

PART I OF THE CORE – CRIME

1. The Nature of Crime

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1.1 The meaning of crime

- A crime includes any act or omission which results in harm to society at large and is punishable by the state
- Culture, history, legal traditions, social attitudes, religious beliefs and political systems are factors in every society that combine to determine how crime is determined and punished
- Thus, most crimes are the result of moral and ethical judgements by society about an individual's behaviour
- Crime, by definition, is seen as an attack on the standards expected by society, so it is the responsibility of all to punish those found guilty
- Accordingly, criminal cases in Australia are reported as R v Jones, in which the 'R' stands for Regina (Latin for Queen) representing the Crown and therefore the state, and Jones being the accused.
- People may have differing views of morality or it may change over time, causing some acts to be decriminalised
- Sources of criminal law:
 - Statute – incl. *Crimes Act 1900* (NSW) and *Crimes Act 1914* (Cwth)
 - Common – judge-made law where no appropriate statute exists

1.2 Elements of crime

- With the exception of strict liability offences, prosecution must prove both mens rea (intention to commit crime) and actus reus (committing crime) for a guilty verdict

DPP v. Morgan (1975)

- Army officer informed some of his men that his wife enjoyed having sex with several men at once, simulating a sexual assault – statement was a lie.
- The officer took four men to his house and they took turns having sex with his wife, despite her pleas to stop.
- The men were charged with sexual assault but they claimed they did not know they were raping her as they believed they had her consent.
- Court found men guilty, as a reasonable person would have known that the victim was not giving consent

- Mens rea
 - Latin for “guilty mind” – accused intended to commit crime
 - 3 elements:
 - Intention – clear, malicious or wilful intention to commit crime
 - Recklessness – accused as aware that act could result in a crime but took risk regardless
 - Criminal negligence – accused failed to foresee the risk where they should have, and harm or death results to another whom they had a duty of care to protect

R v. Thomas Sam and R v. Manju Sam (No. 18) (2009) NSW

- Nine month old Gloria Thomas died in May 2002 due to complications arising from severe eczema
- Her father, Thomas Sam, was a homeopathic practitioner and had been treating her using homeopathic remedies
- Both parents, Thomas and Manju Sam, had been warned by hospital staff that they should be treating the eczema using prescribed medication, though these warnings were ignored
- In June 2009, a jury found Sam and his wife Manju guilty of the manslaughter of their daughter by failing to get her proper medical care before her death in May 2002

- Actus reus

- o Latin for “guilty act” – physical performance or conduct of offence, must be a voluntary act but also includes an omission or failure to act
- o Consequences – some crimes require a certain consequence from the act to render it a particular crime (e.g. death rendering an assault a murder)
- o Circumstances – some acts require special circumstances to render an otherwise lawful act a crime (e.g. lack of consent when having sex rendering it rape)
- o Voluntariness – the act must have been a voluntary act of a conscious mind

1.3 Strict liability offences

- Applies to crimes minor in nature (mostly traffic offences)
- The prosecution must only prove that an illegal act was carried out (actus reus) – no mens rea must be proven

1.4 Causation

- To prove a criminal charge, the prosecution must show that there is a link between the act and the crime
- The prosecution needs to prove that the act was the substantial and operative cause of the crime

R v Muntter (2009) NSW

- Muntter was found guilty of manslaughter following punching and kicking Proctor, a 66-year-old, following a dispute about water restrictions
- Shortly after, Proctor died from a heart attack
- The court found that although there was no apparent intention to murder Mr Proctor, the unlawful assault on him by Muntter had caused his death

R v Blaue (1975)

- Victim was stabbed to death though refused to have a blood transfusion which could have saved her life
- Accused was convicted but argued on appeal that a responsible person would have accepted the blood transfusion, so he could not be held responsible for her death as there was no causation – chain of causation broken
- NSWCCA dismissed appeal, manslaughter conviction upheld – Blaue’s act was the substantial cause of victim’s death
- Court held that he who inflicts a wound or injury which results in death could not excuse himself by pleading that his victim could have avoided death by taking better care of himself/herself

1.5 Categories of crime

- Category of a crime will affect the way it is investigated, prosecuted and punished
- Key classifying factors are:
 - Type of offence – against the person, property, drug
 - Jurisdiction – state or federal
 - Seriousness of the offence – summary or indictable
 - Parties to a crime – principal offender or assistant

1.5.1 Offences against the person

- Involve some form of harm or injury to an individual
 - Three distinct areas: homicide, assault and sexual offences
- a) *Homicide*
- Unlawful killing of another person
 - Includes both deliberate and accidental acts of killing, with varying degrees of mens rea applicable
 - Causation must be established between the actions of the accused and the death of the victim
 - Four main categories:

Murder

- Most serious homicide offence (max penalty life). Prosecutors must prove that one of the following acts took place:
 - Deliberate act to kill
 - Deliberate act to cause serious harm, during which death occurred
 - Reckless indifference to human life, resulting in death
 - A death occurred during the commission of a serious crime

Manslaughter

- Unlawful killing but accused has a defence for their actions (max penalty 25 years).
Two types:
 - Involuntary – death occurs but accused did not have mental intent to cause it
 - Voluntary – accused did intend to cause death but mitigating circumstances exist

Infanticide

- A mother causing the death of her child within its first 12 months of life.
- *Crimes Act 1900* (NSW) requires the court take into account the mental state of the mother when the homicide occurred.
- PND is often used as a defence, and mitigates the punishment of the crime

Death by reckless driving

- Occurs when a person drives in an unsafe and reckless manner, and in doing so causes the death of another human being (max penalty 10 years).
 - Aggravating circumstances can increase penalty to 14 years.
 - Must be a causal relationship between the actions of the accused and the death resulting from them
 - Distinction made between deliberate acts (DUI) and careless ones (adjusting radio) in determining sentence
 - In defence, accused may argue that the accident was the result of poor road conditions or another driver, and not the result of their actions
- b) *Assault*
- Involves causing physical harm or threatening to cause physical harm to another person
 - Physical harm – force is applied to another person’s body unlawfully and without their consent (5 years)
 - Threat of physical harm – fear of immediate and unlawful violence
 - Aggravated assault – more serious than assault as a person uses an object or if the person attacks a police officer whilst on duty
- c) *Sexual offences*
- Involves sexual contact with another person without their consent
 - The *Crimes Act 1900* (NSW) states that sexual assault includes where consent has been withdrawn, given mistakenly, different sexual acts, and unwanted sexual contact between spouses
 - Age of consent in NSW is 16 years, which means that if a person over 16 has sexual intercourse with a person under 16 they can be charged
 - Aggravated sexual assault – 14 year penalty can be extended to 20 years, includes use of excessive violence, if victim is under 16 and has not consented, or has a serious intellectual or physical disability

Gang Rape Cases No 1 – R v AEM, R v KEM, R v MM

- First case was heard in August 2001, by Justice Latham in the District Court
- There was a huge public outcry over the leniency of the sentence – six years. The three teenagers each pleaded guilty to two counts of aggravated sexual assault against the two girls, who were then 16
- Justice Latham sentenced the eldest to a non-parole period of four years, his brother, KEM, a minimum three and a half years, and their cousin MM, four years, although the maximum penalty available was twenty years
- The Crown appealed the leniency of the sentences and the Court of Appeal increased each of the non-parole sentences to 9 years, 10 years and 10 years respectively. Maximum terms were increased to between 13 and 14 years
- The Court of Appeal also ordered that they should serve the remainder of their terms in an adult prison once they turned 19 and 20 respectively
- Following public outcry at the original sentences the NSW Government amended the *Crimes Act 1900* (NSW) with the *Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001* (NSW). This amendment inserted a new section (61JA), so that judges could impose longer sentences

Gang Rape Case No 2 – R v Bilal Skaf, R v Mohammed Skaf

- Bilal Skaf and his brother, Mohammed, were part of a gang that raped several young women in Sydney during 2000
- They took the girls to remote locations and sexually assaulted them
- The Skaf case was heard in the District Court by Judge Finnane in July 2002
- Bilal as ringleader was sentenced to 55 years. Skaf appealed and his sentence was reduced by several years.
- In one of the Skaf appeal cases the judge ordered a retrial because two jury members visited the scene of the crime to look at the lighting in the park at night. The victim refused to testify at yet another trial
- As a result, the government amended the Criminal Procedure Act 1986 with the Criminal Procedure Amendment (Evidence) Act 2005. This legislation allows transcript evidence to be used in certain types of trials.

