich* found authority (and Deane and Gaudron JJ, compulsion) in Chapter III of the Constitution, for requiring that a criminal trial not be unfair. If the foundation for this principle indeed exists in the

[41] at 436.
[42] at 408.
[43] (1915) 20 CLR 425, 436.
[44] (1980) 147 CLR 75.
[45] (1989) 168 CLR 23.
[46] Note, for example, the *Bill of Rights Act* 1688 (Imp), which operates in Victoria at least by virtue of s 3 of the *Imperial Acts Applications Act* 1980 (Vic).

constitutional instrument itself then it cannot be overridden by a hostile legislature.[47]

The proliferation of implied rights and guarantees in the constitution being found and supported by the High Court is evidenced in such cases as *Barton* v *R*,[48] *Street* v *Queensland Bar Association*[49] and *Jago* v *District Court of New South Wales.*[50]

In *ACTV* v *Commonwealth (No 2)*,[51] a majority of the full bench of the High Court found an implied freedom of communication which extends to all matters political and is derived from the principle of responsible government within the framework of representative democracy.[52] The heads of power under s 51 of the Commonwealth Constitution (in this instance the Commonwealth government had sought to rely on s 51(v)) are expressly 'subject to' the constitution, and the High Court found that the government had here overstepped its powers and breached guarantees implicit in the constitution that:

> It is an implication of the doctrine of representative government embodied in the Commonwealth Constitution that there shall be freedom within the Commonwealth of communication about matters relating to the government of the Commonwealth.[53]

The significance of a fundamental right to a fair trial being derived from the Constitution, is that this is a constitutional guarantee which cannot be diminished or violated by any Parliament or persons within the Commonwealth, excepting by referendum under section 128 of the Constitution. The practical effect of this may have become apparent in light of the *Crimes (Criminal Trials) Act* passed by the Victorian Parliament in 1993 (see below).

The Crown in *Dietrich* did not contend, nor did the minority judges argue, that a right to a fair trial did not exist. It was rather argued what that right entailed and how far it extended. In Justice Brennan's view, the applicant was seeking a judgment entitling him to legal representation at the public expense. For both the dissenting judges, Brennan and Dawson JJ, no right to legal representation exists at common law, by statute or in the Constitution, and therefore the applicant's case must fail.[54]

Had one of the recommendations made by the First Report of the Constitutional Commission in 1988 been accepted, this would not have been the case. Under the proposed Bill No 13, the Commission suggested the insertion

[47] See below analysis of the constitutional validity of the *Crimes (Criminal Trials) Act* 1993 (Vic).

[48] (1980) 147 CLR 75.

[49] (1989) 168 CLR on s 117 of the Constitution as guaranteeing non-discriminatory treatment between residents of States within the Commonwealth.

[50] (1989) 168 CLR 23.

[51] (1992) 108 ALR 577.

[52] at 592, Mason CJ refers to *Attorney-General (Cth); Ex rel McKinlay* v *Commonwealth* (1957) 135 CLR 1, 24 per Barwick CJ. Also referred to is Professor Harrison Moore, *The Constitution of the Commonwealth of Australia* 1st ed (1902) 329.

[53] (1992) 108 ALR 577, 617 per Deane and Toohey JJ. Their Honours also noted the support for this proposition in *Nationwide News Pty Ltd* v *Wills* (1992) 108 ALR 681.

[54] (1992) 109 ALR 385, 401 per Brennan J.

of a new 'Chapter VI A — Rights and Freedoms', which in part stated that:

> 124L (1) Everyone who is charged with an offence has the right:
> ...
> (d) to receive legal assistance if the interests of justice so require and, if the person does not have sufficient means to provide for that assistance, to receive it without cost; . . .[55]

Section 124L(1)(d) would appear to provide a direct answer to the problems posed by the *Dietrich* case, at least as regards its source in law. However, as Dawson J argues, there is a point of conjecture regarding what 'the interests of justice' actually entails. It was argued by the majority in *McInnis*, and was again raised in *Dietrich*, that it is not only the interests of the accused person which is to be taken into account; those of the victim, the Crown and the community must also be considered.[56] Dawson J accepts that in practically every case it will be in the interests of justice for representation to be made available and, if necessary, at public expense. Indeed, he argues, it might be in the interests of justice to provide representation of the highest calibre so that the trial be not only fair but the fairest possible.

