MLP707 - Criminal Procedure & Policy

Week 1 — Foundations & Classification

What criminal procedure is and why it matters.
Criminal procedure structures how the State investigates, charges and tries offences, and how courts supervise those processes from first contact through appeal. The animating purpose is to resolve the real issues justly, efficiently, timely and cost-effectively within an adversarial/accusatorial model, where parties present their cases and judges safeguard fairness.

System design.
The course frames the Australian model as adversarial/accusatorial: parties present their cases and the judge manages process and rules of evidence. The accusatorial premise means the prosecution must prove the case; the accused need not assist. Procedural fairness has two indispensable limbs: a real opportunity to be heard and an unbiased decision-maker.

Burdens, standards, and fairness.
The prosecution carries the legal burden on every element, with the standard of proof at trial beyond reasonable doubt; the accused typically bears only an evidential burden to raise statutory defences. Procedural fairness requires timely notice of the case to be met and a real opportunity to respond, administered by an impartial court.

Classification of offences and procedural tracks.
Offences divide into summary and indictable.

- Summary matters run on streamlined timetables in the Magistrates' Court.
- Indictable matters engage pre-trial screening (e.g., committal or equivalent management) and trial on indictment. Some indictable offences are triable summarily where statute and the interests of justice permit.
- This classification determines venue, disclosure settings, case-management tools, and trial rights (e.g., jury availability).

Streams and consequences.
Classifying an offence as summary or indictable selects the procedural track (venue, disclosure, pre-trial steps, trial rights). Some indictable matters are triable summarily where statute and the interests of justice allow. This early classification drives timetabling, disclosure width, and how the court will manage the case.

Core process map introduced in the materials.
A standard sequence is: allegation and investigation → arrest or summons → charge/first appearance → bail decision → for indictable matters, committal/case conference → pre-trial rulings → trial → sentence → appeal. At each point, analysis turns on (1) the source of power, (2) the legal threshold, (3) the safeguard(s) that condition use of the power, and (4) the consequence/remedy for non-compliance.

Remedial architecture.
Where the State misuses power, courts can stay proceedings, exclude evidence, or craft directions and orders to neutralise prejudice. The materials emphasise front-loading: identify

defects early, link them to a practical remedy, and explain how the remedy restores fairness or reliability.

Authorities and how to use them.

- Woolmington v DPP establishes that the "golden thread" of the criminal law is the prosecution's burden to prove guilt beyond reasonable doubt. Deploy it to frame who must do what at each stage and to rebut any attempt to shift a legal burden onto the accused.
- Dietrich v The Queen holds that where an accused on serious charges, through no fault of their own, cannot obtain representation, proceeding may be unfair; the remedy is usually adjournment or a stay. Use Dietrich to structure submissions on fairness at the threshold of trial management and to justify timetable relief when representation is genuinely unavailable.

IRAC — Foundations check.

Issue. What procedural framework and burdens govern the next step?
Rule. Identify the track (summary/indictable), the burdens/standard, and any express statutory preconditions.
Application. Map facts to the track and burdens; test whether the fairness basics (notice, ability to respond, impartiality) are satisfied.
Conclusion. State the immediate order sought (e.g., disclosure timetable; adjournment under Dietrich; management directions) and explain why it advances a just and efficient resolution.

Key ideas (quick recall).

- Accusatorial system; procedural fairness; burden/standard
- Summary vs indictable determines venue, disclosure and rights
- Always analyse power → threshold → safeguard → consequence

🟨 Exam tip. Open every answer with two clean sentences: (1) classify the track, (2) state who bears which burden now. Those anchor every later ruling.

Week 2 — Arrest

Definition, power, and threshold.
An arrest is a compelled restraint of liberty pursuant to a statutory power, justified only where there is an objectively reasonable suspicion (more than possibility, less than belief) that the person has committed, is committing, or is about to commit a relevant offence. Officers should state the grounds, use no more force than necessary, and confine detention to authorised purposes (bringing before a court, prompt investigative steps within time limits).

Threshold and execution.
Reasonable suspicion is an objective standard based on the information actually available to the officer at the time, not on hindsight. Alternatives (e.g., a summons) matter for proportionality. Where jurisdiction for custody is disputed, a conditional appearance may preserve challenges.

