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Don't give me any L.I.P.

Justice Dean Mildren

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DON'T GIVE ME ANY L.I.P. - The Problem of the Unrepresented Litigant in Criminal Trials

HON. JUSTICE DEAN MILDREN

Introduction

[1] At common law, an accused person charged with felony or treason was not entitled to be legally represented at his trial. In 1695, *The Treason Act 1695* (Imp)[1] gave to persons accused of high treason the right to be defended by counsel, a right which was not extended fully to those accused of felonies until 1836 when the *Trial for Felony Act 1836* (Imp)[2] was passed. As Toohey J pointed out in *Dietrich v The Queen* (1992) 177 CLR 292 at 352, prior to 1836 an accused could employ counsel to cross-examine witnesses but counsel was not permitted to address the jury. In addition, counsel were permitted to argue points of law.[3]

[2] In Australia, those accused of felonies or of treason have long enjoyed the right to counsel.[4] In most Australian jurisdictions the right is today expressed as a statutory right to be represented by counsel,[5] it being assumed rather than expressly stated that an accused person has the right to defend himself in person if he so chooses. Nevertheless the right to defend in person is axiomatic.[6] As Stewart J put it in *Faretta v State of California* [1975] 422 US 806 at 834:

> "The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defence ultimately to his own detriment, his choice must be honoured."

[3] There are some occasions when it has been recognised that an accused person was not prejudiced by the fact that he defended himself personally at his trial,[7] but, as Murphy J put it in *McInnis v The Queen* (1979) 143 CLR 575 at 589:

> "The notion that an unrepresented accused can defend himself adequately goes against experience in all but the rarest cases. Even an experienced lawyer would be regarded as foolish to represent himself if accused of serious crime."

[4] Some elaboration of the reasons for this was made by Dawson J in *Dietrich v The Queen* (1992) 177 CLR 292 at 344-345:[8]

> "It is only realistic to recognise that an accused who is unrepresented is ordinarily at a disadvantage because of his lack of representation. If there are some cases in which lack of representation is not a disadvantage or may even be turned to advantage, they must be exceptional. Commencing with a consideration of the form of the presentment or indictment and ending with the making of any necessary objection to the trial judge's charge to the jury, the proper conduct of an accused's defence calls for a knowledge not only of the criminal law but also of the rules of procedure and evidence. Skill is required in both the examination-in-chief and the cross-examination of witnesses if the evidence is to emerge in the best light for the defence. The evidence to be called on behalf of the accused, if any, must be marshalled so as to avoid raising issues which will be damaging to the case for the defence. A decision must be made whether the accused is to give evidence on oath, is to make an unsworn statement or is to remain mute. Competence in dealing with these matters depends to a large extent upon training and experience. And, as Murphy J pointed out in *McInnis*, an accused in person cannot effectively put some arguments that counsel can, such as an argument that, although on the evidence the accused is probably guilty, he is not guilty beyond reasonable doubt."

To this may be added the important consideration that in the Northern Territory an unrepresented accused may not directly cross-examine the complainant in a case involving an alleged sexual offence.[9]

[5] In order to produce a more level playing field, the Courts and the profession have devised rules casting obligations on the trial judge to provide assistance to the litigant in person (L.I.P.) and restricting prosecutors in certain ways. These

rules will be examined shortly; but more fundamentally, the High Court has recognised in *Dietrich v The Queen* (1992) 177 CLR 292 that, whilst an indigent accused may not have a right to counsel at public expense, trial courts have a duty to ensure that a person charged with a serious criminal offence has a fair trial, and that this right may be protected by granting relief either in the form of an adjournment to enable the accused to pursue legal assistance, or, if legal assistance has been withheld, by staying the proceedings until legal representation is obtained. Irksome as that decision may have been to some State governments and legal aid agencies, the result has been, not only to ensure the right to a fair trial, but to relieve to a large extent the courts and judges of the burdensome task of having to assist unrepresented litigants in many cases. Nevertheless new problems have emerged, as a result of the fact that the unrepresented accused is now usually a person who has refused legal assistance offered to him. These accused fall generally into three classes. Sometimes they are very skilful advocates who play the system for all it is worth. On other occasions, they are crackpots, with little or no skills at all, and on yet others, their conduct gives the appearance of deliberately trying to turn the trial into a farce. The question I seek to raise is whether the rules relating to unrepresented accused persons should apply in their full rigour to all such persons, or whether there are some to whom the full rigour of the rules either do not apply or should not apply. But first, it is necessary to look at the rules themselves and to see how they may be abused.

