LEGAL AID AND ACCESS TO LEGAL REPRESENTATION: REDEFINING THE RIGHT TO A FAIR TRIAL

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The unmet demand for legal aid generally and for criminal law matters in particular, has grown in tandem with the expansion of crime control and increased restrictions on funding for publicly funded welfare and support services. This article examines the connection between legal aid, legal representation and the right to a fair trial. It presents an in-depth case study of Victorian case law and policy development to illuminate dilemmas in the prioritised allocation of legal aid resources in serious criminal trials. It then compares the Victorian courts' approach to a fair trial with the tenets of current European Court of Human Rights jurisprudence regarding the scope and timing of an accused person's right to access a lawyer. The comparison underlines the narrow definition of fair trial under Victorian common law, relative to Europe, where a fair trial is interpreted more broadly to include the right to legal representation during police and pre-trial investigations. The article questions whether international developments in access to legal aid for criminal trials and the extension of legal aid and representation to pre-trial procedures, most notably through the Salduz *case (heard in the European Court of Human Rights), may inspire change in Victoria.*

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I Introduction

Across Western nations, restrictions on the provision of legal aid, coupled with changes to crime control and social welfare policies have significantly increased demand for legal services, while simultaneously increasing the extent of unmet legal need. This shift in government priorities has combined with a reduction in investment across every stage of the legal process to produce a potential storm of injustice. In Australia, financial restrictions and changes to the eligibility and accessibility of legal services across all jurisdictions have impacted significantly on the provision of legal aid, the allocation of resources to community legal centres (which provide free legal services to the poor and disadvantaged),[1] and the types of legal aid programs and policy agendas that can be funded. Elsewhere, reductions in government funded legal services across civil and criminal legal systems have similarly become commonplace. In England and Wales for example, the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) c 10 ('*LASPO*') was introduced in 2012 with the specific aim of cutting the legal aid budget by £350 million.[2] The

[1] See generally Jude McCulloch and Megan Blair, 'Law for Justice: The History of Community Legal Centres in Australia' in Elizabeth Stanley and Jude McCulloch (eds), *State Crime and Resistance* (Routledge, 2013) 168 for discussion of community legal centres. For a broader discussion of the impact of reductions in legal aid in Australia, England and Wales see Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, forthcoming 2016).

[2] Ministry of Justice (UK), *Reform of Legal Aid in England and Wales: The Government Response* (June 2011) 7 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228890/8072.pdf>. See also Anthony Edwards, 'Legal Aid, Sentencing and *Punishment of Offenders Act 2012* — The Financial, Procedural and Practical Implications' [2012] 8 *Criminal Law Review* 584. The legal challenge to government plans for criminal legal aid was rejected by the Court of Appeal of England and Wales in March 2015: *R (The Law Society) v Lord Chancellor* [2015] EWCA Civ 230 (25 March 2015). Faced with

complexities surrounding legal aid funding are fuelled by vexed questions: namely, who most deserves legal aid? In the context of finite funding and expanding demands, on what criteria are priorities decided? And who decides those criteria?[3]

In this article, we argue that access to legal aid is necessary in order to ensure the effective availability of legal counsel, and so, the accused's right to a fair trial. A key determinant in answering the above questions, therefore, is the way in which the concept of fair trial is defined and interpreted. In particular, we consider whether international developments in both access to legal aid for criminal trials, and the extension of access to legal aid and legal representation for pre-trial procedures, can and should inspire change in Victoria. That is, we question whether the right to a fair trial as defined in international (or even domestic) human rights instruments can and should be invoked in the Victorian courts to challenge restrictive access to counsel and legal aid provision.

The right to a fair trial is set out in international as well as regional legal instruments, such as the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[4] and refers to core principles including the presumption of innocence, the right to know the nature of the accusation against the accused, and the ability to challenge that accusation effectively in a fair and public hearing by an independent and impartial tribunal.[5] In this context, legal representation is central to the right to a fair trial. The *ICCPR* is not itself part of Australian domestic law, but related international jurisprudence is relevant to the interpretation of the two human rights instruments introduced in Australian jurisdictions: the *Human Rights Act 2004* (ACT), and — a primary focus of this article — the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*'),[6] both of which include fair trial rights.

further cuts, solicitors and barristers took various forms of strike and boycott action during mid-2015: see Dan Johnson, 'Legal Aid Boycott "Causing Chaos"', *BBC News* (online), 8 July 2015 <http://www.bbc.com/news/uk-33443413>.

[3] This has proved frustrating for British judges who have tried to use other sources of public funds in serious civil and family cases where it was felt that representation was required. The Court of Appeal has ruled that this is not permissible: see, eg, *Re K & H (Children)* [2015] 1 WLR 3801.

[4] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[5] See, eg, Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Interim Report No 127 (2015) 279 [10.17], citing *ICCPR* art 14.

[6] *Victorian Charter* s 32(2); *Human Rights Act 2004* (ACT) s 31(1). See also *Tomasevic v Travaglini* (2007) 17 VR 100, 113 [72] (Bell J).

Inextricably linked to the right to counsel is the accessibility of legal aid. Without access to legal aid, the right to counsel becomes meaningless for many accused persons, as it may prevent them from accessing a lawyer to defend themselves against the charges they face. This argument is recognised in the qualified right to legal aid included in definitions of fair trial in international instruments such as the *ICCPR*,[7] and the European *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*').[8] It is also recognised more broadly by the United Nations ('UN') General Assembly, which in 2012 adopted the first global instrument dedicated to the provision of legal aid:

> Recognizing that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process, [s]tates should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution.[9]

The *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* ('*UN Principles and Guidelines*') require states to ensure 'that effective legal aid is provided promptly at all stages of the criminal process',[10] including, 'all pre-trial proceedings and hearings'.[11] Of particular relevance, given the *Victorian Charter*'s legal basis in the *ICCPR*, are the findings of the UN Human Rights Committee,[12] that arts 14(3)(b), (d) and 9(1) are violated when a suspect is not provided with legal aid during the

[7] *ICCPR* art 14.

[8] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) art 6.

[9] *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, UN GAOR, 3rd Comm, 67th sess, Agenda Item 103, UN Doc A/C.3/67/L.6 (3 October 2012) para 14 (citations omitted).

[10] Ibid para 27.

[11] Ibid para 44(c).

[12] The UN Human Rights Committee is the body of independent experts responsible for monitoring implementation of the *ICCPR*: see generally UN Human Rights Office of the High Commissioner, *Human Rights Committee* (2016) <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>.

initial police detention and questioning.[13] These international instruments set out a clear requirement for legal aid to be provided as part of the right to a fair trial when the accused does not have the sufficient means to pay for legal assistance (the 'means test') and when the interests of justice so require (the 'merits test').[14]

In this paper, we explore what a clear requirement for legal counsel to be provided as part of the right to a fair trial might mean in practice, drawing on international and domestic definitions of fair trial. In doing so, we support Australian common law and interpretations of the *Victorian Charter* adopting a less restrictive interpretation of the right to a fair trial.[15] The second strand of our analysis concerns the scope of this right to legal counsel. The criminal trial is widely perceived as the centrepiece of criminal justice. This is the stage at which the prosecution's charges against the accused are tested, the accused is acquitted or convicted, and where relevant, a punishment imposed. In this sense, the courtroom trial is seen as the focal point for ensuring that an overall fair trial is achieved. In light of this view, it arguably makes sense that fair trial is defined according to how the trial itself is run, and that legal aid funding and assistance is subsequently targeted to this phase of the legal process. However, it is also widely acknowledged that this formal, public display of justice is the exception and not the rule.[16] Few cases are contested,

[13] Human Rights Committee, *Views: Communication No 1412/2005*, 102nd sess, UN Doc CCPR/C/102/D/1412/2005 (24 August 2011) 23 [7.6] ('*Butovenko v Ukraine*'); Human Rights Committee, *Views: Communication No 1545/2007*, 102nd sess, UN Doc CCPR/C/102/D/1545/2007 (1 September 2011) 10 [6.3] ('*Gunan v Kyrgyzstan*'); Human Rights Committee, *Views: Communication No 1402/2005*, 101st sess, UN Doc CCPR/C/101/D/1402/2005 (27 April 2010) 13 [8.6] ('*Krasnova v Kyrgyzstan*'); Human Rights Committee, *Views: Communication No 592/1994*, 64th sess, UN Doc CCPR/C/64/D/592/1994 (6 November 1998) 9 [10.2] ('*Johnson v Jamaica*'); Human Rights Committee, *Views: Communication No 719/1996*, 64th sess, UN Doc CCPR/C/64/D/719/1996 (20 November 1998) 8 [7.2] ('*Levy v Jamaica*').

