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# The *Dietrich* Dilemma

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## 1. Introduction

Two years after the decision in *Dietrich v The Queen*,<sup>1</sup> the High Court restated:

...the principle in *Dietrich* is concerned with the right to a fair trial of a party to criminal proceedings.<sup>2</sup>

This avowal encapsulates the touchstone on which the promise of *Dietrich* both is founded and has floundered. In *Dietrich*, the High Court had regard to the growing body of international human rights law as a legitimate influence in developing the common law right not to be tried unfairly in the absence of legal representation, yet decisions since *Dietrich* have indicated that the scope of the Australian right to fair trial in this aspect is likely to be narrower than that recognised under the International Covenants or the Constitutional right recognised in the United States and Canada or under the *New Zealand Bill of Rights Act* 1990.<sup>3</sup> Though declining to specify even the minimum content of a fair trial, civil or criminal, the High Court held that only exceptionally will a trial for a serious criminal offence be fair where the accused has been forced on unrepresented because s/he was without the financial

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1 (1992) 177 CLR 292.

2 *New South Wales v Canellis* (1994) 181 CLR 309 at 328.

3 See *Universal Declaration of Human Rights* Art 10 re fair hearing, Art 11 re guarantees necessary for defence; *International Covenant on Civil and Political Rights* Art 14(3)(d); *European Convention for the Protection of Human Rights and Fundamental Freedoms* Art 6(3)(c); *Canadian Charter of Rights and Freedoms* Art 10(b) read with Arts 7 and 11(d); Sixth Amendment to the *United States Constitution*; *New Zealand Bill of Rights Act* 1990 ss 23 and 24; *American Convention on Human Rights* Art 8(2)(d) and 8(2)(e); *Convention on the Rights of the Child* Art 40(b)(ii). See also D Harris 'The Rights to a Fair Trial in Criminal Proceedings as a Human Right' (1967) 16 *International and Comparative Law Quarterly* 352.

means to fund legal representation.

*Dietrich* has had a fundamental impact on the Australian justice system: an expanding number of decisions have been concerned to work out the detail of the *Dietrich* criteria in the day-to-day administration of criminal justice; the scope for the application of the principle in both the civil and criminal spheres is only just being resolved; the judicial mandate prioritising criminal legal aid for serious matters, to the detriment of other civil, particularly family, law type funding, has created pressure on, and, in the case of women, unfairness in, the allocation of limited legal aid funds; against which background considerable law reform and research work is being undertaken in straightened circumstances to address and redress some of the intended and unintended consequences of the decision. This article examines these various matters and concludes that the *Dietrich* touchstone guarantee of fair trial has not been delivered on. Rather, it will be argued, there has been an illogical and unprincipled evolution of the rule that has left all but the criminal litigant on trial for serious offences without representation or remedy.

## 2. The Decision in *Dietrich*: Legal Representation and Fair Trial

Dietrich was charged with various drug offences under the *Customs Act* 1901 (Cth) in relation to the importation and possession of heroin. Having exhausted all avenues for legal assistance to fund a plea of not guilty and having been refused adjournments to obtain representation, Dietrich was unrepresented at his Victorian County Court trial which lasted approximately forty days.<sup>4</sup> He was convicted of one charge of importing heroin. His application seeking leave to appeal to the Victorian Court of Criminal Appeal was dismissed. Dietrich then sought leave to appeal to the High Court. The High Court unanimously granted leave and, by a majority of 5:2, allowed the appeal, set aside the conviction and ordered a new trial. The sole ground of the appeal to the High Court was that Dietrich's trial miscarried by virtue of the fact he was not provided with legal representation.<sup>5</sup>

The High Court unanimously held that an indigent accused on trial for a serious criminal offence has no right at common law to counsel at public expense.<sup>6</sup> Rather, the majority found that the accused has a common law right to a fair trial or, perhaps more accurately, a right not to be tried unfairly.<sup>7</sup> While each case needs to be determined in the light of its own particular circumstances, ordinarily an indigent person

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4 P A Fairall 'The Right Not to be Tried Unfairly Without Counsel: *Dietrich v The Queen*' (1992) 22 *UWALR* 396 at 399-400.

5 *Dietrich* (1994) 177 CLR 292 at 299 per Mason CJ and McHugh J.

6 *Ibid* at 311 per Mason CJ and McHugh J; at 323-324 per Brennan J; at 330 per Deane J; at 343 per Dawson J; at 356 per Toohey J; at 364-365 per Gaudron J.

7 *Ibid* at 299 per Mason CJ and McHugh J. Deane and Gaudron JJ were prepared to hold that such a right, at least as regards federal offences, could be implied in the Commonwealth Constitution: at 326 per Deane J, at 362 per Gaudron J. See further J Hope 'A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System' (1996) 24 *Fed L R* 173 esp 179-189.

charged with a serious criminal offence who, by reason of lack of means and without fault on his/her part is denied legal representation, will have lost “a real chance of acquittal”<sup>8</sup> and their trial will have been unfair. Legal representation is so central to a fair trial, that only in exceptional circumstances should a trial for a serious criminal matter proceed in its absence.<sup>9</sup> In all other serious cases, the court should exercise the inherent power recognised in *Jago v District Court (NSW)*,<sup>10</sup> and grant an adjournment or a stay of proceedings so that representation may be obtained.

Mason CJ and McHugh J stated the effect of the views of the majority as follows:

...we identify what the majority considers to be the approach which should be adopted by a trial judge who is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation. In that situation, in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available. If, in those circumstances, an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.<sup>11</sup>

In *New South Wales v Canellis*, the High Court reaffirmed:

The Solicitor-General’s submission that the common law does not recognise an entitlement of an accused at trial to publicly funded legal representation is supported by all the judgments in *Dietrich*. At the same time, the principle established by the decision in that case is that a court has jurisdiction to grant an adjournment or order a permanent stay of proceedings at a trial until such time as an indigent person charged with a serious criminal offence is provided with legal representation necessary for a fair trial or resources for such representation. As the majority judgements made clear, that principle is based on, and derives from, the accused’s right to a fair trial.<sup>12</sup>

The High Court has addressed the notion of a “right to fair trial” in a series of decisions<sup>13</sup> but, for the reasons expressed in *Dietrich*, has declined to formulate with any specificity the content of the fairness requirement:

8 *Ibid* at 310-311 per Mason CJ and McHugh J citing *Mraz v R* (1955) 93 CLR 493 at 514 per Fullager J; at 362 per Toohey J; at 375 per Gaudron J.

9 *Ibid* at 311 per Mason CJ and McHugh J; see also at 337 per Deane J; at 371 per Gaudron J; at 362 per Toohey J.

10 (1989) 168 CLR 23.

11 *Dietrich* (1992) 177 CLR 292 at 315 per Mason CJ and McHugh J; see also Deane J at 337; Toohey J at 362; Gaudron J at 374-5. This article does not propose to consider the difference between the majority and the minority positions on the question of the limits of proper exercise of judicial power.

12 (1994) 181 CLR 369 at 328; see also *A-G (NSW) v Milat* (1995) 37 NSWLR 370 at 373.

13 For example, *Barton v R* (1980) 147 CLR 75 re fair trial in absence of committal; *Jago v District Court (NSW)* (1989) 168 CLR 23 re abuse of process; *S v R* (1989) 168 CLR 266 re specification of charges; *McKinney and Judge v R* (1991) 171 CLR 468 re rule of practice requiring a warning to

Clearly enough, the concept of a fair trial is one that is impossible, in advance, to formulate exhaustively or even comprehensively. Only a body of judicial decisions gives content to the concept.<sup>14</sup>

“Fairness” must depend on the facts of the particular case<sup>15</sup> and some members of the court in *Dietrich* referred to the content of fairness as one that is responsive to changing social values and standards.<sup>16</sup> In this regard, Brennan J in dissent spoke of the International Covenant on Civil and Political Rights (ICCPR) Art 14(3)(d) as a “concrete indication of contemporary values”.<sup>17</sup> The ICCPR and its European equivalent, the European Convention on Human Rights (ECHR), attempt to specify in some detail, though not exhaustively, the content of fairness in a criminal context and, following decisions of the Human Rights Committee, a draft United Nations Declaration was produced in 1991 addressing this important question.<sup>18</sup>

### 3. Evolution of the *Dietrich* Principle

#### 3.1. The Content of the *Dietrich* test

For trial courts faced with unrepresented accused, the application of the *Dietrich* test has not been unproblematic. The High Court provided only rudimentary assistance as to how the matters identified as relevant to the invocation of the principle were to be applied. In the years since, a substantial amount of time and money has been devoted to giving substance to the pre-conditions enumerated by the High Court, the purport of some of which yet remain to be satisfactorily resolved.

