

CRIMINAL JUSTICE SYSTEM - AIMS AND PROCESSES

The criminal justice system is:

- Contested space
- Collection of agencies
- Socially-constructed

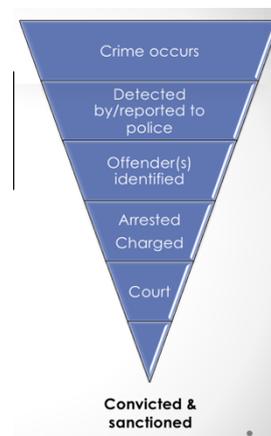
AGENCIES & KEY FIGURES IN THE CJS:

- Police
 - State
 - Federal
- Courts
 - The prosecution and defence
 - The judiciary
 - The jury
- Corrections
 - Prisons
 - Community corrections
 - Parole board
- Other
 - Forensic experts
 - Defendants
 - Victims
 - Victim support groups

These are listed in terms of perceived weight held. Police --> other. Police systems are seemed to be 'more important' than victim support groups information and ideas of criminality in enforcing the law.

THE 'FUNNELLING' EFFECT:

- At each stage of the criminal process the number of cases involved in the CJS becomes smaller and smaller.
- This reflects key discretionary decisions made by the police, the prosecutors and the courts.



KEY CONCEPTS: JUSTICE, RULE OF LAW, AND DUE PROCESS:

- Justice:
 - What is justice? Who defines what is just?
 - Can we achieve justice for all parties involved?
- Rule of Law:
 - No one is above the law
 - The law should be:
 - Transparent, reliable, consistent
 - Consistently and fairly applied
 - Appropriately scrutinised
 - Independent from government
- Due Process:
 - Rights of those who are brought before the law
 - The checks and balances of the CJS
 - Justice is fair and accessible for all regardless of race, religion, gender, age and financial means

- At all levels of the CJS, due process must be upheld.

DUE PROCESS - THE RIGHT TO SILENCE:

- Relevant to investigative, pre-trial and trial stage of the CJS
- Balances the rights of the accused and interests of the state.
- The police cannot compel a suspect to answer questions:
 - A suspect may remain silence because of:
 - Knowing their rights
 - Fear of consequences such as their words being distorted/used against them
 - Mistrust of the police
 - The desire to protect family or friends
 - Fear of reprisal from other possible offenders
 - The desire to hide legal but embarrassing behaviour
- In most jurisdictions, no negative interference may be drawn if a suspect exercises the right to silence
- But NSW recently amended their Evidence Act. Police must now caution that exercising the right to silence may be taken into account in court and a negative inference may be drawn.

OTHER KEY RIGHTS:

- Burden of proof
 - Presumption of innocence until proven 'guilty beyond reasonable doubt'
 - Limited defence disclosure
 - Full prosecutorial disclosure
- Access to legal representation
 - Quality of legal representation can impact significantly on outcomes;
 - Adversarial system: contest between two sides, one winner;
 - This makes legal aid funding a key issue
- Trial by jury
- Avenues for appeal

KEY THEME 1 - DISCRETION:

- Police:
 - Decision by victim to report offence or not
 - Decision by police to investigate or not, to arrest or not, to give a charge or warning, to use force or not
- Courts:
 - OPP decides whether to run a case, which charges to bring
 - Defendant decides whether to plea guilty or not guilty
 - Defendant decides whether to give evidence at trial or not
 - Judge or jury determine guilt
 - Judge decides what sentence to impose.
- Corrections:
 - Risk assessments
 - Classification of prisoner (maximum or minimum security)
 - Decision to release on parole
 - Decision to 'breach' an offender on a community order

KEY THEME 2 - ACCOUNTABILITY:

- Police:
 - Limited accountability; much police work is unobserved
 - Internal oversight - professional standards command