Ancillary search.
A search said to be "incident to arrest" must be supported by its own authority and must remain purpose-bound (e.g., safety, preventing destruction of evidence). Arrest alone does not license exploratory rummaging.

Authorities and how to use them.

- George v Rockett explains that statutory requirements of "reasonable grounds for suspecting" or "believing" are objective: the information must rationally find the state of mind. Use Rockett to test arrest and warrant thresholds against the facts known at the time.
- R v Rondo distils reasonable suspicion as something more than a possibility, less than a belief, assessed solely on information available at the decision point; invoke Rondo to attack "hunch-based" stops, searches and arrests.
- Halliday v Nevill confirms a narrow-implied licence to approach a home and "knock and talk"; it does not authorise entry for a coercive purpose. Use Halliday to challenge warrantless entries repurposed as casual visits when the real aim was coercion.

Consequences.
If the threshold or purpose limits are not respected, the arrest (and any derivative steps) may be unlawful; evidentiary consequences arise under the exclusion discretions (see Week 4).

IRAC — Lawfulness of arrest.

Issue. Is the arrest valid given power, suspicion, grounds, force and detention purpose?
Rule. There must be legislative authority; reasonable suspicion on the information actually available (Rockett, Rondo); grounds should be stated; force limited to necessity; detention confined to authorised ends; no bootstrapping of ancillary search without its own power.
Application. Identify the statute; list known facts; test objectively against the suspicion threshold; record whether grounds were given; assess proportionality and any separate search power.
Conclusion. State validity and the knock-on consequences (admissibility challenges; potential civil liability).

Key ideas (quick recall).

- Statutory power + objective reasonable suspicion at the time
- Stated grounds, necessary force, authorised purpose of detention
- Ancillary search needs its own authority

Exam tips.

- Write the source of power and the threshold before applying facts.
- If arguing proportionality, identify the less-intrusive alternative and explain practicality.

Week 3 — Bail

Framework and purpose.
Bail balances personal liberty with community safety and system integrity. Depending on the offence category, the statute may require the accused to show cause or to establish exceptional circumstances before the court moves to the universal unacceptable risk assessment. The guiding principle is to adopt the least onerous conditions that adequately address identified risks.

Assessing and managing risk.
Risks usually centre on failure to appear, interference with witnesses, further offending, and endangering safety. The materials emphasise prior compliance, ties to the jurisdiction, stability(housing/employment), and supports (surety, supervision, treatment). Conditions must be targeted to specific risks and be clear enough to guide behaviour and enforcement.

Authorities and how to use them.

- Re Ceylan explains the "compelling reason"/reverse onus structure in Victoria and reads it through the text, context and purpose of the Bail Act; rely on it to organise submissions when a reverse-onus category applies. Victorian appellate guidance (often traced to Robinson v The Queen and subsequent cases) stresses that even if a reverse onus is satisfied, the court must refuse bail if unacceptable risk remains; cite this to keep the structure orthodox: reverse onus first (if applicable), then unacceptable risk with reasons tied to statutory factors.

Review, variation and breach.
Bail can be reviewed on material change or where fresh proposals genuinely reduce risk. Non-compliance is addressed by breach procedures, which focus on whether conditions were clear and reasonably capable of compliance. A material change (health, accommodation, supports) justifies variation; breach responses turn on clarity and practicality of conditions, intention, and whether risk can still be controlled.

IRAC — Bail determination.

Issue. Should bail be granted, refused, or conditioned under the proper test?
Rule. Apply the correct limb (exceptional circumstances/compelling reason if engaged), then the unacceptable risk test; adopt least onerous conditions that mitigate specific risks.
Application. Identify risks and propose conditions that address each one with reasons; engage expressly with victim/community safety where relevant.
Conclusion. State the outcome and record clear, enforceable, proportionate conditions.

Key ideas (quick recall).

- Two-step where applicable: reverse onus → unacceptable risk
- Least onerous conditions that actually reduce specified risks
- Material change drives variation; clarity matters for breach

Exam tips.

- State the test in one sentence, then write one sentence per condition explaining the risk it addresses and how.

Week 4 — Search & Seizure

Authority, particularity and execution.
Coercive entry and search require clear statutory authority. A warrant or defined exception (e.g., incident to arrest) frames the scope (places, persons, things) and prescribes execution duties (timing, announcement, records). The more intrusive the step (especially with digital searches), the tighter the required particularity and discipline in execution.