The accused person seeking an adjournment, postponement or stay on the grounds of *Dietrich* must prove, on the balance of probabilities, that:

- the charge is for a serious offence;
- they are indigent;

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jury where uncorroborated police evidence of a confessional nature; *R v Glennon* (1992) 173 CLR 59 re fair trial and prejudicial pre-trial publicity. See discussion in G Zdenkowski ‘Defending the Indigent Accused in Serious Cases: A Legal Right to Counsel?’ (1994) 18 *Crim LJ* 135 at 146; K P Duggan ‘Reform of the Criminal Law with Fair Trial as the Guiding Star’ (1995) 19 *Crim LJ* 258.

14 (1992) 177 CLR 292 at 353 per Toohey J; see also at 300 per Mason CJ and McHugh J; at 328-329 per Deane J; at 364 per Gaudron J.

15 *Ibid* at 353 per Toohey J; see also at 328-329 per Deane J; at 364 per Gaudron J.

16 *Ibid* at 328 per Deane J; at 364 per Gaudron J. See also *McKinney and Judge v R* (1991) 171 CLR 468 at 478 per Deane J and at 486 per Brennan J; changing social conditions, including developments in technology, can give new content to “fair trial”; also A Mason ‘Fair Trial’ (1995) 19 *Crim LJ* 7 at 8.

17 *Ibid* at 321 per Brennan J.

18 *Draft Declaration on the Right to a Fair Trial and a Remedy*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 25 June 1993, UN Doc. E/CN.4/Sub.2/1993/24/Add.1, full text of which appears in M C Bassiouni, *The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards* Transnational Publishers Inc New York 1994, pp 169-188.

- through no fault on their part they are unable to obtain legal representation;
- there are no exceptional circumstances which would in any event warrant the trial proceeding notwithstanding the absence of representation.<sup>19</sup>

Mason CJ and McHugh J suggested that the decision on these matters is “inextricably linked to the facts of the case and the background of the accused”.<sup>20</sup>

Additional issues have also arisen post-*Dietrich*. If an accused can satisfy the court as to these matters, what quality of representation does *Dietrich* guarantee? Does *Dietrich* “legal representation as a component of fair trial” have any application as a safeguard of fairness in other criminal proceedings (such as appeals, committals, bail applications and commissions of inquiry)? Are *Dietrich* stays for unrepresented parties available in civil matters? These issues as to the specific content and scope of the principle will now be examined.

### 3.1.1. Serious offences<sup>21</sup>

The majority in *Dietrich* contemplated that the principle applies only to “serious” cases. Just as it is arbitrary to confine the desirability of legal representation to the trial only (discussed below), it is similarly illogical to restrict this fundamental aspect of fair trial to serious charges only. At a very basic level this operates irrationally and impacts on the delivery of criminal justice: *obiter* in *Dietrich* suggests that the principle does not extend to summary trials<sup>22</sup> and there is evidence that this induces accused persons generally to elect to have cases dealt with on indictment, with virtually guaranteed legal aid.<sup>23</sup>

The High Court did not attempt to settle what constitutes a “serious” criminal charge. Toohey J considered that *Dietrich*’s charges were serious as he faced life imprisonment.<sup>24</sup> Deane J also considered the question, and by reference to American authority, suggested the determinant should be “where there is no real threat of deprivation of personal liberty”.<sup>25</sup> If the test is to be threat of imprisonment without regard to the term of potential incarceration (which is by no means clear from the cases), the range of offences is not much narrowed. Logically, a threshold test of

19 See for example *R v Karounos* (1995) 63 SASR 451 at 457; *Cummings v R* (1994) 12 SR(WA) 172 at 174.

20 *Dietrich* (1992) 177 CLR 292 at 311 per Mason CJ and McHugh J.

21 See Duggan, *supra* n. 13 at 265-266; Zdenkowski, *supra* n. 13 at 144.

22 (1992) 177 CLR 292 at 336 per Deane J.

23 CJC Report on the Sufficiency of Funding of the Legal Aid Commission of Queensland and the Office of the Director of Public Prosecutions, Queensland CJC Brisbane 1995 at 94-95. Cf *Weinell v Fedcheshen*, Unreported Supreme Court of SA, Judgment No 5216, Perry J, 20 September 1995 re summary hearing in the Magistrates Court.

24 (1992) 177 CLR 292 at 361 per Toohey; at 366 per Gaudron J.

25 *Ibid* at 336 citing *Argersinger v Hamlin* (1972) 407 US 25 at 37-38, 40. Cf Australian Law Reform Commission (ALRC 69(1)) *Equality Before the Law: Justice for Women*, Report No 69 Part 1 ALRC Sydney 1994 at 4.31 mooted no legal aid for crime punishable by less than three years.

“any imprisonment” would seem just. The consequences of imprisonment, even for “non-serious” offences, may be quite devastating: a sole parent may lose his/her children; a sole bread-winner’s family is deprived of that financial support; persons may lose employment and, consequently, their homes. But how will *Dietrich* apply where the risk of imprisonment is slight and the offence cannot really be regarded as “serious”? What if the offence is clearly a serious one but there is no possibility of imprisonment? On what basis does logic dictate drawing the line at short term imprisonment? What of

...an environmental offence carrying as monetary maximum of \$1m? One reason for the lack of precision may be that an unfair trial is an unfair trial whether or not the charge is serious.<sup>26</sup>

In *R v Connell (No 7)*,<sup>27</sup> White J referred to Seaman J in *Connell, Lucas and Carter*<sup>28</sup> and was easily satisfied that the applicant was charged with serious offences: each of the offences carried a maximum penalty of seven years imprisonment.

In *Cummings v R*<sup>29</sup> and *Fuller v R*,<sup>30</sup> Barlow J was also satisfied that the offences were serious:

In my view it would be incorrect to view each charge separately. In relation to this matter of seriousness it is appropriate to have regard not only to a particular offence, but to the fact the applicant has been charged with a number of offences and also to the fact that in relation to three of those charges he has been charged with another person.<sup>31</sup>

However, while few would doubt that *Dietrich*’s facing life imprisonment or *Connell*’s facing several years of imprisonment or even *Cummings* and *Fuller* being charged with a number of offences are all “serious” matters, real issues remain under this aspect of *Dietrich* which highlight the arbitrariness of limiting the right to a fair trial by reference to a determinant of “seriousness”.

### 3.1.2. Indigence<sup>32</sup>

A number of questions have been generated under this head of *Dietrich*, few of

26 I Leader-Elliott and M Goode ‘Criminal Law’ in R Baxt and A Moore (eds) *An Annual Survey of Australian Law 1993* Adelaide Law Review Association Adelaide 1994 at 187; see also Zdenkowski, *supra* n. 13 at 144.

27 (1994) 13 WAR 283.

28 Unreported Supreme Court of WA, No. 60 of 1991, Seaman J, 5 May 1993.

29 (1994) 12 SR (WA) 172.

30 (1994) 12 SR (WA) 182.

31 *Ibid* at 184; *Cummings* (1994) 12 SR(WA) 172 at 175.

