Legal aid in crisis: a real and present danger to fair trials

By Arthur Moses SC
President

The importance, or indeed necessity, of adequate representation to achieve the objectives of ensuring a fair trial to a defendant in criminal proceedings, including the smooth and cost-effective operation of the criminal justice system, has been recognised by judges of great experience, both in Australia and abroad. Regrettably, it would seem most Australian politicians show little interest in this topic except when we represent them in a criminal trial or they are facing corruption allegations.

It is troubling to see how little has been done, and is being done, to provide adequate representation to members of the community. I want to address two topics in this President's column because we are at a critical stage of discussions with Legal Aid NSW and the NSW attorney general, and if we cannot reach an agreement on proper rates of pay for members of the New South Wales Bar undertaking work in the criminal justice system, then we may need to consider other options to resolve this issue.

- First, the key decisions in Australia and the United States, in which there has been judicial recognition of the importance of affording representation for defendants in criminal proceedings, are examined and compared; and
- Secondly, the present unsatisfactory state of underfunding in New South Wales, and the consequences of such underfunding, are considered.

Finally, I want to note the commendable efforts of members of the Bar Association who provide, on a voluntary basis, assistance to defendants in the criminal justice system, who would otherwise be unrepresented.

Recognition of the importance of adequate representation: *Dietrich* and *Gideon*

Judicial recognition of the importance of adequate representation finds expression in the seminal decisions of *Dietrich v R* (1992) 177 CLR 292 in Australia, and *Gideon v Wainwright*, 372 U.S. 335 (1963) in the United States. As will be seen from a comparison of the two decisions, there is a significant difference between the respective promises they offer to defendants in criminal proceedings.

In general terms, the principle for which *Dietrich* stands is that there is no common law right to legal representation at public expense in criminal proceedings, but that courts can stay proceedings where an accused is unrepresented if not doing so will result in an unfair trial.

The facts of the case are well known and are conveniently summarised in the recent publication, *Leading cases in Australian Law*.[1]

> Olaf Dietrich was charged before the County Court of Victoria with multiple charges under the *Customs Act 1901* (Cth). Dietrich attempted on multiple occasions to secure legal representation, first by applying to the Legal Aid Commission of Victoria; then, when that was refused, seeking a review of that refusal; then, by making an application under s 69(3) of the *Judiciary Act 1903* (Cth) to have counsel appointed by a judge; and finally, by applying for legal assistance from the Commonwealth Minister for Justice and the attorney-general. These attempts all failed.

Before the trial proper commenced, the applicant made an informal application for an adjournment. As the following exchange shows, this was peremptorily refused:[2]

> His Honour: I want you to understand this, Mr Dietrich — if you will listen to me — that I have no power to give you legal representation.
>
> Accused: You have the power to adjourn the matter, sir.
>
> His Honour: I don't propose to adjourn the matter. The matter is an alleged offence, which occurred the year before last, and it is desirable that the matter proceed to trial.
>
> Accused: Desire by whose side?
>
> His Honour: Desirable to the community.
>
> Accused: The community has got no interest in it. If the community is aware that they're putting people in front of court without representation, the community would be aghast.
>
> His Honour: Yes. Well, I don't propose to engage in this type of matter; this debate can get us nowhere.

As noted in the judgment of Mason CJ and McHugh J, on numerous occasions, the trial judge reiterated his lack of power to appoint counsel to represent the applicant, but on no other occasion did he appear to give any consideration to exercising his discretion to adjourn the matter on the ground that there was a real likelihood that the applicant would not receive a fair trial.

After a 40-day trial, Dietrich was ultimately convicted of one count of importing a traffickable quantity of heroin into Australia in contravention of s 233B(1)(b) of the *Customs Act 1901* (Cth).

Dietrich appealed, arguing that the failure of the trial judge to appoint counsel constituted a miscarriage of justice. Leave to appeal was refused by the Victorian Court of Criminal Appeal, and it was from that order refusing leave that Dietrich appealed to the High Court.

The High Court allowed the appeal 5:2, although it did so on the basis of an alternative ground advanced by Dietrich, which was

that the trial judge had a discretion to stay or adjourn the trial in order to give Dietrich further opportunity to seek legal counsel, and that in the absence of exceptional circumstances, that discretion should have been exercised in Dietrich's favour. Dietrich's primary ground of appeal, that he was denied the right to be provided with counsel at public expense, was held to be unfounded, with the court noting that the common law origins from which it was said to derive related only to a right to *retain* counsel, not to have counsel provided by the state.