- External oversight - Independent Broad-based Anti-corruption Commission (IBAC)
- Media
- Courts:
 - Accountability achieved through appeal
 - Public and open justice - open courtrooms
 - But decisions of juries cannot be scrutinised
- Corrections:
 - Challenging to achieve accountability within the closed walls of a prison
 - Privatisation of prisons = problematic for public accountability
 - Mainly carried out by the Office of Correctional Services Review (OCSR)
 - See: http://www.corrections.vic.gov.au/utility/office+of_correctional+services+review/
 - Some oversight by IBAC

CHAPTER FIFTEEN TEXTBOOK NOTES

THE CHARACTER OF THE CRIMINAL JUSTICE SYSTEM:

SYSTEM OR COLLECTION OF AGENCIES:

These bureaucratic institutions have an investigative arm (police and prosecution authorities, together with specialist investigative agencies), an adjudicative arm (the criminal courts), and correctional arm (prisons, community corrections, and probation and parole services). Must also include the government institutions and agencies that carry out regulatory functions and the agencies that are designed to address public corruption such as the various police integrity commissions and the State and Commonwealth offices of the Ombudsman. The role in justice administration of the non-government sector, including policing by private security firms, and the important "watchdog" role of public interest advocates, such as civil libertarian groups and investigative journalists is also important.

Another problem with the phrase "criminal justice system" is that it trains our attention wrongly to visualise the response to crime as being only that which agency officials such as police officers, magistrates, and corrections officers do. As Lacey (1994: 8) astutely notes, "the most under-noticed feature [of the criminal process] is that its whole operation depends on the decisions and actions of ordinary citizens." First, they elect people to represent them in making laws, and indirectly, in enforcing them. Secondly, they play a substantial role, more so than police, in detecting and reporting crime. Police and prosecutorial investigation and evidence gathering depend heavily on the goodwill and participation of citizens as witnesses and victims of crime. Thirdly, citizens serve on juries. Fourthly, those who are victims of crime may, in addition to their role as witnesses, be asked to participate in court diversion, pre-sentence, or post-sentence schemes such as conferencing. Fifthly, citizens work as volunteers and paid workers in criminal justice agencies and in organisations that serve criminal justice agencies.

Politicians and those working in media organisations also have influence on the criminal process. Politicians can directly affect the criminal justice system by passing laws, such as "truth in sentencing", that constrain the discretion of sentencing officials and increase the numbers of people in prison. Passage of legislation on social and economic policies also has an indirect effect on the crime rate, when, for example, there are cutbacks to unemployment benefits or a new road is built, which cuts through a town and may disrupt social cohesion. The role of the media is principally to entertain and far less to inform and educate the public about crime and the criminal justice system.

Australia operates under an "adversarial" system which means that the two parties in the case - the prosecution and the defence - bring evidence before a magistrate, judge, or jury, each of whom acts as a fact finder. An alternative model, the inquisitorial system, has the prosecutor or police officer assemble the case (or dossier), but the judge calls witnesses and examines them.

Major Criminal Justice Agencies, Personnel, and Agency Functions in Australia:

Police (officers):	<ul style="list-style-type: none"> • Investigate crime • Prevent Crime • Arrest and detain suspects • Maintain public order • Control traffic • Respond to criminal and non-criminal emergencies
Prosecution (prosecutors):	<ul style="list-style-type: none"> • Filter out weak cases, keep strong cases • Prepare cases for prosecution • Prosecute cases in Youth/Children's Courts, Magistrates' Courts, District Courts, and Supreme Courts, including preparing cases for trial
Courts (justices of the peace, magistrates, judges):	<ul style="list-style-type: none"> • Decide on bail and remands (whether there is to be detention or not in the pre-trial period) • Protect the rights of the defendant • Preside over the trial and plea process • Decide on guilt (magistrate, judge, or jury) • Sentence the defendant • Hear appeals against conviction and sentence • Provide public arena so that justice "can be seen" to be done
Community corrections (officers):	<ul style="list-style-type: none"> • Provide information to the court on a defendant's appropriateness for bail or probation • Prepare pre-sentence reports • Work with offenders with probationary orders or community service orders • Supervise released prisoners or pre-release work with persons in custody
Prisons (corrections officers):	<ul style="list-style-type: none"> • Hold people on remand (in custody in pre-trial period) • Hold people who are sentenced to a term of imprisonment • Maintain appropriate conditions for those in custody • Provide activities (such as rehabilitation programs) that encourage learning and life skills • Prepare inmates for release
Victim support groups:	<ul style="list-style-type: none"> • Counsel and assist victims at all stages of the criminal process, from arrest of the perpetrator, through bail applications, sentence and post-sentence.
Defence lawyers:	<ul style="list-style-type: none"> • Provide advice to and advocate on behalf of suspects, accused persons, and sentenced individuals at all stages of the criminal process.