[14] See UN Office on Drugs and Crime, *Early Access to Legal Aid in Criminal Justice Processes: A Handbook for Policymakers and Practitioners* (February 2014) 68 <http://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf>.

[15] Note also that the European Committee for the Prevention of Torture and the UN Subcommittee on Prevention of Torture have also 'repeatedly emphasised the importance of legal aid as a fundamental safeguard against intimidation, ill-treatment or torture': Open Society Justice Initiative, *Legal Aid in Europe: Minimum Requirements under International Law* (April 2015) Open Society Foundations, 15 <https://www.opensocietyfoundations.org/sites/default/files/ee-legal-aid-standards-20150427.pdf>.

[16] Asher Flynn, 'Plea-Negotiations, Prosecutors and Discretion: An Argument for Legal Reform' (forthcoming) *Australian and New Zealand Journal of Criminology* 2; Jacqueline Hodgson, 'Plea Bargaining: A Comparative Analysis' in James D Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2nd ed, 2015) vol 18, 226.

most are resolved by guilty pleas,[17] and increasingly, cases are disposed of by alternatives to trial and prosecution, such as cautions and warnings.[18] In addition to this, few cases actually reach the higher courts, as most charges are tried summarily.[19] For the majority of people arrested and facing possible criminal charges, the pre-trial process is thus likely to be the most significant, and possibly the only stage in their case. Additionally, where cases do proceed to trial (that is, to court, whether or not the charges are contested), the statements the suspect made under police interrogation are likely to form a significant part of the prosecution's case.

Accordingly, as the second theme in this article, we argue that an accused person's right to a fair trial should go beyond the trial, to include the pre-trial process and police custody, in line with established jurisprudence under art 6 of the *ECHR*.[20] This jurisprudence defines fair trial as extending from the point of arrest, up to and including the trial, on the basis that the accused's rights are adversely affected from the moment that she or he becomes a suspect.[21] The European Court of Human Rights ('ECtHR') has held the point of arrest as the stage at which defence rights should be triggered.[22] In line with this definition, early access to legal aid standards has similarly been adopted in international instruments and bodies to recognise that the fairness of the

[17] In Victoria, 76.6 per cent of cases in the higher courts resolved by guilty plea in 2013–14. In England and Wales, 72.2 per cent of cases in the Magistrates' Courts in 2013–14 resolved by guilty pleas (4.4 per cent were convicted after trial and 2.8 per cent acquitted; the rest were discontinued or proved in the accused's absence) and 72.9 per cent of cases in the Crown Courts in the same period were guilty pleas (8.2 per cent were convicted after trial; 5.9 per cent were acquitted; 11.4 per cent were judge-ordered acquittals): Crown Prosecution Service, *Annual Report and Accounts 2013–14* (2014) 84, 87; Director of Public Prosecutions and Office of Public Prosecutions (Vic), *Annual Report 2013–14* (2014) 20. The Magistrates' Court of Victoria no longer publishes data on the number of guilty pleas entered. Thus, no statistics for that jurisdiction have been provided.

[18] See Crown Prosecution Service, above n 17, 82.

[19] In the 2012–13 financial year, 5368 criminal cases were finalised in the Victorian higher courts, compared with 188 537 criminal cases finalised in the Magistrates' Court. Similarly, in England and Wales in 2013–14, 94 617 cases were finalised in the Crown Courts, compared with 640 657 in the Magistrates' Court: Crown Prosecution Service, above n 17, 84, 86; County Court of Victoria, *Annual Report 2012–13* (2013) 2; Magistrates' Court of Victoria, *Annual Report 2012–13* (2013) 6; Supreme Court of Victoria, *Annual Report 2012–13* (2013) 7.

[20] See especially *Imbrioscia v Switzerland* (1993) 275 Eur Court HR (ser A).

[21] Ibid 13 [36].

[22] *Dayanan v Turkey* (European Court of Human Rights, Second Section, Application No 7377/03, 13 October 2009) [31].

trial will be affected by the fairness of the pre-trial.[23] In this way, the *ECHR* provision goes beyond the narrow definitions of fair trial applied by the Australian courts.[24]

This article is informed by collaborative research conducted in the Australian state of Victoria, and in England and Wales. We employ an in-depth case study of Victorian case law and policy development to examine the central dilemmas embodied in the allocation of legal aid, the link between legal representation and assistance, and the right to a fair trial. In doing so, we compare the Victorian definition of fair trial — in which the judiciary have insisted on minimum levels of legal representation in, but also restricted to, contested serious criminal cases heard in the higher courts — with the tenets of current ECtHR jurisprudence regarding an accused person's access to a lawyer, as part of ensuring a fair trial under art 6 of the *ECHR*. This highly restrictive conceptualisation of fair trial in Victoria sits in stark contrast to the interpretation of the *ICCPR*, the *UN Principles and Guidelines*, and the established case law of the ECtHR, where — as noted — fair trial is interpreted more widely to include access to legal representation at non-contested hearings and during the pre-trial investigation.

While many European jurisdictions are currently seeking to implement the fair trial requirements of the ECtHR's line of jurisprudence,[25] beginning with *Salduz v Turkey* ('*Salduz*'),[26] which (as discussed below), requires access to

[23] See, eg, *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, and on the Right to Have a Third Party Informed upon Deprivation of Liberty and to Communicate with Third Persons and with Consular Authorities while Deprived of Liberty* [2013] OJ L 294/1, art 2(1) ('*EU Legal Assistance Directive*'). The *EU Legal Assistance Directive* is discussed later in this article: see below Part V(A).

[24] *ECHR* art 6. In finding breaches of art 6 when accused persons are not afforded free legal representation, the ECtHR have established key criteria to trigger the interests of justice test. These include the seriousness and complexity of the offence, and the ability of the accused to provide his or her legal representation: *Quaranta v Switzerland* (1991) 205 Eur Court HR (ser A) 14–15 [32]–[36].

[25] As discussed below, the European Union ('EU') has also legislated, requiring all EU member states (other than those which have opted out of the Directive) to guarantee suspects (as well as accused persons) a right to legal counsel. The *EU Legal Assistance Directive* spells out in more detail and in a more prescriptive fashion, the requirements outlined in *Salduz v Turkey* [2008] V Eur Court HR 59. It must be implemented in member states by 27 November 2016: *EU Legal Assistance Directive* art 15. Linked to this, there is also a draft legal aid Directive under consideration on the right to legal aid for suspects or accused persons in criminal proceedings: *Commission Recommendation of 27 November 2013 on the Right to Legal Aid for Suspects or Accused Persons in Criminal Proceedings* [2013] OJ C 378/11 ('*EU Legal Aid Directive*').

[26] [2008] V Eur Court HR 59.

legal assistance from the first police interrogation, Victoria, with its highly established culture of defence lawyering, appears to be moving in the opposite direction. In fact, the issue of access to legal representation and legal aid for pre-trial stages has to date not arisen for decision under the *Victorian Charter*. Accordingly, we argue that the human rights framework adopted by the ECtHR, particularly following *Salduz*,[27] provides an enhanced context for conceptualising what constitutes a fair trial. Comparing these two approaches and the extent to which access to legal representation and legal assistance have been recognised as a requirement of a fair trial (and at what stages of the criminal process), we go on to consider whether any such access includes access to public funding of that legal representation and assistance. We begin with an overview of the role of human rights instruments related to legal assistance and representation, and the Victorian common law definition of fair trial.

II Human Rights and the Right to a Fair Trial

The right to a fair trial is recognised in human rights instruments as including the right to instruct legal counsel at trial. Access to legal representation at trial is well established within domestic understandings of fair trial, as well as through international conventions such as the *Universal Declaration of Human Rights*,[28] the *ICCPR* and the right to a fair trial under art 6 of the *ECHR*.[29] The *Victorian Charter* recognises this right in s 24(1): 'a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing', together with the s 25(2)(d) right: 'to defend himself or herself personally or through legal assistance chosen by him or her'. When considering the question of access to representation, however, the Victorian courts have tended to focus on the common law right to a fair trial, as opposed to the *Victorian Charter* provisions. In *Wells v The Queen [No 2]*[30] for example, the Victorian Court of Appeal refused to 'entertain' counsel's argument that the fair trial provisions under the *Victorian Charter* provide 'greater protection to the accused against

[27] Ibid.

[28] *Universal Declaration of Human Rights* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

[29] See Australian Law Reform Commission, above n 5, 299 [10.108]–[10.113].

