

## Week 1 - Intro

### 4 components of CJS:

1. Defining the crime (elements of offences and defences) = substantive criminal law
2. **Rules and principles by which guilt or innocence is determined**
3. **Mechanisms by which people are brought within the criminal justice system (arrest, infringement notice)**
4. Sentencing

### Adversarial system:

- The proceedings are in the hands of the parties (evidence, arguments, witnesses) – judge as adjudicator.
  1. Gathering evidence for trial – responsibility for gathering evidence rests with the parties; P and D.
  2. Trial – 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 where there is evidence to support a criminal charge).
    - Option for D to plead guilty and avoid a trial.
  4. Nature of the trial process – all parties determine the witnesses they call and the evidence they give:
    - The opposing party has the right to cross-examine.
    - The court's 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 – largely relegated to the role of witness; they have no recognised status in either the pre-trial investigation or the trial itself as PROSECUTION IS BROUGHT ON BEHALF OF THE STATE.

### Key features of this system – traditional presumptions that characterise an adversarial system:

- Presumption of innocence (P must prove case against accused)
- Right to silence
- Right to fair trial
- Exclusionary rules of evidence (jury)

### BUT this must be increasingly qualified:

- Right to silence – some statutory reform in Australia and UK.
- Duty on P to disclose evidence.
- Right to confront witnesses *R v Darmody* [2010].
- Contemporary developments – ‘therapeutic jurisprudence’ – collaboration of accused (and defence counsel) e.g. Assessment and Referral Court (ARC) at Melbourne Magistrates’ Court.

### Jurisdiction:

- In Australia, criminal law and procedure is largely the responsibility of State governments.
- **Federal Government** and the Australian Federal Police have roles in relation to some offences – especially drug trafficking and terrorism.
- **State** – Vic Parliament creates most of the laws relating to crime and criminal procedure (including penalties and police powers).

### Jurisdiction – over persons:

- Natural persons – the original object of the criminal law (physical sanctions).
- Corporations – may be prosecuted; liability is attributed through the actions of employees acting within the 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 be.
- Foreign nationals – can be prosecuted for offences committed within the jurisdiction.

### Immunities:

- Sovereign
- Diplomatic
- Children:
  - Under age 10, children are presumed to be incapable of any criminal offence: *Children, Youth and Families Act 2005* s 344; *Criminal Code* s 7(1).
  - 10-14 – CL (*doli incapax*): rebuttable presumption that young persons lack the necessary level of mental culpability.
- 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): s 50 *Drugs, Poisons and Controlled Substances Act 1981* (Vic).
- Witness indemnity:
  - May be granted by Attorney-General or DPP.
  - Witness receives from P a written undertaking of immunity from P if s/he gives evidence on behalf of crown.
  - The effect is to render the person a compellable witness for the crown.

### Jurisdiction – time (Vic):

- Indictable offences:
  - At CL, 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 the precondition is not met, A cannot be convicted of the offence, even on a plea of guilty *R v Tait (1996)*.
- Summary offences:
  - Adults – charges must be filed within 1 year of the date on which the offence is alleged to have been committed: *CPA 2009* s 7.
  - Children – charges must be filed within 6 months of the date on which the offence was alleged to have been committed: *CYFA 2005* s 344A.

#### Jurisdiction – time (Federal):

- Individuals – maximum term of imprisonment for 1<sup>st</sup> offence is > 6 months – prosecution must be commenced within 12 months of commission of offence.
- Corporate entities – maximum penalty for 1<sup>st</sup> offence is 150 penalty units or more – prosecution may be commenced at any time.

#### Retrospectivity and criminal procedure:

- Presumption against retrospectivity doesn't 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 trial (not at the time of offending) *Rodway (1990)*.

**A** – the trigger – reporting crime to police

**B** – police questioning and investigation:

- Major issues concerning the admissibility of confessions are now addressed through technology – recording of police interrogations.
- Police questioning – regulated by statute and CL.
- Search and seizure – regulated by statute and CL.
- Scientific aids to investigation – fingerprinting, DNA testing and other forensic procedures largely governed by statute.

**C** – charging:

- Can be laid by police and the Office of Public Prosecutions (OPP).
- OPP – an independent, government-funded agency which prosecutes serious crimes while police prosecutors prosecute less serious crimes.
- Police – for some minor offences, police can caution or fine a person.
- If the alleged crimes are serious offences, police must first obtain advice from the OPP before laying charges.
- Although both the 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 public interest.
- Police and the OPP have discretion to charge and prosecute someone.

