Dietrich: *Why Should the Prosecution Worry?*[*]

Introduction

'Legal aid' sounds (at least to a lawyer) warm and fuzzy — a comfort to 'them', those poor wretches who need it (including their lawyers), but of little relevance to the rest of 'us'. Unfortunately as time goes by there are more of 'them' and fewer of 'us'.

It is a bit like 'human rights', another warm and fuzzy idea until you stop to think what it means — and what would we do if they were lost or diminished, as legal aid has been in Australia in recent times?

First we should look at the international framework outlining legal aid, since no country is any longer able to isolate its practices from the international community, and since legal aid in that context at least is indeed a human right.

International instruments

The Universal Declaration of Human Rights (10 December 1948) provides:

Article 7: 'All are equal before the law and are entitled without any discrimination to equal protection of the law.'

Article 10: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'

The International Covenant on Civil and Political Rights (23 March 1976) provides:

Article 9: '3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release ...'

Article 14: '1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.'

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* This paper was presented at '*Dietrich* in a Climate of Shrinking Legal Aid Resources', Institute of Criminology seminar, 7 August 1997, Sydney.

In various parts of the world there are complementary provisions to be found in regional instruments.

The European Convention on Human Rights (3 September 1953) provides:

Article 6: '3. Everyone charged with a criminal offence has the following minimum rights:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.'

The American Declaration of the Rights and Duties of Man (1948) provides:

Article II: 'All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.'

The American Convention on Human Rights (18 July 1978) provides:

Article 8: '2 ... During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ...

e. the inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.'

The African Charter on Human and Peoples' Rights (20 October 1986) provides:

Article 3: '1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law.'

The UN Basic Principles on the Role of Lawyers (1990) provide:

'3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organisation and provision of services, facilities and other resources.

...

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.'

Such pronouncements in respected instruments of international influence cannot be ignored by governments, or indeed by courts and lawyers.

Australia's position

International instruments (including treaties) do not have the force of law in Australia unless given specific effect by domestic legislation. The courts have held, however, that recourse may be had to such documents to resolve any ambiguity or to bridge any gap discovered in domestic law.

Nevertheless one should reasonably expect that our domestic laws would be made and interpreted consistently with instruments to which Australia is a party.

The primary responsibility lies with the Commonwealth, which is the national entity in international fora.

The Australian Senate Legal and Constitutional References Committee since 17 September 1996 has conducted an Inquiry into the Australian Legal Aid System. Its First Report was tabled on 26 March 1997.

In the Second Report tabled on 26 June 1997 it stated:

> 3.22 The Committee notes the fundamental position of the Commonwealth Government is that it will be responsible for the provision of legal aid in relation to Commonwealth matters only. It notes in addition that the Commonwealth will fund these matters in accordance with the principles contained in the International Covenant on Civil and Political Rights.
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> 3.23 The Committee also notes that the Commonwealth applies this approach to all laws, irrespective of whether they have any link to Australia's international obligations or not. In doing so, the Commonwealth accepts responsibility for the provision of legal assistance in relation to its laws arising from international obligations, and expects the States and Territories to do the same in respect to their laws. This approach is consistent with the Commonwealth Government's view that it is only responsible for Commonwealth matters.
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> 3.24 When considering the implications of Australia's international obligations, the Committee considers that the approach of the Commonwealth to quarantine its responsibilities to Commonwealth matters only is unrealistic, impractical and inappropriate.

(Chapter 3.24 was described in the Government Senators' Report, the minority report, as an example of 'the partisan nature and commentary of the Majority Report'. It was the only such example cited.)

The Commonwealth Attorney General said earlier this year: 'any government which claims the right to make its own laws must bear the responsibilities that go with that right.'

The situation was summed up more appropriately, however, in a passage from the submission by the Legal Aid Commission of Tasmania:

> The States are not recognised as entities as such in the greater international community, and any leadership in this area must emanate from the Commonwealth. It would equally seem to follow that if the States do not have international recognition and no capacity to raise revenue to cause international obligations to be fulfilled, that the Commonwealth has both a legal and moral duty to fund measures that fulfil those obligations.

Legal aid in Australia

Assisted legal representation was in fact an initiative in Australia of law societies and bar associations, supported by legal academics and students who led to the establishment of community legal centres. Government funding came later.