[30] [2010] VSCA 294 (4 November 2010).

an unfair trial than do the common law principles',[31] stating that the Court does not generally 'entertain arguments involving the application of the Charter on interlocutory appeals',[32] and accordingly, did not consider whether the *Victorian Charter* 'confers a right more extensive than the common law right … [to ensure] the accused be afforded a fair trial'.[33] In any event, where courts have considered s 24 specifically, they have said that the *Victorian Charter* right to a fair trial is equivalent to, and does not extend, the common law right. That is, access to counsel will only be held to be required as part of a fair trial, where the trial itself would otherwise be unfair. As stated by the court in *Slaveski v Smith*:

> Given the similarities between s 24(1) of the *Charter* and art 6(1) of the Convention [*ECHR*], we are disposed to construe s 24(1) of the *Charter* in similar fashion. In that sense, it may be said that s 24(1) creates a right to legal representation in limited circumstances. It is, however, no more than reflective of the position at common law. An indigent person does not have a right at common law to be represented at the State's expense on a serious criminal offence. He has a right to a fair trial, more accurately expressed in negative terms as a right not to be tried unfairly. Depending upon the circumstances of the particular case, including the background of the person, lack of representation may mean that the person is unable to receive a fair trial.[34]

The right to instruct counsel under the *ICCPR* and the *ECHR* includes the accused's right to have free legal assistance 'in any case where the interests of justice so require … if he does not have sufficient means to pay for it'.[35] Unlike these broadly framed *ICCPR* and *ECHR* provisions, any right to the provision of legal aid as outlined in the *Victorian Charter* is clearly limited to cases in

[31] Ibid [38] (Ashley and Redlich JJA).

[32] Ibid [39].

[33] Ibid [38].

[34] (2012) 34 VR 206, 220–1 [52], citing *Dietrich v The Queen* (1992) 177 CLR 292, 311 (Mason CJ and McHugh J) ('*Dietrich*') (citations omitted).

[35] *ICCPR* art 14(3)(d). The relevant provision of the *ECHR* is to substantially the same effect: *ECHR* art 6(3)(c). See also *New Zealand Bill of Rights Act 1990* (NZ) s 24(f). The guarantee of legal assistance is also outlined in Human Rights Committee, *General Comment No 32 — Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 3 [10]. The elaboration of the fair trial right in *ICCPR* art 14(1) (and under the *Victorian Charter* ss 24–5) also includes the right to equality of arms, confirmed by Human Rights Committee, *Views: Communication No 1347/2005*, 90th sess, UN Doc CCPR/C/90/D/1347/2005 (29 August 2007) ('*Dudko v Australia*').

which the applicant is already eligible for legal aid under the relevant legislation. The *Victorian Charter* specifies that a person has the right to:

> defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the *Legal Aid Act 1978*; and … to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the *Legal Aid Act 1978* …[36]

This is similarly confirmed in the Explanatory Memorandum to the *Victorian Charter* which states that there had been 'intentional modifications … to the minimum guarantees' provided by the *ICCPR*,[37] one of which was linking access to legal representation to existing statutory rights to legal aid. Additionally, in debating the Bill, the then Victorian Attorney-General noted that '[i]t is intended that the [B]ill reflect the limits on the right to representation at public expense under current Victorian law.'[38]

The disjuncture between the *Victorian Charter* reference to counsel to ensure a fair trial under ss 24 and 25(2)(d), and the absence of a direct link to government-funded assistance was confirmed by Victorian case law in 2012 following a legal challenge to the refusal of legal aid under the *Legal Aid Act 1978* (Vic).[39] This case involved an accused seeking to appeal a conviction for making a threat to kill. The accused argued that the eligibility provisions of legal aid (which are cast in wide, discretionary terms) ought to be interpreted in a way that was compatible with the rights under the *Victorian Charter*, thus leading to a grant of aid.[40] The challenge was unsuccessful.[41] Instead, the Victorian Court of Appeal held that it was clearly not Parliament's intention in passing the *Victorian Charter* that Victoria Legal Aid ('VLA') should always grant legal aid where an applicant falls within the eligibility requirements of the *Legal Aid Act 1978* (Vic), and in fact, VLA is statutorily required to exercise its discretion with reference to competing demands on limited funds.[42] The Court stated, 'there is no certainty that VLA will always, if ever,

[36] *Victorian Charter* ss 25(2)(d), (f).

[37] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 18.

[38] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1292 (Rob Hulls, Attorney-General).

[39] *Slaveski v Smith* (2012) 34 VR 206.

[40] Ibid 209–10 [1]–[6]; see also at 213–15 [18]–[24] applying s 32 of the *Victorian Charter*.

[41] Ibid 222 [59].

[42] Ibid 215–16 [27]–[28].

have sufficient funds with which to provide legal aid in cases [even] where an applicant satisfies the requirements'.[43]

Where human rights instruments do not exist (ie in all Australian jurisdictions other than Victoria and the Australian Capital Territory), the common law fair trial protection applies to 'protect' an accused's access to counsel. The jurisprudence on what constitutes a fair trial is also relevant to accused persons in jurisdictions that do have a human rights instrument such as a charter, where the person is unable to obtain legal aid for representation and wants to rely on the broader right to a fair trial. In the High Court of Australia decision, *Dietrich v The Queen* ('*Dietrich*')[44] (discussed below), the Court concluded that a trial will, 'as a general proposition', be unfair if a person facing serious criminal charges (eg where there is a risk of imprisonment) is unrepresented, despite their wish to be represented.[45] In Australia, the fact that an accused was unrepresented can be a ground for quashing a conviction if the appeal court considers that refusal of an adjournment to obtain representation resulted in the accused being deprived of a real possibility of acquittal.[46] However, as noted by Gans et al, this does not extend to a 'right to have that representation provided at public expense.'[47] The courts do, however, possess the power to stay proceedings where it is concluded that the proceedings would result in an unfair trial, if the matter were to continue without the accused being represented.[48] Additionally, the principles related to an unfair trial and legal representation do not extend to an accused facing less serious charges, and they address only the specific instance of a contested trial, meaning they do not include any earlier steps in the criminal justice process. In fact, in *Dietrich*, Deane J observed that a trial without representation for a less serious offence, for example, where there was no risk of loss of personal liberty, might well be regarded as *not* unfair.[49] Similarly, in *Fuller v Director of Public Prosecutions* (Cth),[50] the Court rejected the argument that

[43] Ibid 216 [27].

[44] (1992) 177 CLR 292.

[45] Ibid 337 (Deane J).

[46] *McInnis v The Queen* (1979) 143 CLR 575, 579–80 (Barwick CJ).

[47] Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 494. See also ibid 579.

[48] *Dietrich* (1992) 177 CLR 292, 300 (Mason CJ and McHugh J).

[49] Ibid 336.

[50] (1994) 68 ALJR 611.

the rights afforded to an accused pursuant to *Dietrich* applied to pre-trial committal hearings.[51]

This narrow understanding of fair trial and its relationship to legal representation was recently confirmed in a number of cases in Victoria. In mid-2013, a series of court decisions to stay proceedings ultimately forced VLA to suspend the implementation of its new and more restrictive trial representation guidelines, which limited the amount of time that instructing solicitors could assist counsel at trial to two half-days.[52] These cases demonstrate both the inextricable links between the right to a fair trial in the higher courts and legal representation at trial, and the pivotal role the Australian judiciary has in shaping understandings and approaches towards due process and human rights in the criminal justice sphere. Interestingly, and as will be discussed below, while dealing with questions directly relevant to ss 24 and 25(2)(d) (the fair trial provisions) of the *Victorian Charter*, the *Charter* was not regarded as relevant to the decisions — partially due to the courts' traditional reliance on the common law definition as the authority on the fair trial right,[53] and partially because the courts do not deal with applications regarding the *Victorian Charter* in interlocutory appeals.[54] In order to understand the history and significance of these recent cases, it is necessary to begin with the 1992 landmark case of *Dietrich*.[55]

III Victorian Challenges to Legal Aid Policy

A *The* Dietrich *Decision*

The 1992 High Court case, *Dietrich*,[56] has 'had a fundamental impact on the Australian justice system'.[57] Dietrich, who could not afford his own legal costs, was charged with serious drug offences and was denied legal aid for representation in a criminal trial in Victoria's intermediate County Court, in accord-

[51] Ibid 615 (McHugh J).

[52] See VLA, *New Eligibility Guidelines Effective 7 January 2013* (7 January 2013) <https://www.legalaid.vic.gov.au/about-us/news/new-eligibility-guidelines-effective-7-january-2013>.

[53] *Slaveski v Smith* (2012) 34 VR 206, 220–1 [52]; *Wells v The Queen [No 2]* [2010] VSCA 294 (4 November 2010) [40] (Ashley and Redlich JJA).