STATE OR FEDERAL LAW:

Under the Australian federal constitutional structure, State and Territory governments, not the Commonwealth government, are given responsibility for most of the policing and justice functions. Only when law enforcement necessarily extends into areas under the umbrellas of the federal parliament (e.g. people smuggling, drug importation, and customs fraud) is the Commonwealth involved.

CRIMINAL CODES OR COMMON LAW:

Criminal law in Australia is principally governed by the States and Territories, each with its own set of laws. In all jurisdictions, criminal laws are either enacted through parliament in the form of "statutes" or Acts (legislation) or formulated by judges through judgments made in the courts

(common law). Although there are some core legal principles common to all jurisdictions, each differ in fundamental ways such as the definition of offences, their relative seriousness, defences and excuses to crime, and prescribed punishments. These different approaches give rise to inconsistencies in the charging, convicting, and sentencing of offenders. In addition, they can create incompatibilities in data collection and statistical analysis.

DUE PROCESS OR EFFICIENCY:

Herbert Packer (1968) depicted two value systems in the criminal process; the Crime Control Model and the Due Process Model. The Crime Control Model is concerned with the efficiency of the criminal process, whereas the Due Process Model is concerned with the accuracy and reliability of the decisions made.

The Crime Control Model believes an efficient criminal justice system calls for weeding out what Packer referred to as the "factually guilty" from the "non-guilty" cases as early as possible by police officers and prosecutors, who make decisions based on talking with witnesses and reviewing the evidence. Once this screening is accomplished, the case proceeds through successive stages until it is disposed of. During the later stages, Packer said that officials operate on a presumption of guilt, meaning that, based on earlier informal investigations, they assume that innocent individuals have been weeded out. The Crime Control model is based on the presumption that a key goal of agencies within the CJS is to maintain public order and that to do so, various agencies must use their power (albeit, in some cases, wrongly) to ensure that order is maintained.

The Due Process Model has less faith in the reliability and accuracy of decisions made in the early stages of the criminal process. Greater reliance is placed on formal fact finding in the adjudication phase of the criminal process. Judicial officers are supposed to operate on a presumption of innocence. The Due Process Model distinguishes between the factually and legally guilty. *Factual guilt* is based on evidence of a person's commission of a crime, whereas *legal guilt* is based not only on this evidence, but also on evidence that the state has acted legally in obtaining and proving its case beyond reasonable doubt. The Due Process model recognises the power held by agencies of the CJS and emphasises the need for 'checks' of decision-making at all points of the criminal process.

Andrew Ashworth (1998: 27-28) points out several problems with Packer's models, among them: he failed to discuss the relationship between Due Process and Crime Control, he paid insufficient attention to financial pressures on the state's response to crime, and he was silent on victims. He also pointed out some logical lapses. Ashworth says that in emphasising the value of speed in the Crime Control Model, Packer ignored the equal concern that a Due Process Model would give to "unreasonable delay" (1998: 28). On the relationship between the models, he suggests that we might view Crime Control as "the underlying purpose of the system, but that it ... should be qualified out of respect to Due Process" (1998: 27).

