

CRIMINAL PROCEDURE

NOTES

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1.0 | OVERVIEW OF CRIMINAL JUSTICE SYSTEMS & COURTS

INTRODUCTION

Key themes & basic tension in criminal procedure law

- procedural rectitude
- effective crime investigation v protection of rights (e.g. right to silence)
- rights of victims v rights of a accused
- special processing of certain categories of cases (e.g. sexual offences) v general process

Components of the criminal justice system

- 1) Defining crime (elements of offences, defences)
- 2) **Rules & principles by which guilt or innocence is determined**
- 3) **Mechanisms by which people are brought within criminal justice system**
- 4) Sentencing

Note: strong connection between Criminal Procedure and Evidence Law

AN ADVERSARIAL SYSTEM

The proceedings are in the hands of the parties (evidence, arguments, witnesses); judge as referee

- 1) **Gathering evidence for trial:** responsibility for gathering evidence rests with the parties — prosecution and defence
- 2) **Trial/hearing** is the exclusive forum for determining guilt; an independent evaluation of evidence by an impartial neutral judge
- 3) **Discretion:** because in an adversarial model decision making is left largely in the hands of the parties there is a recognised:
 - prosecutorial discretion not to proceed with the case (even when there is evidence to support a criminal charge)
 - option for the defendant to plead guilty and avoid a trial
- 4) **Nature of the trial process:** all parties determined the witnesses they call and the nature of the evidence they give; the opposing party has the right to cross-examine. The courts role is confined to overseeing the process by which evidence is given (to ensure that it is within the rules) and then weighing up that evidence to determine whether there is a reasonable doubt. Strict rules operate to prevent the admission of evidence that may prejudice or mislead the fact finder.
- 5) **Role of the victim:** the victim is largely relegated to the role of witness. They have no recognised status in either the pre-trial investigation or the trial itself. Prosecution is brought on behalf of the State.

Key features of the Adversarial System

Traditional features:

- presumption of innocence (prosecution must prove case against accused)
- right to silence (prosecution must prove case against accused) cf developments in the UK
- right to fair trial etc
- exclusionary rules of evidence (jury)

But this must be increasingly qualified...

- Right to silence — some statutory reform in Australia (e.g. NSW caution), reform in the UK
- Duty on prosecutors to disclose evidence
- Right to confront witnesses

R v Darmody [2010] VSCA 41

- Contemporary developments:
 - 'therapeutic jurisprudence' — collaboration of accused (and defence counsel) ...
 - special courts — Assessment and Referral Court (ARC) at Melbourne Magistrates Court, Koori Courts, Drug Court

JURISDICTION

Jurisdiction — State v Federal

In Australia, criminal law & procedure is largely the responsibility of State governments.

Federal

The Federal Government and the Australian Federal Police have roles in relation to some offences, especially drug trafficking and terrorism.

State

In Victoria, the Victorian Parliament makes most of our laws relating to crime and criminal procedure (including penalties and police powers). The Victorian Government manages funding for police and courts, legal assistance and the prison and parole system. Victoria Police are funded by the Victorian Government and the Chief Commissioner is appointed by the Police Minister.

Jurisdiction — Over persons

Natural persons — the original object of the criminal law (physical sanctions).

Corporations — may be prosecuted. Liability attributed through actions of employees acting within scope of their authority and the mental states of persons of managerial authority of the corporation.

Unincorporated associations — generally cannot be prosecuted as such, but individual members can.

Foreign nations — can be prosecuted for offences committed within jurisdiction.

Immunities — Children

- Sovereign
- Diplomatic
- Children
 - under age 10 — conclusively presumed to be incapable of any criminal offence (*Children, Youth and Families Act* 2005 **s 344**; *Criminal Code* **s 7.1**)
 - aged 10-14 — common law: *doli incapax*: rebuttable presumption that young person lack the necessary level of mental culpability — i.e. prosecution must prove child know his/her conduct was wrong (*ALH* (2003) 6 VR 276 — see especially discussion by Cummings AJA; *Criminal Code* **s 7.2**)

Children Youth and Families Act 2005 (Vic)

Section 344 — It is conclusively presumed that a child under the age of 10 years cannot commit an offence.

Criminal Code Act (Cth)

Section 7.1 — A child under 10 years old is not criminally responsible for an offence.