32 See J Badgery-Parker ‘The Criminal Process in Transition: Balancing Principle and Pragmatism – Part 1’ (1995) 4 *Journal of Judicial Administration* 171 at 181-185; Leader-Elliott and Goode *supra* n. 26, at 188-189; A Taylor ‘*Dietrich*: Some Developments and Outstanding Issues’ (1995) 22 *Brief* 8 at 8-9; Duggan, *supra* n. 13 at 264-265.

which have been resolved definitively to date. Moreover, the international jurisprudence offers little guidance in this area. The phrase employed in both the ICCPR and the ECHR is that the accused has not “sufficient means” and this terminology is drawn on by Deane J in his formulation “by reason of lack of means”.<sup>33</sup> Mason CJ and McHugh J considered that “ad hoc” determination by a trial judge of impecuniosity would be “unwise and undesirable”.<sup>34</sup> But how to and who to determine indigence? What must an accused show in the way of absence of cash, easily realised assets, jointly held assets or other sources of finance as has been required by the American authorities?<sup>35</sup> Is the accused required to submit to examination on the issue of indigence when s/he need not give evidence otherwise? How close may these investigations come to trespassing on the matters for which the accused stands trial? Related to the last is that proceeds of crime legislation may make a sensitive and awkward enquiry even more so. The question of indigence is obviously related to the issue of quality of representation and what of the accused who can afford representation for a trial of a particular length but no longer?<sup>36</sup>

The designation “indigent” is one commonly employed in the American decisions on representation in criminal matters. That jurisprudence indicates that the Court must take into account the funds which are available to the accused from family, friends, trusts and the potential sale of assets.<sup>37</sup> In *R v Connell, Lucas and Carter*, Seaman J considered the meaning of “indigent”:

I do not favour the meaning of “indigent” in the *Shorter Oxford Dictionary* which is relied upon by counsel; I prefer the meaning given by that dictionary “lacking in what is requisite; wanting, deficient”.<sup>38</sup>

As has been observed in later authorities, indigence in this sense “cannot be absolute but must be relative to the demands or need involved”.<sup>39</sup> Specifically, in *Connell, Lucas and Carter* Seaman J found that the assets of the accused’s wife were available to the accused, to the extent of roughly one half, and the value of that share was assessed and specified. Having done so however, his Honour expressed the opinion that “much better mechanisms need to be created to determine questions of this sort”. There have been consequent calls for the establishment of an independent body to determine the question of the accused’s indigence (and the often

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33 (1992) 177 CLR 292 at 337 per Deane J.

34 *Ibid* at 310 per Mason CJ and McHugh J.

35 See, for example, *United States v Ellsworth* (1977) 547 F 2d 1096; *United States v Rubinson* (1976) 543 F 2d 951; *United States v Deutsch* (1979) 599 F 2d 46; discussed in Leader-Elliott and Goode, *supra* n. 26 at 188.

36 See generally Badgery-Parker, *supra* n. 32 at 181-185.

37 Duggan, *supra* n. 13 at 264 and see *Gideon v Wainwright* (1962) 372 US 335.

38 *Supra* n. 28 at 9, endorsed in *R v Cummings* (1994) 12 SR(WA) 172 at 175; and see Badgery-Parker, *supra* n. 32 at 182-185; Taylor, *supra* n. 32 at 9; Duggan, *supra* n. 13 at 264.

39 *R v Cummings* (1994) 12 SR(WA) 172 at 175.

inseparable “fault” issue).<sup>40</sup>

In a further development, Barlow J in *Cummings* and *Fuller* was of the opinion that the two accused could not be described as “indigent”, nor could they be said to have failed to obtain representation without “fault”, until they had taken “all reasonable steps” to obtain any statutory entitlement to property settlement and/or maintenance under the *Family Law Act* 1975 (Cth). Similarly, the bankrupt accused should seek from his/her trustee in bankruptcy allowances for legal costs from either that spousal property settlement or the existing estate.<sup>41</sup>

It was said in *R v Karounos*, that it was open to the court, if it saw fit, to review the Legal Aid Commission’s assessment of indigence.<sup>42</sup> This approach has been endorsed in *A-G (NSW) v Milat*<sup>43</sup> where the Court of Criminal Appeal emphasised that the relationship between the Legal Aid Commission and the trial judge is one where “their respective functions are separate and independent”: it is for the trial judge to decide in light of what the Legal Aid Commission has done, whether there has been an infringement of the accused’s right to a fair trial.

### 3.1.3. Fault<sup>44</sup>

The issue of fault, tied as it is to indigence, is also related to the “exceptional categories” identified by Deane and Gaudron JJ, which will deny an accused the benefit of *Dietrich* where the accused “declines” or “persistently refuses or neglects to take advantage of” legal representation.<sup>45</sup> The fault inquiry has spawned much judicial analysis. Understandably the focus is on the presence of any unreasonable conduct (the absence of any fault) on the part of the accused: “not doing what is reasonable in the circumstances, or doing something which reasonably ought not to be done”.<sup>46</sup> For example, in the pre-*Dietrich* case of *Greer*<sup>47</sup> it was held that the accused was not entitled to an adjournment when he unjustifiably withdrew instructions from counsel at the commencement of the trial.

It has been said that the concept of fault should not be interpreted narrowly and will include the neglect of an accused to arrange representation when there was

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40 Badgery-Parker, *supra* n. 32 at 184-185. Re the inseparability in some instances of questions of indigence and fault see *Karounos* (1995) 63 SASR 451 at 457; M Goode ‘Case and Comment: *Karounos*’ (1995) 19 *Crim LJ* 350.

41 *Cummings v R* (1994) 12 SR(WA) 172 at 179-180; *Fuller v R* (1994) 12 SR(WA) 182 at 189; and see Taylor, *supra* n. 32 at 9 mooted the emergence of a new body of law drawing on principles from bankruptcy and family law and the law of constructive trusts to assist in assessing the financial circumstances of the accused.

42 *R v Karounos* (1995) 63 SASR 451 at 458 per King CJ.

43 (1995) 37 NSWLR 370 at 380.

44 *Dietrich* (1992) 177 CLR 292 at 315 per Mason CJ and McHugh J; see also at 336 per Deane J; at 365 per Gaudron. See Badgery-Parker, *supra* n. 32 at 185-187; Taylor, *supra* n. 32 at 9; Duggan, *supra* n. 13 at 265, Zdenkowski, *supra* n. 13 at 143.

45 (1992) 177 CLR 292 at 336 per Deane J; at 365 per Gaudron J.

46 *Cummings* (1994) 12 SR(WA) 172 at 177; *Fuller* (1994) 12 SR(WA) 182 at 187.

47 (1992) 62 A Crim R 442; also *Frawley* (1993) 69 A Crim R 208.



adequate time available to do so.<sup>48</sup> The Queensland Court of Appeal recently held in *Gudgeon*<sup>49</sup> that, despite the unavailability of senior counsel of choice due to illness, the accused's trial was not unfair in the *Dietrich* sense because the accused, nevertheless, had adequate opportunity to obtain legal representation. McPherson JA and Thomas J considered that this type of unreasonable conduct could be equated to the category of exceptional cases described by Deane J where the accused "persistently neglects or refuses to take advantage of legal representation that is available".<sup>50</sup>

Hunt CJ in *R v Small*<sup>51</sup> explained the notion of "fault" in this context thus:

The concept of fault should not, in my view, be interpreted narrowly. It is a well-known and frequently encountered phenomenon that some accused persons are psychologically quite unable to face up to the fact that their trial is to proceed. They put off applying for legal aid until it is far too late for their case to be prepared adequately. Very rarely could such conduct properly or fairly be characterised as a deliberate refusal or a wilful neglect on their part, yet the absence of legal representation can certainly be characterised as resulting from their fault. The criminal justice system would be crippled if such persons had either the absolute right to an adjournment in order finally to arrange legal representation or the right to a new trial if the trial is unsatisfactory as a result of the absence of such representation when they are solely responsible for that state of affairs.

In the later decision of *Batiste*,<sup>52</sup> Carruthers J affirmed Hunt CJ's comments and considered further that the notion of fault ought to be interpreted in a manner which was consistent with the view that there was a public interest in the administration of justice. With respect, this endorsement is also in conformity with the notion of balancing competing interests, referred to by Toohey J in *Dietrich* when exemplifying the "exceptional circumstances" which might justify the trial proceeding in the absence of representation.<sup>53</sup>

In *Karounos*,<sup>54</sup> King CJ considered that in discharging the onus of establishing no fault on the accused's part, it was necessary for Karounos to show that all reasonable requirements of the Legal Services Commission had been complied with:

*Dietrich* has established that the opportunity of legal representation, irrespective of means, is a necessary incident of a fair trial on a charge of a serious offence. It is, however, the responsibility of an accused person to arrange his own legal representation.