Key statements of principle emerging from the case, and for which the case is often cited, come from a passage in the joint judgment of Mason CJ and McHugh J (at 311):

> … it should be accepted that Australian law does not recognise that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial …
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> A trial judge faced with an application for an adjournment or a stay by an unrepresented accused is therefore not bound to accede to the application in order that representation can be secured; *a fortiori*, the judge is not required to appoint counsel. The decision whether to grant an adjournment or a stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained …

The position on this topic in the US is different. There, a defendant in criminal proceedings is, to put it shortly, afforded a better promise. In the US, the case of *Gideon v Wainwright* has been described by some as 'the case that guaranteed the right to counsel in every criminal trial in the United States'.[3]

The story behind how the matter found its way to the US Supreme Court is intriguing.

Between midnight and 8:00 am on 3 June 1961, a burglary occurred at the Bay Harbor Pool Room in Panama City, Florida. An unknown person broke a door, smashed a cigarette machine and a record player, and stole money from a cash register. Later that day, a witness reported that he had seen Clarence Earl Gideon in the poolroom at around 5:30am that morning, leaving with a wine bottle and money in his pockets. Based on this accusation, the police arrested Gideon and charged him with breaking and entering with intent to commit petty larceny.

Gideon appeared in court alone as he was too poor to afford counsel. It is said that the following exchange took place in the court:[4]

> The COURT: Mr. Gideon, I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the State of Florida, the only time the court can appoint counsel to represent a defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint counsel to defend you in this case.
>
> GIDEON: The United States Supreme Court says I am entitled to be represented by counsel.

The Florida court declined to appoint counsel for Gideon. As a result, he was forced to act as his own counsel and conduct his own defence in court, advocating for his own innocence in the case. At the conclusion of the trial the jury returned a guilty verdict. The court sentenced Gideon to serve five years in the state prison.

From the cell at Florida State Prison, Gideon prepared a handwritten application[5], appealing to the United States Supreme Court in a suit against the secretary of the Florida Department of Corrections, HG Cochran. Cochran later retired and was replaced with Louie L. Wainwright before the case was heard by the Supreme Court. Gideon argued in his appeal that he had been denied counsel and, therefore, his Sixth Amendment rights, as applied to the states by the Fourteenth Amendment, had been violated.

The Supreme Court assigned Gideon a prominent Washington, DC, attorney, future Supreme Court justice Abe Fortas of the law firm Arnold, Fortas & Porter.

The Supreme Court's decision was announced on 18 March 1963, and delivered by Justice Hugo Black. The decision was announced as unanimous in favour of Gideon. Three concurring opinions were written by Justices Clark, Douglas and Harlan.

The earlier Supreme Court decision of *Betts v Brady*, 316 U.S. 455 (1942) had earlier held that, unless certain circumstances were present, such as illiteracy of the defendant, or an especially complicated case, there was no need for a court-appointed attorney in state court criminal proceedings. *Betts* had thus provided selective application of the Sixth Amendment right to counsel to the states, depending on the circumstances, as the Sixth Amendment had only been held binding in federal cases. *Gideon v Wainwright* overruled *Betts v Brady*, instead holding that the assistance of counsel, if desired by a defendant who could not afford to hire counsel, was a fundamental right under the United States Constitution, binding on the states, and essential for a fair trial and due process of law regardless of the circumstances of the case.

Justice Clark's concurring opinion stated that the Sixth Amendment to the Constitution does not distinguish between capital and non-capital cases, so legal counsel must be provided for an indigent defendant in all cases. Justice Harlan's concurring opinion stated that the mere existence of a serious criminal charge in itself constituted special circumstances requiring the services of counsel at trial.

The Supreme Court remanded the case to the Supreme Court of Florida for further action not inconsistent with the Supreme Court's decision. Ultimately, Gideon was acquitted.

During a recent panel discussion in the US in 2017 about *Gideon v Wainwright*, which was attended by several judicial officers[6], Judge Timothy Dyk observed that '[a]nybody who has practised, really, over the last fifty years just assumes that this is the framework that exists and should always exist. You don't hear people questioning the right to counsel anymore.'

At the same panel discussion, Judge James Boasberg observed that the impact of the decision was so immediate that 'by 1975 … the court requires that before someone can proceed without a lawyer there must be a knowing, intelligent, and voluntary waiver'.

It is to be hoped that in New South Wales, and indeed Australia more generally, we can move towards a position closer to that which is established by the United States by *Gideon*. However, as will now be seen, there is a significant impediment to the achievement of this objective, in New South Wales and other states in Australia, including Victoria.