Such programs have continued to be supported and supplemented by lawyers doing pro bono work and taking speculative cases.

The Senate Inquiry found that 'the legal profession has consistently made a substantial contribution to legal aid provision in Australia by:

- undertaking legally aided work for reduced fees, often at or below cost, and at a discounted rate even relative to basic scale rates;
- performing a range of pro bono legal work;
- providing voluntary advice in community legal centres, and other community agencies;

- assisting at no charge in the administrative aspects of legal aid provision;
- through professional bodies, providing substantial input into the development of legal aid policy; and
- undertaking a wide range of other free legal work in areas such as free interviews, duty solicitor activity, speaking presentations, assisting students in mock trials or assisting with community legal centre activities.

But it can never be left to the generous members of the private profession to meet the needs of all deserving but indigent litigants.

Governments entered into the scene at various times and to various extents:

South Australia	1933
NSW Public Defender	1941
NSW Public Solicitor	1943
C'wealth, for servicemen & ex-servicemen	1942
Tasmania	1954
Western Australia	1960
Victoria	1961
Queensland	1966
NSW Law Society scheme	1970
C'wealth, Aboriginal Legal Service	1971
C'wealth, Australian Legal Aid Office	1973
Others (independent legal aid commissions)	1977 to 1990.

Prior to the establishment of the Commonwealth ALAO in 1973 the state of affairs nationally was fragmented and messy. At that time the Attorney General, Senator Lionel Murphy, said:

> The Government has taken action because it believes that one of the basic causes of the inequality of citizens before the laws is the absence of adequate and comprehensive legal aid arrangements throughout Australia ... The ultimate object of the Government is that legal aid be readily and equally available to citizens everywhere in Australia and that aid be extended for advice and assistance of litigation as well as for litigation in all legal categories and in all courts.

However, as the Commonwealth did not have a specific constitutional power over legal aid the ALAO could only assist on matters covered by federal law or for individuals in matters of both federal and state law to whom the Australian government was deemed to have a special responsibility — Aborigines, immigrants, war veterans and recipients of Commonwealth benefits.

Funding arrangements were later made by the Commonwealth (1977–1990) with independent State and Territory Legal Aid Commissions.

Dietrich (aka *Hugo Rich*)

The judgment [(1992) 177 CLR 292] was authority for the proposition that where an indigent defendant (that is, one who is without funds or ability to hire a lawyer to defend him or her) is charged with a serious criminal offence and, through no fault of his or her own,

is unrepresented, a trial judge should normally grant a stay or an adjournment if he or she requests one, to give the opportunity to seek legal representation.

The Court explicitly stated that there was no right to legal representation at public expense (and this in a case prosecuted under Commonwealth law).

The decision was based on the common law right of an accused to a fair trial. Lack of representation in such circumstances may prevent a fair trial from occurring, depending on the nature of the case and the background of the accused.

While the principles enunciated in the decision are to be applauded, the Senate Inquiry identified the following areas of concern:

- its potential to direct legal aid funding to criminal law matters at the expense of civil and family law matters;
- its impact on the legal aid assessment criteria for determining an applicant's means and the merits of his or her case;
- its potential to increase the incentive for an accused to defend charges rather than plead guilty;
- the consequential impact of these points on legal aid funding; and
- the associated impacts on the administration of justice.

There are also several unanswered questions about the application of the decision:

- Who should determine indigence, and how (the legal aid office or the court)?
- What is a 'serious' offence?
- Does the right extend to effective or competent representation (linked to the amount to be paid)?

Funding cuts

There is no need to spend time in this paper describing the funding cuts that took effect from 1 July 1997 and the arrangements made as a consequence. In brief, so far as NSW is concerned:

- the Commonwealth cut $12.9 million dollars (out of a national cut of $19 million) from its contribution to legal aid in NSW (which had an annual budget of $87 million), claiming that was the extent to which the Commonwealth was 'subsidising' legal representation in State matters);
- the State added $2 million and the Law Society $2 million to the State's contribution for State matters;
- the State also established its own independent Legal Aid Commission which will charge the Commonwealth for work done in Commonwealth matters.

Effectively, therefore, there are two parallel regimes in operation, the State one being severely underfunded. More of the cake must therefore be spent on administration. It is a grossly inefficient way of going about the business.

Why should the prosecution worry?