Consent searches.
Consent must be voluntary, informed, and bounded to the scope understood by both sides; exceeding that scope risks invalidity and exclusion. Consent to "have a quick look" differs from permission for an intensive forensic examination; staying within agreed scope is essential.

Authorities and how to use them.

- Coco v The Queen stands for the principle of legality: statutes authorising intrusions on fundamental rights (like home privacy) must do so in clear words, and ambiguities are resolved against intrusion. Use Coco to insist on strict compliance with preconditions and tight construction of powers.
- George v Rockett requires that issuing officers be given material that rationally supports the required suspicion/belief; deploy Rockett to challenge thin affidavits and generic particularity.
- DPP v Leonard (NSW) confirms that consent can validate a search even without express advice of a right to refuse; voluntariness remains a fact question — rely on it where the Crown asserts consent and you need to test scope and voluntariness.

Illegality, impropriety and exclusion.
At common law, Bunning v Cross established a balancing discretion for illegally or improperly obtained evidence; Uniform Evidence Act s 138 now governs in many jurisdictions. Deliberate or reckless illegality, poor reliability, and the availability of lawful alternatives weigh toward exclusion; the importance of the evidence and the gravity of the offence may weigh the other way. Kadir v The Queen; Grech v The Queen shows the modern approach: the High Court excluded covert surveillance unlawfully obtained by private actors working with investigators, emphasising deliberateness and the ready availability of lawful methods; other items (e.g., warrant-based evidence) were separately admitted, illustrating item-by-item analysis.

IRAC — Validity of search/seizure (and admissibility).

Issue. Was the search/seizure authorised and properly executed, and should the evidence be admitted?
Rule. Identify the statutory authority or valid consent;
apply particularity and execution requirements; if illegality/impropriety is shown, weigh s 138 factors (Bunning; Kadir).
Application. Set out the warrant/exception terms; map each step against those terms; for consent, specify who consented, what was explained, and the limits agreed; where illegality is found, analyse s 138 deliberately (gravity, deliberateness, reliability, importance, lawful alternatives).
Conclusion. Uphold/strike the search; admit or exclude evidence (with reasons); make ancillary orders (e.g., return of property).

Key ideas (quick recall).

- Particularity confines scope; execution rules bite

- Consent must be voluntary and bounded
- s 138 item-by-item balancing; deliberateness weighs to exclusion

Exam tips.

- Do a side-by-side: authorised vs done. For s 138, write the factors as sub-headings and argue under each.

Week 5 — Forensic Procedure & Fingerprinting

Classification controls authority and safeguards.
Forensic procedures are intimate (e.g., blood, buccal swab) or non-intimate (e.g., fingerprinting). Classification determines who may authorise, what threshold applies, and which safeguards (support persons, information, recording) must be observed. Authority rests on informed, specific, voluntary consent or a proper order/authorisation; extra protections apply to children and protected persons.

Conduct, record and retention.
Lawfulness turns on the manner of taking, information provided, presence of required supports, chain of custody, and compliance with retention/destruction rules. These affect both admissibility and permissible future use.

Admissibility.
Non-compliance can render results inadmissible or provide grounds for a discretionary exclusion. Even where the result is probative, the manner of obtaining it is scrutinised to protect the integrity of the process.

Authorities and how to use them.

- Police v Dunstall (HCA) shows that where Parliament designs a statutory proof regime (e.g., alcohol readings), courts must assess fairness and exclusion within that framework; use it to argue that departures from mandated procedure can justify exclusion, but only by applying the statute's structure rather than intuition.
- Aytugrul v The Queen warns against misuse of DNA statistics; directions must prevent juries from overvaluing "random match" figures. Rely on Aytugrulwhen proposing clarity in directions and when explaining the probative force (and limits) of DNA/fingerprint evidence. Uniform Evidence Act s 138 (see Week 4) governs unlawfully obtained forensic material; the gravity/deliberateness of any impropriety and the availability of lawful alternatives are pivotal in the balance.

IRAC — Legality of forensic procedure (and admissibility).