Lack of funding of legal aid in NSW and its consequences for the bar and the justice system

There are real and prescient issues confronting counsel, particularly junior counsel at the private bar in New South Wales who accept briefs to appear in District and Supreme Court trials when funded by Legal Aid NSW. Day rates of $987 plus GST for junior counsel have remained unchanged since May 2007, save that the day rate in the Supreme Court was adjusted from $1,142 plus GST to $1,150 plus GST upon the commencement of the 'Complex Crime Panel' for barristers during the period under consideration – that is, an increase of $8 per day, or expressed as a percentage – 0.7 per cent. In contrast, the NSW attorney general's rate for junior counsel appearing for the state in civil cases, as at

1 August 2017, is $285 per hour, with a daily maximum of $2,140 plus GST.

The cumulative level of inflation (Consumer Price Index) from financial year ending 30 June 2007 to financial year ending 30 June 2017 is 26.4 per cent with an annual average increase in inflation of 2.4 per cent.

Thus, in real terms (i.e. taking into account the effect of inflation), there has been a decrease in pay, to an extent which is unacceptable and can no longer be tolerated by the New South Wales Bar. Many of our members (including young and newly admitted barristers) who undertake legal aid work are doing stressful trials in difficult matters including historical sexual assault cases with no proper support. This places enormous pressure on them and their families. There should be no question that barristers should be adequately paid for undertaking such important work in the justice system let alone their remuneration being decreased.

The consequences of inadequate pay to barristers undertaking legal aid work has been the subject of a detailed study undertaken by the Victorian Bar and Pricewaterhouse-Coopers in April 2008. The key results of the study are troubling, but unsurprising.

It requires only an application of common sense, and little foresight, to identify the serious consequences that will flow from an under-funded, and therefore handicapped, scheme that is otherwise intended to provide representation for defendants in criminal proceedings. These have been referred to in the Pricewaterhouse Coopers study, with reference to Victoria, and include the following:

a. fees paid by Victoria Legal Aid to barristers in criminal cases fall significantly below (i) increases in CPI, (ii) remuneration paid by prosecuting agencies to police prosecutors and Crown prosecutors, and (iii) remuneration paid to government and private lawyers in other areas of law;

b. Victoria Legal Aid funded barristers' real take home pay is the lowest compared to similar professions, at the most 60 per cent of the mean salary, at each experience level;

c. Victoria Legal Aid funded barristers' real take home pay has fallen by 20-32 per cent over the past 10-15 years while other professions have increased 15 per cent during this period;

d. during 2001-02, Australian barristers undertook 289,100 hours of legal aid work at reduced or no fees, personally bearing part of the cost of providing access to justice. Practitioners who are currently subsidising the criminal justice system by offering their time at a significant discount to market, may withdraw their support once they feel that their contribution outweighs any potential benefit that they may be receiving;

e. barristers who undertake 90 per cent of more criminal work have been declining in number over the last three years (i.e. leading up to 2008);

f. deficiencies or unevenness in access to justice result in less than socially optimal outcomes and serves to perpetuate social disparity; and

g. the level of sufficiently experienced barristers taking up causes funded by legal aid will continue to decline.

Other flow-on effects, in at least some cases, will include incorrect incarceration, a loss of faith in the justice system, increases in appeals, and aborted trial and retrials. Many criminal cases require a high level of specialisation, experience and commitment and thus a public defence system needs to be able to attract and retain the appropriately skilled barristers to perform this work. Without this the result is an inefficient allocation of resources and sub-optimal justice outcomes that do not align with the principles of a fair and high quality justice system. Over-stretched, inexperienced or under-prepared barristers inflict a significant social cost by decreasing the efficiency and effectiveness of the court systems.

One of the conclusions reached in the PriceWaterhouseCoopers study is that the criminal justice system needs appropriate funding to attract and retain criminal barristers with the necessary commitment and experience.

The results of the review speak with equal force as to the troubling situation and inevitable consequences for the criminal justice system in New South Wales, which has worsened in recent years. Significant numbers of senior and experienced counsel undertake legal aid work in order to ensure that the justice system continues to operate. However, the government can no longer assume that the New South Wales Bar will continue to subsidise the justice system at great personal and financial cost.