Doreen McBarnet (1981) and others have also identified a way to view the relationship between the two models. The Crime Control Model is more evident in Magistrates Courts, which dispose of the less serious cases, typically by guilty pleas, and where trials are uncommon. The Due Process Model is more frequently observed in the District and Supreme Courts, which handle more serious cases, where a higher proportion of matters are dealt with by trial, and where the full repertoire of legal arguments and options is utilised, given the potential for a lengthy prison term if a defendant is convicted.

CRIMINAL:

In summary, the criminal justice system could best be defined this way: a loosely coupled collection of interdependent agencies, each having bureaucratic interests, and each having specific functions

(which can be in conflict with other agencies) that are subject to legal regulations, for which agency workers have great discretion in making decisions when responding (or not responding) to harms defined as criminal by the state, and where value conflicts exist within and across agencies and in the general population about the exact meaning of "justice".

REPORTING CRIME TO THE POLICE:

People first enter the criminal justice system when their activities have been reported to the police and the police act upon the report. Once an offence is reported, the police may decide not to investigate it, or they may be unable to identify a suspect. If they do identify a suspect, the person may not be apprehended or arrested, or charged with a crime if the evidence against them is insufficient or inconsistent. If a suspect is arrested and charged, the case may go to court, but the charges may be dismissed or withdrawn. If a case is finalised in court by conviction (typically by the accused entering a plea of guilty to the offence or to a less serious offence, and less often, by trial), the defendant may receive a non-incarceration sentence.

POLICE ACT UPON THE REPORT - ARREST AND QUESTIONING:

The common law authorises an arrest when there are reasonable grounds to believe that the suspect has committed or is committing an "arrestable" offence. Police officers can also detain any person upon suspicion that the person might be about to commit an offence. If their suspicions turn out later to be incorrect, they are generally immune from a legal suit so long as their grounds for suspicion were well founded.

PROSECUTION:

After a suspect has been formally charged, the case moves from the investigative to the prosecutorial stage. The state, through the process of prosecution, acts on behalf of citizens against the accused person (the defendant). The police generally determine what charges will be laid against a defendant and have responsibility for prosecuting the charges in the lower courts. At the pre-trial stage, prosecutors advise the defendant's legal representatives of the prosecution evidence. This ensures that the defendant knows precisely what case they are required to meet.

"Plea bargaining" is the term applied to negotiations between the prosecution/police and defendants (and their legal representative) ahead of any plea. The aim of such bargaining (with respect to the facts to be agreed and the charges to be laid) is to achieve pleas of guilty in exchange for some benefit to the defendant. Typically, the benefit is a possible reduction in the defendant's sentence. However, Australian judges are not involved in the process, and they do not indicate a potential sentence. The Australian experience is better described as charge bargaining (occurring between the police or prosecution and a defendant's legal representative only).

Advantages:

From the state's point of view, "plea bargaining" has the benefit of avoiding the need for, and the expense of, a trial. It also eliminates the change - feared by the prosecution - that an accused person may be found not guilty, if a more serious charge goes to trial, and thus exonerated completely. The advantage to the defendant of a plea bargain is that it often results in fewer (or less serious) charges and, therefore, in a potentially reduced sentence upon a plea of guilty.

Disadvantages:

The problem with such bargaining is that innocent defendants (or defendants with a viable defence) may be induced to plead guilty because of the pressure to do a deal (a plea of guilty can lead to a sentence discount of between 25-40%) or because they view that their attempt to challenge the prosecution evidence (albeit flawed) may be fruitless. Moreover, a plea of guilty does not expose to the scrutiny of a trial any irregularity in police practices, investigations, or the exercise of a prosecutor's discretion.

CRIMINAL COURTS (THE HEARING):

There are three tiers: lower, intermediate, and superior courts.

MAGISTRATES COURTS:

The Magistrates Court is presided over by a paid magistrate; or in some jurisdictions where there is no available magistrate, two unpaid Justices of the Peace may hear minor matters. The severity of the fine or sentence that can be imposed in a criminal case is limited (usually only up to 2-3 years' imprisonment and with maximum fines ranging from \$120,000 to \$150,000). Decisions in these courts are made without a jury and are referred to as "summary" decisions.