It is submitted that this issue raised by his Honour is answered more than adequately by the proviso stated by the majority judges in the case that there be an absence of 'exceptional circumstances'. Deane J postulates three situations in which a lack of representation will not constitute an unfair trial. Where an accused desires not to be represented or 'persistently neglects or refuses to take advantage of legal representation which is available';[57] where she or he has the financial means to pay for representation but chooses not to pay for it;[58] and where proceedings are before a magistrate or a judge, without a jury, for a non-serious offence. All of these are instances where trial without legal representation will not be taken to be unfair to the accused, where the 'interests of justice' have not been seriously compromised. It is submitted that the qualification that there be no exceptional circumstances would extend to the situation where an accused person demanded counsel of a particular calibre, such as Queen's Counsel, to handle the case; in light of the multifariousness of considerations in the criminal justice system, as recognised by the court, refusal to meet the demands of an accused in this regard would not be met with sympathy. Those who have raised concerns in the media regarding this abuse of the *Dietrich* ruling have not read the case closely or understood the qualified position maintained by the majority.

The *Dietrich* decision will, however, have far-reaching ramifications for the administration and allocation of public funds for legal representation, and its effect has already started to ripple in the Victorian legislature. These considerations were undeniably of paramount concern to Brennan and Dawson

[55] *First Report of the Constitutional Commission* (Canberra, AGPS, April 1988) Vol II, 813.
[56] See, for example, 415 per Deane J.
[57] at 415; reference to *R* v *Greer*, Court of Criminal Appeal (NSW), 14 August 1992 (unreported).
[58] (1992) 109 ALR 385, 416.

JJ in their dissenting judgments. However, it is settled, at least for now, that the right to a fair trial extending, in the absence of exceptional circumstances, to representation of an indigent accused of a serious criminal offence is entrenched in the common law of this country and possibly in the fabric of the Constitution, by virtue of Chapter III.

VICTORIA'S PROPOSED UNFAIR TRIALS LEGISLATION

It is therefore clear that the ramifications which will inevitably accrue from the High Court's decision in the *Dietrich* case will have an enormous impact on the criminal justice system, as it presently stands. Several fires have already been lit by proponents and opponents alike, and whilst the debate is argued on an administrative, social and political level, it has already become clear in Victoria at least that the real losers are going to be dependants of the Legal Aid Commission and the community legal centres.

The *Crimes (Criminal Trials) Act* 1993 is an attempt to deal with some of the problems which are discussed in the previous chapter. Section 1 of the Act states that the purpose of the instrument is 'to facilitate the efficient conduct of criminal trials'. The Act proposes a number of amendments to the running of criminal trials inVictoria, many of which are extremely disturbing and warrant a good deal of discussion and criticism. For the purpose of this article, however, only one section of the Act will be discussed. Part Seven amends the *Crimes Act* 1958 (Vic) to insert a new section:

> "360A. **Adjournment or stay of trial**
> (1) Subject to sub-section (2) and despite any rule of law to the contrary, if —
> (a) a person is committed for trial; or
> (b) a presentment has been filed —
> 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.
> (2) If a court is satisfied at any time before or during a trial that —
> (a) it will be unable to ensure that the accused will receive a fair trial unless the accused is legally represented in the trial; and
> (b) the accused is in need of legal assistance because he or she is unable to afford the full cost of obtaining from a private practitioner legal representation in the trial —
> the court may order the Legal Aid Commission of Victoria to provide assistance to the accused, on any conditions specified by the court, and may adjourn the trial until such assistance has been provided.
> (3) Despite anything in the **Legal Aid Commission Act 1978**, the Legal Aid Commission of Victoria must provide legal representation in accordance with an order under sub-section (2)."

The new provision raises several questions and carries quite heinous ramifications for the Legal Aid Commission and persons who require legal assistance for a variety of reasons.

Over the 1991/92 period, the Legal Aid Commission provided legal services to a record 172,000 people in Victoria. At one stage the Commission was

estimating that it would run at almost an $8 million deficit, however due to some severe cost-cutting there was no deficit.[59] The future of the Commission, however, looks bleak. Despite repeated public statements to the contrary by the Director, Andrew Crockett,[60] it was forced to reduce grants of assistance by 16%. Furthermore, the Solicitors' Guarantee Fund, which provides for a large percentage of the Commission's funding, has had to set aside $10 million for the 1992/93 financial year for a possible claim against it due to alleged misappropriation of trust moneys by solicitors. Add to this a further $2.3 million funding cut dealt out by the new Victorian Liberal Government and it is quite clear that the Commission is in dire financial trouble.