Duties on the Court

[6] It is now generally expected that courts, as institutions, have a duty to assist the unrepresented litigant in both civil and criminal proceedings by providing advice on technical procedure, and, if forms are required, in filling them out, but are not required to give legal advice.

[7] The interim report of Lord Woolf to the Lord Chancellor on the Civil Justice System in England and Wales (1995) observes, at p 123:

> "Procedural and other advice to litigants is at present provided on a one-to-one basis. This imposes heavy time demands on court staff and advisers alike. It also requires considerable expertise to be effective."

[8] The report suggested a range of remedies, including the provision of "kiosks" in court premises, in which computerised programs covering the basic assistance needed is provided (including explanations of the physical layout of the court-room and the roles of the judge, jury, advocate, instructing solicitor, court orderlies and other staff, perhaps in video format), access to court libraries, as well as a range of other measures designed to assist the unrepresented litigant. Similar proposals have been made by the Australian Law Reform Commission in relation to unrepresented litigants in Federal courts and courts and tribunals exercising Federal jurisdiction.[10] At present Supreme and District court staff are expected to provide similar assistance to those unrepresented defendants involved in criminal trials who are on bail. Those who are in custody are left to inform themselves from prison libraries or other prisoners, or by correspondence with the court's registry. The information likely to be sought from court registry staff is wide ranging, and could include assistance concerning the obtaining of copies of documents, exhibits and transcript of the committal or trial proceedings, advice concerning the jury selection process, matters relating to bail, and access to library materials, for example. The amount of assistance required is likely to put significant strain on court resources, a matter commented upon in a joint judgement of five Justices of the High Court in *Cachia v Haynes* (1994) 179 CLR 403 at 415:

> "All too frequently, the burden of ensuring that the necessary work of a litigant in person is done falls on the court administration or the court itself. Even so, litigation involving a litigant in person is usually less efficiently conducted and tends to be prolonged."

[9] Moves by many courts to introduce case-flow management techniques into criminal matters is, to some extent, likely to shift much of the burden from the court registry to the judge or other officer conducting the matter. One

considerable advantage of this is that the accused is likely to be informed of much that is otherwise required to be spelt out by the trial judge during the trial before the trial begins. It will be necessary for courts to record what advice accused have been given to prevent unnecessary duplication and so that appeal courts can know what assistance has been given pre-trial. Nevertheless, appropriate advice pre-trial is likely to reduce disruption to the trial itself.

Duties of the Trial Judge

[10] High Court authority has made it clear that the trial judge's obligation is not to offer advice to the unrepresented litigant, but to inform the litigant as to his or her rights in order that he or she may determine how to conduct the case and in order to ensure a fair trial: *MacPherson v The Queen* (1980-1981) 147 CLR 512. The point of distinction is illustrated by the decision in *R v Zorad* (1990) 19 NSWLR 91 where the New South Wales Court of Appeal held that the trial judge was under no duty to reformulate questions which had been rejected on the ground that they were not in proper form. At one time the expression was used that the trial judge was to be 'of counsel for the prisoner', but it is clear that there is no such requirement.[11] In *Dietrich v The Queen* (1992) 177 CLR 292 at 334-335, Deane J said

> "While the prosecution has a duty to act fairly and part of the function of a presiding judge is to seek to ensure that a criminal trial is fair, neither prosecutor nor judge can or should provide the advice, guidance and representation which an accused must ordinarily have if his case is to be properly presented. Thus, it is no part of the function of a prosecutor or trial judge to advise an accused before the commencement of a trial about the legal issues which might arise on the trial, about what evidence will or will not be admissible in relation to them, about what inquiries should be made to ascertain what evidence is available, about what available evidence should be called, about possible defences, about the possible consequences of cross-examination, about the desirability or otherwise of giving sworn evidence or about any of a multitude of other questions which counsel appearing for an accused must consider and in respect of which such counsel must advise in the course of the preparation of a criminal trial. Nor is it consistent with the function of prosecutor or trial

judge to conduct, or advise on the conduct of, the case for the defence at the trial."