Issue. Was the forensic step (fingerprints/DNA) lawfully authorised and conducted, and is the product admissible?
Rule. Identify classification; specify consent vs order; state authoriser and threshold; confirm safeguards for vulnerable persons; if non-compliance occurred, apply s 138; ensure directions accurately convey the meaning of statistics (Aytugrul).
Application. Test consent for voluntariness and comprehension; verify required supports and the manner of taking; check chain of custody and retention/destruction compliance; if impropriety exists, balance s 138 factors; anticipate necessary judicial directions on statistics.
Conclusion. Admit/exclude; specify destruction or limits on retention where appropriate.

Key ideas (quick recall).

- Classification → authority → safeguards
- Consent must be informed and specific; orders must meet the threshold
- Chain of custody and retention rules are part of legality

Exam tips.

- Start by labelling the classification — it dictates the authoriser and protections.
- If relying on consent, write exactly what was explained and how understanding was checked.

Week 6 — Police Questioning & Confessional/Identification Evidence

Caution, silence, voluntariness.

Before questioning, police must give an effective caution and respect the right to silence. The caution's timing, contents, and the suspect's comprehension are central. Questioning should cease (or be paused) when the right is invoked, subject to the limited contexts permitted by the governing statute and policy.

Admissions must be voluntary; threats, promises, prolonged or oppressive conditions, or exploitation of vulnerability vitiate voluntariness. Enhanced safeguards apply to vulnerable persons (support persons, interpreters, recording).

Recording and documentation.

Lawful practice requires the timing and terms of the caution, any breaks, requests for legal advice, presence of a support person, and the questions and answers to be recorded. Gaps or inconsistencies weigh against admissibility or favour discretionary exclusion.

Authorities and how to use them (confessions).

- McDermott v The King and Lee v The King are the classic voluntariness cases: a confession must not be the product of threats, inducements or oppression; even if technically voluntary, judges may exclude on fairness. Use them to structure the threshold and the residual discretion.
- R v Swaffield shows that covert admissions to an undercover officer may be excluded on fairness grounds where the method undermines reliability or the accusatorial process.
- Tofilau v The Queen (Mr Big operations) admits the impugned confessions on the facts but teaches you to test inducements, basal unreliability and the residual unfairness discretion carefully.
- Petty and Maiden v The Queen confirms that no adverse inference can be drawn from exercising the right to silence pre-trial; rely on it to police prosecutorial submissions and to ground directions.

Authorities and how to use them (identification).

- Domican v The Queen requires a strong judicial warning where the case depends substantially on contested visual identification; Festa v The Queen addresses adequacy and tailoring of directions. Use them to demand a Domican-style caution and to analyse observation conditions (lighting, distance, duration, stress, cross-racial ID, suggestiveness of procedure).

IRAC — Admissibility of admissions / reliability of identification.

Issue. Is an admission admissible (given caution, voluntariness, impropriety), and is identification evidence sufficiently reliable to admit and rely upon?

Rule. Apply caution + right to silence; insist on voluntariness (McDermott/Lee); consider fairness discretion(Swaffield, Tofilau); for ID, apply Domican/Festa reliability and warning requirements.

Application. Time-stamp and paraphrase the caution; explain how comprehension was checked; evaluate pressure/inducements and the presence of supports; reconstruct observation conditions and the identification procedure; pinpoint any suggestive features.

Conclusion. Admit with directions or exclude on fairness/integrity grounds; for ID, either admit with a strong Domican warning or exclude if unreliability cannot be cured.

Week 7 — Identification Evidence

- Identification evidence = evidence that attempts to connect the accused to the offence by visual/aural recognition.
- Highly persuasive to juries, but dangerously unreliable → wrongful convictions.
- Law's response:
    - Primary protection = admissibility rules (Evidence Act 2008 (Vic) Part 3.9)
    - Secondary protection = jury directions (Jury Directions Act 2015 (Vic))

Alexander v R (1981) 145 CLR 395 → Even honest witnesses can be mistaken.

2. TYPES OF IDENTIFICATION EVIDENCE

2.1 Visual Identification

- Recognition by sight.
- May occur in:
    - Identification parade (line-up including accused)
    - Courtroom dock identification
    - Chance encounter (e.g. witness points out accused in street)

2.2 Picture Identification

- Based on photographs.
- Risks: "rogues' gallery" → jury infers prior convictions.
- Controlled under s 115 EA (Vic).