The level of delay experienced in the criminal justice system in New South Wales is disturbing. As at July 2016, the District Court Criminal caseload was 2,042 criminal trials and 1,195 sentencing matters outstanding.[7]

In May 2017, BOCSAR released its *NSW Criminal Courts Statistics 2016* report.[8] The key findings are as follows:

a. between 2012 and 2016, the median delay in the NSW District Court between committal for trial and finalisation rose by 56 per cent from 243 days to 378 days; and

b. the median time between arrest and trial finalisation is now 714 days (up from 512 days in 2012).

BOCSAR released a report in April 2017 titled, 'Forecasting trial delay in the NSW District Court: An update'.[9] The key findings are as follows:

a. a pattern was observed for trial cases dealt with in the Sydney District Criminal Court. 10% increase in the Sydney trial case backlog results in an immediate 2.38 per cent increase in the average time taken to finalise criminal trials in the Sydney District Court; and

b. at present, it takes about 260 days to finalise 50 per cent of trial cases in the NSW District Court. To reduce the median time to finalise trial cases to 130 days, the backlog of pending trial cases would have to be reduced by about 80 per cent.

The disturbing levels of delay experienced in criminal proceedings in the New South Wales District Court can be expected to continue, if not be exacerbated, unless the under-funding is remedied. The early guilty plea reforms which are to be implemented from 1 April 2018 will fail in their objective to clear up the District Court caseload unless accused are represented by experienced counsel who are properly funded to deal with cases from the start to the finish of a matter. The delay in cases impacts not only on the accused but victims and witnesses who anxiously await a trial. Indeed, in some cases, the delay may impact on a successful prosecution because the memory of witnesses may fade.

Contrary to what some mischievous politicians and bureaucrats have asserted in the past, the Bar Association's push for better funding is not motivated by a desire to protect its own. Rather, it is motivated by the recognition that there will be a significant enhancement to the proper functioning of the criminal justice system when those involved in the system are represented by experienced counsel who understand how the criminal justice system works, and are able to provide assistance to the court. This will reduce delays and save money in the justice system.

The point was made earlier this year, in May 2017, by Ms Jelahn Stewart[10] during a panel discussion in the US, involving several judicial officers, about *Gideon v Wainwright*. Ms Stewart rightfully made the following observation:

> Most people would think that prosecutors would not be pleased with the decision and that their job would be easier if *Gideon* had been decided the other way, they would be able to obtain convictions more easily. However, that's just not the case. The job

> of the prosecutor is not just to obtain convictions but rather to seek justice, and seeking justice is far easier when you have competent, ethical counsel on the other side.

The current funding situation in NSW cannot be allowed to continue. The Bar Association is currently engaged in discussions with Legal Aid NSW and the NSW attorney general to ensure that our members who undertake this most difficult work are fairly remunerated.

The reality is that in order for the criminal justice system in any society to reap the benefits of the principles established in cases such as *Dietrich v R* and *Gideon v Wainwright*, there must be adequate funding to support counsel representing defendants in criminal trials. In the US, it was recently observed that '[u]nderfunding public defender programs is the most common way that states fail to keep the promise of the *Gideon* decision'.[11] The same may be said of the promise of the *Dietrich* decision in Australia.

Some of the current efforts of members of the New South Wales Bar to assist the justice system

I also want to touch upon the enormous contribution the Bar already makes to the justice system on a pro bono basis, to put into perspective the concerns we have raised about our members not being fairly remunerated by Legal Aid NSW when appearing in criminal trials. I spoke about this on 16 November 2017 when I thanked our members at a function in the Bar Common Room. Members of the judiciary, including Chief Justice Bathurst and Chief Magistrate Henson were in attendance to also thank our members as their work greatly assists the administration of justice.

The Duty Barrister Scheme at the Downing Centre has been operating for 23 years. The Duty Barrister Scheme at John Maddison Tower has been operating for the last two years. 120 barristers of all levels of seniority have volunteered to assist.

Four duty barristers see an average of four clients each per day which equates to assisting over 4,000 members of the public annually. This does not include the many urgent requests from the court and/or the DPP for a barrister to give discrete advice to witnesses or a self-represented accused to ensure a trial can properly proceed.

From the feedback that the Bar Association has received from both the judiciary and members of the public there is every reason to believe that duty barristers have provided, and continue to provide, a valuable resource for the fair and effective administration of justice.

The Legal Assistance Referral Scheme (referred to as 'LARS') has also been operating for 23 years. It is a scheme where less fortunate members of the public, who have been refused legal aid, can receive assistance from a barrister, either in the form of advice, representation or mediation.

Since inception, approximately 7,000 applications have been processed and members of the bar have contributed approximately 53,000 hours of work.