[54] *Wells v The Queen [No 2]* [2010] VSCA 294 (4 November 2010) [39].

[55] (1992) 177 CLR 292.

[56] Ibid.

[57] Sally Kift, 'The *Dietrich* Dilemma' (1997) 13 *Queensland University of Technology Law Journal* 211, 212.

ance with legal aid funding policy at the time.[58] While the High Court unanimously recognised that there is no right in Australian law for an accused to be provided with counsel at public expense, the majority determined that in most instances involving serious criminal charges (eg where there is a risk of imprisonment), a judge should grant a request for an adjournment or stay proceedings when, through no fault of her or his own, the accused is unable to obtain legal representation. Mason CJ and McHugh J stated in the first paragraph of their Honours' joint judgment:

> In our opinion, and in the opinion of the majority of this Court, the common law of Australia does not recognize the right of an accused to be provided with counsel at public expense. However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence.[59]

The majority found as a general proposition, and in the absence of exceptional circumstances, that a trial of an indigent person accused of a serious crime will be unfair if, by reason of lack of means and the unavailability of other assistance, she or he is denied legal representation.[60] This case highlighted tensions in the respective roles of the judiciary and government in managing legal aid budgets and priorities. Indeed, the joint judgment (forming part of the majority in the High Court) recognised that the decision might require a reconsideration of legal aid funding priorities, pointing out that:

> even in those cases where the accused has been refused legal assistance and has unsuccessfully exercised his or her rights to review of that refusal, it is possible, perhaps probable, that the decision of a Legal Aid Commission would be re-considered if a trial judge ordered that the trial be adjourned or stayed pending representation being found for the accused … In these circumstances we should proceed on the footing that, if a trial judge were to grant an adjournment to an unrepresented accused on the ground that the accused's trial is likely to be unfair without representation, that approach is not likely to impose a substantial financial burden on government and it may require no

[58] *Dietrich* (1992) 177 CLR 292, 298–9 (Mason CJ and McHugh J).

[59] Ibid 297–8.

[60] Ibid 337 (Deane J); see also at 315 (Mason CJ and McHugh J), 357 (Toohey J), 374–5 (Gaudron J).

> more than a re-ordering of the priorities according to which legal aid funds are presently allocated.[61]

Brennan J, in the minority, contended by way of contrast that:

> The courts do not control the public purse strings; nor can they conscript the legal profession to compel the rendering of professional services without reward. The provision of adequate legal representation for persons charged with the commission of serious offences is a function which only the legislature and the executive can perform. No doubt, demands on the public purse other than legal aid limit the funds available.[62]

While the High Court did not find that accused persons, even those faced with serious charges, had a *legal right* to publicly-funded representation, the practical impact of the finding, as the majority foresaw, was to put pressure on legal aid agencies to make funding available for legal representation at serious criminal trials.[63] The decision also narrowed the scope of the fair trial concept to serious criminal offences where the accused enters a plea of not guilty, thereby reducing the perceived importance and accessibility of legal representation prior to trial for continuing pre-trial preparation, and for those pleading guilty. As Flynn explains in the context of VLA:

> Victoria's Legal Aid funding structure is based on adversarial traditions that prioritise a trial and reimburse counsel based on this prioritisation. As a consequence, counsel have limited access to resources for their pre-trial preparation, which hinders the effectiveness of pre-trial hearings from attaining any significant level of efficiency or in achieving their inherent ideals, namely the early identification of issues, both those in dispute and those that could resolve.[64]

In addition to this, the narrow conception of fair trial omits consideration of legal assistance for suspects in police custody which, as noted above, is often a crucial point for the defence case.

[61] Ibid 312 (Mason CJ and McHugh J).

[62] Ibid 323.

[63] Ibid 311 (Mason CJ and McHugh J), 330 (Deane J), 361–2 (Toohey J), 364 (Gaudron J); see also at 343 (Dawson J).

[64] Asher Flynn, 'Victoria's Legal Aid Funding Structure: Hindering the Ideals Inherent to the Pre-Trial Process' (2010) 34 *Criminal Law Journal* 48, 48.

B *Restricting Funding for Instructing Solicitors*

In attempting to negotiate finite resources with increasing unmet legal need, VLA altered their criminal trial guidelines in early 2013 to limit the funding available for an instructing solicitor at trial to two half-days.[65] This decision was informed by the practice of other Australian states, where 'the customary [Victorian] model … of an instructing solicitor available to attend court for every day of every trial is not considered necessary to ensure a fair trial'.[66] The decision to restrict legal aid funding in this way was subject to extensive criticism. The Law Institute of Victoria ('LIV') — the main body representing solicitors in the State — was particularly vocal in its critique, with then President, Reynah Tang, commenting that 'having a solicitor to assist a barrister in a trial is not a luxury, but fundamental to a fair and just outcome.'[67] Tang observed that such restrictions raised an 'equality of arms' issue,[68] because the prosecution would continue to operate with an instructing solicitor and an informant to assist the prosecuting barrister. This argument raised an interesting point as to what constitutes 'adequate' or 'fair' representation, in particular, whether this is premised on a matching of the resources of one's opponent, in this instance, of the prosecution. As discussed below, the courts subsequently became a central location for the debate and adjudication of the definition of fair trial in the context of legal representation, and for the first time since *Dietrich*,[69] the judiciary actively intervened to reaffirm legal representation as the foundation of a fair trial, and in doing so, were implicit in challenging and forcing change to this new VLA policy.

Between February and May 2013, at least 47 applications were made to indefinitely stay criminal trial proceedings involving legally aided accused persons in Victoria's higher courts, on the basis that an accused could not receive a fair trial in light of the VLA policy change.[70] For these four months,

[65] VLA, *New Eligibility Guidelines Effective 7 January 2013*, above n 52.

[66] VLA, *Victoria Legal Aid to Introduce More Flexibility for Criminal Trial Funding* (7 May 2013) <http://www.legalaid.vic.gov.au/about-us/news/victoria-legal-aid-to-introduce-more-flexibility-for-criminal-trial-funding>.

[67] Reynah Tang, 'LIV Seeks to Ensure Fair Trials by Intervening in Supreme Court Case' on Law Institute of Victoria, *President's Blog* (15 February 2013) <http://www.liv.asn.au/Mobile/Home/PresidentsBlog/BlogPost.aspx?blogpostid=397721>.

[68] Ibid.

[69] (1992) 177 CLR 292.

[70] See Jane Lee, 'Legal Aid Funds Stoush Halts Trials', *The Age* (online), 2 May 2013 <http://www.theage.com.au/victoria/legal-aid-funds-stoush-halts-trials-20130502-2ivej.html>.

the courts accepted many of the applications, before the Victorian Office of Public Prosecutions ('OPP') sought leave for an interlocutory appeal in an attempt to end the 'staying' saga.[71] The three key cases informing the appeal request are discussed below.

C Chaouk

The first Victorian case subject to a stay of proceedings was *R v Chaouk* ('*Chaouk*').[72] Chaouk was charged with attempted murder and several counts of reckless conduct endangering life. It was estimated that Chaouk's trial would last between two and three weeks. Chaouk had originally been awarded a legal aid grant for a barrister and instructing solicitor for the duration of the trial; but following the policy change, the instructing solicitor was limited to two half-days.[73] Chaouk's barrister sought an order from the court that the trial be stayed on the basis that: (1) a trial in which an instructing solicitor was available for only two half-days would be unfair; (2) there is a direct and unbalanced comparison with respect to the resources (namely an instructing solicitor) available to the prosecutor; and (3) the failure to provide full funding for an instructing solicitor indicates a lack of understanding of the important role that a solicitor plays in a criminal trial.[74] This conception of fair trial echoes the principle of equality of arms which underpins much of the art 6 *ECHR* jurisprudence dealing with access to counsel.

Lasry J confirmed that he possessed the power to stay proceedings under the inherent jurisdiction of the Court to ensure the fairness of proceedings.[75] Granting the stay, his Honour stated that the absence of an instructing solicitor:

> substantially increase[s] the likelihood of errors being made or important matters being overlooked by counsel — a risk that will not confront the prosecution. I am therefore of the view that in the circumstances as they are at present, the trial of the accused is likely to be unfair in the sense that it carries a risk of improper conviction.[76]

[71] Leave for an interlocutory appeal was sought in *R v Chaouk* (2013) 40 VR 356, 369 (Nettle AP, Buchanan and Osborn JJA).

[72] (2013) 40 VR 356.

[73] Ibid 359 [6], [10] (Lasry J).

[74] Ibid 360 [11].