1.5.2 Offences against the sovereign

- Laws are justified as protecting the structure, authority and integrity of the state and the citizens that it governs
- Includes political offences against the state or heads of state, such as treason (i.e. an attempt or manifest intention to levy war against the state, assist the enemy, or

cause harm to the head of state) and sedition (i.e. promoting discontent against a government through slanderous use of language, or urging force or violence against the government)

Anti-Terrorism laws

- Federal Government's anti-terrorism laws contain sedition provisions, which have attracted strong debate about the need to balance protection of society against freedom of speech
- Main Commonwealth laws relevant to terrorism are the *Anti-Terrorism Act 2004* (Cwlth) and the *Anti-Terrorism Act (No. 2) 2005* (Cwlth)
- The later act further amended the Criminal Code by introducing control orders, preventative detention orders and new sedition offences
- Haneef, wrongly charged with various sedition offences and under new legislation, was detained for approximately a month without charge
- Sydney Morning Herald – "Some of our anti-terrorism laws are well past their use-by date"

1.5.3 Economic offences

- Broad term that includes a wide range of crimes that can result in a person or persons losing property or sums of money – largest area of criminal law as it encompasses some of the most common types of crime
- Includes:

a) Crimes against property

Larceny (theft)

- Occurs when one or more persons intentionally take another person's property without their consent and without the intention of returning it
- Punishable by up to 5 years imprisonment

Robbery

- Occurs when the use of force is present in the act of stealing goods, or when property is taken directly from a victim
- If the robbery is accompanied by the use or threatened use of a weapon, the crime is escalated to 'armed robbery' and carries a higher sentence

Break and enter

- Refers to a series of offences in the *Crimes Act* that occur when a person or persons enter a room or building with the intention of committing an offence.
- Usually is accompanied with larceny

b) *White-collar crime – non-violent crimes associated with professionals*

Embezzlement

- When a person, usually an employee, misappropriates another person's property or money that they have been entrusted with

Tax evasion

- Occurs when a person or company tries to avoid paying taxes, which often entails fraudulently filling out tax returns

Insider trading

- An offence related to the buying and selling of company shares, when a person obtains confidential inside information about a company that will affect that company's share price
- The information will usually relate to the share price significantly increasing or dropping, which the offender will then take advantage of

R v. Rivkin (2003)

- Well known stockbroker, found guilty of insider trading relating to the purchase of Qantas shares following a discussion with a Qantas executive about a forthcoming merger with another company
- Convicted and sentenced to periodic weekend detention, and his stockbroking licence was revoked

c) *Computer offences*

- Various crimes related to hacking and unauthorised access or modification of data

- Includes an increasing number of computer-based property offences, including money laundering, identity theft, scams, counterfeits and industrial espionage
- The power and capacity of modern computer technology is continually increasing, driving the need for ongoing law reform

iiNet Case

- iiNet, an Australian Internet Service Provider (ISP) has been fighting against a group of 34 entertainment companies represented by the Australian Federation Against Copyright Theft (AFACT) in court over their responsibility for preventing or managing their customers' use of copyright material
- The AFACT group have been attempting to persuade the Federal Court that iiNet authorised its customers to breach copyright by refusing to pass its infringement notices to customers
- The Federal Court upheld its decision that iiNet could not be held liable for any internet piracy by their customers. It is highly likely that AFACT will appeal this decision in the High Court

1.5.4 Drug offences

- Describes a broad range of offences involving prohibited or restricted drugs
- They focus on the movement of the drugs themselves, including the cultivation, use, possession and supply of drugs
- Covered by Commonwealth and state laws, and in NSW, most offences are covered in the *Drug Misuse & Trafficking Act 1985* (NSW)

1.5.5 Driving offences

- Driving and traffic offences are included in both the *Road Transport (Safety and Traffic Management) Act 1999* (NSW) and the *Crimes Act 1900* (NSW)
- Most common traffic offences are exceeding the speed limit, driving without a licence, ignoring road signs and DUI
- Most of these offences are dealt with administratively by issuing fines/deducting demerit points
- More serious offences or challenges to fines are dealt with in the Local Court

1.5.6 Public order offences

- Relate to acts that are deemed to disrupt the public order in some way
- These are often acts that society deems inappropriate or offensive when conducted in public
- There are a number of public order offences listed in the *Summary Offences Act 1988* (NSW) and the *Crimes Act 1900* (NSW)
- Include: offensive language or behaviour, possessing a knife in public and obstructing traffic or ignoring police direction to 'move on'
- More serious offences include affray and riot
- Can be over-policed and have a disproportionate effect on young persons, Indigenous Australians, people from particular minority groups – lead to people becoming criminalised for minor conduct

1.5.7 Preliminary crimes (attempts and conspiracy)

- Offences that precede the commission of a crime or where the crime has not been completed for some reason
- Convictions for preliminary crimes are often difficult due to lack of evidence

a) Attempts

- It is an offence to attempt a criminal act, and attempts are generally punishable by the same penalty as if the crime had taken place
- An exception is made for attempted murder, which carries a lower penalty

b) Conspiracy

- Occurs when two or more people jointly conspire to commit a crime
- The conspiracy is complete where an agreement is reached between the parties, with the intention also shown by each person's explicit agreement to commit the offence
- The agreement to act criminally is the actus reus, whilst the planning demonstrates the intent (or mens rea) to carry it out

1.6 Summary and indictable offences

- Summary offences are less severe offences that are heard and sentenced by a magistrate in a Local Court, which usually incur lesser penalties (<2 years) than indictable offences
- Indictable offences are serious criminal matters that are heard and sentenced by a judge in a District Court, or tried before a judge and jury

1.7 Parties to a crime

- Any person who has been involved in any way in committing a crime may become a 'party' to the crime
- The level of punishment that a court metes out to a party is usually determined by that person's level of involvement in the crime

1.7.1 Principal in the first degree

- The principal offender – person who actually committed the criminal act
- Directly responsible for the crime being carried out and so is likely to receive the highest sentence

1.7.2 Principal in the second degree

- Person who assists others in the commission of a crime
- Present during the crime, though is not a main participant, and instead assisted or encouraged the principal offender to perform the offence
- May be given a lesser sentence, depending on the circumstances

1.7.3 Accessory before the fact

- Person who helps others to commit a crime by helping them plan or prepare the criminal act, though is not present at the commission of the crime

1.7.4 Accessory after the fact

- Person who has assisted the principal after the actual act is committed
- The law recognises this offence only for serious crimes

1.8 Factors affecting criminal behaviour

- Psychological factors – e.g. mental illness, important during the criminal process and sentencing

- Social factors – e.g. family situation or person relationships; the social groups that people associate with will often influence a person's attitudes and views of acceptable behaviour
- Economic factors – e.g. disadvantaged background; more likely to commit crimes, closely related to poor education and lack of skills, with such criminals often habitually unemployed and unskilled; sometimes may view criminal acts with a financial benefit necessary (e.g. larceny, robbery)
- Genetic theories – not a conclusive factor, does not determine that individuals with certain genes are predisposed to commit crimes than those without them
- Political factors – often influence offences against the sovereign and public order offences such as riots
- Self-interest – white collar offences are often driven by greed rather than by underlying socio-economic or political factors

1.9 Crime prevention: situation and social

Situational crime prevention

- Usually involves one of two approaches:
 - Planning and architectural design, which focuses upon the influence of physical environments upon crime (e.g. security)
 - Focused (situational) approaches, which rest on rational choice theory
- Aims to make it more difficult for criminals to carry out a crime and therefore stop it before it is committed by increasing the risk of being caught, making the crime more difficult to perpetrate (CCTV), making the crime less rewarding (security tags on clothing), and opportunity reduction (alcohol-free zones, improved lighting in at-risk areas)

Social crime prevention

- Attempts to address the underlying social factors that may lead to criminal behaviour (e.g. poor home environment and parenting, social and economic disadvantage, poor school attendance and early contact with the police and other authorities)
- There is social and economic value in social crime prevention and so the government spends millions of dollars trying to combat these issues
- Strategies such as providing better opportunities who find the school setting difficult, parenting workshops and youth programs have been proven to be effective in tackling social inequities, leading to a reduction in criminal activity

- 2.1** Police powers
- 2.2** Reporting crime
- 2.3** Investigating crime
 - 2.3.1** Gathering evidence
 - 2.3.2** Use of technology
 - 2.3.3** Search and seizure
 - 2.3.4** Use of warrants
- 2.4** Arrest and charge, summons, warrants
- 2.5** Bail or remand
- 2.6** Detention and interrogation, rights of suspects

2. The

Criminal Investigation Process

2.1 Police powers

- Police are responsible for the prevention and detection of crime and for the maintenance of public order
- The role of the police in the criminal investigation process is to investigate crimes, make arrests if necessary, interrogate suspects and gather evidence against the accused. Police will then present the evidence for judgement to a court on behalf of the state, either directly or through a prosecutor
- There is a great deal of tension in balancing the extent of powers required by police against the rights of ordinary citizens
- Majority of police powers are contained in the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*, and in some other legislation
- Main powers include detaining and questioning suspects, searching property and seizing evidence, using reasonable force, using technology to assist an investigation, arresting and interrogating suspects and recommending whether or not bail should be granted