It is in this context that the government has passed the *Crimes (Criminal Trials) Act*. Part of the effect of this Act is to allow judges to order the Commission to fund cases it would otherwise reject. For the Director of the Commission to come out and openly criticise this legislation, and to appeal to the Commonwealth Attorney-General to take direct action against this and other rash legislation,[61] is an indication of just how heinous the Commission considers the consequences of this legislation to be for it and its beneficiaries. To impose an incalculable amount of revenue to be expended upon judicial order makes it impossible for the Commission to make any budgetary forecast, and is a serious imposition upon its legislative independence. It automatically deprives thousands more Victorians of legal assistance by virtue of orders made by a judiciary with no experience or understanding of the wider budgetary ramifications. Furthermore, orders under the proposed section 360A would undoubtedly be made in favour of accused persons charged with serious criminal offences (for this is what the *Dietrich* decision covered) and would therefore be expensive, possibly running into the hundreds of thousands of dollars.[62]

Moves such as these, and their possible consequences, were not lost upon the High Court in bringing down the decision in *Dietrich*. In his dissenting judgment, Dawson J stated:

> 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. The determination of what funds are to be made available is not a function which the courts can or should perform. Nor are the courts

59 These included a 16% reduction of grants of assistance, a 10% reduction on payments made to the private profession for legally aided cases, and administration cuts saving $1.4 million and adding $3.8 million in self-generated revenue.

These figures are contained in the 13th Annual Report 1991/92 of the Legal Aid Commission of Victoria. This report does not mention the significant impact upon the morale of lawyers and support staff who already give a great deal of time and energy for a relatively modest income.

60 One such undertaking was delivered by Mr Crockett at the inaugural *Social Justice Action Group* lecture delivered at Monash University on August 15, 1992.

61 See below, fn 65.

62 The Commission presently refuses to fund trials with an estimated cost of $200,000 or more. This policy could be breached by a judicial order under proposed amendment to the *Crimes Act*.

If this were the case thousands of people presently eligible for legal assistance would probably be deprived. Furthermore, legal assistance to civil cases could be eradicated entirely, as has occurred in New South Wales.

equipped to determine how the available funds are to be distributed — for example, whether it is preferable to spread them amongst the largest number of cases possible or to devote them to a smaller number of complex and more costly cases.[63]

This is one of the most contentious issues to arise out of *Dietrich*, and the practical impacts upon government funding, the allocation of funds by legal aid bodies and accused persons alike will be extremely significant. On one view it is possible to see the decision as a judicial comment on the state of the legal aid funding crisis nationwide and the adverse effect this is having upon the criminal justice system. Indeed, in a society where police and criminal prosecution budgets are being increased or frozen it may be said that cutting of funds to legal aid bodies is unfair to say the least. Be that as it may, the response by governments to the High Court ruling was never guaranteed to be favourable, and Justice Dawson's concerns have found their target in the Victorian legislature.

The Act does exactly what Dawson J states should *not* be done; that is, it vests in the judiciary the power to determine the availability of legal aid funds. This, in his Honour's reasoning, would hijack an ostensibly specialist independent legislative role, which properly belongs to the statutory bodies set up to administer legal aid, corrupting what is a delicate balancing of the needs of the community with the limited funds available. It is hard to disagree with these comments in light of the proposed legislation.

Furthermore, it is submitted that the provision is quite possibly constitutionally invalid insofar as it attempts to abrogate the accused's right to a fair trial. The Attorney-General of Victoria, Jan Wade, stated in the second reading of the Bill in the Legislative Assembly:

> ... because there are indications that large numbers of accused persons are starting to use the Dietrich device as a means of avoiding or delaying prosecution, I believe an urgent response is required. This Bill limits the power of the court to adjourn a trial solely on the grounds that an accused has been refused legal assistance in respect of the trial.[64]

I have argued above that four of the seven judges of the High Court in *Dietrich* found Chapter III of the Commonwealth Constitution to be a source of power for the right to a fair trial, and Deane and Gaudron JJ found compulsion in that Chapter for an accused's right to a fair trial. The importance of that finding should be obvious. If Chapter III somehow holds an implied guarantee of this nature, then legislation such as that of the Victorian government would be constitutionally invalid. The provision operates despite any rule of law to the contrary, and it is clear from the Explanatory Memorandum to the Act and from its second reading that the legislation is designed to override the *Dietrich* ruling. Furthermore, the language in which the proposed provision is couched grants discretionary power to a trial judge to order the Legal Aid

[63] (1992) 109 ALR 385, 426.
Brennan J (at 404) claims that these issues 'touch the legitimacy of judicial legislation', whereas Gaudron J takes the view that it is up to the court to make decisions as to fairness regardless of the consequences or cost (see fn 36).