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48 *R v Small* (1994) 33 NSWLR 575; *Cummings* (1994) 12 SR(WA) 172 at 177; *Fuller* (1994) 12 SR(WA) 182 at 187; *Gudgeon* (1995) 83 A Crim R 228.

49 (1995) 83 A Crim R 228.

50 *Ibid* at 242-244 per McPherson JA and Thomas J; at 233-234 per Fitzgerald P; see also *R v Sandford* (1994) 33 NSWLR 172.

51 *R v Small* (1994) 33 NSWLR 575 at 588.

52 (1994) 35 NSWLR 437; F Bates 'Case and Comment: *Batiste*' (1996) 20 *Crim LJ* 48. Special leave to appeal to the High Court refused 2 June 1995: *Batiste v R* (1995) 10 Leg Rep C15.

53 (1992) 177 CLR 292 at 357: not only the accused's interests are relevant.

54 (1995) 63 SASR 451 at 457-8.

He is not deprived of a fair trial if the lack of legal representation is due to the accused's failure to take appropriate measures to obtain legal representation. Those measures include utilisation of his own financial resources or, if they are insufficient to fund the trial, taking the necessary steps to obtain legal aid. If legal aid is sought the accused must comply with the reasonable requirements of the legal aid authority.<sup>55</sup>

In that case the accused failed to satisfy the Commission as to his continuing eligibility for aid; there was "an apparent incongruity between the appellant's alleged indigence and his capacity to raise finance".<sup>56</sup> Aid was consequently withdrawn.

The cases have suggested that the examination of fault is limited to accused's conduct from the time of the charge: it is doubtful that any conduct remoter in time which lead to a lack of financial means will be relevant. In *Connell (No 7)*,<sup>57</sup> White J considered that the term "fault" extended to the conduct of an accused whose indigence was brought about by his voluntary disposition of substantial assets (sufficient to cover legal costs) to family and third parties *with knowledge* of the charges against him. His Honour considered that, even if he were incorrect in this categorisation, the conduct certainly constituted "exceptional circumstances" which justified the trial proceeding, despite the accused being unrepresented.

Recently in *Craig v South Australia*<sup>58</sup> the High Court reconsidered the reference in *Dietrich* to the accused being unable to obtain legal representation "through no fault on his or her part" and unanimously said that these comments were not intended to indicate that:

...in every instance of misbehaviour, improvidence or other fault in the part of an accused which had contributed to his or her lack of representation must automatically preclude entitlement to a stay. In that regard, we agree with the view expressed by Olsson J in the Full Court that:

...what was in contemplation was a test which focused on the reasonableness of the conduct of the accused in all of the circumstances and excluded situations in which it could fairly be said that the accused, by his gratuitous and unreasonable conduct, had been the author of his own misfortune.

A fortiori, it was not intended to suggest that the power to grant a stay on the grounds of inability to obtain legal representation does not exist at all if there has been, as a matter of objective fact, contributing fault on the part of the accused.<sup>59</sup>

The High Court in *Craig* ultimately found that there was no jurisdictional error on the part of the District Court Judge in that case (the findings were open to him

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55 *Ibid* at 458.

56 *Ibid*.

57 (1995) 13 WAR 283 at 285-6; see also *SA v Russell and Craig* (1994) 71 A Crim R 497; Badgery-Parker, *supra* n. 32 at 185-187.

58 (1995) 184 CLR 163.

59 *Ibid* at 184.

on the evidence and he had not erred in his understanding of *Dietrich*) and no error of law on the face of the record. Accordingly there was no ground on which the South Australian Full Court could base an order of certiorari.<sup>60</sup> This decision signals a strong reluctance on the part of the appeal court to review any error said to have been made by a trial judge in assessing the effect of the *Dietrich* principle in a given case: generally, no jurisdictional error or error of law on the face of the record will exist for the purposes of certiorari.<sup>61</sup>

### 3.1.4. Exceptional circumstances<sup>62</sup>

The accused must also show that no exceptional circumstances exist which would justify the trial proceeding, notwithstanding the accused's unrepresented status. Though it is not possible to develop a definitive list of "exceptional circumstances", the cases indicate that a balancing process is to be undertaken. For example, in *Dietrich* itself, Toohey J recognised that the fair trial requirement will usually be "the prevailing consideration" but stated:

It is not possible to say that the trial judge must adjourn the trial for there are other considerations to be taken into account. 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. But ordinarily the requirement of a fair trial will be the prevailing consideration. Therefore, in the absence of compelling circumstances, a trial should be adjourned where an indigent accused charged with a serious offence lacks legal representation, not due to any conduct in the accused's part.<sup>63</sup>

If the trial proceeds without defence counsel in the absence of compelling circumstances, and the accused is convicted, the conviction will almost certainly be quashed.

Deane and Gaudron JJ also identified a category of exceptional circumstances where the accused "declines" or "persistently refuses or neglects to take advantage of" legal representation.<sup>64</sup> Invoking notions of "seriousness", Deane J further suggested that proceedings before a magistrate or judge, without a jury, for a non-serious offence will not offend the fair trial requirement.<sup>65</sup>

The way in which Toohey J's competing interests might be relevant is exemplified

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60 *Ibid* at 187.

61 See *Roddan v Director of Public Prosecutions* (1996) 70 ALJR 557 at 558 per Toohey J, especially so in that case where the trial was already "on foot".

62 See Zdenkowski, *supra* n. 13 at 144; P Fairall 'Trial Without Counsel: *Dietrich v The Queen*' (1992) 4 *Bond LR* 235 at 236-237.

63 (1992) 177 CLR 292 at 357 per Toohey J; see also at 335 per Deane J; cf at 365 per Gaudron J.

64 *Ibid* at 336 per Deane J; at 365 per Gaudron J; and see also *Gudgeon* (1995) 83 A Crim R 228 at 244 per McPherson JA and Thomas J.

65 *Ibid* at 336.

in *Greer*<sup>66</sup> where the trial had already been adjourned several times at the accused's request. Kirby J in the NSW Court of Criminal Appeal considered it legitimate for a trial judge to take into account case management considerations, there being nothing in the ICCPR, nor at common law, which "affords a person charged with a criminal offence the right to determine when he or she will be ready to face his trial".<sup>67</sup> In *Greer*, Carruthers J also referred to the "rights of the Crown (some nine witnesses were present at Court) and the public interest in the due administration of the criminal law."<sup>68</sup>

Where the accused is a "highly experienced commercial lawyer", the question may arise whether the accused's ability, qualifications and experience are such as to constitute an exceptional circumstance and part of the balancing exercise might be to weigh that "ability, training and experience...against the relative complexity of the charges brought".<sup>69</sup>

### 3.2. "Legal Representation"<sup>70</sup>

Fundamental to *Dietrich* is the importance of an accused having "legal representation" as an aspect of fair trial, particularly in the adversarial context. But what quality of representation is required? Are issues of adequacy and efficacy relevant? What regard is to be had to the accused's choice of lawyer? While the guidelines (in some cases statutory) under which the various Legal Aid Commissions (LACs) operate suggest that, to the extent reasonably practical, an applicant should obtain the services of the lawyer of his or her choice,<sup>71</sup> few would disagree with the observations of Barlow J in *Cummings* that "to avoid an unfair trial the applicant's legal representation need only be reasonable, it need not be 'Rolls Royce'".<sup>72</sup> But, again, how to assess "reasonableness"?

The tenor of the *Dietrich* majority was to the effect that "competent" representation is required.<sup>73</sup> But how does a court determine (before a trial has begun) the difficult question of whether the accused has competent representation: does the court hear argument concerning the seniority and relevant degree of experience and competence of the lawyers appointed?<sup>74</sup> As posited by Mason CJ and McHugh

66 (1992) 62 A Crim R 442 (decided pending *Dietrich*). Also *Cox* [1960] VR 665 at 667: interests of justice may be regarded; adopted in *McInnis v R* (1979) 143 CLR 575 at 581 per Mason J; *Moss v Brown* [1979] 1 NSWLR 114 at 126: imperative to consider the position of all parties.

67 *Ibid* at 448, 451.

68 *Ibid* at 460; also *R v Helfenbaum* [1993] 2 Tas R 115 at 117 per Cox J.