- With limited resources, police must decide which crimes to target and which reports to investigate – thus, crime is not always as thoroughly investigated as it could be

2.2 Reporting crime

- Police rely on members of the public to report crimes – Crime Stoppers and Neighbourhood Watch can assist police work and help promote a sense of community participation in solving crimes
- Many crimes, such as sexual assault, domestic violence and child abuse, often go unreported due to reluctance to become implicated, fear of consequences, inability to report the crime or a perceived burden of reporting a crime

2.3 Investigating crime

- Police investigate most alleged crimes, but have discretion as to whether or not they will pursue the investigation or take no further action
- Here, the severity of the offence, the likelihood of success, and the available resources or priorities are relevant

2.3.1 Gathering evidence

- A main responsibility of the police is to gather evidence for use by the prosecution in order to support a charge in court and ultimately gain a conviction
- This evidence may be physical, electronic, or come in the form of witness statements
- Police have significant resources at their disposal to search and seize to gather evidence, but must follow correct procedure and act lawfully
- Evidence that has been contaminated or otherwise compromised is inadmissible
- The fundamental rule governing the admissibility of evidence is that it be relevant
- The *Evidence Act (1995)* (NSW) applies to all proceedings in a NSW court, except sentence proceedings
- Types of evidence gathered include oral testimony of the accused, police and witnesses as well as physical evidence such as objects or weapons, documents, fingerprints, DNA samples and CCTV footage
- Police can ask you to accompany them to a police station for questioning, but you are not required to go unless you have been arrested for an offence

2.3.2 Use of technology

- Technology is frequently used by the police in order to gather evidence and prove charges
- However, it can often be difficult for the law to keep up with new technology in law enforcement
- There have been some concerns regarding an overreliance on technology as it risks being inadmissible in court or result in a wrongful conviction

DNA evidence

- An important advance in technology that has been useful in gaining difficult convictions in current and cold cases
- Generally relied on in court as a dependable form of evidence
- There have been concerns over the reliability of DNA testing due to a number of wrongful convictions discovered in NSW and Victoria, which had been caused by errors in the process
- R v Jama, R v Gilham – DNA evidence overturned both convictions

2.3.3 Search and seizure

- Under Part 4 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), police are given powers to 'search people and seize and detain things' in certain circumstances. One of the most important of these is the power to search and seize without a court warrant
- These powers are controversial as they represent an intrusion into people's privacy or personal space
- The police can stop, search and detain anyone reasonably suspected of having anything in their possession that is stolen, unlawfully obtained or intended for use in committing a serious offence (*Law Enforcement (Powers and Responsibilities) Act s.21*)
- Police can search a person, cars or premises for the purposes of investigating a crime when the person or occupier consents to the search
- Unless a crime scene is established, the power to search premises may be enforced only if the police have a search warrant, which the occupier of the premises is entitled to see. If they have no warrant, the police can normally be refused entry
- Police can search a person when they have been arrested and again later at the police station
- Police can search you/your vehicle if they have reasonable grounds to suspect that you are carrying stolen goods or goods unlawfully obtained, prohibited drugs, an item that has been, or may be used in a serious crime, knives, weapons or 'dangerous implements' and a laser pointer
- Police can only perform a strip search if they have reasonable grounds to suspect that it is necessary and the circumstances are serious and urgent. They must provide you with as much privacy as possible
- If police are executing a search warrant they can take things they find

2.3.4 Use of warrants

- A warrant is a legal document issued by a magistrate or judge which authorises a police officer to perform a particular act (e.g. make an arrest, conduct a search, seize property or use a phone tap)

- This helps ensure that those special police powers are used only when appropriate, and provides an additional layer of protection for ordinary citizens against misuse of that power
- When applying for a search warrant, the police must give substantial reasons or evidence to the magistrate or judge to justify its granting
- Police may use reasonable force to enter premises if they have a search warrant. It is an offence to obstruct or hinder a person carrying out a search under a warrant

2.4 Arrest and charge, summons, warrants

Arrest and charge

- Police can only legally detain people if they lawfully arrest them
- The conditions under which the police may lawfully arrest a person are contained in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and include catching a suspect committing an offence, believing on reasonable grounds that a suspect has committed or is about to commit an offence, and possessing a warrant for that person's arrest
- Essentially, arrest warrants usually require police to justify their suspicions based on reasonable evidence
- Arrest should be used only as a last resort, and there is some criticism that arrests can be applied too early in the investigative process
- At the end of the maximum detention period, and following interrogation, the police must either charge the suspect with a specific offence or release them unconditionally
- The officer should tell you that you are under arrest, tell you why you are being arrested, and his or her name and place of duty
- A police officer may use as much force as is necessary to arrest – unreasonable force is an assault

NSW Police Force Code of Conduct

- The NSW Police Force Code of Conduct states that, at the time of arrest, police officers:
 1. Must inform the person being arrested the reason for their arrest;
 2. State that to resist arrest is itself an offence;
 3. Use the minimum amount of force in order to subdue and arrest a person. If police use unreasonable/excessive force, they may also be charged

Summons

- Once a person is charged, they will be issued with a summons to appear in court or, if it is a serious matter, they will be further detained and a bail hearing will be set

- A court attendance notice (CAN) is a legal document that states when and where a person must appear in court and the charge to which they must answer
- Witnesses may receive a subpoena which requires them to appear in court in a specified date to give evidence

Warrants – outlined above

2.5 Bail and remand

Bail

- Bail is the conditional release of a person until their case is determined by a court
- The less serious the charge, the more likely bail will be granted and vice versa, unless there are exceptional circumstances
- Following charge, the police are required to bring the accused before a court as soon as practicable for a bail hearing
- At a bail hearing, the court or authorised officer will determine whether the accused should be released on bail or remain in custody until trial
- Sometimes there are conditions, which include the lodgement of a specified sum of money, reporting to the police on a regular basis, forfeiture of a passport and restrictions on associations and movement
- Bail can also be unconditional
- For young people, bail conditions are much more onerous (e.g. curfew, supervision by government departments, reside as directed, obey reasonable directions of carer)
- It is difficult to obtain bail for certain offences, particularly violent offences or where there is some risk to the community or risk of reoffending
- R v. Amani Iskandar (2001) – Sperling J stated, ““Where the presumption against bail applies, an application for bail should normally or ordinarily be refused. A heavy burden rests on the applicant to satisfy the court that bail should be granted. The application must be somehow special if the Crown case in support of the charge is strong.”

R v. Young (2006)

- Mr Young killed another person while driving his car. He was charged with murder, failing to stop and assist after a vehicle impact causing death, and drink driving. The police alleged that Mr Young deliberately drove at the other person and killed them
- In this bail hearing, Justice Johnson of the Supreme Court was asked to decide whether or not he should grant bail to Mr Young
- The prosecution argued that as Young was charged with murder there should be a presumption against bail, but the defence argued that the *Bail Act 1978* (NSW) does not forbid the granting of bail in murder cases where the court feels there are exceptional circumstances in favour of bail
- The defence pointed out that Mr Young had a good job, his family had never had any contact with the criminal law before, he had close ties with the community, and his father was prepared to use their house as security for bail. Justice Johnson agreed that these factors constituted exceptional circumstances and granted bail under strict conditions
- In making his judgement, Justice Johnson made it clear that in granting bail he was not deciding on the merits of the case but rather whether the evidence constituted exceptional circumstances only

The Bail Act 1978 (NSW)

- At its enactment in 1978, the *Act* created a presumption in favour of bail for all offences bar those violent
- Since then, it has become considerably more complex due to a series of amendments inserting presumptions against bail. These provisions restrict judge's exertion of their discretion
- Serious offences have no adopted a presumption against bail, though it can be granted in exceptional circumstances
- Under the new *Bail Act*, the offence-based presumptions will be replaced with one test of whether or not the accused poses an unreasonable risk to the community

Bail law debate

- NSW Attorney-General 2007 debate regarding the *Bail Amendment Bill* - The Bill builds on the Government's extensive reforms over the past years to strengthen our bail laws and ensure the community is properly protected while defendants are awaiting trial... Part of those changes includes removing the presumption in favour of bail for a large number of crimes... Those types of offenders now have a much tougher time being granted bail under our rigorous system. These extensive changes have delivered results. There is no doubt that the inmate population, particularly

those on remand, has risen considerably as a result of these changes. In fact, the number of remand prisoners have increased by 20 per cent in the last three years alone and new jails are being opened to accommodate the increase.”

- Review of bail laws by NSWLRC 2012 – “Over the last 15 years the number of remand prisoners has more than trebled and the rate of remand prisoners per 100,00 of the population has more than doubled. The evidence is clear that policy shifts have made a significant contribution to the increased remand population.”