[75] Ibid 363 [22].

[76] Ibid 368 [47].

In reaching his decision, Lasry J emphasised the harshness of the penalty faced by Chaouk in the event of a finding of guilt, which included the risk of a substantial period of imprisonment.[77] He also stressed the value that instructing solicitors provide to both the defence barrister and the judge.[78] Lasry J ordered that the matter be adjourned until the defence barrister had the assistance of an instructing solicitor on a daily basis for the duration of the trial.[79] While not specifically naming the VLA policy, the implications of this decision to the policy were immense, in that it effectively required a reversal of the new funding stipulations, if the case were ever to proceed to trial.

D MK

The second case, *MK v Victoria Legal Aid* ('*MK*'),[80] involved an accused charged with two counts of murder. As in *Chaouk*,[81] MK's VLA grant of assistance included funding for an instructing solicitor, which was reduced to two half-days following the policy change. MK's counsel sought a temporary stay of proceedings until funding for full legal representation was made available by VLA, arguing that without the assistance of an instructing solicitor, MK would not receive a fair trial.[82]

In assessing this application, Forrest J drew heavily from the *Chaouk* decision given three days earlier, stating:

> I agree with [Lasry J's] conclusion that the decision to grant an adjournment or a stay is one made in the exercise of the inherent jurisdiction of the court to ensure the fairness of proceedings before it … The question on this temporary stay application, as I see it, is not whether [MK] is represented, but whether he is sufficiently represented in all the circumstances. If I conclude that he is not and that insufficiency causes me to be satisfied that I cannot ensure that the applicant will receive a fair trial, then it is my duty to intervene.[83]

[77] Ibid 368 [43].

[78] Ibid 364–5 [27]–[32].

[79] Ibid 368 [48].

[80] (2013) 40 VR 378.

[81] (2013) 40 VR 356.

[82] Ibid [2]–[4] (Forrest J).

[83] Ibid [43].

Forrest J granted the application for a stay of proceedings, concluding that:

> one person, no matter how diligent or brilliant, simply cannot do to a proper standard what is expected of [the defence]. Put another way, I consider that I am unable to ensure that MK will receive a fair trial in the current circumstances.[84]

In these two statements, his Honour directly links the absence of an instructing solicitor for the duration of a trial with an absence of 'sufficient representation' and thus, the absence of a fair trial. Like *Chaouk*,[85] the implications of this decision on the VLA policy would require a reversal of the new funding requirements.

E *The Third Case*

A third case to successfully apply for a stay of proceedings involved three co-accused, in the intermediate County Court, whose VLA funded representation was also reduced following the policy change.[86] In making his decision on the application for a stay of proceedings, Judge Dean found it to be 'entirely unsatisfactory that the barristers, whether it be one or two, have the responsibility of dealing with a person who they are not briefed by.'[87] His Honour used the ruling as an opportunity to specifically encourage VLA to reconsider its new policy, and stated that if additional funding for instructing solicitors was not forthcoming, the trial 'would be an unfair one and I will not preside over an unfair trial'.[88]

Like the two cases before it, this decision fundamentally challenged the viability of retaining the VLA policy restricting the use of an instructing solicitor to two half-days. In addition, it forced the OPP to take action to challenge the courts' decisions if these and other 'stay' cases were ever to proceed to trial. This was because, as stated in the *Chaouk* interlocutory appeal, 'despite strenuous efforts by the [D]irector [of the OPP] to procure the

[84] Ibid [46].

[85] (2013) 40 VR 356.

[86] The names of the accused and the nature of their charges have not been revealed due to a court order. Media coverage on the case can be found in Jane Lee, 'Judge Pressures Legal Aid over "Unfair Trial" Risk', *The Age* (online), 23 April 2013 <http://www.theage.com.au/victoria/judge-pressures-legal-aid-over-unfair-trial-risk-20130423-2ichw.html>.

[87] Ibid.

[88] Ibid.

necessary legal aid funding',[89] for the various respondents, VLA 'declined to alter its previously announced determination that it will not fund the attendance at court of an instructing solicitor … for more than two half-days of the trial.'[90]

F *The Interlocutory Appeal*

In May 2013, the Victorian Court of Criminal Appeal heard the OPP's application for leave to appeal the decision in *Chaouk*.[91] The OPP argued that VLA's refusal to restore funding rendered Lasry J's order, 'in effect, a permanent stay of the serious criminal charges',[92] with the result that 'there is a very strong public interest that the correctness of that decision be the subject of appellate scrutiny'.[93] As a matter of law, the OPP argued that Lasry J's decision involved an erroneous departure from the principles laid down by the High Court in *Dietrich*,[94] because 'his Honour applied an incorrect test of there being a "risk" of an unfair trial or a "risk" of an improper conviction, as opposed to what counsel contended to be the correct test of whether the trial would be unfair or at least likely to be unfair',[95] as established in *Dietrich*.

Leave to appeal was denied, with the Court unanimously reaffirming the forms of judicial intervention present in the three cases described above, and noting that if leave to appeal had been granted, the Court would not have been persuaded that Lasry J had erred in his finding.[96] The Court concluded emphatically that:

> When it comes to legal representation, a decision to stay a trial reflects the court's assessment of what is necessary to ensure that justice is done. … [W]e find it difficult to imagine on the particular facts of this case that his Honour

[89] (2013) 40 VR 356, 369 [3] (Nettle AP, Buchanan and Osborn JJA).

[90] Ibid.

[91] (2013) 40 VR 356, 369. Note that the judgment concerning this interlocutory appeal commences on this page.

[92] Ibid 369 [3].

[93] Ibid.

[94] (1992) 177 CLR 292.

[95] *Chaouk* (2013) 40 VR 356, 372 [18].

[96] Ibid 377 [40]. This decision was made based on the timing of the Crown's application, namely that the Court would not entertain an appeal on a point of law that was not previously advanced. Specifically, the Court held that granting leave to appeal would 'allow the Crown to advance a new and radically different point for the first time on interlocutory appeal'; an outcome the Court did not believe was justified by the circumstances of the case: at 371 [16].

> could properly have come to any other conclusion. … [B]oth the finding and the path of reasoning from it to his Honour's conclusion are unimpeachable. … [W]e see no reason to doubt that the lack of an instructing solicitor at trial would be productive of a very real and substantial risk of improper conviction.[97]

The Court's decision in this case, like the previous stay decisions, was made on the basis of common law principles pertaining to a fair trial, namely those established in *Dietrich*.[98] Notably, the *Victorian Charter* right to a fair trial was not specifically mentioned in the stay applications. The *Victorian Charter* was, however, raised as a point of consideration in the *Chaouk* interlocutory appeal, with both the Attorney-General and the Equal Opportunity and Human Rights Commission using their powers under ss 34(1) and 40(1) to 'intervene in, and … be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of this *Charter* or a question arises with respect to the interpretation of a statutory provision in accordance with this *Charter*.'[99] Despite the intervention of these two parties, the Court relied upon the decision in *Wells v The Queen [No 2]*,[100] to decline to consider the *Victorian Charter* issues. In doing so, the Court stated that the *Victorian Charter* was inapplicable in interlocutory cases, and was also unnecessary to their decision:

> ordinarily this court should not be expected to entertain *Charter* points on an interlocutory criminal appeal. As it turns out, this case is no exception. … [T]he matter is capable of being decided in favour of the respondent without resort to the *Charter*; and, even assuming, without deciding, that the *Charter* could make any difference, it is agreed on all hands that it would in no way be inimical to the respondent's position.[101]

In saying this, the Court reiterated again the prioritisation given to the common law definition of fair trial, at the expense of any consideration of the *Victorian Charter* fair trial provisions.

97 Ibid 370 [6], 375 [31], 373 [22].

98 (1992) 177 CLR 292.

99 *Chaouk* (2013) 40 VR 356, 376 [34].

100 [2010] VSCA 294 (4 November 2010) [39] (Ashley and Redlich JJA) in which it was stated that '[t]his Court should generally not be expected to entertain arguments involving the application of the *Charter* on interlocutory appeals.' This passage was cited in ibid 376 [35].

101 *Chaouk* (2013) 40 VR 356, 376 [35].

