

# The Court of Criminal Appeal: A New Scheme to Assist Indigent Appellants



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*A new scheme has been set up to assist convicted offenders appearing before the Court of Criminal Appeal of Western Australia. The scheme will provide pro bono representation by barristers or solicitors for those offenders who have been refused legal aid. Students from the Law Faculty of the University of Western Australia will play a crucial role in the implementation of the scheme. In this article, the Chief Justice of Western Australia outlines how the scheme originated, whilst Dr Paul Moyle, the scheme's coordinator, explains how it will be administered and in particular what part the law students will play.*

**F**OR various reasons, including limitations on the availability of legal aid, the numbers of unrepresented litigants in the Supreme Court of Western Australia have increased. Various efforts have been made to resolve the problems which have arisen in respect of unrepresented litigants since 1992. The main area of concern has been in relation to unrepresented applicants and appellants who appear before the Court of Criminal Appeal, but considerable difficulties have also been encountered with unrepresented litigants in civil cases.

In recent years, there have been about 50 unrepresented persons appearing before the Court of Criminal Appeal each year. In the first half of 1999, 38 persons appeared without representation and 46 unrepresented persons had appeals or applications pending.

While there is no constitutional or common law right to legal representation on an appeal, or an application for leave to appeal, to the Court of Criminal Appeal,

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the statutory right of a convicted person to appeal or seek leave to appeal against conviction and/or sentence is an empty one if the person does not have the necessary skill or capacity to undertake the task. In such a case, there is a denial of the statutory right under the Criminal Code,<sup>1</sup> which itself may be regarded as a denial of access to the Court, which in turn is a denial of justice. The mere fact that a person has been denied legal aid for an appeal is not conclusive of the absence of merit. In the 11 years that I have been on the Bench there have been several cases where persons refused legal aid have successfully appealed against conviction and/or sentence. I recall one case in which an appeal succeeded where a person incapable of addressing the Court because of both language and other disabilities was permitted to have a law student address the Court by an extension of the ‘McKenzie friend’ principle.<sup>2</sup>

Until deleted by an amendment in 1990, the Court of Criminal Appeal had the power to assign a convicted appellant a solicitor and counsel, or counsel alone, in any case where it considered it desirable that a person without legal aid should have such aid.<sup>3</sup> The provision was deleted because it was thought unnecessary following the introduction of the legal aid scheme under the Legal Aid Commission Act 1976 (WA).

The greatest difficulties faced by unrepresented applicants and appellants have been the drafting of grounds of appeal and the preparation of the appeal books. As a last resort, the staff of the Criminal Registry have been imposed upon to prepare appeal books. That approach has not resolved the substantive problems encountered by unrepresented persons who wish to appeal to the Court of Criminal Appeal. A number of unrepresented applicants appear time and again on Motion Days as they attempt to formulate coherent grounds of appeal, settle submissions and prepare appeal books.

Generally speaking, the preparation time of a case which involves an unrepresented litigant may be extended by a third or more. It is extremely difficult for the Bench to maintain a balance between impartiality and the provision of assistance to unrepresented litigants. Judges should not be put in a position of giving legal advice about grounds of appeal. The expenditure of judicial time on giving advice about procedural matters is wasteful.

Discussion with the Legal Aid Commission over a period of some years failed to yield a solution to the problems of unrepresented persons formulating their grounds of appeal. In December 1997, Mr Robert Lindsay<sup>4</sup> proposed the development of a ‘self-help’ kit for appellants. While the proposal represented a

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1. S 695.

2. *McKenzie v McKenzie* [1970] 3 WLR 472.

3. Criminal Code (WA) s 698.

4. Then Acting Director of Legal Aid.

significant step in resolving problems for unrepresented appellants, the question of costs in the preparation of materials and the grounds of appeal remained. Early in 1998, I suggested to the Legal Aid Commission that assistance could be sought from law students to prepare materials in a similar manner to that which had been undertaken in *R v Schagen*.<sup>5</sup>

In March 1998, I approached the Dean of the Law Faculty, Associate Professor IG Campbell, concerning the provision of assistance to unrepresented appellants by students from The University of Western Australia Law School. The most significant obstacle to the proposal was the need for adequate supervision by a practitioner. There would also be administrative costs in the establishment of the scheme.

In August 1998, Her Honour Judge Kate O'Brien, the then President of the Law Society, and Mr Laurie Levy<sup>6</sup> proposed similar schemes for the provision of advice to unrepresented litigants generally. In summary, their proposal was that practitioners would be required, as a condition of the renewal of their Practice Certificates, to undertake one piece of pro bono work each year. In the context of the Law Society's proposal, this would involve the supervision of a matter by the practitioner while a student undertook background research.