Remand

- If bail is denied and the magistrate or authorised officer determines that the accused should remain in custody until trial, the accused will be held on remand in police custody or at a remand centre
- It is usually sought for people who have committed particularly violent crimes, dangerous criminals, repeat offenders, or those thought to be a flight risk
- People being held on remand are not convicted criminals and it is therefore important that the amount of time spent on remand is as short as possible
- In recent years there has been a huge growth in remand numbers, particularly in young people and Indigenous offenders

2.6 Detention and interrogation, rights of suspects

Detention

- The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) sets out the lawful conditions under which a suspect can be detained for questioning and for the purpose of further investigation
- Police can only detain a suspect for four hours, by which time that person must be either charged or unconditionally released. This can be extended to 8 hours only with a magistrate’s approval
- Exception to the four hour detention rule is terrorism – a person suspected of engaging in terrorist activity can be detained for 48 hours without charge, and extensions can be granted if the police investigation is ongoing (*Anti-Terrorism Act (No. 2) 2005* (Cwlth))

Interrogation

- Usually, as soon as the police have a suspect in custody, the suspect is interrogated
- The police must also issue a caution to the suspect as soon as practicable after the person has been detained, to inform them of the maximum period of detention and that they ‘do not have to say or do anything but that anything the person does say or do may be used in evidence’
- Interrogations may be recorded on videotape and audio, though the suspect must be given a copy. They may also refuse to have the interrogation recorded

- As a general rule, the suspect has the right to silence (they cannot be compelled to answer any questions unless specifically required to do so by law due to the specific nature of the offence). This right has been diminished in many terrorism-based offences
- If the suspect is under 18, they have the right to a responsible adult being present
- Suspects also have the right to contact a friend, relative, guardian or lawyer
- If charged, the suspect will be brought before a magistrate for a bail hearing

Rights of suspects

- If the police want to question a person, they have a right to contact a lawyer or other

<p>3.1 Court jurisdiction</p> <p>3.2 The adversary system</p> <p>3.3 Legal personnel</p> <p> 3.3.1 Magistrate</p> <p> 3.3.2 Judge</p> <p> 3.3.3 Police prosecutor</p> <p> 3.3.4 Director of Public Prosecutions</p> <p> 3.3.5 Public Defenders</p> <p>3.4 Pleas, charge negotiation</p> <p>3.5 Legal representation, including legal aid</p> <p>3.6 Burden and standard of proof</p> <p>3.7 Use of evidence, including witnesses</p> <p>3.8 Defences to criminal charges</p> <p> 3.8.1 Complete defences</p> <p> 3.8.2 Partial defences to murder</p> <p>3.9 The role of juries, including verdicts</p>
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person (although Legal Aid lawyers do not attend police stations to advise arrested people and they do not provide telephone advice – except to young people under 18 on the Youth Hotline)

- In general the right to silence exists, however in some circumstances suspects have to give the police some information and in some circumstances exercising the right to silence may be used against you
- ‘Special caution’ can be administered if you have had an opportunity to obtain legal advice from a lawyer and then are given the ‘special caution’ in the presence of the lawyer – the effect is that if you then fail or refuse to tell police a fact that is later relied on in your defence in court, it may permit the court to use your silence against you
 - if you are not represented by a lawyer or if your lawyer is not present when police speak to you, this provision does not apply
- if your arrest relates to a serious offence you may be asked if you want to take part in an interview which will be recorded on both audio and video. If you do you will be given a copy of the audio recording

- The police may take photographs, fingerprints and palm prints for identification

3. The Criminal Trial Process

3.1 Court jurisdiction

- Three levels in the Australian court hierarchy – lower, intermediate and higher
- Court jurisdiction refers to the authority of a court:
 - To hear a matter for the first time (original jurisdiction)
 - To review matters on appeal from another court (appellate jurisdiction)
- Which court a matter is heard in depends on the seriousness of the matter, whether it is being heard for the first time or involves an appeal, the nature of the offence, the age of the accused, the type of hearing and whether the alleged offence comes under state or federal law
- The system of appeals is an important feature, allowing higher courts to review and control the decisions of lower courts

a) *Lower courts*

Local Court of NSW

- Created under the *Local Courts Act 1982* (NSW)
- Presided over by a magistrate
- Has two main functions in relation to criminal matters: summary hearings and committal hearings
- Also hears civil matters

The Children's Court

- Jurisdiction to hear almost any matter when the accused is less than 18-years-old when charged, or less than 21-years-old when charged for a crime committed when aged less than 18
- Exceptions for serious indictable offences including homicide and aggravated sexual assault
- Main aim of this court is to achieve the rehabilitation of the offender
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- Jurisdiction extends to matters that involve enquiries into:
 - a. The cause and manner of death of any person where violence has occurred
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- The role of a coroner is to determine the identity of the deceased, the date, place, manner and medical cause of death
- The coroner is not bound by the same rules as other courts, and it instead operates on the inquisitorial system
- A coronial inquest into a death is a court hearing where a coroner considers information to help determine the manner and cause of a death
- The findings of the coroner will often be used as evidence in a later criminal or civil trial
- A coroner is not responsible for trying people, rather the coroner's task is to establish if there is sufficient evidence to suggest that a criminal act has been committed, in which case the matter can be referred to the DPP, who then decides if criminal proceedings will be brought against that person

b) *Intermediate courts*

District Court of NSW

- Created by the *District Court Act 1973* (NSW)
- Jurisdiction extends to all indictable offences, apart from murder and treason
- Criminal cases are typically heard by a jury and judge, who determine the verdict and sentence respectively
- Jurisdiction to hear civil matters up to \$750 000
- Proceedings are significantly lengthier than those in the Local Court, and tend to result in greater cost to both the accused and prosecution

c) *Superior Courts*

Supreme Court of NSW

- Constituted under the *Supreme Court Act 1970* (NSW)

- Hears the most serious criminal cases, as well as civil matters beyond the jurisdiction of the Local and District Courts
- Has original criminal jurisdiction to hear murder, manslaughter and attempted murder, major conspiracy and drug-related charges and Commonwealth prosecutions for serious breaches of the Corporations Law
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- This court usually consists of three Justices, with the majority view prevailing
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- Mainly deals with civil and administrative disputes related to environmental planning, though also has criminal jurisdiction to hear some environmental offences (such as illegal polluting or dumping)
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- Prosecutions are usually brought by the NSW Environment Protection Authority

High Court of Australia

- Highest court in Australia
- Mandated by section 71 of the Constitution of Australia, and is constituted under the *Judiciary Act 1903* (Cth)
- Has original jurisdiction to hear cases concerning the interpretation of the Constitution and the constitutional validity of laws
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- Special leave is granted for questions of law of public importance, conflict between courts or in the interests in the administration of justice

3.2 The adversary system

- Underpins Australia’s legal system
- Australia inherited this system with the English common law system
- Relies on a two-sided structure of opposing sides, each presenting its own position, with an impartial judge or jury hearing each side and determining the truth in the case
- Each side tests the evidence put forward by the opposing sides by cross-examining witness and introducing other witnesses and evidence to counter the other side’s case
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- Witnesses, especially victims of crime such as sexual assault, are often subjected to unfair cross-examination
- In this system, strict rules of evidence are imposed, which require that any evidence used on the case must be obtained within these rules

Feature	Adversary System
Role of the judge	<ul style="list-style-type: none"> • Independent third party • Decides questions of law and procedure • Only asks for clarification
Role of legal representative	<ul style="list-style-type: none"> • Represents parties interests • Prepare and presents the parties’ case • Examination of witnesses
Collection of Evidence	All evidence, except witnesses statements, are collected by the parties
Witnesses	Witnesses must answer the questions put to them by the legal representative
Prior criminal record	Inadmissible
Rules of evidence	<ul style="list-style-type: none"> • Strict rules apply • Mainly relies on oral evidence
Role of the parties	<ul style="list-style-type: none"> • Responsible for the preparation and presentation of their case • Determine the issues that are disputed and which witnesses are to be called

3.3 Legal personnel

3.3.1 Magistrate

- Presides over the Local Court
- Typically hears summary cases and within this, determines whether the accused is guilty, and the applicable sentence
- Also establishes prima facie cases in preliminary hearings

3.3.2 Judge

- Judicial officers who preside over the intermediate and superior courts
- Oversee proceedings, maintain order in the courtroom, and ensure that the procedures of the court are followed
- Judges will make decisions about points of law and give instructions to the jury
- Once the jury reaches a verdict, the judge will hand down sentences and rulings
- In some cases the judge will sit without a jury, wherein they determine the verdict
- Are expected to remain impartial at all times

3.3.3 Police prosecutor

- Police undertake an intensive and exhaustive investigation of the matter and gather all the evidence to be used at trial in order to form the case against the accused
- The police will often also be required to give testimony
- For summary offences in the Local Court and Children's Court, police prosecutors will usually prosecute cases. These people are specially-trained members of the NSW Police Force who conduct prosecutions