Since 2015 all Court of Appeal and Supreme Court referrals are made to LARS in cases where judges or registrars think a self-represented litigant is deserving of legal assistance. A recent analysis of the matters from the court indicates that LARS was able to assist the court in over 90 per cent of matters.

An analysis of the referrals made through the scheme over the years has consistently shown that over 60 per cent of the matters have legal merit – a statistic which may surprise some given the 'last port of call' circumstances of many of the clients.

This is not easy work – many of the clients deliver their paperwork in a form far less tidy than a crisp white folder bound in pink tape, but to the barristers' credit they are not put off and regardless, are able to obtain some very worthwhile results.

The Law Kitchen was established in 2011 by barristers Les Einstein and Geoff Pulsford, joined by Stephen Richards, a solicitor and a stalwart supporter of The Law Kitchen's work. Very sadly since those early days, both Geoff and Steve have passed away, Steve only recently. The Law Kitchen has as its objectives the provision of free legal services to marginalised persons including those who are transiently, episodically or chronically homeless or in danger of becoming so. Since inception, the Bar Association has allocated a solicitor employee to assist barristers who have volunteered to help the Law Kitchen by providing weekly advice sessions at the café in Woolloomooloo.

Conclusion

As can be seen, the New South Wales Bar contributes greatly to the justice system. It is hoped that the current efforts of the Bar Association to procure funding in order to support an already strained criminal justice system in New South Wales, will be fruitful. In short, the New South Wales Bar will not be taking no for an answer – 10 years of no increases in fees paid to barristers undertaking legal aid work is unacceptable. Rather than approaching this issue in a superficial manner and responsible ministers pointing the finger at each other, government needs to understand that paying adequate Legal Aid fees will allow experienced counsel to be retained on a regular basis. This will lead to the more efficient conduct of proceedings which will reduce delays, ensure persons are adequately represented and result in substantial cost savings to the community.

If more evidence is needed of the lack of appropriate funding for legal assistance and sustainable court funding then we urge the government to engage with the Law Council of Australia's Justice Project. The Justice Project is the Law Council's national review into the state of access to justice in Australia. It was set up by Law Council President Fiona McLeod SC and is led by an expert Steering Committee headed by former Chief Justice Robert French. The Law Council has released 14 consultation papers and the secretariat and president have attended 133 consultations and received over 130 submissions. A progress report outlining some of the emerging themes from consultations will be released in December this year. The final report will be released in late February 2018. The Justice Project is an extension of the work of the Law Council in promoting equality before the law, it recognises that the justice system is in crisis with legal assistance services chronically under resourced and are operating under immense pressure. Its conclusions will need to be taken seriously by government.

Best wishes for Christmas and the New Year

I would like to extend to each of our members, the NSW judiciary and our staff at the Bar Association, my best wishes for Christmas and 2018. I hope each of you takes time to reflect and to rest with your family and friends during the holiday period after what has been a busy year. It is our family and friends who sustain us during stressful and busy times at the bar. Now is the time for us to reconnect with them. Keep safe and well.

ENDNOTES

1 D Reynolds and L Goddard, 'Leading cases in Australian law' (2016, The Federation Press) at 121.
2 As recorded in *Dietrich v R* (1992) 177 CLR 292 at 314 per Mason CJ and McHugh J.
3 Robert White, *'Gideon v Wainwright'*, The Supreme Court Historical Society Quarterly, Volume XXXIX, Number 2, 2017.
4 https://www.law.cornell.edu/supremecourt/text/372/335
5 'Petition for a Writ of Certiorari from Clarence Gideon to the Supreme Court of the United States, 01/05/1962'. The National Archives. Retrieved 9 November 2014.
6 As reported by Robert White, *'Gideon v Wainwright'*, The Supreme Court Historical Society Quarterly, Volume XXXIX, Number 2, 2017
7 http://www.smh.com.au/nsw/district-court-delays-to-criminal-cases-unlikely-to-ease-for-a-year-judge-warns-20160902-gr7nie.html
8 http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2017/mr-NSW-Criminal-Courts-Statistics-2016.aspx
9 http://www.bocsar.nsw.gov.au/Documents/BB/Report-2017-Forecasting-trial-delay-in-the-NSW-District-Criminal-Court-BB122.pdf
10 Special Counsel for Professional Development and Director of Training at the US Attorney's Office.
11 Robert White, *'Gideon v Wainwright'*, The Supreme Court Historical Society Quarterly, Volume XXXIX, Number 2, 2017