In December 1998, in light of the series of proposals and recommendations which had been advanced, I considered that it would be appropriate to approach the whole of the question of unrepresented litigants, rather than to deal with individual aspects of the matter. The issue of how to deal with unrepresented litigants generally had also been put firmly back on the agenda by the release of the Australian Institute of Judicial Administration's paper, *Courts and the Public*.<sup>7</sup> A committee was formed under the chairmanship of His Honour Justice Geoffrey Miller with representatives from various organisations.<sup>8</sup> The committee's terms of reference were broad. In part, they were:

1. To examine proposals for the implementation of a pilot scheme to provide pro bono advice and assistance for unrepresented applicants and appellants in the Court of Criminal Appeal.
2. To examine proposals for the implementation of a pilot scheme to provide pro bono advice and assistance for unrepresented litigants in all State courts in a manner which is not inconsistent with the role and objectives of the Legal Aid Commission of Western Australia.

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5. (1993) 8 WAR 410.

6. From the community organisation, People for Justice.

7. S Parker *Courts and the Public* (Melbourne: AIJA, 1998).

8. The Ministry of Justice, the Legal Aid Commission, the University of Western Australia, the Law Society of Western Australia, the Criminal Lawyers' Association and People for Justice.

3. To determine the most appropriate proposals and report to the Chief Justice of Western Australia.
4. To oversee the implementation of any pilot scheme, making recommendations and giving advice as appropriate.

Since its inception the committee's efforts have been directed exclusively towards dealing with the issue of unrepresented applicants and appellants before the Court of Criminal Appeal. In April 1999, a submission for funding was produced by the committee for what has become known as the Unrepresented Criminal Appellants Scheme ('UCAS'). In essence, the Scheme provides for a coordinator and solicitor to supervise senior students at the University of Western Australia Law School who, in the course of their Sentencing and Criminal Procedure units, will attend prisons under the guidance of the supervising solicitor, interview unrepresented prisoners and take instructions, obtain transcripts of trial proceedings, undertake research on likely grounds of appeal, prepare draft grounds of appeal and outlines of submissions, and prepare a brief for consideration by the supervising solicitor. The final step will be the preparation of the appeal books. The primary objective of the Scheme is to provide assistance to unrepresented applicants and appellants to allow their cases to be heard expeditiously, rather than to leave them languishing in a series of Motion Days.

The second stage of the Scheme looks to the profession to provide assistance in the form of practitioners who will be willing to argue the prepared appeals on a pro bono basis. With the support of the Western Australian Bar Association and members of the committee, a register of practitioners willing to undertake at least one pro bono brief per year in the Court of Criminal Appeal has been established. There has been considerable interest from practitioners willing to undertake pro bono work, with 12 responses being received within one week of the establishment of the register. I commend these practitioners for their public-spirited action and hope that many more will follow their example.<sup>9</sup>

The Scheme has my full support. I would like to make it clear that it is not intended that this Scheme will be a substitute for legal aid or intrude upon areas in which a grant of legal aid might be expected; indeed, matters accepted into the Scheme which subsequently appear to meet the Legal Aid Commission's guidelines may be referred to the Commission. Applicants and appellants in the Court of Criminal Appeal will only be considered eligible for assistance by the Scheme when they have been refused legal aid.

This Scheme should be a great advance in assisting the Court of Criminal Appeal to deal fairly, expeditiously and justly with the many applicants and appellants who appear before it.

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9. 43 practitioners, including 6 QCs, had enrolled in the Scheme by 28 March 2000, the date of going to press. – Ed.

# The Administration of UCAS



PAUL MOYLE<sup>†</sup>

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**T**HE primary objective of the Unrepresented Criminal Appellants Scheme is to make the hearing of appeals in criminal cases proceed more efficiently and effectively. The Scheme will run initially for a two-year period commencing in February 2000.<sup>1</sup>

The Scheme has the approval of the Chief Justice of the Supreme Court and will be administered by the Faculty of Law at the University of Western Australia. Interested practitioners<sup>2</sup> will appear on a pro bono basis for the appellant. If no practitioner is available, the appellant will appear unrepresented before the Court of Criminal Appeal.