3.3.4 Director of Public Prosecutions

- The DPP is an independent authority that prosecutes all serious offences on behalf of the NSW Government
- It is the role of the prosecutor to prosecute the case using evidence gathered by the police, examine and cross-examine witnesses and draw out the truth from the evidence and testimony
- The DPP also reviews cases proposed by the police to determine if there is enough evidence to gain a conviction
- The decision to prosecute depends of the sufficiency of the evidence to establish the elements of the offence and gain a conviction, as well as certain discretionary factors that relate to the public interest

Barristers and solicitors

- A person charged with an offence will usually contact a solicitor, who can advise the accused on the charge, the alleged offence and the procedures surrounding a trial, and will assist in interactions with the police investigating the case. They may also advise on any available defences, the likelihood of conviction and possible sentences
- A solicitor may also represent the accused in court, or engage a barrister to represent the accused

- Barristers have two main roles in court proceedings: to provide legal advice for the accused on the likely outcome of the case and to present that case in court

3.3.5 Public defenders

- When an accused cannot afford to pay for a barrister or solicitor, they may be granted access to a public defender.
- Public defenders are paid public barristers who are independent of the government and perform the same duties as other barristers, though appear in serious criminal matters for an accused who has been granted legal aid
- They appear in relation to criminal trials, sentencing matters and appeals, and may be briefed by a private solicitor, through Legal Aid or through a community-based group

3.4 Pleas, charge negotiation

- A charge is a form of accusation against a person, though it does not imply guilt
- The law requires the accused to enter a plea of either guilty or not guilty
- If they do not enter a plea, it is taken to mean ‘not guilty’
- The plea entered by the accused has a significant impact on how the charges are dealt with
- A guilty plea is dealt with quickly and does not require witnesses to give testimony, instead the case goes directly to sentencing
- If the accused pleads not guilty, the case will be defended in court
- Charge negotiation is where the accused agrees with the prosecution to plead guilty to a particular charge or charges (usually a lesser charge) in exchange for other higher charges being withdrawn, or a lesser sentence
- This is also known as case conferencing and plea bargaining, and will usually result in a faster and less expensive case for the prosecution, the accused and the court

For	Against
Decrease time delays and costs	Crimes may go unpunished or insufficiently punished
Increases the rate of criminal convictions	The accused may plead guilty to a lesser charge of which they are innocent
The conviction on a lesser charge is better than no charge at all	May lead to bullying of the accused to forfeit their right to trial

3.5 Legal representation, including Legal Aid

- In the Australian legal system, a defendant has the right to a fair trial, though Australian courts have evidenced that a trial will rarely be fair for an accused person who does not have adequate legal representation

- Dietrich v. The Queen (1992) recognised that there is no automatic right to legal representation in Australia
- Many defendants can afford adequate legal representation and are able to pay for a barrister or solicitor to advise them and present their case in court, though the quality of legal services offered varies
- In rare circumstances an accused may elect to represent themselves in court, but due to the complexities of court processes and the consequences of inadequate representation in criminal matters, this is not advised unless the offence relates to a very minor matter
- In 1979, the Legal Aid Commission was created under the *Legal Aid Commission Act 1979* (NSW), which provides legal assistance and representation to people who are socially and economically disadvantaged to ensure that they have equitable access to the law
- Legal Aid provides free brief legal advice sessions to anyone, though to access subsidised legal representation, the defendant must be means tested

3.6 Burden and standard of proof

- The burden of proof (or onus) refers to the responsibility of the prosecution to prove the case against the accused (in criminal matters)
- The prosecution must also meet the standard of proof for criminal matters: they must prove the case beyond reasonable doubt
- Accused has no responsibility to show that they are not guilty of the crime but if the accused wishes to bring a defence, then the burden of proving that defence belongs to the accused

3.7 Use of evidence, including witnesses

- The collection, presentation and interpretation of evidence are crucial aspects of the criminal justice process
- The use of evidence in a court case is bound by the *Evidence Act 1995* (NSW). For evidence to be admissible in court it needs to be relevant to the case and legally obtained by the investigating police
- Evidence obtained illegally is generally inadmissible, as is evidence deemed irrelevant or opinionated
- Evidence used in court can take the form of real evidence (physical evidence), documentary evidence (original documents gathered during the investigation) and witness testimony
- Anyone who witnessed a crime may be subpoenaed to appear later in court
- The witness will be examined by both sides in the adversary system
- Often a long period of time elapses between when a crime occurs and when the matter goes to trial, sometimes causing a witness' recollection of events to be an issue in trial, particularly if a person says something that conflicts with the statement they made at the time the crime was investigated and evidence gathered (the witness can be found to be unreliable)

- An expert witness may be called, who is qualified in a specific area. Their role is to give testimony based on their expert or specialised knowledge and give an opinion or interpretation of the evidence

3.8 Defences to criminal charges

- Most defences involve some denial, justification or excuse for the accused act, and the majority revolve around the mens rea of the offence
- Legal defences help achieve justice by allowing the court to consider circumstances that might justify the accused's act or reduce their culpability
- Defences can be categorised into complete defences and partial defences

3.8.1 Complete defences (if successfully proven, complete defences will result in either certain charges being dropped or an acquittal)

Mental illness or insanity

- A defence only available where the accused can prove that they were in fact mentally incapacitated when they committed the offence
- Relates to the mens rea of the accused, and requires the accused to claim that they were not criminally responsible for their actions because they could not have formed the necessary intent
- If this defence is successful, the accused may be found not guilty on the grounds of insanity

M'Naghten's Case – 1843

- The defence is derived from the rules laid down in *M'Naghten's case*
- "To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."
- The common law test applies in New South Wales and Victoria. In all other states and territories, the defence, with some changes, is set out in legislation

R v Waterlow

- Antony Waterlow was charged with the murder of his sister and father, and with grievous bodily harm of his three-year-old niece
- The main issue in this decision concerned whether Waterlow was mentally ill and not responsible in law for his actions
- Waterlow was found to be not guilty by reason of mental illness. However, an order for his detention under s39 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) was made that he be detained at Long Bay Prison Hospital until the Mental Health Review Tribunal deem he is fit to be released

Self-defence

- May be used if the accused can show they carried out a crime in the act of defending themselves or another person, while attempting to prevent a crime or in the defence of property
- Overriding question is whether a reasonable person would have used a similar level of force in a similar situation
- Where a defendant uses this defence, the jury is compelled to either acquit the defendant or find them guilty of the crime

R v. Osland (Vic)

- Relates to the defence of “battered woman syndrome”
- Heather Osland was found guilty in the Victorian Supreme Court in 1996 of killing her husband in July 1990. She used the defence of “battered woman syndrome” to justify the murder
- Her defence was unsuccessful and the case launched a women’s rights campaign, sparking reform of homicide defences in Victoria
- Under the reforms, victims of family violence who kill their partners are able to claim self-defence even if they were not facing immediate danger at the time

Compulsion

- Necessity – used when the crime committed is not as bad as the possible outcome of not committing the crime
- Duress – describes unlawful pressure that is applied by one person to induce another person to do something against their will
 - “Threats of immediate death or serious personal violence so great as to overbear the ordinary powers of human resistance should be accepted as a

justification for acts which would otherwise be criminal.” – Attorney-General v Whelan [1934] Murnaghan J (Irish CCA)

- o *R v Williamson (1972)* NSW – the defendant disposed of a body whilst under a death threat. This threat was held to constitute duress.

Consent

- Most often used in sexual assault cases
- If it can be shown that the alleged victim consented to the act, the accused may be acquitted
- Not a valid defence for offences such as murder
- *R v Wilhelm* – accused claimed Brimble consented

3.8.2 Partial defences to murder (involves mitigating circumstances which may reduce the sentence/charge or acquit the accused)

Provocation

- The defence wherein the defendant claims that their actions were a direct result of the other person’s actions, which caused them to lose control of their actions
- Implies that the victim has some level of responsibility for the act
- In order to succeed, the defendant must prove that the victim caused them to act in a way that, given the same circumstances, any ordinary person would have acted
- Can only be used when attempting to have a murder charge reduced to manslaughter

R v. Camplin (1978)

- A 15-year-old boy successfully argued provocation after he hit his uncle with a frying pan and killed him
- The uncle had just sexually assaulted the boy and was mocking him about the incident
- The court held that an ‘ordinary person’ in the position of the accused would have formed the intent to kill or inflict grievous bodily harm on the person who had assaulted them

R v. Filippou (2011)

- Christopher Filippou was found guilty of murdering Luke and Sam Willis
- It was a culmination of a long-standing neighbourhood dispute
- Filippou relied on the defence of provocation, claiming that he temporarily lost his self-control when confronted by one of the brothers brandishing a gun
- Following an incident in June 2009, there was extensive verbal abuse between them – often following noisy drinking parties held by the Willis brothers
- The trial Judge found that Filippou's conduct during the shooting and afterwards was inconsistent with the proposition that he temporarily lost his self-control
- He was found guilty of murdering both brothers