**D** – bail and remand:

- Bail – the release of the person from custody upon their agreement to return to court to respond to the charges against them.
- Bail can be granted by a police sergeant, a bail justice, a magistrate or a judge.
- A can apply for bail more than once and may do it any stage.
- If they are refused 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.
- If a person is granted bail but doesn't attend court, they can be arrested and potentially charged with an additional offence.

**E** – remand:

- If the court refuses bail, A will remain in custody.
- They 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.

**F** – prosecution:

- Process of presenting evidence in court which seeks to prove that a person committed the crime they are charged with.
- Police and the OPP have discretionary powers and prosecute charges.
- Plea negotiation – take place between P and D – judge is not involved.
- *Victims Charter* sets out the rights of victims in relation to the investigation and prosecution of crimes.

**G** – courts and trials – most A plead guilty and appear before the courts for sentencing.

**H** – Magistrates' Court: *Magistrates' Court Act 1989* (Vic):

- Trials of less serious offences (summary offences) are heard in the MC without a jury.
- MC also hears committal hearings for indictable offences – this is where a decision is made about whether there is enough evidence for the case to go to trial in the County or Supreme Courts.

#### Children and young people – CYFA 2005 (Vic):

- Trials of children and young people accused of crimes normally happen in the Children's Court.

- Jurisdiction – hears and determines charges against young people aged between 10-17 years at the time of committing the alleged offence.
- If, for example the young person has turned 19 by the time their court case is commenced in the CC, the case will be transferred to MC.
- Deals with all charges except:
  - Murder/attempted murder
  - Manslaughter
  - Child homicide
  - Defensive homicide
  - Arson causing death
  - Culpable driving causing death

#### County Court:

- Trials of indictable offences like murder and rape are heard in these courts.
- A jury hears evidence, decides the facts and applies the facts to the law, as directed by the judge, to determine whether A is guilty.
- County Court is the largest trial court in the state, hearing serious offences which are prosecuted by the OPP.

#### Jurisdiction of the County Court:

- Can hear all indictable offences, EXCEPT treason, murder and related offences.
- Most offences arise under Vic legislation; however, the Court also deals with a number of offences under Cth legislation.

#### Appeals to the County Court:

- The Court hears appeals from the criminal jurisdiction of the MC and the criminal and family divisions of the CC.

#### County Koori Court:

- Established in 2008 as a division of the County Court.
- Objective is to ensure greater participation of the Aboriginal community in the sentencing process of the County Court though the role played in that process by the Aboriginal Elders and others, such as the Koori Court Officer.

#### Supreme Court:

- Highest court in the State.
- The Chief Justice presides over the court, which is divided into **2 sections**:
  - a) **Court of Appeal** – hears appeals against decisions made by single judges of the Supreme and County Courts.
  - b) **Trial Division** – hears very serious criminal cases including rape and murder, which are prosecuted by the OPP.

#### Determination of appeal against conviction – s 276 CPA 2009:

- (1) On an appeal under s 274, the COA must allow the appeal against conviction if the appellant satisfies the court that:
  - a) The **verdict of the jury is unreasonable** or cannot be supported having regard to the evidence.
  - b) As the result of an error or an irregularity in, or in relation to, the trial there has been a substantial **miscarriage of justice**.
  - c) For any other reason there has been a substantial miscarriage of justice.
- (2) In any other case, COA must dismiss an appeal under s 274.

CASE: <i>Sibanda v The Queen</i> [2011]	
<b>FACTS:</b>	<ul style="list-style-type: none"> <li>• D convicted at trial of V – sentenced to 6 years imprisonment (min of 3.5 years).</li> <li>• D appealed against the sentence and conviction.</li> <li>• Prosecution and defence agreed that instruction of judge regarding consent was erroneous.</li> </ul>
<b>CONSIDER:</b>	<ul style="list-style-type: none"> <li>• What was the effect of erroneous instruction?</li> </ul>
<b>PRINCIPLES:</b>	<ul style="list-style-type: none"> <li>• An error by the trial judge doesn't necessarily result in an appeal being granted.</li> </ul>
<b>HELD:</b>	<ul style="list-style-type: none"> <li>• COA determined that there was no substantial miscarriage of justice because the belief in consent was not part of D's case.</li> <li>• Application to appeal against sentence and conviction was refused.</li> </ul>

#### Charter of Human Rights and Responsibilities 2006 (Vic):

- Rights of individuals in relation to criminal matters largely set out in s 25.
- Does not purport to create new rights.
- Designed to guide the courts in their interpretation of existing statutes.