## ADMINISTRATION OF THE SCHEME

A Legal Consultative Committee<sup>3</sup> will be established to ensure that input is received from the profession. The function of the Committee will be to provide

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1. Funding for the Scheme has been provided by the Ministry of Justice, the WA Supreme Court and the University of Western Australia. The author wishes to acknowledge the assistance given by the Dean, Associate Professor IG Campbell, and Professor P Porter in establishing and attracting funding for the Scheme.
2. A register of participating practitioners will be kept by a registrar of the WA Supreme Court.
3. The LCC will consist of the Chief Justice of the Supreme Court (or nominee), a coordinator, a supervising solicitor, the Executive Director of Court Services at the Ministry of Justice (or nominee) and one registrar of the Supreme Court. The LCC will also have one member from the Law Society of WA, the Legal Practice Board, the Bar Association, the Criminal Lawyers Association, the Legal Aid Commission and community legal interest groups.

occasional policy advice and general guidance in the running of the Scheme. It is proposed that the Committee will meet four times each year. A coordinator will assume overall responsibility for the operation of the Scheme and will work hand in hand with a supervising solicitor. The role of the supervising solicitor is explained below.

The coordinator and the supervising solicitor will not be considered to be the representatives of an individual appellant, and they will not be obliged to appear before the Court of Criminal Appeal on behalf of any appellant.

The coordinator and supervising solicitor will be required to be members of appropriate professional bodies;<sup>4</sup> they will hold current practising certificates and comply with professional indemnity insurance requirements. The coordinator will have responsibility for the academic components of the Scheme, including devising clinical assessment methods, and he or she will assume overall responsibility for the supervising solicitor. The academic components of the Scheme will comply with requirements established by the Faculty of Law at the University of Western Australia.

## STUDENT PARTICIPATION

A clinical component will be introduced into the Law Faculty's curriculum in the Sentencing and Criminal Procedure units. Students enrolled in these units will have the option to be assessed in part through participation in the Scheme. A detailed list of the skills to be acquired by students, and methods for assessing those skills, will be developed. Students who participate in the Scheme must agree to comply with the guidelines for the Scheme and under no circumstances will they offer legal advice to appellants receiving assistance under the Scheme.

In terms of their practical involvement, the students will perform tasks in teams of about five. The students in each team will be required to undertake the following tasks:

1. Attend the State's prisons (under the guidance of the supervising solicitor) with a view to interviewing and taking instructions from unrepresented appellants;
2. Obtain transcripts of the trial proceedings;
3. Undertake research on the likely grounds of appeal;
4. Prepare draft grounds of appeal and an outline of submissions;
5. Prepare a draft brief for consideration by the supervising solicitor; and
6. Assist with the preparation of appeal books.

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4. Eg Law Society of WA, Bar Association and the Criminal Lawyers Association.

## THE SUPERVISING SOLICITOR

The supervising solicitor<sup>5</sup> will be responsible to the coordinator for ensuring the accuracy and propriety of all steps undertaken by the students in fulfilling the foregoing requirements. The supervising solicitor will also assess the quality of the students' work. A standardised checklist will ensure that proper controls and performance indicators are in place. In particular, the supervising solicitor will ensure that proper attention is given to preparation of the appeal books.

The supervising solicitor will be responsible for making the brief available to the lawyer allocated from the register of participating legal practitioners. When the practitioner accepts the brief, he or she accepts full responsibility for the conduct of the appeal. The practitioner may be either a solicitor or a barrister, and he or she has the sole prerogative to argue the appeal in the most appropriate way; the prepared brief is only a guide and is in no way binding on the practitioner.

The supervising solicitor will not be responsible for arguing appeals. His or her role will primarily be one of ensuring that the brief is of sufficient quality for either pro bono representation by a practitioner, or for the appellant to make submissions to the Court of Criminal Appeal himself or herself.

## BENEFITS OF THE SCHEME

The Scheme has the potential (i) to reduce delay and improve case management in appeals before the Court of Criminal Appeal; (ii) to improve the quality of grounds of appeal and therefore reduce the average hearing time of appeals before the Court; and (iii) to improve fairness to appellants appearing before the Court.

In addition, the Scheme will provide an opportunity for a structured and supervised clinical component in selected undergraduate units. A range of skills will be cultivated in participating students, including the analysis of legal rules, drafting skills, interviewing and negotiation skills, and techniques of case management. The students will also develop an awareness of the appeal process in criminal matters and be given an opportunity to learn about social justice issues through practical experience.

There are other potential benefits from the Scheme which will need to be identified and evaluated during the initial two-year period.<sup>6</sup> The Scheme will meet

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5. Ms K Farley, Senior Lecturer, UWA Faculty of Law, is the first person appointed to this position.
  6. It is intended to submit an application to the ARC (or other appropriate body) for research funding in order to conduct a comprehensive evaluation of the Scheme. The results of the evaluation will assist in producing a report on the outcomes of the Scheme after the expiry of initial funding. The report will be made available to the key stakeholders.

an important community need by promoting pro bono legal representation for those who are on low incomes. A successful Scheme will enhance the public image of the legal profession, the judiciary and the Law Faculty. It will also provide an opportunity to introduce a novel form of teaching in practice-oriented units.

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