R v. Singh (2012)

- Chamanjot Singh was found guilty of manslaughter rather than murder after a jury accepted his claim that he had been provoked by a stream of verbal abuse from his wife, Ms Kaur, including an alleged threat that she would have him deported
- In response to community outrage over the 6 year sentence given to Mr Singh over the use of the provocation defence to successfully have the charge of murdering his wife reduced to manslaughter, the NSW Parliament set up a Committee to consider whether the provocation defence needs reforming
- A 2013 Report recommended a new partial defence of gross provocation, which focuses on the nature of the provocative conduct, rather than the defendant's loss of control

Substantial impairment of responsibility (diminished responsibility)

- Exists when a person suffers from a mental abnormality that caused them to act in a certain manner and carry out a crime – impairs mental responsibility (e.g. low IQ or mental retardation)
- Defence is more widely used than the insanity plea as it is easier to prove

R v. Byrne (1960)

- The accused was a sexual psychopath with violent sexual desires that he could not control
- Most of the time he was considered to be normal, but the occasional episodes had led to homicide in the past
- In this case, the court ruled that the charge of murder should be reduced to that of manslaughter

Viro v. The Queen (1978)

- Viro was charged with, and later convicted of the murder of John Rellis
- On the night before the murder, Viro had arranged to meet with another addict in order to sell him heroin, though he could not obtain enough to fill the order so they both agreed they would rob Rellis to purchase more heroin
- Viro and 'F' took heroin and went in search of Rellis, before attacking him with an iron bar that Viro had taken along for this purpose
- Rellis produced a knife and slashed at Viro and a third person who was in the car
- During the struggle, Viro then repeatedly stabbed Rellis
- He later claimed that he panicked and stabbed Rellis in self-defence
- After his conviction, Viro appealed on the grounds that the trial judge had failed to inform the jury that, as Viro was a drug addict, the charge could be reduced to manslaughter due to diminished responsibility
- The High Court agreed and a new trial was ordered

3.9 The role of juries, including verdicts

- A panel of citizens, selected at random from a list compiled from the electoral roll, whose job it is to determine the guilt or innocence of the accused based on the evidence presented to them at trial (reach a verdict) – do not sentence
- A criminal trial involves a jury of 12 people
- In a criminal trial, the prosecution and defence have the right to challenge either the selection of the entire panel of jurors, or individual jurors.
- Both sides can also exercise a certain number of peremptory challenges (disqualify individual jurors without having to give a reason, based on appearance)
- Challenges for cause are challenges on the person not being qualified to serve on a jury (i.e. through being ineligible, disqualified or suspected of bias)
- Australian citizens aged 18 years or over are eligible to sit on a jury
- Those over 65, pregnant, non-English speakers, emergency services workers, disabled people, convicted criminals, members of the legal profession and people who care full-time for children can be exempted

- Before a court case begins, jurors are sworn in
- During the trial the role of a juror is to listen to the evidence presented to the court, apply the law as directed by the judge and come to a verdict as to the accused's guilt or innocence
- They are expected to be unbiased and impartial, and to make a judgement based solely on the evidence they are presented with

Verdicts

- A jury has to reach a verdict of guilty or not guilty, and present that verdict to the court. If found not guilty, the accused will be acquitted, and if found guilty, the judge will subsequently pass a sentence
- A jury unable to reach a verdict is known as a 'hung jury', and in these cases the case is dismissed and a retrial ordered – this puts significant strain on all parties
- In 2006 the NSW Parliament amended the *Jury Act 1977 (NSW)* with the *Jury Amendment (Verdicts) Act NSW*, allowing for majority verdicts of 11 to one or 10 to one
- The Act does not apply to Commonwealth offences, and unanimous verdicts for those offences are protected under s80 of the Constitution

- 3.1** Court jurisdiction
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R v. Burrell (2006)

- Bruce Burrell was found guilty of the kidnap and murder of Kerry Whelan
- This has been after extensive police investigations, a coronial inquest (2002), and a trial in 2005 that ended with a 'hung jury'
- A retrial in 2006 resulted in Burrell being sentenced to life, never to be released
- The publicity surrounding Burrell's aborted trial prompted the NSW government to introduce legislation allowing majority verdicts in criminal cases

4.

*The Criminal Trial Process***3.1 Court jurisdiction**

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3.3.2 Judge

- Judicial officers who preside over the intermediate and superior courts
- Oversee proceedings, maintain order in the courtroom, and ensure that the procedures of the court are followed
- Judges will make decisions about points of law and give instructions to the jury
- Once the jury reaches a verdict, the judge will hand down sentences and rulings
- In some cases the judge will sit without a jury, wherein they determine the verdict
- Are expected to remain impartial at all times

3.3.3 Police prosecutor

- Police undertake an intensive and exhaustive investigation of the matter and gather all the evidence to be used at trial in order to form the case against the accused
- The police will often also be required to give testimony
- For summary offences in the Local Court and Children's Court, police prosecutors will usually prosecute cases. These people are specially-trained members of the NSW Police Force who conduct prosecutions

3.3.4 Director of Public Prosecutions

- The DPP is an independent authority that prosecutes all serious offences on behalf of the NSW Government
- It is the role of the prosecutor to prosecute the case using evidence gathered by the police, examine and cross-examine witnesses and draw out the truth from the evidence and testimony
- The DPP also reviews cases proposed by the police to determine if there is enough evidence to gain a conviction
- The decision to prosecute depends of the sufficiency of the evidence to establish the elements of the offence and gain a conviction, as well as certain discretionary factors that relate to the public interest

Barristers and solicitors

- A person charged with an offence will usually contact a solicitor, who can advise the accused on the charge, the alleged offence and the procedures surrounding a trial, and will assist in interactions with the police investigating the case. They may also advise on any available defences, the likelihood of conviction and possible sentences
- A solicitor may also represent the accused in court, or engage a barrister to represent the accused
- Barristers have two main roles in court proceedings: to provide legal advice for the accused on the likely outcome of the case and to present that case in court

3.3.5 Public defenders

- When an accused cannot afford to pay for a barrister or solicitor, they may be granted access to a public defender.
- Public defenders are paid public barristers who are independent of the government and perform the same duties as other barristers, though appear in serious criminal matters for an accused who has been granted legal aid
- They appear in relation to criminal trials, sentencing matters and appeals, and may be briefed by a private solicitor, through Legal Aid or through a community-based group

3.4 Pleas, charge negotiation

- A charge is a form of accusation against a person, though it does not imply guilt
- The law requires the accused to enter a plea of either guilty or not guilty
- If they do not enter a plea, it is taken to mean ‘not guilty’
- The plea entered by the accused has a significant impact on how the charges are dealt with
- A guilty plea is dealt with quickly and does not require witnesses to give testimony, instead the case goes directly to sentencing
- If the accused pleads not guilty, the case will be defended in court
- Charge negotiation is where the accused agrees with the prosecution to plead guilty to a particular charge or charges (usually a lesser charge) in exchange for other higher charges being withdrawn, or a lesser sentence
- This is also known as case conferencing and plea bargaining, and will usually result in a faster and less expensive case for the prosecution, the accused and the court

For	Against
Decrease time delays and costs	Crimes may go unpunished or insufficiently punished
Increases the rate of criminal convictions	The accused may plead guilty to a lesser charge of which they are innocent
The conviction on a lesser charge is better than no charge at all	May lead to bullying of the accused to forfeit their right to trial

3.5 Legal representation, including Legal Aid

- In the Australian legal system, a defendant has the right to a fair trial, though Australian courts have evidenced that a trial will rarely be fair for an accused person who does not have adequate legal representation
- *Dietrich v. The Queen* (1992) recognised that there is no automatic right to legal representation in Australia
- Many defendants can afford adequate legal representation and are able to pay for a barrister or solicitor to advise them and present their case in court, though the quality of legal services offered varies
- In rare circumstances an accused may elect to represent themselves in court, but due to the complexities of court processes and the consequences of inadequate representation in criminal matters, this is not advised unless the offence relates to a very minor matter
- In 1979, the Legal Aid Commission was created under the *Legal Aid Commission Act 1979* (NSW), which provides legal assistance and representation to people who are socially and economically disadvantaged to ensure that they have equitable access to the law
- Legal Aid provides free brief legal advice sessions to anyone, though to access subsidised legal representation, the defendant must be means tested

3.6 Burden and standard of proof

- The burden of proof (or onus) refers to the responsibility of the prosecution to prove the case against the accused (in criminal matters)
- The prosecution must also meet the standard of proof for criminal matters: they must prove the case beyond reasonable doubt
- Accused has no responsibility to show that they are not guilty of the crime but if the accused wishes to bring a defence, then the burden of proving that defence belongs to the accused