Given very little choice, VLA amended their guidelines shortly after the Court's decision, and put in place an interim instructing and co-counsel policy, which provided funding 'as and when required' for:

a) The instructing lawyer who has prepared the matter for trial; or

b) An instructing lawyer who is experienced and well versed in the facts of the case and the relevant law; or

c) Junior counsel, where the assigned lawyer in consultation with their client determines that is more appropriate to ensure a fair trial in the particular case; or

d) Junior counsel, where a legal practitioner who meets subsection a) or b) is not available or not preferred.[102]

IV Fair Trial Beyond the Criminal Trial

A *Why Legal Aid Matters Pre-Trial*

This forced shift in VLA policy was seen through the criminal justice lens as a 'victory' over potentially unjust prescriptive changes to legal aid funding, as it required VLA to re-consider and return to the dominant common law definition of fair trial in Victoria. However, the *Chaouk*[103] decision on the meaning of a fair trial not only enforced a prioritisation of serious criminal trial funding, but it also came absent of any consideration of the pre-trial and investigation stages being critical to the concept of fair trial. As flagged earlier, the police investigation and pre-trial processes are likely to be the most significant, and possibly the only stages in most criminal matters. Accordingly, a lack of legal representation pre-trial may: (a) disadvantage the accused; (b) impact on counsel's ability to negotiate and prepare the case; and (c) hinder resolution attempts (plea negotiations and guilty pleas) at an early stage. As a prosecutor noted in Flynn's study of the trial-focused nature of VLA's funding structure:

> all that time and effort [pre-trial] in trying to resolve matters or at least considering resolution is not properly funded for Legal Aid solicitors and if this isn't

[102] VLA, *Guideline 4 — Trials in the County or Supreme Courts* (31 July 2015) VLA Handbook <https://handbook.vla.vic.gov.au/handbook/3-criminal-law-guidelines/guideline-4-trials-in-county-or-supreme-courts>.

[103] (2013) 40 VR 356.

> changed, then it is unlikely that many solicitors will have the time and effort to spend on non-resourced activities [like preparation].[104]

The benefits of pre-trial preparation for ensuring a fair trial have been well documented in socio-legal research, with some studies suggesting that its importance exceeds that of the presentation of the case at trial:

> the extent and quality of preparation is infinitely more important, significant and essential than the manner of presentation … the decisive factor lies in the initial preparation; the material which is so disclosed; the incontrovertible facts which are marshalled; and the care and patience which go into ensuring that no stone is left unturned. These are by far the most significant factors …[105]

The connection between pre-trial representation, preparation and a fair trial was similarly noted in a 2008 review of VLA:

> A well resourced and competent defence can ensure that a case proceeds correctly through the court system and minimises the risks of an aborted trial, appeals and retrials … Prepared counsel can also explain the hard choices that a defendant may face in deciding to plead or go to trial.[106]

Flynn also recognises that in the absence of such preparation, there is the possibility that defence counsel may have 'to rely upon their own perceptions and assumptions about clients and facts gleaned from prosecution papers in order to construct their own case'.[107]

When the narrow common law definition of fair trial results in legal aid funding policy having to be focused on the trial stage of serious criminal matters, the quality of justice provided in the pre-trial and investigatory stages of the legal process is compromised. Failure to accept the definition of fair trial as extending to the broader criminal justice process, which we argue is more representative of the experiences of the majority of those who come before the legal system, may thus result in an accused person's access to a fair

[104] Flynn, 'Victoria's Legal Aid Funding Structure', above n 64, 59.

[105] Mike McConville et al, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press, 1994) 48, quoting Sir David Napley, *The Technique of Persuasion* (Sweet & Maxwell, 2nd ed, 1975) 16.

[106] PricewaterhouseCoopers, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases* (2008) Victorian Bar External Publications 22 <https://www.vicbar.com.au/news-resources/external-publications>.

[107] Flynn, 'Victoria's Legal Aid Funding Structure', above n 64, 60 quoting McConville et al, above n 105, 68.

trial being eroded, despite the various legislative and human rights instruments designed to protect against this.

B *Why Legal Aid Matters Pre-Charge*

Even prior to the pre-trial phase — for example, during the suspect's interrogation at the police station — it is essential that legal assistance is understood as an integral part of the right to a fair trial. The evidence obtained through police questioning is crucial in a number of respects. First, it may influence whether or not charges are brought and if they are, the terms in which these are framed. Second, there are increasingly complex rules of evidence that apply to the pre-charge police investigation. For example, the suspect's silence when questioned may result in the drawing of adverse inferences at trial in England and in New South Wales.[108] In this way, evidential significance may attach to what the suspect does not say, as well as what she or he does say; but deciding whether or not to answer police questions requires some knowledge of the police case, as well as an understanding of the legal consequences of responding or remaining silent, which may not be achievable without legal advice. Third, in the increasing number of cases disposed of without trial, the mode of case disposition will be determined by the evidence gathered during the initial investigation. Whether or not the suspect answers questions, as well as the account and any admission that she or he provides, will in many less serious cases be determinative of the case outcome. An admission, even of a less serious offence than that for which the suspect was arrested, may result in a caution or some other form of diversion away from prosecution.[109] These outcomes appear attractive, as they often result in immediate release from custody and can lead to no recorded conviction, but it is important that suspects understand that these are formal admissions which carry consequences in any future arrests, including that pleading guilty, even where no conviction will be recorded, can still appear on any criminal record check.[110]

[108] *Criminal Justice and Public Order Act 1994* (UK) c 33, ss 34–7; *Evidence Act 1995* (NSW) s 89A. For more detail see Francine Feld, Andrew Hemming and Thalia Anthony, *Criminal Procedure in Australia* (LexisNexis Butterworths, 2015) 124–7.

[109] See, eg, *Criminal Procedure Act 2009* (Vic) s 59.

[110] In some countries, such as France, the canvassing of these alternate options requires the suspect to first consult with a lawyer. This is seen as an essential protection that helps guarantee that fair trial rights are not bypassed through abbreviated procedures. In this sense, legal assistance is as much a need of the system as a right for the accused: see Jodie Blackstock et al, *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia, 2014).

Finally, even where cases do proceed to trial, it is the evidence that is gathered during the initial investigation and the police interrogation of the suspect, in particular, that shapes the trial — not only in terms of the charges prosecuted and the evidence presented, but also the reliability of that evidence. As the ECtHR has often remarked, the fairness of the trial depends on the fairness of the pre-trial, including the investigatory stages.[111]

At a general level, the ECtHR has emphasised the importance of the lawyer in ensuring that the privilege against self-incrimination is respected and understood, that the principle of equality of arms is respected, and in helping to guard against unlawful detention or treatment.[112] More specifically, a lawyer is also needed in order to provide legal assistance in relation to any accusations made against the suspect, the strength of any evidence collected and the lawfulness of the detention.[113] The right to information about the charges is the right of the suspect, not of the lawyer, but in practice, research suggests the police are unlikely to disclose evidence of their case to unrepresented suspects prior to interrogation.[114] This means that represented suspects are often better placed in terms of knowledge of their case, which will assist them in determining how to respond during police interrogation. Representation can also assist an accused in accessing some of the less punitive based options, such as a diversionary program (see, eg, the Criminal Justice Diversionary Program operating in the Magistrates' Court of Victoria), which may not be apparent to someone without legal knowledge.[115] For these reasons, it is vital that suspects have access to legal assistance and do not face police questioning alone.

V European Court of Human Rights: *Salduz*

We have argued that the limited definition of fair trial narrowed to a specific set of circumstances relating to legal representation and serious criminal trials in Victoria — recently affirmed by the series of cases heard in 2013 and the subsequent reversal of VLA policy — has the potential to reduce the capacity for an accused to have access to fair and adequate legal representation. In order to examine this argument in an international context, we now consider

111 See, eg, *Imbrioscia v Switzerland* (1993) 275 Eur Court HR (ser A) 9.

112 See below Part V.

113 *Dayanan v Turkey* (European Court of Human Rights, Second Section, Application No 7377/03, 13 October 2009) [32].

114 Blackstock et al, above n 110, 273.

115 See Flynn, 'Plea-Negotiations, Prosecutors and Discretion', above n 16, 13.

how this contrasts with the development of the fair trial concept in Europe. As briefly noted, art 6 of the *ECHR* sets out a number of fair trial guarantees, including that the accused has a right to access a lawyer, and further to this, for that right to be funded by the government, where the interests of justice so require.[116] Although art 6 *ECHR* speaks of those charged with a criminal offence, this has been interpreted broadly and, in recognition of the importance of the investigation stage, it is now well established that these fair trial rights also apply pre-trial;[117] a stark contrast to the Victorian legal landscape.