An "indictable" offence is a more serious offence, and it is usually heard in a higher court. A person charged with an indictable offence will have a right to a trial before a jury if they plead not guilty. In some jurisdictions, a person charged with an indictable offence can elect to have the matter heard summarily (by a magistrate). All defendants who will be heard, or who elect to be heard, in the higher courts must first appear before a magistrate at a "committal" hearing. The magistrate decides whether there is a "case to answer" that is, whether the evidence against the person (either oral or written argument) is such that a jury could find them guilty of the offence. If the magistrate finds there is a case to answer, the accused is committed for trial in the higher court. If there is no case to answer, the charge is dismissed.

INTERMEDIATE COURTS:

District/County courts hear matters involving more serious crimes (but not usually murder, attempted murder, or manslaughter). Trials in these courts are presided over by a judge, and usually involve a jury unless the defendant has elected to be tried by "judge alone".

SUPREME COURTS:

The most serious crimes are usually dealt with in this court. Again, a jury will usually hear the case, appeals from the lower courts and from the Supreme Court are heard by the Court of Criminal Appeal (three Supreme Court judges). In rare circumstances an appeal can be made directly to the High Court. The rules relating to appeals vary among the States and Territories.

COURTS DECISION-MAKING AND SENTENCING:

There are two types of decisions in the criminal process (Ashworth 1998). One is processual, that is, decisions about "the processing of the case from initial charge through to trial" (Ashworth 1998: 10); these include police procedures in questioning suspects and gathering evidence, and prosecutorial decisions on what charges to lay. Another is dispositive, that is, decisions about "the disposal of the case" (Ashworth 1998: 10). Sentencing is a dispositive decision. Although the distinction between processual and dispositive can blur in practice, it alerts us to the different values that guide each decision. Processual decisions are guided by values of legality, and equality before the law (consistency of treatment and avoiding discriminatory practices) (Ashworth 1998: 50-61). Dispositive decisions are guided by values of proportionality and crime prevention or reduction (Ashworth 1998: 61-63).

Upon conviction by plea or trial, the defendant is sentenced by a judge. The purposes of sentencing are varied, as exemplified by section 5(1) of the Sentencing Act 1991 (Vic.), which states the following:

The only purposes for which sentences may be imposed are:

- a. To punish the offender to an extent and in a manner which is just in all of the circumstances; or
- b. To deter the offender or other persons from committing offences of the same or a similar character; or

- c. To establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
- d. To manifest the denunciation by the court of the type of conduct in which the offender engaged; or
- e. To protect the community from the offender; or
- f. A combination of two or more of those purposes.

PROPORTIONALITY - DESERT THEORY AND RETRIBUTIVE PUNISHMENT:

In Victoria's Sentencing Act 1991, items (a) and (d) - to punish and denounce crime - are associated with the value of proportionality. This value is embodied in desert theory and retributive punishment. The core idea is that the penalty structure should reflect a relationship between crime seriousness and punishment seriousness (harshness), and that the absolute level of punishment should be in proportion to the harm. A retributive justification for punishment means that a crime must be censured and that a punishment (penalty or sanction) should reflect the degree of blameworthiness that we attach to the act. The aim is to punish a backward orientation to punishment (von Hirsch 1985).

DETERRENCE, REHABILITATION, INCAPACITATION THEORIES AND UTILITARIAN PUNISHMENT:

The remaining items in Victoria's Sentencing Act 1991 (b, c, and e) are associated with the value of crime prevention. This value is embodied in deterrence, rehabilitation, and incapacitation theories and utilitarian punishment. The aim is to prevent future crime, and thus, we may say it takes a forward orientation to punishment. The major theories are:

- Individual deterrence: to dissuade or deter an offender from committing a crime in the future.
- General deterrence: to dissuade or deter members of the broader community from committing a crime in the future.
- Rehabilitation: to change the attitudes or behaviour of offenders so they do not commit crime in the future.
- Incapacitation: to protect community members from certain offenders who may pose a threat to their welfare and safety.