3.7 Use of evidence, including witnesses

- The collection, presentation and interpretation of evidence are crucial aspects of the criminal justice process
- The use of evidence in a court case is bound by the *Evidence Act 1995* (NSW). For evidence to be admissible in court it needs to be relevant to the case and legally obtained by the investigating police
- Evidence obtained illegally is generally inadmissible, as is evidence deemed irrelevant or opinionated
- Evidence used in court can take the form of real evidence (physical evidence), documentary evidence (original documents gathered during the investigation) and witness testimony
- Anyone who witnessed a crime may be subpoenaed to appear later in court
- The witness will be examined by both sides in the adversary system

- Often a long period of time elapses between when a crime occurs and when the matter goes to trial, sometimes causing a witness' recollection of events to be an issue in trial, particularly if a person says something that conflicts with the statement they made at the time the crime was investigated and evidence gathered (the witness can be found to be unreliable)
- An expert witness may be called, who is qualified in a specific area. Their role is to give testimony based on their expert or specialised knowledge and give an opinion or interpretation of the evidence

3.8 Defences to criminal charges

- Most defences involve some denial, justification or excuse for the accused act, and the majority revolve around the mens rea of the offence
- Legal defences help achieve justice by allowing the court to consider circumstances that might justify the accused's act or reduce their culpability
- Defences can be categorised into complete defences and partial defences

3.8.1 Complete defences (if successfully proven, complete defences will result in either certain charges being dropped or an acquittal)

Mental illness or insanity

- A defence only available where the accused can prove that they were in fact mentally incapacitated when they committed the offence
- Relates to the mens rea of the accused, and requires the accused to claim that they were not criminally responsible for their actions because they could not have formed the necessary intent
- If this defence is successful, the accused may be found not guilty on the grounds of insanity

M'Naghten's Case – 1843

- The defence is derived from the rules laid down in *M'Naghten's* case
- "To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."
- The common law test applies in New South Wales and Victoria. In all other states and territories, the defence, with some changes, is set out in legislation

R v Waterlow

- Antony Waterlow was charged with the murder of his sister and father, and with grievous bodily harm of his three-year-old niece
- The main issue in this decision concerned whether Waterlow was mentally ill and not responsible in law for his actions
- Waterlow was found to be not guilty by reason of mental illness. However, an order for his detention under s39 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) was made that he be detained at Long Bay Prison Hospital until the Mental Health Review Tribunal deem he is fit to be released

Self-defence

- May be used if the accused can show they carried out a crime in the act of defending themselves or another person, while attempting to prevent a crime or in the defence of property
- Overriding question is whether a reasonable person would have used a similar level of force in a similar situation
- Where a defendant uses this defence, the jury is compelled to either acquit the defendant or find them guilty of the crime

R v. Osland (Vic)

- Relates to the defence of “battered woman syndrome”
- Heather Osland was found guilty in the Victorian Supreme Court in 1996 of killing her husband in July 1990. She used the defence of “battered woman syndrome” to justify the murder
- Her defence was unsuccessful and the case launched a women’s rights campaign, sparking reform of homicide defences in Victoria
- Under the reforms, victims of family violence who kill their partners are able to claim self-defence even if they were not facing immediate danger at the time

Compulsion

- Necessity – used when the crime committed is not as bad as the possible outcome of not committing the crime
- Duress – describes unlawful pressure that is applied by one person to induce another person to do something against their will
 - “Threats of immediate death or serious personal violence so great as to overbear the ordinary powers of human resistance should be accepted as a

justification for acts which would otherwise be criminal.” – Attorney-General v Whelan [1934] Murnaghan J (Irish CCA)

- o *R v Williamson (1972)* NSW – the defendant disposed of a body whilst under a death threat. This threat was held to constitute duress.

Consent

- Most often used in sexual assault cases
- If it can be shown that the alleged victim consented to the act, the accused may be acquitted
- Not a valid defence for offences such as murder
- *R v Wilhelm* – accused claimed Brimble consented

3.8.2 Partial defences to murder (involves mitigating circumstances which may reduce the sentence/charge or acquit the accused)

Provocation

- The defence wherein the defendant claims that their actions were a direct result of the other person’s actions, which caused them to lose control of their actions
- Implies that the victim has some level of responsibility for the act
- In order to succeed, the defendant must prove that the victim caused them to act in a way that, given the same circumstances, any ordinary person would have acted
- Can only be used when attempting to have a murder charge reduced to manslaughter

R v. Camplin (1978)

- A 15-year-old boy successfully argued provocation after he hit his uncle with a frying pan and killed him
- The uncle had just sexually assaulted the boy and was mocking him about the incident
- The court held that an ‘ordinary person’ in the position of the accused would have formed the intent to kill or inflict grievous bodily harm on the person who had assaulted them

R v. Filippou (2011)

- Christopher Filippou was found guilty of murdering Luke and Sam Willis
- It was a culmination of a long-standing neighbourhood dispute
- Filippou relied on the defence of provocation, claiming that he temporarily lost his self-control when confronted by one of the brothers brandishing a gun
- Following an incident in June 2009, there was extensive verbal abuse between them – often following noisy drinking parties held by the Willis brothers
- The trial Judge found that Filippou's conduct during the shooting and afterwards was inconsistent with the proposition that he temporarily lost his self-control
- He was found guilty of murdering both brothers

R v. Singh (2012)

- Chamanjot Singh was found guilty of manslaughter rather than murder after a jury accepted his claim that he had been provoked by a stream of verbal abuse from his wife, Ms Kaur, including an alleged threat that she would have him deported
- In response to community outrage over the 6 year sentence given to Mr Singh over the use of the provocation defence to successfully have the charge of murdering his wife reduced to manslaughter, the NSW Parliament set up a Committee to consider whether the provocation defence needs reforming
- A 2013 Report recommended a new partial defence of gross provocation, which focuses on the nature of the provocative conduct, rather than the defendant's loss of control

Substantial impairment of responsibility (diminished responsibility)

- Exists when a person suffers from a mental abnormality that caused them to act in a certain manner and carry out a crime – impairs mental responsibility (e.g. low IQ or mental retardation)
- Defence is more widely used than the insanity plea as it is easier to prove

R v. Byrne (1960)

- The accused was a sexual psychopath with violent sexual desires that he could not control
- Most of the time he was considered to be normal, but the occasional episodes had led to homicide in the past
- In this case, the court ruled that the charge of murder should be reduced to that of manslaughter

Viro v. The Queen (1978)

- Viro was charged with, and later convicted of the murder of John Rellis
- On the night before the murder, Viro had arranged to meet with another addict in order to sell him heroin, though he could not obtain enough to fill the order so they both agreed they would rob Rellis to purchase more heroin
- Viro and 'F' took heroin and went in search of Rellis, before attacking him with an iron bar that Viro had taken along for this purpose
- Rellis produced a knife and slashed at Viro and a third person who was in the car
- During the struggle, Viro then repeatedly stabbed Rellis
- He later claimed that he panicked and stabbed Rellis in self-defence
- After his conviction, Viro appealed on the grounds that the trial judge had failed to inform the jury that, as Viro was a drug addict, the charge could be reduced to manslaughter due to diminished responsibility
- The High Court agreed and a new trial was ordered

3.9 The role of juries, including verdicts

- A panel of citizens, selected at random from a list compiled from the electoral roll, whose job it is to determine the guilt or innocence of the accused based on the evidence presented to them at trial (reach a verdict) – do not sentence
- A criminal trial involves a jury of 12 people
- In a criminal trial, the prosecution and defence have the right to challenge either the selection of the entire panel of jurors, or individual jurors.
- Both sides can also exercise a certain number of peremptory challenges (disqualify individual jurors without having to give a reason, based on appearance)
- Challenges for cause are challenges on the person not being qualified to serve on a jury (i.e. through being ineligible, disqualified or suspected of bias)
- Australian citizens aged 18 years or over are eligible to sit on a jury
- Those over 65, pregnant, non-English speakers, emergency services workers, disabled people, convicted criminals, members of the legal profession and people who care full-time for children can be exempted

- Before a court case begins, jurors are sworn in
- During the trial the role of a juror is to listen to the evidence presented to the court, apply the law as directed by the judge and come to a verdict as to the accused's guilt or

- 5.1 Age of criminal responsibility
- 5.2 The rights of children when questioned or arrested
- 5.3 Children's Court – procedures and operation
- 5.4 Penalties for children
- 5.5 Alternatives to court

innocence

- They are expected to be unbiased and impartial, and to make a judgement based solely on the evidence they are presented with

Verdicts

- A jury has to reach a verdict of guilty or not guilty, and present that verdict to the court. If found not guilty, the accused will be acquitted, and if found guilty, the judge will subsequently pass a sentence
- A jury unable to reach a verdict is known as a 'hung jury', and in these cases the case is dismissed and a retrial ordered – this puts significant strain on all parties
- In 2006 the NSW Parliament amended the *Jury Act 1977 (NSW)* with the *Jury Amendment (Verdicts) Act NSW*, allowing for majority verdicts of 11 to one or 10 to one
- The Act does not apply to Commonwealth offences, and unanimous verdicts for those offences are protected under s80 of the Constitution