69 *Cummings* (1994) 12 SR(WA) 172 at 180-181; *Fuller* (1994) 12 SR(WA) 182 at 190.

70 See Leader-Elliott and Goode, *supra* n. 26 at 189; Zdenkowski, *supra* n. 13 at 146; Duggan, *supra* n. 13 at 265.

71 See Zdenkowski, *supra* n. 13 at 146.

72 *Cummings* (1994) 12 SR(WA) 172 at 178; also *Fuller* (1994) 12 SR(WA) 182 at 188.

73 For example (1992) 177 CLR 292 at 353 per Toohey J: "I assume, of course, that representation is competent"; at 345 per Dawson J; at 310 per Mason CJ and McHugh J. American decisions on the Sixth Amendment (providing a right to the "assistance of counsel") have interpreted this as a right to *effective* assistance: *Strickland v Washington* (1983) 466 US 668.

74 See Zdenkowski, *supra* n. 13 at 146.

J if a right existed to “demand counsel of a particular degree of experience and who can conduct the defence ‘effectively’... how could such a right be monitored properly by the trial judge?”<sup>75</sup>

These questions, avoided for some time post *Dietrich*, arose squarely for decision in *AG (NSW) v Milat*.<sup>76</sup> There the court was concerned with the application of *Dietrich* in a case where legal aid had been approved but there was a dispute about the type and adequacy of the funding package: in those circumstances could the accused show he was unable to obtain proper legal representation and that his trial would therefore be unfair?

The trial judge, Hunt CJ, ordered a stay of the accused’s murder trial until funds were provided for the legal representation in accordance with a formulae set by his Honour.<sup>77</sup> Hunt CJ also considered that the difficulty and complexity of the case required that the (second) junior counsel in the case should have at least “ten years practice in the criminal jurisdiction”.<sup>78</sup>

On appeal, the NSW CCA unanimously set aside Hunt CJ’s orders and said it was inconsistent with *Dietrich* for trial judges to

...embark upon a detailed exercise of assessing the relative degrees of competence and experience of lawyers potentially available to act for an accused person. Of course, lawyers vary in ability; accused persons obtain better representation from some lawyers than from others, just as trial judges obtain better assistance from some lawyers than from others. But the principle in *Dietrich* turns upon whether legal representation is unavailable to an indigent accused. It would be a serious criticism of a qualified lawyer, regularly practising in the criminal area, to say that representation by such a person was the equivalent of being relevantly unrepresented.

The principle in *Dietrich* concerns persons being, or about to be, tried for serious criminal offences who are to use the language of one of the leading judgments (at 311), “forced on unrepresented”. It does not concern an accused person’s supposed right to competent counsel: the existence of such a right was denied by the decision in *Dietrich*. That does not mean that questions of competence are entirely irrelevant to the application of the *Dietrich* principle. They are however, to be put in their proper perspective. It may well be that, in a given case, if the only representation available to the accused is *manifestly inadequate to the task*, it would be appropriate to regard the accused as being, for practical purposes, unrepresented. That however, is not the present case.<sup>79</sup> (Emphasis added.)

75 (1992) 177 CLR 292 at 310 per Mason CJ and McHugh J; also *A-G (NSW) v Milat* (1995) 37 NSWLR 370 at 375.

76 (1995) 37 NSWLR 370. Special leave to appeal to High Court refused 23 November 1995: see *Milat v A-G for NSW* (1995) 20 Leg Rep C3 per Dawson, Toohey and McHugh JJ.

77 *Ibid* at 371-373, 379: Hunt CJ’s formulae increased the Legal Aid package rates by between 10% and 30%.

78 *Ibid* at 378.

79 *Ibid* at 375. During argument on the special leave application, McHugh J also raised how the High Court could determine pre-trial whether an accused person did or did not have competent legal representation: see *Milat v A-G for NSW* (1995) 20 Leg Rep C3.

The Court posited that there could be cases where the legal aid offered was “so inadequate, or subject to such restrictive terms and conditions” that it would be appropriate to regard the accused as being relevantly unrepresented for *Dietrich* purposes.<sup>80</sup> Again, that was not the present case. Rather, the trial judge risked being drawn into a form of arbitration between Milat’s lawyers and the Legal Aid Commission: *Dietrich* was not about the setting of reasonable rates of remuneration for defence lawyers.<sup>81</sup>

Finally, it would not seem unreasonable that the accused’s own particular circumstances are also relevant. Where the accused was a “highly experienced commercial lawyer”, Barlow J suggested:

In assessing what constitutes reasonable representation in this case, it must be borne in mind that by virtue of the applicant’s qualifications and experience, he would be able to provide a solicitor and counsel with detailed and informed instructions.<sup>82</sup>

## 4. Extension of the *Dietrich* Principle

### 4.1. Criminal Extension

It has been suggested that *Dietrich*’s focus on representation at trial “encourages a fundamental misunderstanding of our criminal justice process”,<sup>83</sup> a process which actually emphasises pre-trial procedures and which generates guilty pleas that commonly resolve criminal cases.

It is time to shift the focus from the jury trial, which is used in only a tiny proportion of criminal matters, to the pre-trial process, the site which actually determines the fate of most accused persons. As Sallmann and Willis have written:

The perception of the jury trial as the stage where the only really important decisions are made is often accompanied by a view of criminal investigation as exploratory, procedural, mechanical, introductory...Nothing could be further from the truth, and in fact a great many persons’ convictions are signed, sealed and delivered in the police station during the criminal investigation process.<sup>84</sup>

That criminal *suspects* should have access to legal representation at pre-trial investigatory stages as a logical extension of any right to legal representation at trial (or in a precautionary way to ensure the efficacy of that later representation),

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80 *Ibid* at 375.

81 *Ibid* at 375, 380.

82 *Cummings* (1994) 12 SR(WA) 172 at 178-9; *Fuller* (1994) 12 SR(WA) 182 at 188.

83 CJC *Report on a Review of Police Powers in Queensland Volume IV: Suspects’ Rights, Police Questioning and Pre-Charge Detention* CJC Brisbane 1994 at 705.

84 NSWLRC *Police Powers on Detention and Investigation After Arrest: Criminal Procedure*, Report LRC 66 National Capital Printing Canberra 1990 at 21. See also *Murray v United Kingdom* (1996) 22 EHRR 29.

has been the subject of much reform work in recent times, the most influential legislative model for which is clearly the *PACE Act 1984 (UK)*.<sup>85</sup>

*Dietrich* was concerned with the requirements for fair *trial* and the undoubted desirability of (competent) legal representation in the *criminal trial*. The very valid rationales for trial representation are almost indistinguishable from those that might be fairly put in relation to the desirability of legal representation at the pre-trial stage and would accord with affirmations to be found in international human rights documents:

The right to consult a lawyer is ... also a central feature of contemporary international statements of human rights. The right is pivotal in assuring so far as possible that both those detained and those detaining them act in accordance with the law. It recognises the reality that an individual who is arrested or detained is ordinarily at a significant disadvantage in relation to the informed and coercive powers available to the State. Access to counsel is a means of reducing that imbalance and of ensuring that anyone arrested or detained is treated fairly in the criminal process. In that regard the right to a lawyer facilitates access to knowledge and also allows for representation by an independent intermediary.<sup>86</sup>

Nevertheless, the emphasis post-*Dietrich* has very much been to focus on the criminal *trial*: *Dietrich* has no application to anything that precedes the trial nor to the appeal after it. Indeed shortly after *Dietrich*, the Tasmanian Supreme Court in *R v Helfenbaum*<sup>87</sup> discharged an order nisi staying committal proceedings on the basis of lack of representation and denial of legal aid, and distinguished the case because no stay was sought of the prosecutor's "trial", but only of the "preliminary hearing".<sup>88</sup> *Helfenbaum's* finding that *Dietrich* was inapplicable to committal proceedings was subsequently confirmed in *Fuller v Field and South Australia*.<sup>89</sup> committal proceedings do not produce the same serious consequences as does a trial.

The High Court in *Canellis*,<sup>90</sup> rejecting any extension of *Dietrich* that required the provision of legal representation for witnesses before a statutory inquiry, made the position crystal clear:

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85 Particularly s 58 and Code of Practice C, in essence providing that suspects detained at police stations be informed that they have a right of access to free legal advice. For an overview of the *PACE Act 1984 (UK)*, the current statutory position in Australia and recommendations for a free legal advice scheme see CJC, *supra* n. 83, esp Chapter 21 and Appendix 10.