Similar observations are to be found in other authorities.[12]

[11] Nevertheless, there is a trend towards requiring more intervention by trial judges under the rubrick that it is necessary to ensure a fair trial. For example, in *MacPherson v The Queen,* the High Court held that the trial judge ought to have held a voir dire to see if the accused's confession was admissible in evidence once suggestions made by the accused in cross-examination raised the question of voluntariness, even though no application had been made by the accused to exclude the evidence, on the basis that the trial judge had a duty to ensure that only admissible evidence was placed before the jury. A similar result in relation to evidence apparently not objected to at trial was reached in *Frawley* (1993) 69 A Crim R 208. In *R v Owen* (1991) 56 SASR 397 at 411-412, Olsson J thought it 'questionable' whether the trial judge had carried out his responsibilities in failing to advise the appellant of his right to apply for a mistrial when an important crown witness opened to the jury had failed to come up to proof.[13] The precise limits of the trial judge's duty are ill-defined; consequently judges are likely to be cautious and go beyond what is required, and this in itself will create new expectations and boundaries delineating the scope of the duty.

The Role of the Prosecutor

[12] There are also important limitations on the prosecutor in such cases. The passage quoted in para [10] above, from the judgement of Deane J in *Dietrich v The Queen,* indicates some of the important considerations. Toohey J was of a similar view, commenting at 354:

"...while the prosecutor must act fairly towards the accused and can offer some assistance, the prosecutor cannot tell the accused how to conduct his or her defence. Indeed, a prosecutor would need to tread carefully in

dealing with the accused in order to avoid compromising the prosecutorial role."

[13] Further, there are some particular restrictions on prosecutors when the accused is unrepresented. In Queensland, the prosecutor will not be permitted to address the jury at the end of the trial if the accused does not adduce evidence, unless the prosecutor is the Crown Law Officer.[14] In New South Wales, the position is governed by a tradition that the prosecutor in such cases will not address the jury in simple cases.[15] In England, the practice is that in no case may the prosecutor address the jury where the accused either stands mute and calls no evidence or where he only gives evidence himself.[16] The position varies in other jurisdictions.[17] There are also, apparently, some further restrictions on cross-examination of the accused by the prosecutor as to his prior convictions.[18] Additionally, the prosecutor may be subject to a requirement to bring to the Court's attention any information which may be favourable to the accused.[19]

Counsel for the Co-accused

[14] If there is a co-accused represented by counsel, from his point of view the L.I.P. is a loose cannon on the deck likely to wreak havoc at any moment. Counsel's duty to his own client may require him to attempt to cast the whole blame for the criminality upon the L.I.P. – a situation which is likely to cause a heated reaction. Apart from tactical considerations, there are some other points counsel should be aware of. First, the order of addresses as between co-accused is, in the absence of agreement, in the reverse order to the order in which their names appear in the indictment,[20] and this is unaffected by whether or not they, or some of them, are represented by counsel. Secondly, if an accused gives evidence against his co-accused, the latter may be cross-examined about his character (including prior convictions), without the leave of the trial judge in most jurisdictions.[21] The legal position is not affected by whether or not the accused is unrepresented, but the situation is more likely to

occur in such cases. Finally, counsel's overriding duty to the Court may require him to draw to the attention of the trial judge certain matters, whether of law or not, which may not suit his own client's interests.[22]

McKenzie friends [23]

[15] Despite the approach in England, the idea of a lay person to be present, particularly at the bar table, to assist the L.I.P. has not received favour in Australia. In 1982, the New South Wales Court of Appeal termed such assistance an "indulgence" which the Court may approve only in extraordinary circumstances.[24] This appears to be the practice in most Australian jurisdictions.[25] In *Dietrich, supra*, the accused sought the assistance of a fellow prisoner to take notes. The trial judge ruled he could take his own notes. The High Court made no comment on this matter. The reason for the lack of enthusiasm in Australia is explained by the attitude of Moffit P in *Re B* [1981] 2 NSWLR 372 at 385-6, who regarded the "McKenzie friend" as potentially undisciplined and disruptive, someone undermining the judge's full control over the proceedings, and in many cases making it almost impossible for the trial judge to ensure a fair trial:

> "To permit indirect participation in the trial process by a person to whom the court has no direct access in a disciplinary and controlling sense – a person who may well, for one reason or another, be concerned to promote the case of the person he is advising by fair means or foul, by legal means or illegal, or by any device whatever, a person immune from disciplinary or effective control by the trial judge – is in my view fraught with the prospect of causing serious miscarriages in the orderly and regular conduct of criminal trials in this State."