[64] *Hansard*, Legislative Assembly (Vic), Thursday 29 April 1993, 1359.

Commission to provide legal assistance to an accused person before that judge, if he or she is satisfied that the accused will not receive a fair trial without legal representation and that person cannot afford such.

Sub-section 2 of section 360A states that the court 'may' order legal aid to be provided to such persons. Section 45(1) of the *Interpretation of Legislation Act* 1984 (Vic) instructs that the use of the word 'may' makes sub-section (2) of the new provision discretionary, and means that even if a trial judge concluded that a fair trial could not be had without the provision of legal representation, he or she could still proceed without ordering the Commission to fund the accused's trial. This seems absurd, however it must be understood that if the decision in *Dietrich* does not derive some validity from the Constitution of the Commonwealth, then the Victorian legislature is competent, in the absence of Commonwealth legislation directly to the contrary,[65] to conduct unfair trials.

The provision is, therefore, a statutory licence to override what the High Court describe as 'a fundamental precept of criminal law'. Therefore, the Victorian government has legislated to construct a system in which unfair trials may be given unquestionable legal validity. This and other legislation introduced by this government into Parliament has been the target of a massive response from a diverse range of groups and individuals concerned about their impact.[66] The provision is contrary to fundamental precepts of criminal law; it is contrary to Australia's international commitment expressed in the ICCPR, and it is contrary to a common sense understanding of fairness. The crucial question is whether it breaches an implied constitutional guarantee.

It is submitted that the provision is constitutionally invalid, and upon appeal to the High Court, will be found to be so. This is for two reasons. First, the High Court in *Dietrich* indicated that a sufficient constitutional connection between the concept of fair trial and Chapter III of the Constitution existed, and this sets the framework for a challenge to the constitutional validity of the legislation in attempting to override it. Deane and Gaudron JJ would certainly endorse such a view, and it is strongly probable that Mason CJ and McHugh J (and possibly Toohey J, although his Honour was relatively silent on the matter) would also endorse it, creating a majority of support under the present structure of the High Court.

Secondly, in the light of its recent approach to implied rights and guarantees within the Constitution, it is highly likely that, if pressed directly on the point, the High Court would find the right to a fair trial to be enshrined by implication within Chapter III, as did Deane and Gaudron JJ in *Dietrich*. If the High Court is willing to find a constitutional guarantee to freedom of

[65] Such legislation would render the Victorian provision inconsistent with the Commonwealth provision, and invalid to that extent under s109 of the Constitution.

[66] In an article in the *Age* newspaper, dated 30/04/1993, 16 groups were reported to have appealed to the Attorney-General of the Commonwealth, Mr Lavarch, to do just that. The Legal Aid Commission of Victoria was one of these.

It is noteworthy that the Human Rights Commissioner, Brian Burdekin, has come out against the legislation, concerned that it breaches fundamental human rights and liberties.

communication on all matters political in the principle of responsible government within the framework of representative democracy,[67] then it is entirely conceivable that it would find the right to a fair trial to be enshrined in the Constitution by virtue of the requirement of judicial process under Chapter III.

CONCLUSION

The decision of the High Court in *Dietrich* v *R* carries with it both positive and negative ramifications. The fact that an indigent accused of serious criminal offences has a right to legal representation in the absence of exceptional circumstances is a good thing. The fact that it is an inherent part of the fundamental common law right to a fair trial goes some of the way toward entreching some basic human rights recognised by international treaties, to which Australia is party,[68] within the common law.

However, the decision does not by ratio recognise such a right as being entreched in the Commonwealth Constitution, and may therefore be subject to the slings and arrows of hostile legislatures, such as the Victorian State Government. By failing to do this the High Court has had an enormous effect upon the provision for and allocation of legal aid without also guaranteeing the protection of the very rights which *Dietrich* serves to sanctify.

It will be some time before the effects of the ruling will be fully realised. However, already in Victoria legislative action is taking place. It may well be that legal action arising out of this legislation will see some resolution to the many questions which the *Dietrich* decision raises, but until then the future of persons accused of serious criminal offences will continue to be subject to the legislative and common law developments.

[67] *ACTV* v *Commonwealth (No 2)* (1992) 108 ALR 577. See fn 51.

[68] For example, Article 14(3)(d) of the International Covenant of Civil and Political Rights, discussed supra, in the text following fn 19.