2.3 Voice Identification

- Based on recognition of voice.
- No special statutory exclusion, governed by ordinary admissibility (s 55 EA Vic).
- Reliability depends on familiarity, distinctiveness, conditions.

2.4 Other Forms

- Photo-fit / identikit / composite images.
- Positive ID = identifying a stranger.
- Recognition ID = identifying someone known.
- Similarity evidence = witness says accused "looked like" offender.
- Comparison = witness compares two images/voices.
- Negative ID = witness says accused is not the offender.

3. PRIMARY PROTECTION — EXCLUSION OF EVIDENCE

Statutory Framework: Evidence Act 2008 (Vic)

- s 113 – applies to criminal proceedings and prosecution evidence.
- s 114 – exclusion of visual ID evidence.
- s 115 – exclusion of picture ID evidence.
- s 137 – discretionary exclusion (prejudice > probative value).

3.1 Visual Identification (s 114)

- Inadmissible unless:
    - Identification parade held; or
    - Parade not reasonable; or
    - Accused refused to participate; AND
    - ID not influenced.

Reasonableness factors (s 114(3)):

- Seriousness of offence
- Importance of ID evidence
- Practicality (timing, cooperation, resources)
- Relationship between accused and witness

Presumptions:

- s 114(4) – unreasonable if unfair to accused.
- s 114(5) – if accused had no legal rep, presumed unreasonable.
- s 114(6) – availability of photos not a reason to skip parade.

Police Rules (VPM):

- ≥8 people of similar age, appearance, class.
- Suspect cannot be forced to participate but can request one.
- Witness should not see prior photos.
- Police must observe only.

Dock identifications are highly suspect → Aslett v R [2009] NSWCA 188.

3.2 Picture Identification (s 115)

- Excluded if suggests accused has prior record (mugshots).
- Admissible only if:
    - ID parade refused; OR
    - Parade unreasonable; OR
    - Accused's appearance has changed.

Alexander v R; Festa v R → dangers of "rogues' gallery".

3.3 Voice Identification

- Treated under general evidence rules.
- Cases: R v Callaghan (2001) 4 VR 79; Latorre v R [2012] VSCA 280.

3.4 Discretionary Exclusion (s 137)

- Court must exclude if unfair prejudice > probative value.
- ID evidence often has:
    - Low probative value (unreliable)
    - High prejudice risk (convincing but wrong)

Bayley v R [2016] VSCA 160; R v Shamouli (2006) NSWCCA 112.

4. SECONDARY PROTECTION — JURY DIRECTIONS

Jury Directions Act 2015 (Vic)

- s 35 – defines ID evidence (broader than EA).
- s 36 – either party may request a jury warning.
- s 37 – abolishes common law directions.

Jury Warnings (s 36)

If requested, judge must:

- Warn jury to exercise caution.
- Identify reliability factors (lighting, distance, familiarity, discrepancies, time lapse).
- Emphasise:
  - Honest witnesses can still be mistaken.
  - Mistaken ID evidence can be convincing.
  - Multiple mistaken witnesses possible.
  - Mistaken ID has led to wrongful convictions.

Audsley v R [2018] VSCA 162 → confirms role of JDA directions.

Common Law Categories of ID Evidence (still useful)

Type	Description	Case
Positive ID	Witness identifies stranger	Festa v R (2001)
Recognition ID	Witness recognises known person	R v Lovett [2006]
Similarity	Witness says offender "looked like" accused	R v Clune (No 2) (1996)
Comparison	Non-expert compares images/voices	Bulejcik v R (1996)
Negative ID	Witness says accused not the offender	R v Pollitt (1990)

5. POLICY CONTEXT

- Eyewitness evidence = leading cause of wrongful convictions (Innocence Project: 70% DNA exonerations had ID errors).
- Psychological research: memory is malleable, suggestion effects.
- Law balances:
  - Protecting accused from wrongful conviction.
  - Allowing probative evidence where reliable.
- Tension: practical policing needs vs fairness to accused.

6. PROBLEM QUESTION ROADMAP

When answering an exam problem:

1 Identify the type of ID evidence (visual, picture, voice).
2 Apply EA rules (s 114, s 115). Was there a parade? Was it reasonable?