86 *MOT v Noort* [1992] 8 CRNZ 114 at 136 per Richardson J; see also *R v Brydges* (1990) 53 CCC (3d) 330 per Lamer J esp 349; *Murray v United Kingdom* (1996) 22 EHRR 29 (European Court of Human Rights): applicant's lack of access to a lawyer in Northern Ireland during the first 48 hours of police detention (where adverse inferences could be drawn from the applicant's failure to answer questions by police) was a violation of Art 6(1) in conjunction with Art 6(3)(c) ECHR.

87 [1993] 2 Tas R 115.

88 *Ibid* at 117.

89 (1994) SASR 112. Special leave to appeal to High Court refused 26 August 1994. See also *NSW v Canellis* (1994) 181 CLR 309 at 328.

90 (1994) 181 CLR 309.

There is no suggestion in the majority judgements that a court could exercise a similar jurisdiction in civil proceedings or in committal proceedings; nor do they suggest that such a jurisdiction could be exercised in favour of an indigent person charged with a criminal offence which is other than serious. Furthermore, and this is of decisive importance in the present case, the principle in *Dietrich* is concerned with the right to a fair trial of a *party* to criminal proceedings; the principle has nothing at all to say about the protection of the interests of a witness, let alone the protection of the interests of a witness at an inquiry.<sup>91</sup>

*Canellis* further found that, unlike a court, an inquiry or a tribunal has no “inherent jurisdiction” to be exercised in the witness’s favour; nor do the requirements of procedural fairness and natural justice applicable to an inquiry require that it be stayed until legal representation is secured for a witness, even a witness against whom serious and adverse findings might be made.<sup>92</sup> These considerations have been applied equally to deny a witness before a Royal Commission any relief.<sup>93</sup>

Any residual questions as to the criminal scope of *Dietrich* were resolutely answered in *Johns v R*:<sup>94</sup> *Dietrich* also did not affect the hearing of an appeal with an unrepresented appellant. Johns had been represented at trial but was refused legal aid for his appeal. He argued that the appeal was simply a continuation of the trial and that, accordingly, as he had exhausted all avenues for obtaining legal representation, his appeal should be upheld and his conviction set aside. The West Australian Court of Appeal rejected that argument, restating that *Dietrich* does not call for representation in every case: it “certainly does not extend to the grant of legal representation in the case of an appeal” and, in any event, the only power available to the appeal court, if it were minded to grant a remedy, would be to adjourn the appeal so that the appellant could seek the services of counsel without charge.<sup>95</sup> This restrictive interpretation of the *Dietrich* safeguard stands in stark contrast to a number of recent decisions in the European Court of Human Rights which have interpreted the guarantees of Art 6 ECHR as requiring publicly funded assistance in criminal appeals.<sup>96</sup>

#### 4.2. Civil Extension

*Canellis* made it plain that the *Dietrich* principle only assists a party to criminal

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91 *Ibid* at 328 per Mason CJ, Dawson, Toohey and McHugh JJ.

92 *Ibid* at 328-331

93 *Easton v Griffiths* (1995) 130 ALR 306 at 312-313, Toohey J applying *Canellis*: “*Canellis* is strongly against the plaintiff’s claim that he will be denied procedural fairness if he is not provided with the funds for legal representation”.

94 (1995) 13 WAR 380. Special leave to appeal to High Court refused 19 June 1996 per Toohey, McHugh and Kirby JJ: *Johns v R* (1996) 11 Leg Rep C1.

95 *Ibid* at 382.

96 *Granger v UK* (1990) 12 EHRR 469: unanimous decision of European Court of Human Rights finding a violation of Art 6(3)(c) ECHR right to counsel, taken together with Art 6(1) fair hearing. See also *Maxwell v United Kingdom* (1994) 19 EHRR 97; *Boner v United Kingdom* (1994) 19 EHRR 246.



proceedings and that the rules of natural justice and procedural fairness do not require the provision of legal representation in administrative inquiries or proceedings. Consequently, claims of entitlement to publicly funded legal assistance have been rejected, for example, at the early stages of investigation of a claim to refugee status,<sup>97</sup> before the Refugee Review Tribunal,<sup>98</sup> before the Administrative Appeals Tribunal regarding objections to taxation assessments,<sup>99</sup> and in circumstances where the applicant claimed he had been denied the opportunity to properly defend himself before a Disciplinary Appeals Committee.<sup>100</sup>

Claims that the *Dietrich* principle guarantees adequate legal representation in bankruptcy proceedings have been similarly unsuccessful. In *Williams v Official Trustee*,<sup>101</sup> the Full Federal Court said:

*Dietrich* was a criminal case involving the prosecution of an accused who was not represented at all. The judges of the court make it quite clear that they are dealing with the criminal justice system, not with the civil justice system. Thus Mason CJ and McHugh J commence their discussion of the right of an accused to a fair trial by saying that the right of an accused to receive a fair trial according to law is a fundamental element of "our criminal justice system". Reference may also be made to the judgement of Deane J...where he says that an accused is brought involuntarily to the field in which he is required to answer a charge of serious crime.

The position of *Dietrich*-type applications in relation to family law matters deserves some special attention, though the result has been disappointingly similar. In decisions prior to *Dietrich*, the Family Court had already identified a reduced level of legal aid funding for family law matters and had expressed concern that unrepresented parties might not receive a fair trial:

Despite increased Commonwealth funding for legal aid, recent years have seen a sharp contraction in legal aid for family law matters and a substantial increase in legal aid for criminal matters. While we recognise the conflicting pressures on legal aid authorities, we think that the time has come to call into question the continued diminution of aid to parties in family law matters.

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97 *Rong v Minister for Immigration and Ethnic Affairs* (Unreported Federal Court of Australia, 4 May 1995, Nos. AG 48, 52, 56,57 of 1994, Sackville J); (1995) 38 ALD 38.

98 *Barzideh v Minister for Immigration and Ethnic Affairs* (Unreported Federal Court of Australia, 21 August 1996 NO. WG 54 of 1995 Fed No. 729/96, Hill J).

99 *Stuart v Commissioner of Taxation of the Commonwealth of Australia* (Unreported Federal Court of Australia, 10 May 1996, No. WAG 117 of 1995 Fed No. 338/96, Nicholson J).

100 *McGibbon v Linkenbach* (Unreported Fed Ct of Aust, 2 February 1996, No ACTG 22 of 1994, Fed No. 18/96, Keifel J).

101 (1994) 122 ALR 585 at 600. Special leave to appeal to the High Court refused 17 February 1995: see *Williams* (1995) 4 Leg Rep SL3, per Mason CJ "This case commands no prospects of success whatsoever." See also *Nassar v Advance Bank Australia Limited* (Unreported Federal Court of Australia, Full Court, 12 May 1995 No SG 1 of 1995 Fed No 341/95 Bankruptcy, Burchett, O'Loughlin and Nicholson JJ).

In the present case, for example, the husband is in receipt of Workcare payments and the wife social security benefits. Neither can speak English. The welfare of a child is involved. The husband was represented both at the trial and on appeal, and the wife was not. The likelihood of an injustice occurring was greatly exacerbated by her lack of representation and in fact we have found that an injustice did occur in that she was unable to properly present her case.<sup>102</sup>

As noted by the Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, the *Dietrich* decision clearly endorses and may exacerbate the existent legal aid priority accorded to criminal matters: at the very least it makes it unlikely that scarce dollars will be channelled away from criminal law to family or other civil law matters.<sup>103</sup> These issues will be discussed further below.

Against this background, the Family Court was not quick to concede the inapplicability of the *Dietrich* principle. For example, in *Andrews v Andrews*,<sup>104</sup> the father was not represented at trial, and, on appeal, referred to *Dietrich*. Though Baker J in the Full Court was cognisant of the “direct distinction to be drawn between a person not being represented in a criminal trial and a person not being represented...in the Family Court”, Nicholson CJ was not prepared to make any concluded comment on the effect of *Dietrich* in the Family Court “since that [would] undoubtedly be a matter of full argument in this court in the future.”