Evidence = materials which the courts will consider in deciding disputed issues of fact.

#### Key themes in evidence:

- Foundational inclusionary rule (rule of relevance) – all relevant evidence is admissible; evidence that is not relevant is not admissible (no discretion): s 56 *Evidence Act 2008*.
- Judicial discretion to exclude prejudicial evidence.
- Exclusionary rules (discretionary) including:
  - Hearsay: s 59 (some exceptions: ss 60-75)
  - Coincidence/similar fact (some exceptions): s 98
  - Tendency (some exceptions): s 99

- Prejudicial effect outweighs probative value: s 137
- Fairness discretion: ss 85 (reliability) and 90
- **Illegally/improperly obtained evidence: ss 138 and 139 (failure to caution)**

#### Objectives of the rules of evidence:

1. Reliability principle relates to the aim of ensuring the guilty are convicted and the innocent are acquitted.
- This underpins a number of rules which supposedly enhance the accuracy of the outcome.
2. Disciplinary principle leads to the exclusion of certain forms of ‘wrongly’ obtained evidence.
3. Protective principle requires that A should be treated fairly and protected from the possible prejudice of juries.

#### Illegally/improperly obtained evidence:

- Now governed by s 138 *EA 2008*
- Evidence that was obtained –
  - a) Improperly or in contravention of an Australian law or;
  - b) In consequence of an impropriety or of a contravention of an Australian law – is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

#### What matters should a court take into consideration when applying this balancing test?

##### S 138(3) *EA 2008*:

- Without limiting the matters that the court may take into account under subsection (1), it is to take into account –
  - a) The probative value of the evidence and;
  - b) Importance of the evidence in the proceeding and;
  - c) Nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding and;
  - d) Gravity of the impropriety or contravention and;
  - e) Whether the impropriety or contravention was deliberate or reckless and;
  - f) Whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights and;
  - g) Whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention and;
  - h) The difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

<b>CASE: <i>R v Ireland (1970)</i></b>
<b>CONSIDER:</b> <ul style="list-style-type: none"> <li>• Admissibility of interview evidence after D stated that he didn’t want to answer any more questions.</li> <li>• Admissibility of photographs of D’s right hand.</li> <li>• Admissibility of evidence of medical practitioner who examined D’s hand.</li> </ul> <b>PRINCIPLES/HELD:</b> <ul style="list-style-type: none"> <li>• Unanimous verdict – special leave to appeal refused.</li> <li>• Interview evidence NOT admissible because it was not relevant – didn’t constitute admissions, wasn’t probative of any relevant fact or circumstance.</li> <li>• Relevant statute gave police power to take photographs for purposes of ID, but this didn’t extend to compelling D to be photographed for any other purpose – judicial discretion to exclude (and should’ve been excluded).</li> <li>• Relevant statute not complied with regarding the evidence of medical practitioner – judicial discretion to exclude (and should’ve been excluded).</li> <li>• HC not satisfied that trial judge exercised such a discretion, refused special leave to appeal.</li> </ul>
<b>CASE: <i>Dietrich v R (1992)</i></b>
<b>FACTS:</b> <ul style="list-style-type: none"> <li>• A could not find a lawyer and was forced to represent himself in a trial lasting 40 days.</li> </ul> <b>CONSIDER:</b> <ul style="list-style-type: none"> <li>• Fairness means different things to different people; it is an emotive term.</li> </ul> <b>PRINCIPLES:</b> <ul style="list-style-type: none"> <li>• Unless the government provides legal funding to all A’s facing serious charges, then the trials of all matters will not proceed.</li> <li>• Thus, s 197 inserted into <i>CPA 2009</i>.</li> <li>• Court is given power to order legal aid to provide legal representation at public expense, if it believes that without a lawyer A cannot obtain a fair trial.</li> <li>• Unfair trial is a subset of the broader notion of an abuse of process <i>Dupas v The Queen (2010)</i>.</li> </ul> <b>HELD:</b> <ul style="list-style-type: none"> <li>• Miscarriage of justice.</li> <li>• A charged with a serious crime has a common law right to a fair trial.</li> <li>• If a fair trial cannot occur because an indigent A cannot secure legal representation, then the trial should be stayed.</li> <li>• Did not order that legal aid must be provided to A; rather</li> <li>• It stated that unless exceptional circumstances exist, the trial should be stayed unless and until legal representation is provided by the government.</li> </ul>