While access to a lawyer during the pre-trial stage has been an art 6 *ECHR* interpretation for some years,[118] the 2008 case of *Salduz*[119] went further in specifying that suspects must be allowed access to legal advice both before and during the police interrogation.[120] In this case, Salduz — a 17 year-old — was taken into police custody and questioned without legal representation regarding his alleged involvement in an illegal demonstration. During this interrogation, he admitted participating in the demonstration, but when he came before the court, he denied any involvement on the basis that his statement to the police had been made under duress. Salduz was appointed a lawyer after being remanded in custody, and continued to deny any involvement in the demonstration during his trial. Notably, his five co-accused, who had also made statements to the police that Salduz participated in the demonstration, similarly retracted their statements regarding his participation during the trial. Yet on the basis of his earlier statement to the police, the Court found Salduz guilty.[121]

In reviewing this case, the ECtHR determined that a correct interpretation of art 6 of the *ECHR* requires that access to a lawyer be provided from the initial police interrogation of the suspect, unless there are compelling reasons to restrict this right.[122] Even where there are compelling reasons, the Court

116 *ECHR* art 6(3)(c).

117 *Imbrioscia v Switzerland* (1993) 275 Eur Court HR (ser A) 13–14 [38].

118 See, eg, *John Murray v United Kingdom* [1996] I Eur Court HR 30; *Magee v United Kingdom* [2000] VI Eur Court HR 159.

119 [2008] V Eur Court HR 59.

120 Other international institutions such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment have long recognised the importance of the lawyer's presence in police interrogation as a fundamental safeguard against the ill treatment of the detainee. This was acknowledged in ibid 77–8 [54].

121 Ibid 65–6 [12]–[17].

122 Ibid 78 [55].

held that such restrictions must not unduly prejudice the rights of the accused:

> in order for the right to a fair trial to remain sufficiently 'practical and effective' … [art 6] requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police … [t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.[123]

Salduz's conviction was thus overturned and a new precedent pertaining to legal assistance, representation and the right to a fair trial emerged. Subsequent ECtHR case law emphasised the legal assistance, as well as the legal advice, to which the suspect is entitled under art 6 of the *ECHR*. In *Dayanan v Turkey* the Court stated:

> an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned … Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.[124]

In previous cases,[125] the ECtHR had taken a holistic approach to the notion of a fair trial, looking at the fairness of the procedure overall. This meant that breaches of art 6 of the *ECHR* at an early stage of the proceedings might be 'remedied' by subsequent procedures, resulting in a finding that the trial was fair overall. *Salduz*[126] and subsequent case law have been more robust, holding that the absence of a lawyer would in principle irretrievably prejudice the rights of the accused, whatever the subsequent procedure.[127] Any restriction

[123] Ibid.

[124] (European Court of Human Rights, Second Section, Application No 7377/03, 13 October 2009) [32].

[125] See, eg, *John Murray v United Kingdom* [1996] I Eur Court HR 30; *Magee v United Kingdom* [2000] VI Eur Court HR 159; *Brennan v United Kingdom* [2001] X Eur Court HR.

[126] [2008] V Eur Court HR 59.

[127] Ibid 78 [55]. See also *Pishchalnikov v Russia* (European Court of Human Rights, First Section, Application No 7025/04, 24 September 2009) [70]; *Brusco v France* (European Court of Human Rights, Fifth Section, Application No 1466/07, 14 October 2010) [45]; *Mader v Croatia* (European Court of Human Rights, First Section, Application No 56185/07, 21 June

to this right is only permitted where there are compelling reasons that relate to the circumstances of the individual case and the restriction does not unduly prejudice the rights of the accused under art 6 of the *ECHR*.[128] Where such reasons do exist, it is unlikely that any admissions obtained by police may be used at trial, as this would prejudice the rights of the accused. While it is currently unknown what might amount to 'compelling reasons', the Irish Supreme Court in *Director of Public Prosecutions (Ireland) v Gormley*[129] in applying *Salduz*, suggested that 'it would be necessary that there be wholly exceptional circumstances involving a pressing and compelling need to protect other major constitutional rights such as the right to life.'[130]

A *The* Salduz *Solution*: *A Question of Legal Aid?*

The *Salduz*[131] decision set an important benchmark for legal representation and the right to a fair trial. In the United Kingdom Supreme Court case of *Cadder v Her Majesty's Advocate (Scotland)*,[132] in which the right to custodial legal advice was held to be required in Scotland under *Salduz*, Lord Hope DP noted:

> The conclusion that I would draw as to the effect of *Salduz v Turkey* is that the contracting states are under a duty to organise their systems in such a way as to ensure that, unless in the particular circumstances of the case there are compelling reasons for restricting the right, a person who is detained has access to advice from a lawyer before he is subjected to police questioning.[133]

The *Salduz* line of jurisprudence is significant in defining the scope of art 6 of the *ECHR*, but the nature of the *ECHR* is that it leaves a margin of appreciation for states to ensure compliance according to their own procedural traditions. While a number of signatory states have legislated reforms to allow suspects to have their lawyer present during police interrogation, the ECtHR cannot issue guidelines on the implementation of its decisions and as a result,

2011) [154]; *Šebalj v Croatia* (European Court of Human Rights, First Section, Application No 4429/09, 28 June 2011) [256]–[257].

128 *Salduz* [2008] V Eur Court HR 59, 78 [55]. For example, this means that a lawyer cannot be denied in certain blanket categories of serious offences.

129 [2014] 1 ILRM 377.

130 Ibid 405 [9.14] (Clarke J).

131 [2008] V Eur Court HR 59.

132 (2010) 1 WLR 2601.

133 Ibid 2623 [48].

there were significant differences in the reforms legislated to ensure that countries were *Salduz* compliant.[134] The Netherlands, for example, had no general right for suspects to have access to a lawyer during police detention and interrogation.[135] Instead, a reform introduced in 2010 allowed suspects to consult with a lawyer prior to, but not during, interrogation.[136] In France, suspects were already permitted a 30 minute private consultation prior to any police interrogation, but this was not considered to be *Salduz* compliant.[137] A reform introduced in 2011 thus extended this right to allow the suspect to have her or his lawyer present throughout the police interrogation, however, the lawyer's role was restricted; she or he was not permitted to intervene or to ask questions until the end of the interrogation.[138]

In contrast to the ECtHR decisions, EU Directives are normative and aim to harmonise laws and procedures, with clear and universal standards to be adopted by all member states.[139] Since the late-2000s, the EU has legislated a number of Directives to improve the procedural safeguards for suspects and accused persons in Europe, including the right to access a lawyer before and during police interrogation.[140] Significantly, the *EU Legal Assistance Directive* applies from the moment that a person is officially informed that they are a suspect, through to the conclusion of proceedings, irrespective of whether they are deprived of their liberty.[141] The Directive stipulates that member states must ensure: 'that suspects and accused persons have the right of access

134 See, eg, the measures legislated by France, Scotland and the Netherlands discussed in Blackstock et al, above n 110. In many instances, legislation was prompted by *Salduz* litigation in the national courts see, eg, the reform in Scotland immediately following the United Kingdom Supreme Court ruling in *Cadder v Her Majesty's Advocate (Scotland)* (2010) 1 WLR 2601: the *Criminal Procedure (Legal Assistance, Detention and Appeals (Scotland) Act 2010* (Scot) asp 15.

135 Blackstock et al, above n 110, 109.

136 Juveniles are permitted to have a lawyer present see ibid.

137 Jacqueline Hodgson, 'Making Custodial Legal Advice More Effective in France' (2013) 92 *Criminal Justice Matters* 14, 14.

138 Art 63-4-3 *code de procédure pénale*. Dimitrios Giannoulopoulos, 'Custodial Legal Assistance and Notification of the Right to Silence in France: Legal Cosmopolitanism and Local Resistance' (2013) 24 *Criminal Law Forum* 291, 292, 322. See also ibid 15.

139 For a discussion of ECtHR and EU approaches to defence rights see Jacqueline S Hodgson, 'Safeguarding Suspects' Rights in Europe: A Comparative Perspective' (2011) 14 *New Criminal Law Review* 611.

140 Ed Cape and Jacqueline Hodgson, 'The Right to Access to a Lawyer at Police Stations: Making the European Union Directive Work in Practice' (2014) 5 *New Journal of European Criminal Law* 450.