[16] Nevertheless, the discretion still exists, and in *Schagen* (1993) 65 A Crim R 500, the W.A. Court of Criminal Appeal permitted an unrepresented appellant who had hearing and speech difficulties to be assisted by two law students, one of whom was permitted to address the Court by speaking to a written statement prepared on the appellant's behalf. Indeed in *Smith v The Queen* (1985) 159 CLR 532 Gibbs CJ said, at p 534:

"The question whether an accused person should be allowed to have a "McKenzie friend" present at his trial is very much a matter of practice and procedure, and within the discretion of the trial judge to decide. It would be far too absolute to say that an application to have a "McKenzie friend" should always be refused. All the circumstances of the case must be considered in deciding upon the application. However, when the accused has been offered legal aid but has refused it, and nevertheless desires to have a barrister appear as a "McKenzie friend", it would be understandable if the judge regarded his application with some scepticism."

[17] In the light of the situation which has arisen since *Dietrich*, it is expected that L.I.P.s who are refused legal aid are likely to be rare, and that applications for such assistance will be, generally speaking, refused. However, it is difficult to see the justification for a general rule of exclusion, or as it has been put in the Australian authorities, a requirement to establish "extraordinary circumstances" if all that is sought is someone to assist with note-taking, to quietly assist the accused by prompting him or discussing with him privately what course he should take in the light of information provided by the Court, or the like. At least some academic writers believe that Australian courts should reconsider the tough stand taken on this issue.[26]

The Lay Advocate who chooses self-representation

[18] Earlier in this paper I raised the question whether the rules relating to L.I.P.s should be strictly applied to skilled lay advocates who choose to represent themselves. There is no doubt that there are some defendants who seek to leave themselves unrepresented in order to obtain some perceived advantage. In *R v Varley* (1973) 2 NSWLR 427, the accused withdrew his instructions to his solicitor (which resulted in his counsel withdrawing) after the trial, which had lasted 33 days, had reached the point where the accused was about to be cross-examined by the prosecutor. The prosecutor had indicated to the trial judge he proposed to seek leave to cross-examine the accused upon his previous convictions. The Court of Criminal Appeal observed that the accused

probably thought that he might gain a benefit for himself by acting in person as this might prevent him being so cross-examined, and that in fact no such cross-examination was then sought by the prosecutor. The appellant's complaint, on appeal, was that, contrary to the prevailing practice, the prosecutor addressed the jury at the end of the trial. The Court of Criminal Appeal held that the practice in New South Wales was confined to simple cases and in the circumstances of this case, it would have been irresponsible of the prosecutor not to address the jury. The Court's decision was upheld on appeal.[27]

[19] In *Frawley* (1993) 69 A Crim R 208, the accused had been granted legal aid and senior counsel was briefed, but at the trial he withdrew his instructions saying that he did not believe that the trial would be conducted according to his wishes. The trial date was vacated. Thereafter the accused had engaged in a lengthy disagreement with his legal representatives as to the way in which the matter was to be conducted. When, after many adjournments and a proper refusal of a further adjournment, the day for his trial arrived, he was represented at public expense by an experienced solicitor and by Queen's Counsel. He insisted on making what they regarded as a hopeless application for an adjournment, and the application was properly refused. The appellant's conduct and instructions was such that his legal representatives felt obliged to withdraw, and the trial continued. In those circumstances Gleeson CJ observed, at 212:

> "The fact that the appellant was unrepresented, resulting, as it did, substantially from his own rejection of the legal advice and representation that was provided to him at public expense, does not of itself amount to unfairness: cf. *Dietrich* (at 335-336; 206-207). The Court must consider whether there was a miscarriage of justice, but it does so in the context in which the fact that the appellant was unrepresented was the result of his own conduct."