The Family Court has expressed itself as “increasingly conscious”<sup>105</sup> of the difficulties which confront both the Court and the parties where one or both litigant(s) appear(s) in person, but it is now clear that *Dietrich*, so far as it provides positively for representation in the criminal courts, has no application in the Family Court, and that self-representation, though a disadvantage, does not represent a justification for a retrial in itself.<sup>106</sup>

Consequently, the predicament of a pre-*Dietrich* trial judge, who was required to shoulder all the additional responsibilities associated with an unrepresented accused, has simply become an increased dilemma for the Family Court. As the High Court has laid down, a frequent consequence of self-representation is that the Court must assume the burden of endeavouring to ascertain the rights of the parties which might be “obfuscated by their own advocacy”.<sup>107</sup> Little wonder then that the call has been made for a reordering of legal aid priorities, particularly with a view to ensuring the adequacy and fairness of legal assistance provided to custodial

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102 *Sajdak v Sajdak* (1993) FLC 92-348 at 79, 687.

103 ALRC 69(1), *supra* n. 25 at 4.15.

104 Unreported Full Family Court 25 October 1993, Appeal No. SA3 of 1993, Nicholson CJ, Strauss and Baker JJ.

105 For example, *In the Matter of Feldman and Kendell* (Unreported Family Court Full Ct, 21 June 1995, Fogarty, Lindenmayer and Moss JJ) per Fogarty J.

106 *Re R* (1995) FLC 92-564 citing *Sparkes v Sparkes* (1994) 9 Leg Rep SL4 (though the report does not set out text see 81,623). Cf pre-*Dietrich* decision *Sajdak v Sajdak* (1993) FLC 92-348 at 79, 687).

107 *Neal v Nott* (1994) 68 ALJR 509 at 510; cf *MacPherson v R* (1981) 147 CLR 512 at 546-7 per Brennan J re criminal trial.

and contact parents in the full range of contact cases.<sup>108</sup> Such a move would be instrumental in redressing the gender imbalance that currently exists in the allocation of litigation legal aid (discussed below). It would also be in conformity with the obligations to provide legal representation espoused by the international instruments, where there has been recognition of a limited right to funded counsel in civil matters. For example, in *Airey v Ireland*,<sup>109</sup> Airey complained that she was unable to proceed with her divorce proceedings 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 guaranteed in Art 6(1) ECHR, although it did not imply the right to free legal aid in the determination of the individual’s *civil* rights and obligations (in contrast to the Art 6(3)(c) right in relation to *criminal* proceedings but which is subject to limitations), may sometimes

... compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.<sup>110</sup>

The right in Art 6(1) was held to be one that is “‘practical and effective’ and not merely ‘theoretical and illusory’”<sup>111</sup> and the right was violated in Airey’s case. Following that decision, the Government of Ireland made legal aid available in divorce cases and took steps to simplify divorce procedure and reduce costs.<sup>112</sup>

In Australia in the meantime, in one area at least, the Family Court has taken matters into its own hands. In *Re K*,<sup>113</sup> the Full Family Court set out a non-exhaustive but detailed list of guidelines for the appointment of separate representatives for children pursuant to s 65 *Family Law Act* 1975 (Cth). In so doing the Court had specific regard to the requirements of Arts 9 and 12 of the United Nations Convention of the Rights of the Child and stated that the guidelines proposed were not only consistent with those requirements but “further [those] objects”.<sup>114</sup> Prior to the decision in *Re K*, separate representation was only ordered in the most serious of cases and in the vast majority of cases no representative for the child was appointed.<sup>115</sup> It is conceivable that a significant number of custody cases would come within at least one, if not more,

108 ALRC 73 *Complex Contact Cases and the Family Court: Report* 73 ALRC Sydney 1995 at 2.57-2.62.

109 (1979) 2 EHRR 305. See also *X and Y v The Netherlands* (1975) 1 D & R 66 at 71: no right to free proceedings in civil matters guaranteed under the Convention.

110 *Ibid* at 317.

111 *Munro v United Kingdom* (1988) 10 EHRR 516 at 517 using the language of *Artico v Italy* (1980) 3 EHRR 1 at 13 re Art 6(3)(c).

112 K Fletcher “Legal Aid: Right or Privilege” (1993) 18 *Alt LJ* 21 at 26.

113 (1994) FLC 92-461 at 80,771-80,776.

114 *Ibid* at 80,777.

115 *Ibid* at 80,771-2; N M Eidelson and V Papaleo ‘Separate Representation in Light of *Re: K*’ (1995) *Australian Family Lawyer* 36 at 37; Also M Pyke ‘Custody and Criminal Charges’ (1994) 16 *Bulletin* 29 at 30.

of the criteria established by the Court: for example, within the guidelines are cases of “apparently intractable conflict between the parents”, “cases where it is proposed to separate siblings” and “custody cases where none of the parties are legally represented”. Regarding the last criterion, the Court said:

This can occur through the choice of the parties, or the non-availability of legal aid. In such circumstances we consider it imperative that the child’s interests be protected as soon as is practicable after this situation becomes apparent.<sup>116</sup>

Implicit in this is the expectation that the separate representative would be involved in all stages of the proceeding and it has been suggested that the funding implications of this decision could be substantial given that funds for separate representatives are presently derived from the legal aid budget (consequent on an order of the Family Court requesting the appointment of a Separate Representative).<sup>117</sup> However, as has been conceded recently by the Full Family Court in *Heard v de Laine*,<sup>118</sup> the Family Court has no power to order the Legal Aid Commissions to fund separate representatives under s 65 of the *Family Law Act 1975* (Cth), nor does s 65 enable the Court to review the administrative decisions of legal aid bodies to refuse or limit aid.<sup>119</sup> While so much has already been accepted in the criminal context, there exists in those proceedings a circuit breaker that will operate for the benefit of the criminal litigant if all else fails him (or her): as recognised, for example, in *Karounos* and *Milat*, the function of the trial judge determining indigence and that of the Legal Aid Commission declining aid are “separate and independent” and it is ultimately for the court to satisfy itself on indigence. No such safety net exists in Family Court proceedings: there can be no ultimate protection of the rights and interests of the child forced on unrepresented whatever the Family Court judge may decide for him/herself about whether there is, nevertheless, an infringement of the child’s right to a fair trial. Unlike criminal proceedings, family proceedings cannot be left languishing: they must be brought to finality and, preferably, as quickly as possible.

## 5. Legal Aid and Fair Trial

An analysis of the extensive jurisprudence that has been generated by *Dietrich* reveals the essence of the Dietrich dilemma. The evolution of the principle post-*Dietrich* has been unsatisfactory: the common law right to fair trial, in this aspect of funded representation, has been confined in an illogical and unprincipled fashion to the “serious” “criminal” “trial”. The difficulties inherent in each of those indicia are manifest, even without recourse to the further complicating pre-conditions laid down by the High Court.

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116 *Ibid* at 80,775.

117 Pyke, *supra* n. 115 at 30; Eidelson and Papaleo, *supra* n. 115 at 41-42.

118 (1996) FLC 92-675.

119 *Ibid* at 80,038-80,039.

*Dietrich* effectively forces governments either to accept the mediocre position that certain serious criminal trials may be stayed indefinitely or to assume an obligation to fund the criminal defence in serious cases, thus affecting the legal aid available for other law types (such as family) in an environment where the shrinking legal aid dollar is subject to ever increasing demand.<sup>120</sup>

What is then called into question is the validity of the relative seriousness (and funding priority) that has traditionally been accorded criminal litigation legal aid, to the detriment of other law type aid. In *Dietrich*, the Court discussed extensively the rationales for considering representation in serious criminal matters as essential for a fair trial, yet this discussion occurred without regard to other areas of law where litigation legal aid may also be essential, and without reference to the fact that the decision may have had an engendered impact by reason of the simple statistical fact that more men commit crime (including serious crime) than women. As put by the ALRC when discussing the *Dietrich* decision:

No-one put the case that women might be disadvantaged by the decision. Given the finite resources available for legal aid, an intervenor on behalf of women may have made a significant difference to the decision, or the way in which the reasons for the decision were framed.<sup>121</sup>

The particular priority accorded to legal representation in crime is rationalised under two heads.<sup>122</sup> The first invokes liberalist notions of equality, fairness and justice and seeks to redress the obvious disparity of resources that occurs when State versus accused. However this inequality of resources is also present in other, non-criminal, proceedings: social security and refugee cases, for example.<sup>123</sup> A second and related justification is the seriousness of the consequence which faces an accused in the *Dietrich* circumstances: the potential for (long-term) imprisonment. However, again, other non-criminal or less serious criminal cases may also have very serious consequences: for example, loss of a sole parent pension; loss of custody of one's children; going to jail for a minor (not serious) crime which may result in loss of children; protection from partner violence; loss of a job resulting in a family's eviction consequent on loss of income and so on.<sup>124</sup>

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120 For a recent analysis see CJC *Legal Aid*, *supra* n. 23, at 15-16, 29-31; also Access to Justice Advisory Committee (AJAC) *Access to Justice - An Action Plan* AGPS Canberra 1994 Chapter 9 esp 239-244.

