

## Topic 2: Criminal Procedure

- Criminal procedure is concerned with the law that governs the prosecution of criminal offences (arrest, investigation, committal etc).
- Typically, the main stages of the process of prosecuting a criminal offence is:
  - Investigation
  - Committal;
  - Case conferences
  - Trial
  - Plea hearing
  - Sentence
  - Appeal

### Fundamental Principles

- Criminal procedure concerns the processes involved in bringing a person to trial
- The rules surrounding criminal procedure are based on a number of fundamental principles:
  - i. The presumption of innocence
  - ii. The rule of law: 'no punishment without law'
  - iii. Equality before the law
  - iv. Every person has a qualified right to legal representation
  - v. Natural justice and principles of fairness: the right to an open and fair trial according to law → Ensures transparency and accountability.

*The Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic)*

**Section 21** - 'Right to liberty and security of person'

**Section 22** - 'Humane treatment when deprived of liberty'

**Section 24** - 'Fair Hearing'

**Section 25** - 'Rights in criminal proceedings'

**Section 26** - 'Right not to be tried or punished more than once'

**Section 27** - 'Retrospective criminal laws'

### **S25 Charter of Human Rights and Responsibilities Act 2006 (Vic)**

Rights in criminal proceedings

(1) A person charged with a criminal offence **has the right to be presumed innocent until proved guilty according to law.**

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—

(a) **to be informed promptly** and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and

(b) to have adequate time and facilities or advisor chosen by him or her; and **to prepare his or her defence and to communicate with a lawyer**

(c) to be tried without unreasonable delay; and

(d) **to be tried in person**, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the Legal Aid Act 1978 ; and

(e) to be told, if he or she does not have legal assistance, about the right, if eligible, **to legal aid** under the Legal Aid Act 1978 ; and

(f) **to have legal aid provided if the interests of justice require it**, without any costs payable by him or her if he or she meets the eligibility criteria set out in the Legal Aid Act 1978 ; and

(g) **to examine, or have examined, witnesses** against him or her, unless otherwise provided for by law; and

- (h) to **obtain the attendance and examination of witnesses** on his or her behalf under the same conditions as witnesses for the prosecution; and
  - (i) to have the free assistance of an **interpreter** if he or she cannot understand or speak English; and
  - (j) to have the free assistance of **assistants and specialised communication tools and technology** if he or she has communication or speech difficulties that require such assistance; and
  - (k) **not to be compelled to testify against himself or herself or to confess guilt.**
- (3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.
- (4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.

## **Arrest**

### **EXAM**

*Preliminary step: The offence X is being arrested for is a [indictable/summary] offence, as set out in Schedule 7 of the CA.*

#### **Step 1 – Identify the Legal Authority**

- Did the police need a warrant to arrest X?
- Which statutory provision governs arrest without a warrant in Victoria?
- What must police believe before arresting someone without a warrant?

If warrant – were the contents of the warrant in line with s13 CPA and charge sheet attached in compliance with s6 CPA

#### **Step 2 – Apply the Legal Test**

- At the time of arrest, did police have reasonable grounds to believe David committed an indictable offence?
- What offence might police suspect David of committing?
- Does the fact that the police identified David two days after the incident affect the lawfulness of the arrest?

#### **Step 3 – Consider Necessity of Arrest**

- Was arrest necessary in this situation, or could police have used a summons or notice to appear instead?
- What are some legitimate purposes of arrest that police might rely on (for example, ensuring attendance at court or preventing further offending)?

#### **Step 4 – Executing the Arrest**

- What must police communicate to a person when they are arresting them?
- Why is it important that the arrested person understands that they are no longer free to leave?

- In considering the law governing arrest we must note the following distinctions:
  - an arrest with a warrant and an arrest without a warrant;
  - arrests conducted by police as opposed to arrests conducted by citizens;
  - arrests at state or federal level; and
  - the power to arrest and the power to bring someone before a bail justice, magistrate, or court within a reasonable period of time.
- The authority to arrest is **only governed by statute**
- Think about whether there is a warrant;

- Whether the arrest is conducted by a: Police officer, A PSO, A citizen

### *Arrest Without a Warrant*

#### **Section 457 of the Crimes Act 1958 (Vic)**

##### **No person to be arrested without warrant except under this Act**

After the commencement of the Crimes (Powers of Arrest) Act 1972 no person shall be arrested without warrant except pursuant to the provisions of—

- (a) this Act; or
- (b) some other Act expressly giving power to arrest without warrant.

#### **Section 458 of the Crimes Act 1958 (Vic)**

Person found committing offences may be arrested without warrant by any person

(1) **Any person, whether a police officer or not, may at any time without warrant apprehend and take before a bail justice or the Magistrates' Court to be dealt with according to law or deliver to a police officer to be so taken, any person—**

(a) **he finds committing any offence** (whether an indictable offence or an offence punishable on summary conviction) where he **believes on reasonable grounds** that the apprehension of the person is necessary for any one or more of the following reasons, namely—

(i) **to ensure the attendance of the offender before a court of competent jurisdiction;**

(ii) **to preserve public order;**

(iii) **to prevent the continuation or repetition of the offence or the commission of a**

**further offence; or**

(iv) **for the safety or welfare of members of the public or of the offender;**

(b) **when instructed so to do by any police officer having power under this Act to apprehend that person; or**

(c) **he believes on reasonable grounds is escaping from legal custody or aiding or abetting another person to escape from legal custody or avoiding apprehension** by some person having authority to apprehend that person in the circumstances of the case.