One of the appellant's submissions was that the case was too serious and too difficult for the appellant to defend himself. The Court accepted that, but held that the disadvantage which the appellant found himself was of his own making

and did not of itself involve unfairness.[28] Nevertheless the Court held, at p 212, that the trial judge was still under an obligation to render assistance at the trial.

[20] Nevertheless it is submitted that the question of what is or is not fair must be measured by reference to the conduct of the accused. In *Dietrich*, Deane J observed, at 335-6:

> "There are circumstances in which a criminal trial will be relevantly fair notwithstanding that the accused is unrepresented. The most obvious category of case in which that is so is where an accused desires to be unrepresented or persistently rejects or refuses to take advantage of legal representation which is available. Another category of case in which that is so is where the accused has the financial means to engage legal representation but decides not to incur the expense."

[21] In principle, I submit that the extent to which the trial is regarded as fair must be looked at in the light of the accused's conduct. In *Greer* (1992) 62 A Crim R 442, for example, the Court of Criminal Appeal held that the judge was right to inform the jury of the fact that the accused was self-represented by his own choice, as otherwise the jury might surmise that he had been refused legal aid because he had no reasonable defence. Indeed, the accused's conduct may be so bad as to effectively make it impossible for the trial judge to render his assistance and at the same time control the proceedings. In *R v Morley* [1988] 2 WLR 963, the L.I.P.'s behaviour towards the trial judge was such that he had to be frequently removed from Court. Repeated efforts by the trial judge to get the accused to behave proved fruitless. At the end of the trial, the judge refused to allow the accused to address the jury, had him removed from court, and proceeded to sum up the case to the jury in the accused's absence. On appeal, the Court of Appeal held that as the L.I.P. would not have made a closing speech confined to matters appropriate for him to raise, but would have used the occasion to attack the judge and the prosecutor and to have made nothing more than protests, the trial judge was justified in taking the course he did, that no prejudice occurred to the accused which made his conviction unsafe or unsatisfactory, and that there was no unfairness in the trial.

[22] What is the position where the L.I.P. happens to be a skilful advocate, by which I mean, for example, a barrister with considerable criminal trial experience? In the light of Murphy J's observations in *McInnis v The Queen* cited above (at para 3), it might be thought that the obligations placed on the trial judge remain unchanged. Surely this cannot be right. Take, for example, the obligation to explain to a L.I.P. the jury selection process and the right of challenge. It would be absurd if the judge were to be required to explain such matters to an experienced trial advocate. It is submitted that the obligation is only to take such steps as are necessary to ensure a fair trial, and the extent to which the judge is required to go, must be measured by all of the circumstances, including the experience of the accused. So far, I have not been able to find any decisions precisely on this point, but it is submitted that such an approach is consistent with the authorities on a similar point discussed in para [26] below.

[23] In paragraph [4] I referred to legislative provisions preventing L.I.P.s from cross-examining the complainant in sexual matters, except through the trial judge. In my view there is no reason to confine this type of provision to sexual offences. The alleged victim of any offence is likely to be just as traumatised, annoyed, or embarrassed, regardless of whether the alleged offence is a sexual offence or otherwise, and there is always a real risk that the trial judge may have difficulty in controlling the situation.

<u>What can be done to avoid L.I.P.s</u>?

[24] Earlier in this paper, I referred to the accused's right to defend in person. In addition, if counsel's instructions are terminated, it is well settled that he or she must withdraw from the case.[29] However, in some cases a trial judge may ask counsel to continue – if, for example, the instructions have been terminated because counsel's fees cannot be secured. In this situation, counsel is usually expected to accede to the Judge's request,[30] but is not bound to do so. The

course to be then taken, depending on the circumstances, may result in the trial being adjourned.

[25] Judges do not possess inherent powers to appoint counsel, if an accused is unrepresented. Such powers must be found in a statute.[31] Only Victoria has passed laws enabling a Judge to order the provision of legal assistance.[32] No doubt a Judge could ask the bar to provide de bono assistance in any case where legal aid has been refused. If that is not forthcoming, the Judge must decide whether to continue with the trial, or grant an adjournment or a stay.

