

## Theories of justice

These theories are designed to ensure that the law operates in a way that is fair. They provide standards and requirements for the content of the law and the procedures through which law is implemented.

### – **Distributive justice**

‘Distributive justice is concerned with the distribution within a group or a community of things such as wealth, resources and power. Distributive justice is achieved when these things are distributed fairly and properly. The law is a means to ensure such a fair and proper distribution.’ (James and Field, 2013, p 408)

### Approaches to distributive justice

James and Field use the example of a chocolate cake to explain the three approaches

- **Egalitarian approach:** everyone gets an equal share, in terms of equality of opportunity or equality of outcome (J/F, 2013, p 408)
  - everyone would get an equal slice
- **Desert approach:** everyone gets what they deserve, not based on equality but based on some other criterion (e.g. need, talent or effort) (J/F, 2013, p 409)
  - might give the hungriest person the biggest slice, or give the baker of the cake the biggest slice
- **Utilitarian approach:** distribute in a way to maximise total happiness or welfare across the group or community (J/F, 2013, p 409)
  - might try and give as many slices away to as many people as possible, even if they are only small pieces

**John Rawls theory of distributive justice** requires an impartial distribution of resources and opportunities and is guided by two principles:

1. Each person should generally be free to do as they choose, provided they don't infringe on the freedom of others (i.e. liberty should be shared equally)
2. Social and economic goods (e.g. wealth and power) should be distributed equally unless a different distribution would be better for those who are worst off (i.e. social and economic goods might need to be distributed unequally to ensure that the disadvantaged receive the help they need)

## Access to Justice

Another issue is the relationship between law and society: how do we get to use the law? Is this relationship equal and fair?

To ensure our legal system achieves the objectives of justice, we need to ensure all people have access to:

1. Information about the law – so we can know what the law requires or entitles us to do
2. Courts, tribunals and other processes – so we can pursue a remedy when we suffer a wrong, or challenge a decision that affects us, or hold our public officials accountable.
3. Legal representation – to assist us in understanding the laws and procedures that affect us.

Some **barriers** to accessing justice are:

- **ignorance;**
  - the law is complicated, specialised, lengthy, obscure and challenging
  - it can be hard for a person with no legal training to access and understand the law that applies to them and how it will apply
- **cost; and**
  - legal services can be very expensive, which deters people from accessing legal services or pursuing a claim which they may be entitled to
  - the resources of the parties influences the access to adequate legal representation → typically, richer = can afford better lawyers
- **discrimination and disadvantage**
  - e.g. of groups which are less likely to access legal services, which can be a result of past or present discrimination and disadvantage
    - Indigenous Australians
    - Persons from non-English speaking backgrounds
    - Women
    - Homeless persons

(James and Field, 2013, p 414).

### Case Study: Self-Representation

Often a person who cannot afford legal representation will attempt to represent themselves in legal proceedings. This is permitted in our courts and tribunals, but it presents a number of problems:

- Difficulty understanding the substantive law which applies to the matter
  - No training in legal research, reading statutes and cases, understanding the way the doctrine of precedent and other legal doctrines work
- Difficulty understanding the procedural rules which apply
  - Forms, fees, time limits, disclosure requirements
  - Rules of evidence
- Time involved in preparing for a case
  - Can result in lost income
- Understanding the protocols and conventions of the courtroom

The result of this may be that a person might lose a case because they haven't understood the law/procedures correctly, even though they had a strong legal argument.

See: *Dietrich v R* [1992] HCA 57 in which the High Court held by majority that:

- in Australia, there is no common law right to publicly provided legal representation in all cases, and
- in some cases, however, legal representation will be necessary in order to ensure a fair trial, and a trial judge should use their power to adjourn a trial if it is in the interests of fairness that an accused have legal representation

Failure to do so can be a miscarriage of justice.

### **Initiatives to improve access to justice**

- Community Legal Centres
- Specialised community legal services (e.g. focus on disadvantaged groups)
- Pro Bono schemes – legal services without cost
- Legal Aid – government funded legal assistance for people who qualify
- ADR – help with dispute resolution without going to trial
- Interpreters and translators
- Utilising 'plain English' speak in legal documents

## CASE STUDIES

### Security related laws

#### National security and anti-terrorism laws

##### *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth)*

- Drafted so broadly that the laws potentially criminalise normal behavior allowing for arbitrary exercises of power
  - wording of the new offence:
    - information means information that is true *or* false, includes opinions and a report of a conversation
    - a person ‘deals’ with information if they: receive it, make a record of it, copy it, communicate it, publish it
- Laws may make it harder to hold government accountable to laws (vertical accountability)
  - Under these proposed amendments, and current national security laws, the ABC’s publication of confidential and secret cabinet documents would be in breach of the proposed bill.
- Contains excessive penalties, including imprisonment for life, irrespective of whether or not any harm has been caused or is likely to be caused

#### Anti-terrorism law and Human Rights (specifically, a Bill of Rights)

‘Human rights lack political effectiveness in Australia in part because they also lack legal force. Unlike every other democratic nation, Australia must search for answers to fundamental questions about civil liberties and national security without the benefit of a Bill of Rights. As other nations have shown, a Bill of Rights does not form an impenetrable barrier to bad law. However, it can be especially important when new laws are made and old laws amended with great haste in response to community fear. At such a time, legal systems, and the basic principles that underlie them, such as the rule of law and the liberty of the individual, can come under considerable strain. Bills of Rights can remind governments and communities of a society's basic values and of the principles that might otherwise be compromised at a time of grief and fear. After new laws have been made, a Bill of Rights can also allow courts to assess the changes

against human rights principles. This can provide a final check on laws that, with the benefit of hindsight, ought not to have been passed.’ (**‘Balancing National Security and Human Rights: Lessons from Australia’, Williams, 2005**)

### **Anti-terrorism law**

Since 2001 more than 100 anti-terrorism offences have been created

- Includes offences around financing terrorist organisations and travelling overseas to join terrorist groups
- Also created specific measures for investigating and prosecuting terrorism offence
  - Eg the use of ‘control orders’ for people suspected of terrorist involvement
    - **Div 104 of the *Criminal Code 1995 (Cth)***
      - Modelled on the control orders introduced in the UK
      - Involve restrictions on person’s freedom of movement and communication (e.g. through the use of tracking devices, the requirement to report to a specified person at set time and dates, a prohibition or restriction on the person to be at specified areas or places) for up to 12 months
      - Lower standard of proof than other similar measures
        - police officer can request a control order if they ‘suspect on reasonable grounds’ (**div 104.2 CC**)

Anti-terrorism laws could be criticised from perspective of principles of human rights, justice, ethics and the rule of law.

- (**Philip Ruddock (former Australian Attorney-General), 2003**):
  - “There will always be a trade off between national security and individual rights. The task of the government is to recognise these trade offs and preserve our security without compromising basic rights and liberties.”