Law enforcement

- No general doctrine of immunity but special statutory provisions may operate for activities within the scope of their duties e.g.
 - undercover operations for illicit drugs (*Drugs, Poisons and Controlled Substances Act 1981* **s50**)
 - child pornography (*Crimes Act 1958* **ss68(2) & 70(4)**)

Immunities — Law enforcement

Drug, Poisons and Controlled Substances Act 1981 (Vic)

Section 50: Immunity of authorised officers and authorised police employees

No authorised officer or authorised police employee shall be in any way liable to any penalty in respect of anything done by him or her in the exercise of any power or in the performance of any duty conferred or imposed upon him or her pursuant to the provisions of this Act and the regulations.

Witness 'immunity'

Witness indemnity

- may be granted by Attorney-General or DPP
- witness receives from prosecutor a written undertaking of immunity from prosecution if s/he gives evidence on behalf of crime (*transaction indemnity*). The effect is to render the person a compellable witness for the crown
- if witness does not give frank and truthful evidence, DPP may withdraw indemnity
- **but** if DPP subsequently unfairly reneged on decision not to prosecute, court could exercise inherent power to stay any prosecution as oppressive and abuse of process (Fox 2010, 21)

Office of Public Prosecutions (OPP) Victoria

General policy

Indemnity granted only in those cases:

'in which all alternative means of securing the conviction of the principal offender have been considered and rejected and which involve relatively serious offences.'

Statutory basis of DPP's power to grant indemnity from prosecution:

Public Prosecution Act 1994 (Vic) — ss 22(1)(ca), 22(1)(cb), 22(1A) (conditions)

DPP prosecution Policies, *Indemnities and Undertakings* (<http://www.opp.vic.gov.au>)

Article: Police witness loses immunity in drug arrest (L Kennedy, *Sydney Morning Herald* 12/12/2010)

An informant who evaded prosecution for his role in the sale of stolen army rocket launchers that were acquired by a Sydney terrorist cell has been arrested.

The man, a former member of the Rebels motorcycle gang, turned whistleblower for counter-terrorism police investigating the theft and sale of 10 rocket launchers stolen from the Holsworthy army base in 2001.

He was arrested this month by drug squad police investigating amphetamine supply ... This man was given the code name Harrington and indemnity from prosecution for giving evidence in the trial of former army captain Shane Della-Vedova, who used Harrington as a go-between to sell the rocket launchers. Harrington passed on at least seven of the launchers to south-western Sydney illegal gun dealer Taha Abdul-Rahman, who became the middle man in selling two of the launchers to Adnan "Eddie" Darwiche for use in his feud with a rival drug gang. Darwiche, serving a triple life sentence for murder, on-sold five other launchers to members of a Lakemba terrorist cell, all of whom have since been convicted despite only one of the launchers ever being found. Harrington got off scot free. Abdul-Rahman received a 2½ year sentence.

Shane Della-
Vedova

Harrington (10)

Abdul-Rahman
(7)

Eddie Darwiche
(7)

Lakemba
terrorist cell (5)

Jurisdiction — Time

Victoria:

- *Indictable offences*: at common law, prosecution may take place at any time after their commission. **But**, some statutory time limits / procedural preconditions may exist for specific offences
- if limitation period passes or precondition not met, an accused cannot be convicted of the offence, even on a plea of guilty (*R v Tait* (1996) VR 662)

Summary of offences: Generally

Adults — charges must be filed within 1 year of the date on which the offences alleged to have been committed (*CP Act 2009* **s7**)

Children — charges must be filed within 6 months of the date on which the offence alleged to have been committed (*Children Youth and Families Act 2005* **s344A**)

Commonwealth

Like Victoria, refer to specific Acts but generally:

- For individuals —
 - where maximum term of imprisonment for 1st offence is > 6 months: prosecution may be commenced at any time.
 - If less, prosecution must be commenced within 12 months of commission of offence (*Crimes Act 1914* (Cth) **s15B**)
- If offender is corporate entity —
 - where maximum penalty for 1st offence is 150 penalty units or more: prosecution may be commenced at any time
 - If less, prosecution must be commenced within 12 months of commission of crime (*Crimes Act 1914* (Cth) **s15 (1A)**)

Retrospectivity and Criminal Procedure

- the presumption against retrospectivity **does not apply** to procedural and evidentiary matters.
- a person who allegedly has committed an offence is to be tried according to the practice and procedure prevailing **at the time of the trial** (not at the time of offending) (*Rodway* (1990) 160 CLR 515)

Note: be mindful of transitional provisions.

Application

- Robert Hughes was charged with sexual offences that occurred between 1983-1991
- Trial Feb 2014:
 - relevant law for sexual offences (indecent assault, sexual assault) was the law as it existed at the time of offending
 - relevant law for trial/criminal procedure was the law as it existed at the time of the trial.