121 ALRC 69(1), *supra* n. 25 at 4.14; also R Graycar and J Morgan 'Disabling Citizenship: Civil Death for Women in the 1990's' (1995) 17 *Adel LR* 49.

122 Badgery-Parker, *supra* n. 32 at 179-181.

123 ALRC 69(1), *supra* n. 25 at 4.19.

124 *Ibid* at 4.17; also M J Mossman 'Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change' (1993) 15 *Sydney Law Review* 30 esp 48; E van Moorst and K Deverell 'Justice for All: Women's Access to Legal Aid in Victoria' (1993) 1 *Australian Feminist Law Journal* 147; Legal Aid and Family Services (LAFS) *Gender Bias in Litigation Legal Aid: Issues Paper* Attorney-General's Department Canberra 1994 esp at 42-43; Attorney-General's Department *Justice Statement* Canberra May 1995 Chapter 6.

Providing free legal assistance in criminal matters cannot always be at the expense of legal assistance in other matters. As the Family Court has recently put:

Issues concerning the welfare of children are no less important in a civilised legal system than issues concerning liberty of the subject. Provision of proper legal representation in matters concerning liberty of the subject has been seen by the High Court to be essential to the administration of justice (*Dietrich v R*). The provision of appropriate legal assistance in children's custody cases is equally as vital.<sup>125</sup>

At a very fundamental level, the criminal bias in legal aid funding is impacting on gender equality before the law and has led the ALRC to conclude that directing legal aid funding away from areas of greatest concern to women and to areas of greatest concern to men has resulted in women not "being provided with a basic level of protection of their rights".<sup>126</sup> In 1994, the Legal Aid and Family Services (LAFS) division of the Commonwealth Attorney-General's Department identified that in 1992/3 men received 63% of net national litigation legal aid while 37% went to women.<sup>127</sup>

The gender bias in legal aid is largely, if not solely, a function of distribution of aid amongst law types – people applying for aid in criminal matters have a greater expectation of approval and a large majority of approvals are for criminal aid, and a large majority of applicants in criminal matters are men.<sup>128</sup>

Litigation legal aid has become, essentially, criminal legal aid. This cannot be optimal in terms of legal aid as a measure to ensure equality and equity in accessing justice and securing the all important common law right to fair trial. The gender inequality of legal aid resource allocation prioritising criminal legal aid that has been validated by *Dietrich*, underscores the deficiencies of isolating and elevating the criminal process as a more worthy recipient of the benefits of a fair trial.

To this extent, though the desirability of funded representation in criminal matters is accepted as manifest, the concerns expressed by the *Dietrich* minority, Brennan and Dawson JJ, regarding the limits of the proper exercise of judicial power

125 *McOwan v McOwan* (1994) FLC 92-451 at 80,691.

126 ALRC 69(1), *supra* n. 25 at 4.30.

127 LAFS, *supra* n. 124 at 24-25 (charts 7-10): criminal law accounts for 62% of applications, 72% of approvals and 43% of the total budget; family law for 27% of applications, 21% of approvals and 32% of total budget; civil for 11% of applications, 7 % of approvals and 25% of budget. 80% of applicants in criminal law are men and, as the figures show, criminal applications have a much higher success rate. This trend is confirmed in the more recent studies: see for example, CJC, *Legal Aid*, *supra* n. 23, at 45-50; M Cunningham and T Wright *The Prototype Access to Justice Monitor (Queensland)* Justice Research Centre Sydney 1996 at 41 esp Figure 57.

128 LAFS, *supra* n. 124 at 37. At 41, it is suggested that this is a form of indirect discrimination in relation to which "temporary special measures" could be implemented: see *Sex Discrimination Act 1984* (Cth) s 33; also *Convention on the Elimination of All Forms of Discrimination Against Women*, Art 4.

and the appropriateness of the court (rather than the executive or the legislature) deciding questions which impact so dramatically on legal aid allocation of resources, have proved legitimate.<sup>129</sup> Unless the size of the legal aid cake increases (against the current trend) or the demand on it decreases (again against the current trend), *Dietrich* will continue to have a considerable impact on the efficacy of legal aid as a real and useful tool in the access to justice armoury, certainly much greater than the re-ordering of legal aid priorities anticipated by Mason CJ and McHugh J.<sup>130</sup>

## 6. Conclusion: The Interests of Justice

Undeniably, *Dietrich* strengthens the Australian common law position on the right to fair trial, as it is guaranteed in the international human rights instruments. But not only criminal legal matters involve human rights. When the evolving *Dietrich* principle is scrutinised against the significant international concern for rights protection, the high-principled rationale for *Dietrich* appears incongruous as interpreted and practised: there is internal inconsistency in the scope of its application in the criminal sphere, while the supposedly incontrovertible priority accorded serious crime to the detriment of every other law type, and particularly those law types of most concern to women, is at best questionable.

While this article has focused primarily on the right to legal representation as an indicia of a fair *criminal* trial, as pointed out by the ALRC, the ICCPR in Arts 23 and 26 also requires that appropriate steps be taken to ensure equality before the law and equality of rights and responsibilities of spouses on the dissolution of marriage and to ensure the necessary protection of children on marriage breakdown.<sup>131</sup> Arguably this is not occurring presently and Australia leaves itself open to legitimate complaint under the Optional Protocol.

The landscape of the Australian justice system is changing rapidly. With the many recent inquiries and reports into improving access to justice which are concerned with making the justice system fairer, simpler and more affordable,<sup>132</sup> pragmatic responses have been forthcoming on methods to increase efficiency in the criminal justice system and generally: for example, the widespread acceptance of case management practices in the civil context.<sup>133</sup> Legal Aid, being budget

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129 (1992) 177 CLR 292 at 317-323 per Brennan J; at 349-350 per Dawson J.

130 *Ibid* at 312 per Mason CJ and McHugh J.

131 ALRC 69(1), *supra* n. 25 at 4.18.

132 See, for example, AJAC, *supra* n. 120.

133 J Badgery-Parker (II), "The Criminal Process in Transition: Balancing Principle and Pragmatism - Part II" (1995) 4 *Journal of Judicial Administration* 193; D A Ipp 'Reforms to the Adversarial Process in Civil Litigation - Part 1' (1995) 69 *ALJ* 705; Lord Woolf, MR *Access to Justice, Final Report: The Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* July 1996 'Lord Woolf's Inquiry Internet Site' at <http://ltc.law.warwick.ac.uk/woolf/>; Australian Law Reform Commission *Review of the Adversarial System of Litigation* Issues Paper 20 ALRC Sydney 1997 Chapters 5 and 6.

dependant and not demand driven in Australia, is under continuing pressure and scrutiny.<sup>134</sup> The courts will doubtless continue to examine and develop the content of fair trial, as specifically exemplified, but hopefully not stifled, by *Dietrich*. It can only be hoped that all of these various inquiries, reports and investigations will further the human right of equality of fair (criminal or civil) trial in the interests of justice for all.

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134 For example, ALRC 69(1), *supra* n.25 at 4.4 recommending that Com A-G's undertake a detailed examination of legal aid legislation and guidelines to determine the most appropriate way to achieve a change in priorities to ensure that applicants in criminal, family and civil matters are accorded a "minimum level of protection and assistance"; see also at 4.30 and 4.31 .