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2 and 5 Australian legal system and The British origins of the judiciary

Sem 2 Topics:

- **Categories of law: the different ways that law is divided and classified**
 - **Criminal/civil**
 - **Public/private**
 - **Substantive/procedural**
 - **Domestic/international**
- **Sources of law:**
 - **Primary source: cases and legislation**
 - **Secondary source: textbook, journals**
 - **International law**
- **What is common law:**
 - **Comparison to legislation**
 - **Comparison to civil system**
 - **Comparison to equity**
- **Problem solving using IRAC**

James and Field: pp 45-48, 96-97, 146-148, 158-161, 174-180

Substantive: system of legal rules that sets out the rights and obligations of individuals and the state

Procedural: system of legal rules that regulate legal process such as civil litigation or criminal prosecution

- What the law is (substantive) v how the law works (procedural)

Within substantive, are public and private

Public: relationship between the individual and the state. Establishes the rights and obligations of individuals and state when dealing with each other. Usually CRIMINAL law

Types:

- **Constitutional:** relationship between arms of government, and between government and citizens
- **Administrative:** regulates admin activities of the government. The government is accountable for its actions, seek judicial review
- **Criminal:** offences and penalties
- **Taxation:** regulates admin and collection of tax

Private: relationships between people in the community. Regulations of dealing with others. Usually CIVIL law

Types:

- **Torts:** remedy for those harmed by acts or omissions of others. Civil wrong other than contract breach. Eg trespass, negligence, defamation
- **Contract law:** regulates agreements and promises - legally enforceable agreement
- **Property law:** property rights in things (personal property) and land (real property)
- **Company law:** establishment, management and dissolution of corporations

Incidents can attract both criminal and civil cases – eg physically assaulted – can use tort (battery) and criminal offence

Domestic: (municipal) regulates persons within a particular jurisdiction such as nation or state

- **Criminal:** maintaining social order- state v person

- Civil: people v people, or government acting as person

International:

- Public international: regulates relationships between states – treaties, conventions
- Private: determines which states' laws should be applied to resolve a dispute between people in different states

Sources of law:

Primary: legislation and case law – those items that actually make up the law

- Legislation: overrides case law. As parliament passes more legislation, community life more increasingly regulated by statute
 - Can be both reactive and prospective
 - Much wider applicability. Court decisions are only binding on the parties
- Common law: still important as it interprets the law, decides its limits, defines terms. Also decide if legislation is constitutional
 - Is reactive – created to address an old problem

Secondary: documents that summarise, critique, show the law – eg textbooks, journals, dictionaries, government reports, parliamentary reports

Delegated legislation:

- Parliament passes 'parent legislation' setting out overarching principles and objectives of a regulatory scheme and then delegates to an authority to make delegated legislation.
- The authority may be the GG, Executive Council an individual minister, a local authority, a government department or government agency.
- Most common form is regulations, which usually need to be tabled in parliament – legislature can disallow
- Routinely examined for relevance – sunset clauses – time runs out on regulation
- Saves time of parliament who have less expertise, made by appropriately qualified experts, better able to devise a solution, easier and quicker to amend an instrument
- However, is undemocratic- laws are supposed to be made by elected officials
- Contributes to potential over-regulation of business and community

Civil and Criminal Procedures (174-180)

Civil:

1. Decision by plaintiff to litigate, consider evidence, cost time, stress, last resort. Issue a formal letter of demand to person being sued. If no agreement, litigation commences
2. Statement of claim – writ or summons. Filed to court, served to defendant – must receive. Defendant can produce a defence, may put in counterclaim. If no defence, go to court and seek default judgement – plaintiff automatically wins
3. Pre trial: each party knows what other is doing – can ask interrogatories – must answer. Given relevant documents – discovery. Can seek interlocutory order if other not cooperating. Once all info, issue certificate of readiness to court, hearing set. Many disputes settled in pre-trial
4. Plaintiff has burden of proof, standard is balance of probabilities
5. Opening statements, supporting evidence – may be real evidence (objects to examine) or direct evidence (person account)
6. Plaintiff's evidence first – examination in chief, cross, re-examination.
7. Defence in same order
8. Closing statements
9. Usually no jury, just judge
10. Remedies may be damages, injunction or specific performance

11. Order for costs – mostly given to losing case
12. May be able to appeal on question of law

Criminal:

1. Arrest or in minor offence, charged. Issue of bail decided, paying a surety
2. Proceedings begin when charged. Plead guilty or not guilty. If guilty, only sentencing
3. Prosecutor may offer a plea bargain.
4. If indictable offence, committal hearing is held in local court to see if enough evidence for trial
5. If charged with indictable, may have option to hear summarily in local court
6. Crown with burden of proof, standard is beyond a reasonable doubt
7. Same evidence types – also evidence checked on relevance, admissibility and weight. Witnesses can be subpoenaed
8. Same order of evidence, closing statements
9. Judges summarise for jury, jury make decision in indictable criminal
10. Court decides sentence
11. May be able to appeal to higher court