PROCESSING THROUGH THE CRIMINAL JUSTICE SYSTEM

A. The trigger — reporting crime to police

- Victoria Police & Australian Federal Police (AFP) record and investigate crime and also have a crime prevention role.
- **but** not all crime is reported to police or recorded by them (especially assault, sexual assault and family violence) which can affect the accuracy of police crime statistics.

- 2014/15:
 - 482,959 offences were recorded by Victoria Police
 - police death with 164,941 alleged offender incidents over the same period (approx. 3% of the Victorian population)

B. Police questioning and investigation

- major issues re admissions/confessions now addressed through technology — recording of police interrogations (cf USA). mobile phones, body cameras re arrest?
- Police questioning regulated by statute and common law
- Search and seizure regulated by statute and common law
- Scientific aids to investigation — fingerprinting, DNA testing & other forensic procedures largely governed by statute.

C. Charging

- charges can be laid by the police and the Office of Public Prosecutions (OPP)
- OPP — an independent, government-funded agency which prosecutes serious crimes
- Police — prosecute summary offences. For some minor offences, police can caution or fine a person. For other offences. police will charge them.
- If the alleged crimes are serious offences such as rape, assault or murder, the police may first obtain advice from the Office of Public Prosecutions (OPP) before laying charges.
- Although both police and OPP consider the views of the victim, decisions about what charge to lay are based on the evidence collected during the investigation, legal principles and the public interest.
- Police and the OPP have **discretion** to charge and prosecute someone. In broad terms, they will charge a person if it is reasonably likely the court will find them guilty and it is in the public interest to charge them.

D. Bail & remand

- for some offences, the police will arrest the suspected offender and take them into custody.
- Bail — the release of the person from custody upon their arrangement to return to court to respond to the charges against them.
 - bail can be granted by a police, a bail justice, a magistrate or a judge.
- An accused person can apply for bail more than once and may do it at any stage between being charged and the date when their charges are heard by the court. If they are refused bail the first time, they can apply again. They must show the court that there are 'new facts and circumstances' since their first application.
- Bail conditions — can be imposed, such as not approaching the alleged victim or paying money that will be lost if the person does not attend court. If a person is granted bail but does not attend court, they can be arrested and may be charged with an additional offence.

E. Remand

- if the court refuses bail, the accused person will remain in custody. They are known as a 'remand' prisoner and will be held in custody until they successfully apply for bail or until the end of their trial — where they may be found guilty and sentenced to prison, or found not guilty & released.
- remand prisoners are innocent until proven guilty at trial.
- In Victoria, from 2005-10, about 10% of prisoners were on remand (the remaining 82% were serving prison sentences).

F. Prosecution

- prosecution is the process of presenting evidence in court which seeks to prove that a person committed the crime they are charged with.
- the police and the Office of Public Prosecutions (OPP) prosecute charges:
 - Police — summary offences, Magistrates' Court
 - OPP — indictable offences, higher courts
- police and the OPP have *discretion* to prosecute someone. In broad terms, they will prosecute a person if it is reasonably likely the court will find them guilty and it is in the public interest to charge them.
- Plea negotiation (cf plea bargaining in the USA) — involves the judge
- the prosecution acts on behalf of the State of Victoria, **not** the victim of the crime (all crimes are said to be committed against the state).
- however, there are a range of support services for crime victims and witnesses. In Victoria, the ***Victims' Charter*** sets out the rights of victims in relation to the investigation and prosecution of crimes, including rights to:
 - be treated fairly;
 - be kept informed;
 - make a victim impact statement if the court decides a person is guilty.

G. Courts & Trials

- most accused plead guilty and appear before the courts for sentencing.
- e.g. Western Australia:
 - 1997: 68 per cent of charges in the higher courts were determined by a plea of guilty
 - 1996/97: 90 per cent of police charges in the Courts of Petty Sessions were determined by pleas of guilty (LRCWA (1999) Report 92: 7.18)
- '...the vast majority of those who are prosecuted in the courts plead guilty to the charges against them. Indeed, if only a small percentage of those who at present plead guilty decided to contest the charges, our courts would break down under pressure of cases for trial, and not simply for sentence' (Waller & Williams (2001) 20).
- if someone pleads **not guilty** — a court hearing will determine whether the person committed the crime they are accused of. The prosecution must prove beyond reasonable doubt that the accused person can present evidence seeking to show they did not commit the crime.
- If a person pleads **guilty** — the court hearing will be for the purpose of sentencing the accused.