My Office has the role, inter alia, of improving and ensuring the effectiveness of the criminal justice system in this State, hence my concern about this turn of events.

Our values include the achievement of justice by fair means in all cases in which we have some involvement.

Our system of justice — the adversarial system — operates most effectively, most efficiently and most fairly when all parties to contested litigation are represented by competent legal practitioners.

If an accused person in criminal proceedings is unrepresented, additional obligations or burdens are placed upon the court (particularly the judge, in a trial) to ensure that the trial is manifestly fair to the accused. Extra time must be spent and extra efforts must be made to ensure that the accused is aware of and able to exercise effectively his or her options at all stages. The prosecution also has additional obligations towards an accused and difficulties in communication can arise between the parties that take time and effort to resolve.

In some such cases witnesses, including victims of crime, may be cross-examined directly by the accused — a wholly undesirable event (particularly where children are involved)

The accused usually remains incompetent throughout to properly identify relevant issues, to address them by questioning and argument and to test the evidence adduced.

Representation therefore is not a luxury — in many cases it is essential for justice: the more serious the charge, the more important it becomes. In serious criminal cases the prosecution will be represented by competent advocates. There should always be an 'equality of arms' (as the Europeans say) in such contests, or the weak and disadvantaged may suffer unjustly.

These considerations seem to have bypassed the Commonwealth Attorney General, however. In March of this year he was reported as having said that cuts to legal aid would slash the length of Commonwealth drug trials by putting the brakes on defence lawyers wasting money by arguing ridiculous points — that funding caps on cases would force lawyers to focus on the real issues and mean more money for clients in family law and other areas.

The absence of logic from his arguments was highlighted by the quotation:

> We don't want the commissions to do the sort of thing that has been going on where if a legal aid client gets approval for legal aid they go off and do all sorts of things, bring all sorts of appeals, make all sorts of applications, that a self-funding litigant could never afford to do.

Government's obligations

The provision of a criminal justice system is a core activity of government. Just as it must provide from public funds for courts, judges, prosecutors, support services and prisons, so it must now provide for an adequate level of legal aid. If it does not do so, it jeopardises the efficacy of the other components provided and contributes to an inefficient system overall.

Legal aid — is the money better spent elsewhere?

Most people accused of crime — and particularly of serious crime — are not people of means. They cannot afford to buy representation. For the legal system to apply fairly and justly they must be provided with representation from elsewhere: legal aid.

The argument is sometimes advanced that many of the present ills of the criminal justice system — long trials and delays, particularly — are the product of the increased availability of legal aid in the last 20 years or so. Critics say that without legal aid there would be more pleas of guilty and fewer tiresome defended hearings. (That is really an extension of the argument that 'he wouldn't be here if he wasn't guilty'.)

An equally compelling argument may be made that delays and long trials are the product of inefficient management practices in the courts, inadequate resources for funding an adequate number of courts and judges, outmoded laws of evidence and procedure, a culture of obstruction and delay amongst defence representatives and distrust between defence and prosecution, increasingly complex and extensive legislation under which accused persons must be tried and decisions of superior courts requiring additional time to be spent at trial exploring increasingly complex issues thrown up by the newly declared law. Perhaps we should look carefully at some aspects of our present adversary system.

There is plenty of criminal work available for competent lawyers. There is no need for a lawyer to unnecessarily spin out proceedings on legal aid — there are more briefs waiting. Legal aid has been a necessary reaction to, not a cause of, increasing complexity.

Conclusion

There is no imminent prospect of the *Dietrich* decision being overturned — nor should it be: it is based on sound principle. (However, some jurisdictions have contemplated — and South Australia has passed — anti-*Dietrich* legislation.)

The simple consequence is that more and more public funding, via legal aid, will be required to provide legal representation in serious criminal cases.

Legal aid administrators can choose to direct their ever scarcer resources elsewhere (and there are many competing priorities). Even if they do not, the cake is getting smaller while the potential consumers in the criminal jurisdiction (and elsewhere) are growing in number.

If we continue down the road of funding cuts, many serious offenders will inevitably escape conviction and punishment. The criminal justice system as a whole will be brought into further disrepute. It will not serve the legitimate needs of the community — and that will be a great cause for worry for all of us.

Nicholas Cowdery QC

Director of Public Prosecutions, New South Wales