Should Legal Aid Agencies have the right to refuse legal aid?

[26] At present, legal aid agencies have an absolute right to refuse legal aid, subject to any system of review which may exist, whether internal or external (such as exists in Victoria). There are sound arguments for leaving any right of review outside of the courts. The question of how much funding is available and how it is best spent is best left to executive bodies. This demonstrates that the question of the provision of legal aid is best left to the executive, and cannot effectively be made subject to judicial supervision. So much was recognised by at least some of the Justices in *Dietrich*.[33] The question, perhaps, should more properly be formulated as to whether the courts should properly refuse to grant a stay or adjournment at least in some cases where legal aid has been refused. To this question, the answer must be yes, as the *Dietrich* principle is in any event limited to those indigent accused who are unable to obtain legal representation through no fault of their own.

[27] The circumstances where a trial judge would be entitled to refuse relief have been discussed in a number of recent authorities, and fall into three main categories. First, cases where the failure to obtain legal aid was due to the L.I.P.'s misconduct; secondly, cases where the accused has no arguable defence to the charge, and thirdly, cases where the accused are legally trained. In cases of the first category, there is no unfairness if the accused has, by his

own misconduct, failed to secure his own legal representation or to obtain legal aid.[34] In this respect, an accused should be expected to apply for legal aid promptly, provide all relevant information for his claim to aid to be assessed and, if refused aid, promptly pursue any rights of review he may have, the question being whether his failure to obtain legal representation was due to his own fault.[35] In the second category of case, the right to a fair trial must be tempered by the consideration that the accused had no arguable defence. I do not consider that the *Dietrich* principle should operate so as to require, effectively, the public funding of defences which merely put the Crown to proof, in the face of instructions that the accused is guilty. There are observations in *Dietrich* itself to support the contention that the accused must show he has a chance of acquittal fairly open to him, as it is only in those circumstances that it could be said that there was any potential for a miscarriage of justice. In *R v Gudgeon* (1995) 133 ALR 379 Queensland's Court of Appeal held, in a case where the Crown case was overwhelming and was supported by the accused's admissions in cross-examination by the prosecutor, that there was no basis for any complaint on appeal. As McPherson JA and Thomas J observed, at p. 397:

> "Having admitted on oath to having committed the offence, it is difficult to appreciate how the absence of legal representation at the trial can have the result that there has been a miscarriage of justice, or that the appellant has lost a chance of acquittal that was fairly open to him. In the face of the prosecution evidence against him, he had no realistic chance of acquittal. His testimony at the trial serves to confirm that conclusion. It also shows that the appellant cannot now look towards a further chance of acquittal at a fresh trial in the future. It would be pointless to order such a trial if the only consequence would be that his guilt would be established yet again with the assistance of the evidence he gave at the trial from which the appeal is now brought."

If this be so, it follows that a trial judge could refuse to grant a stay if the Crown case was so overwhelming that the accused has no realistic chance of an acquittal. In cases of the third category, the court will consider the level of the applicant's experience at the bar, the complexity and length of the case, the applicant's knowledge of the case he or she is to meet and any other relevant

factors which show whether or not the applicant is capable of running the litigation himself.[36] There are, it is submitted, no closed categories of fairness, and each case should be judged on its merits – the conduct of the accused being of considerable importance.

[1] 7 & 8 Will III c3.

[2] 6 & 7 Will IV c114.

[3] A.C. Castles, *An Australian Legal History*, Law Book Company (1982) at 57.

[4] See *Counsel Act* (1840) 4 Vict. No.27 (NSW); *Ex parte Nichols* (1839) 1 Legge 123, B & C 271; Castles op.cit, pp199, p 430-31

[5] *Judiciary Act 1903* (Clth) s78; *Crimes Act 1900* (NSW) s402; *Crimes Act 1958* (Vic) s 397; *Criminal Law Consolidation Act 1935* (SA), s288; *Criminal Code* (Qld) s616; *Criminal Code* (WA) s634; *Criminal Code 1924* (Tas) s368; *Criminal Code 1983* (NT) s360.

[6] *Collins v The Queen* (1975) 133 CLR 120 at 122.