141 *EU Legal Assistance Directive* art 2(1). This means that the right applies to those questioned as volunteers, as well as those arrested and detained in police custody.

to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.'[142] The Directive sets out the nature of this legal assistance in some detail, including that suspects must have access to a lawyer from the first stage of police questioning, and throughout criminal proceedings, and must be permitted confidential meetings with the lawyer.[143] In addition, these rights must be provided without undue delay.[144] For her or his part, the lawyer must be allowed to play an active role during police questioning of the suspect. While the lawyer's participation is governed by national procedures, these must 'not prejudice the effective exercise and essence of the right concerned.'[145] For many member states, these will be demanding requirements, especially in those jurisdictions where the lawyer has, historically, had little or no pre-trial role, and where austerity measures are in place.[146] States have until 27 November 2016 to implement the Directive into their own national law.[147]

While *Salduz*[148] and the EU Directives show an appreciation of the variety of ways in which a fair trial can be interpreted, the question of legal aid is a separate one. Legal aid had originally been part of Measure C in the *EU Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings*, together with the right to legal counsel for the suspected or accused person, but was later separated off.[149] It is clear that obtaining agreement on when government-funded legal assistance should be available to suspects and accused persons, and what the extent of that aid should be, is likely to be extremely difficult in the current economic climate.[150] As noted above, the ECtHR has found states to be in breach of the *ECHR* when individuals have been denied access to state-funded legal assistance, but the nature of the *ECHR*'s operation, and the rulings of the ECtHR, mean that states cannot be directly compelled to fund specific cases. Thus, although the

142 Ibid art 3(1).

143 Ibid art 3(2)(a)–(b).

144 Ibid art 3(2)(c).

145 Ibid art 3(3)(b).

146 For further discussion see Cape and Hodgson, above n 140.

147 *EU Legal Assistance Directive* art 15(1).

148 [2008] V Eur Court HR 59.

149 See *Resolution of the Council of 30 November 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings* [2009] OJ C 295/1, 3.

150 Having separated the question of legal aid from that of legal assistance, current discussions are addressing the extent to which the *EU Legal Aid Directive* should cover all situations in which legal assistance is mandated under the *EU Legal Assistance Directive*.

ECtHR is constantly at pains to emphasise the need for rights (including the right of access to counsel) to be effective, rather than theoretical or illusory, it does not establish any rights-based obligation to *fund* this access. Without a more expansive system of state-funded legal aid in criminal matters, the effectiveness of these rights *in practice* will be undermined. In the European context, the law will appear to be compliant by making provision for suspects to take up legal assistance if they wish, but without legal aid, suspects might not be able to gain access to a lawyer. This leaves a complex situation for member states, who must comply with the *EU Legal Assistance Directive*, but may not necessarily have the funds to do so. While the current EU program of Directives has the potential to address this gap, contemporary economic concerns have resulted in little appetite for the progression of the instrument addressing the provision of legal aid.

VI Conclusion

Since the establishment of community legal centres and a national legal aid system in Australia in the 1970s,[151] government funding of legal aid has become a widely accepted ideal (though demands for legal aid typically far outstrip available resources).[152] Despite this widely accepted ideal, in Victoria (and Australia more generally), where the common law definition of fair trial is limited to the contested trial, the concept of legal aid in the form of legal assistance and/or representation has not extended to include police interrogation, the pre-trial stage, or generally the summary jurisdiction. Under s 464C(1) of the *Crimes Act 1958* (Vic), any person under arrest or 'in custody' must be informed that they may obtain legal advice, and any questioning must be delayed 'for a time that is reasonable in the circumstances to enable the person to make, or attempt to make, the communication.' The investigating police are required to provide appropriate facilities and to ensure that 'as far as practicable' the lawyer is able to communicate with the person in

[151] See generally John Chesterman, *Poverty Law and Social Change: The Story of the Fitzroy Legal Service* (Melbourne University Press, 1996); David Neal (ed), *On Tap, Not on Top: Legal Centres in Australia, 1972–1982* (Legal Service Bulletin, 1984); Jude McCulloch and Megan Blair, 'From Maverick to Mainstream: Forty Years of Community Legal Centres' (2012) 37 *Alternative Law Journal* 12.

[152] Access to Justice Taskforce, Attorney-General's Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 146.

custody without being overheard.[153] While these protections appear to parallel those that have developed in Europe,[154] there is no obligation to ensure that legal advice is in fact provided, or that it is provided where the person is unable to pay for it. At the discretion of the court, failure to advise of the right to attempt to contact a legal practitioner, or to give access to a lawyer if requested, can lead to exclusion of the evidence thereby obtained, but the fact that legal representation was not provided at the custody stage does not amount to a *failure* to provide a fair trial. The ongoing assistance of a lawyer pre-trial is not procedurally mandated, and is clearly not provided for under the most recent VLA policy discussed above.

The expanded definition of fair trial applied by the ECtHR in *Salduz*[155] has resulted in important developments that seek to ensure the right to custodial legal advice and assistance is recognised as an essential part of the right to a fair trial. These developments also address the principle of equality of arms across all criminal procedural traditions, not just those that are more adversarial and party-driven.[156] We believe this emerging human rights jurisprudence in Europe regarding the scope and timing of access to legal representation and assistance has the potential to be adopted beyond the *ECHR* signatory states to also be considered in Australia, where the current definition of a fair trial focuses on the minority of criminal cases (those that actually proceed to trial in the higher courts). In this sense, mandating legal representation pre-trial not only more accurately captures the reality of the criminal justice process, but it would better reflect the needs of the majority of those who come before the law and offer enhanced opportunities for efficient, early resolutions (where appropriate).

As discussed, the *Victorian Charter* parallels the relevant *ECHR* provisions, as well as those in the *ICCPR*, and international jurisprudence is expressly made relevant under s 32(2) of the *Victorian Charter*, as well as being relevant

153 *Crimes Act 1958* (Vic) s 464C(1)–(2). See also guidelines 9 and 18 of LIV, *Guidelines for Police and Legal Practitioners at Police Stations* (2001) <http://www.liv.asn.au/PDF/Practising/Ethics/GuidelinesPoliceLegalPractitioners.aspx>.

154 Historically, countries such as France and the Netherlands have resisted the introduction of any significant role for the defence lawyer at the first stages of investigation, considering this less necessary in a more inquisitorial procedure characterised by judicial investigation: see Blackstock et al, above n 110; Jacqueline Hodgson, 'Criminal Procedure in Europe's Area of Freedom, Security and Justice: The Rights of the Suspect' in Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar, 2016) 168, 171.

155 [2008] V Eur Court HR 59.

156 Hodgson, 'Criminal Procedure in Europe's Area of Freedom', above n 154, 171–4.

under general principles of interpretation. Practitioners to date, however, have been reluctant to raise arguments under the *Victorian Charter*.[157] Additionally, a 'distinct under-utilisation of the *Charter* in the courts' has been identified more generally, including 'examples of judicial avoidance and minimisation of *Charter*-based arguments'.[158] We contend that lawyers should be raising the *Victorian Charter* provisions to challenge the domestic limitations currently accepted, and judicial decision-makers should be using international human rights jurisprudence to inform fundamental due process findings. In responding to his own rhetorical question in *Tomasevic v Travaglini*[159] as to why he should refer to human rights when deciding a case on 'fair trial' under common law principles, Bell J stated:

> Australia may be an island geographically, but in international law terms we are not. Australia has chosen to become a party to the *ICCPR*, and so has undertaken to promote and respect the human rights of equality before the law and access to justice, which are universal and fundamental. This case concerns the inherent duty of a judge to ensure a fair trial by giving due assistance to a self-represented litigant. It therefore raises issues of direct practical importance to the promotion and respect of those rights. The inherent duty to ensure a fair trial and the human rights of equality before the law and access to justice may be said to breathe the same air. Without impairing, indeed by asserting, the independence of our own law, judges can, and in my view should, act consistently with the international obligations specified in the *ICCPR* by accepting that, when appropriate, the exercise of relevant judicial powers and discretions, such as the duty to ensure a fair trial, can take into account the human rights specified in the *ICCPR*.[160]

Expanding the right to fair trial concept from pre-charge through to the pre-trial stages, and where applicable, to the contested trial, is paramount in a legal system that encompasses human rights and due process ideals. We contend that the definition of fair trial interpreted in *Salduz*[161] provides this opportunity, but such changes require governments to revisit their resourcing

[157] Chief Justice Marilyn Warren and Justice Pamela Tate, 'Editorial' (2014) 2 *Judicial College of Victoria Online Journal* 2, 3.

[158] Julie Debeljak, 'The Rights of Prisoners under the *Victorian Charter*: A Critical Analysis of the Jurisprudence on the Treatment of Prisoners and Conditions of Detention' (2015) 38 *University of New South Wales Law Journal* 1332, 1333.

[159] (2007) 17 VR 100.

[160] Ibid 115 [76].

[161] [2008] V Eur Court HR 59.

of legal aid to ensure it is available across all stages of the criminal justice process. It also requires Australian jurisdictions to engage more consistently and regularly with international law and legal obligations, as acknowledged by Bell J above. While this will take some time, and require debate over funding priorities, the outcome will be in the best interests of substantive justice.