(2) For the purposes of paragraph (a) in subsection (1) "offence" means offence at common law or a contravention of or failure to comply with a provision of an Act of Parliament and unless otherwise by Act of Parliament expressly provided does not include a contravention of or failure to comply with a rule regulation by-law or other law made under an Act of Parliament.

#### **Section 462 of the Crimes Act 1958 (Vic)**

##### **Definition of finds committing**

In this Act the expression finds committing and any derivative thereof extends to the case of a ***person found doing any act or so behaving or conducting himself or in such circumstances that the person finding him believes on reasonable grounds that the person so found is guilty of an offence.***

#### **Section 459 of the Crimes Act 1958 (Vic)**

Powers of **police officer or protective services officer** to apprehend offenders

(1) In addition to exercising any of the powers conferred by section 458 or by or under any other Act a police officer, or a protective services officer on duty at a designated place, **may at any time without warrant apprehend any person—**

(a) **he believes on reasonable grounds has committed an indictable offence in Victoria** (including any indictable offence which may be heard and determined summarily); or

(b) he believes on reasonable grounds has committed an offence elsewhere which if committed in Victoria would be an indictable offence against the law of Victoria (including any indictable offence which may be heard and determined summarily).

(2) If a protective services officer arrests a person under subsection (1), the protective services officer must hand the person into the custody of a police officer as soon as practicable after the person is arrested.

(3) In this section, "designated place" has the same meaning as it has in the Victoria Police Act 2013 .

### Section 462A of the *Crimes Act 1958* (Vic)

Use of force to prevent the commission of an indictable offence

A person may use such force not disproportionate to the objective as he believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence.

#### *Arrest Under a Warrant*

### Section 12 of the *Criminal Procedure Act 2009* (Vic)

**Court may issue summons or warrant to arrest**

(1) On the filing of a charge-sheet under section 6, **an application may be made to a registrar of the Magistrates' Court for the issue of—**

- (a) **a summons** to answer to the charge directed to the accused; or
- (b) **a warrant** to arrest in order to compel the attendance of the accused—

unless a notice to appear has been served on the accused under Division 2.

(2) An application under subsection (1)(b) must be made by the informant personally but an application under subsection (1)(a) may be made by the informant or a person on behalf of the informant.

(3) An application under subsection (1) may be made by the applicant in person or by post.

(4) On an application under subsection (1), the **registrar must, if satisfied that the charge discloses an offence known to law, issue—**

- (a) **a summons** to answer to the charge; or
- (b) subject to subsection (5), **a warrant to arrest.**

(5) A registrar of the Magistrates' Court **must not issue in the first instance a warrant to arrest unless satisfied** by sworn evidence, whether oral or by affidavit, **that—**

- (a) **it is probable that the accused will not answer a summons;** or
- (b) **the accused has absconded, is likely to abscond or is avoiding service** of a summons that has been issued; or
- (c) **a warrant is required or authorised by any other Act or for other good cause.**

#### *Contents of a Warrant*

- **Section 13** of the *Criminal Procedure Act 2009* (Vic)
- The warrant must include:
  - A copy of the charge-sheet
  - A notice that contains a summary of the preliminary or hand-up brief
  - Advice that D should seek legal advice
  - Advice that D has the right (if eligible) to legal aid
  - Details for contacting Victoria Legal Aid
- The warrant may direct that D be released on certain bail conditions (**MCA s.62**).

#### *Executing an Arrest*

- The words or conduct must convey to the arrested person that he or she is under compulsion (no longer free)

- Person arrested is entitled to know the reason for the apprehension – entitled to know what the charge is – no need for technical language or specific wording – need not be told if it is really apparent
- The person arrested cannot complain of not being supplied with the requisite information if they make it difficult to convey – e.g. running away

### ***Entry***

- **Sections 458** and **459** which govern arrests without warrant do not automatically carry with them the power to enter or search private premises.
- Normally a police officer will not be acting in the course of their duty in executing an arrest without warrant for a conventional offence if they are a trespasser on private property. However, the implied licence which members of the public have to walk on a path or on a driveway is also available to police.

### ***Force***

- Reasonable force may be used
- **Section 462A** allows anyone to use force to prevent the commission of an indictable offence or to effect or aid in the lawful arrest of a person committing or suspected of committing an indictable offence.

### ***Search and Seizure***

- Arrest warrants that include the authority to break, enter and search any place in which the person named or described is suspected to be found (**MCA s.64(1)(a)**)
- However, police have the authority to enter and search any place without a warrant to find and arrest a person who, **on reasonable grounds**, is believed to be there and to have committed a *serious indictable offence* or to have escaped legal custody (**CA s459A(1)**)
- May use reasonable force to enter (**CA s.459A(2)**)
- There is also a common law power to search the person and premises of an arrested person without a warrant
- Cannot seize property BUT if the arrest is for an indictable offence, may seize all documents and articles under the person's control that are reasonably believed to be material evidence to prove the commission of a crime

### ***Executing a Search Warrant***

- To execute a search warrant you must:
  - Disclose the suspected offence
  - Define the premises to be searched
  - Delimit the things to be searched for and seized