[7] Prior to recent times, it was not uncommon for appellate courts to so find: see, for example, *McInnis v The Queen* (1979) 143 CLR 575, esp. at 589 per Murphy J.

[8] See also at 316-17 per Brennan J; at 336 per Deane J; at 353-54 per Toohey J; *McInnis v The Queen* (1979) 143 CLR 575 at 579, 582, 586-90.

[9] See *Sexual Offences (Evidence & Procedure) Act* (NT) s5.

[10] See for example *The Unrepresented Party*, Adversarial Background Paper 4, 12/3/99; *The Litigant in Person*, ALRO IP 20, 8, 12/3/99.

[11] See Wills J in *R v Gibson* (1887) 18 QBD 537 at 543, quoted with approval by Brennan J in *MacPherson v The Queen* (1981) 147 CLR 512 at 546.

[12] *Richardson v The Queen* (1974) 131 CLR 116 at 122; *Whitehorn v The Queen* (1983) 152 CLR 657 at 682-83; *MacPherson v the Queen* (1981) 147 CLR 512 at 546-47; *Powell v Alabama* (1932) 287 US 45 at 61.

[13] Contrast *R v Gidley* [1984] 3 NSWLR 168 at 181 per Hunt J.

[14] See *Criminal Code* (Qld) s619.

[15] See *Varley v The Queen* (1976) 12 ALR 347.

[16] See *R v Pink* [1971] 1 QB 508 at 509-10.

[17] In Victoria, see *Crimes Act 1958*, s417(1) and *R v Marijancevic* [1982] VR 936. In the N.T. there is no restriction, the matter being left to the discretion of the prosecutor: *Criminal Code 1983* (NT) Schedule 4.

[18] See *R v Varley* (1973) 2 NSWLR 427 at 432. Possibly the difficulty lies in getting leave from the trial judge.

[19] N C Steytler, *The Undefended Accused on Trial*. Juta & Co. (1988) at p 136.

[20] *Criminal Code 1983* (NT) Schedule 4.

[21] *Evidence Act* (NT) s9 (7)(c), *Matusevich v R* (1977) 137 CLR 633 at 653-4; *Murdoch v Taylor* (1965) AC 574; and see the cases referred to in footnote 74, Gillies, *Law of Evidence in Australia*, 2nd Ed (1987) p 265 and in *Cross on Evidence*, para 23375, footnote 1. Leave is required under the Commonwealth's and NSW's *Evidence Act*: s104(6).

[22] See *Laferla v Birdon Sands Pty Ltd* (unreported, Mildren J. 21/3/98 Supreme Court of the N.T. at pp 16-17).

[23] So named after the decision in *McKenzie v McKenzie* [1970] 3 WLR 472; [1971] P. 33 where the assistance of a lay person was first sanctioned.

[24] *R v E.J. Smith* [1982] 2 NSWLR 608 at 614 per Street CJ.

[25] See *R v Burke* (1993) 1 Qd R 166; *Re B* [1981] 2 NSWLR 372 at 385-6; *R v Schagen* (1993) 65 A Crim R 500 at 501 per Malcolm CJ; *R v Marijancevic* (1993) 70 A Crim R 272 (Vic CCA).

[26] See J. Hunter & K.C. Cronin, *Evidence, Advocacy and Ethical Practice, A Criminal Trial Commentary*, Butterworths (1995) p 59.

[27] *Varley v R* (1976) 12 ALR 347.

[28] At p 215.

[29] *Greer* (1992) 62 A Crim R 442 at 452 per Kirby P.

[30] *McMinnis v The Queen* (1979) 143 CLR 575 at 585-6 per Murphy J.

[31] See *Dietrich v The Queen* (1992) 177 CLR 292 at 311-12 per Mason CJ and McHugh J.

[32] See *Crimes Act 1958* (Vic), s360A.

[33] At p 310 per Mason CJ & McHugh J; at 349-50, per Dawson J.

[34] *R v Rich* (1997) 68 SASR 390.

[35] *Craig v South Australia* (1994-5) 184 CLR 163 at 184-186; *R v Kennedy* (1997) 94 A Crim R 341 at 348.

[36] *R v Fuller & Another* (1997) 69 SASR 251.