VICTIMS AND SENTENCING:

The prosecution is primarily interested in preparing and presenting criminal cases to the court. After conviction and at sentencing, the prosecution role is to assist the court in making submissions on any aggravating factors (mitigating factors will be highlighted by defence counsel) and on statutory provisions such as sentences guidelines. The prosecution also has a role at sentencing in making an application for a reparation order (also called a compensation order) and facilitating the submission of a Victim Impact Statement. The prosecution's application for a reparation order will document the losses the victim incurred from an offence, with the aim of the defendant being required to make good on these losses. A reparation order is part of sentencing legislation, but even after a judicial officer makes it, it is up to a victim to enforce it. A judicial officer is required to regard for the impact of the offence on the victim and on the community when sentencing the defendant. Victims of violent offences may also be eligible to apply for money from state-administered schemes for criminal injuries compensation or financial assistance. Such schemes are not part of sentencing, nor is there any strict requirement that an offender be located, charged or convicted. However, most Australian schemes require that victims will have reported the offence to police.

APPEALS:

Any person who believes that they have been unfairly convicted or given a sentence they consider to be excessive can appeal their conviction and/or sentence. All appeals are heard in the Court of Criminal Appeal (in each state) and, ultimately, the High Court (if there is a further appeal). Most of the High Court's work involves hearing appeals from the courts of the different states and territories,

which have worked their way up through the hierarchy of courts, sometimes (albeit rarely) all the way from a magistrate's decision.

CLOUD NOTES

Within Australia, the CJS can be conceived as the arrangement between these various "state-run bureaucratic institutions [to] deal with offending and offenders" (Daly and Sarre 2017, p.358). However, the term "criminal justice system" can cause misconceptions about these institutions, mostly because people may imagine that responding to crime is the only purpose of the police, court and prison officers (Daly and Sarre 2017, p.359). Daly and Sarre (2017, p.359) instead suggest that we should instead refer to the CJS as a "collection of interdependent justice agencies" that requires the input of ordinary citizens in order to be able to function and for laws to be enforced.

Whilst research commonly recognises that the key goal of the CJS is to prevent "the certain kinds of behaviour that society regards as either harmful or potentially harmful" (Findlay, Odgers and Yeo 2009: 2), significant debate has emerged as to what the key aims and values of the CJS are and how these can be achieved in practice.

THE CRIMINAL JUSTICE SYSTEM:

The criminal justice system (CJS) comprises multiple agencies that operate at various stages of the criminal process. Agencies that operate within the CJS include the police, the courts, community corrections, prisons and other key organisations and actors.

Figure 15.1 (Daly and Sarre 2017, p.365) in chapter 15 of the textbook illustrates where these different agencies operate throughout the criminal process. The criminal process has often been described as a 'funnel' - as at each stage of the CJS the number of cases that progress becomes smaller and smaller. This means that the agencies involved in the earlier phases of the criminal process, specifically the police, are faced with the largest number of cases, whilst agencies such as the courts and corrections are confronted with far fewer.

This narrowing of cases to proceed through the system illustrates one key effect of the discretionary decision-making powers of the agencies that operate within the CJS. Discretionary decision-making is evident at all points of the CJS - during the police investigation, the court process and through the punishment of offenders. Whilst the operation of each of these stages is heavily scrutinised, those who operate within it - the police officers, legal counsel, judges, probation officers and correctional staff - are afforded a high-level discretion on a day-to-day basis. Importantly, at each point of the CJS, people involved make discretionary decisions relating to whether cases should continue within the system or not (Daly and Sarre 2017).

The funnelling process described by Daly and Sarre (2017) means that few cases that are initially reported to, or come to the attention of, the police actually go before the courts or result in a conviction.