R v. Burrell (2006)

- Bruce Burrell was found guilty of the kidnap and murder of Kerry Whelan
- This has been after extensive police investigations, a coronial inquest (2002), and a trial in 2005 that ended with a 'hung jury'
- A retrial in 2006 resulted in Burrell being sentenced to life, never to be released
- The publicity surrounding Burrell's aborted trial prompted the NSW government to introduce legislation allowing majority verdicts in criminal cases

5.1 Age of criminal responsibility

- A key defining boundary is the age at which a person allegedly commits an offence
- Those under 18 when they commit an offence are dealt with in the **juvenile justice system** up until they turn 21
- The law grapples with difficulties in determining cut-off points to reflect the transition from the age of innocence through to full responsibility under the law
- Minimum age of criminal responsibility in Australia is 10 (under *doli incapax*)
- Principle exists for children between 10 and 14, though it is rebuttable as they are presumed to be incapable of forming the intent to form a crime, though there may be exceptions
- NSW Law Society seeking to raise age of criminal responsibility to 13 years

R v. LMW (1999) NSW

- A 10-year-old boy, LMW, was charged with the manslaughter of six-year-old Corey Davis, who drowned in March 1998 after the accused dropping him into the Georges River, knowing he was unable to swim
- Accused was found not guilty- jury supported defence that the death was a 'childish prank gone wrong', enacted by an almost retarded boy who did not appreciate the consequences of his actions

5.2 The rights of children when questioned or arrested

- The law recognises that children and young people require some special protection when dealing with the police
- When police arrest a young person, they must:
 - Tell the offender that they are under arrest and why
 - Find out details of the young person's parent/guardian and contact them
- Children and young people have the right to silence
- The law provides extra protection to young people by requiring that a responsible adult be present when they are being questioned by police
- Role of support person is to assess whether the investigation is being conducted reasonably, identify communication issues and assist children in asserting their rights

R v. Phung and Hunyh (2001)

- 17-year-old Phung was suspected of armed robbery and fatal shooting
- He was arrested by police and 2 interviews were conducted whilst in custody, in which Phung made admissions
- The Judge refused to admit the interviews into evidence, finding the police didn't act properly as they failed to provide an appropriate support person for Phung
- First support person was Phung's cousin who had poor English and was intimidated by police
- Second support person was a Salvation Army officer who was a stranger to Phung and didn't have the chance to speak with him privately
- Judge found the support people didn't appreciate the seriousness of the charges nor did they give Phung any advice or guidance about his right to remain silent or to obtain legal advice

Police searches

- Police may stop and search a person if they suspect on reasonable grounds that they are carrying drugs, stolen goods, something about to be used to commit an offence, a knife, or other dangerous implements
- Police search powers relating to young people are the same for adults except for strip searches, which can never be performed on a child under 10 and for those children 10-18, must be performed in the presence of a responsible adult
- Search must be conducted in line with all regulations, and respect of privacy

Arrest

- Police powers to lawfully arrest a young person are the same as for an adult
- They must know or believe on reasonable grounds that the person has, or is about to commit an offence, have a warrant for said person's arrest, contact a support person to be present during interview, give the caution of rights in presence of the support person, and inform the suspect of their right to contact Legal Aid

R v. ME and LT

- Court found that it wasn't good enough for police to just give a child a phonebook and tell them to look up their own lawyer
- The failure to make the hotline available to the child is a clear breach of the Act and regulations, as well as being a breach of the requirement of fairness to the young person

Detention and forensic procedures

- Detention has the same time limit as adults (4 hours, or extension to 8 hours with warrant)
- Fingerprints and photos can only be obtained with a Children's Court order if the suspect is under 14, and if over 14, only for identification purposes
- DNA samples are only permissible for those under 18 with a Children's Court order

5.3 Children's Court – procedures and operation

- A specialised court established under the *Children's Court Act 1987* (NSW), which outlines jurisdiction and procedure
- Has a dual role:
 - Dealing with criminal matters of children and young people under 18 years of age
 - Dealing with matters of care and protection of children and young people, as referred by the Department of Community Services
- Jurisdiction covers any offence other than a serious indictable offence, as well as committal proceedings for any indictable offence where the accused is a child
- Proceedings are much less formal – presided over by a magistrate, no jury
- Protection of the identity and privacy of the young person are paramount due to the principle of rehabilitation
- Court is closed to the public, and media can only be present on specific terms (only if directed, though child's name/photo cannot be published without the consent of the child if over 16, or court if under 16)

5.4 Penalties for children

- The purpose of rehabilitation is given heavy weight when sentencing children, due to their age/vulnerability/high likelihood of rehabilitation
- This is consistent with the UN Convention on the Rights of the Child, which acknowledges that children and young people have the best chance of any offenders of being rehabilitated and reintegrated into the community
- S33 of the *Children's (Criminal Proceedings) Act 1987* (NSW) lists the penalties that can be applied to children:
 - Dismissal – without conviction or punishment, may be issued with a caution
 - Conviction – if under 16, no conviction can be recorded
 - Adjournment – deferral of sentencing for up to 12 months so the magistrate can consider child's prospects of rehabilitation at a later date
 - Bond – good behaviour bond of maximum 2 years, can be conditional
 - Youth justice conference – outcome plan developed
 - Fine – up to 10 penalty units (\$1100)
 - Probation – up to 2 years, overseen by NSW Juvenile Justice

- o Community service order – up to 100 hours if under 16, 250 hours if 16 and over
- o Suspended control order – similar to suspended sentence, up to 2 years, subject to good behaviour
- o Control order – detention in a Juvenile Justice Centre up to 2 years

Principles of juvenile justice

- Children's rights and freedoms before the law are equal to adults; they have a right to participate in the processes that lead to decisions affecting them
- Children who commit offences bear responsibility for their actions but because of their state of dependency and immaturity, require guidance and assistance
- Desirable to allow employment or education of child to proceed uninterrupted and for a child to reside in their home

R v. GDP (1991)

- Court of Criminal Appeal upheld an appeal by the 14 year old offender against a 12 month custodial sentence for serious criminal damage to property totaling \$550,000, stating that it was manifestly excessive;
- The Appeal Court stated that the sentencing principles for children differed from those for adults - general deterrence and retribution were not as important for children as they are with adults, rehabilitation is the primary aim. The Appeal Court sentenced GDP to a 12-month probation order.

5.5 Alternatives to court

- All Australian states and territories have diversionary schemes for young offenders
- In NSW in 1998, the *Young Offenders Act* became law, introducing a graded diversionary scheme of police warnings, formal cautions and youth justice conferences for young offenders
 - o Prior to *Act*, 68% of young people appearing in Children's Court reappeared within 5 years
 - o After *Act*, 42% of those cautioned and 58% of YJC reoffended within 5 years
- It was designed to divert a significant majority of young offenders from the courts
- There is an entitlement in the *Act* for offenders to be dealt with in the least restrictive and most appropriate way – criminal proceedings should not be started if there is an alternative
- The only offences which must go to court are those that cause death, sexual assault offences, serious drug offences and a few other offences

Warnings

- Least serious option for an offence – non-violent summary offences

- Quick and informal, issued on the spot
- Does not involve an admission of the offences
- Can't attach any conditions or impose a sanction
- No penalty or criminal record but name and details are recorded in case there is a subsequent offence

Cautions

- If a warning is not deemed appropriate or is not issued, a young person is entitled to be dealt with by way of caution
- Are given by police and courts if the young person admits the offence and consents to a caution
- Must receive written notice prior to receiving the caution and must be given at police station or anywhere the issuing person considers appropriate
- Can't have more than 3 cautions, but a single caution can be given for more than 1 offence
- Don't get a criminal record but full details of caution retained on police records and can be used if reoffend
- Offender can be asked to write an apology to any victim, though no other conditions
- Any time before the caution is given, the young offender can ask to have the matter dealt with by the court

Youth Justice Conferences

- Young offenders who admit an offence to which the *Young Offenders Act* applies can be referred by either a specialist police youth officer or a court to a YJC
- Entitled to YJC if a caution is not issued
- YJC regarded as progressive as they recognise the rights of young offenders, their victims, their families and members of their community to decide what to do about the harm caused by the young person's actions
- 4 key aims:
 - To provide a safe, supportive environment to discuss the crime
 - Holds the young person accountable to their actions
 - Find ways to repair the damage/harm caused to the victim
 - Involve the victim, young person's family and young person
- At any time the young person can decide not to proceed with the YJC and elect to go to court
- Objective is to reach an agreement on an outcome plan – may include an oral or written apology, reparation to the victim or integration of the child into the community through a program; must be realistic and appropriate, sanctions cannot be more severe than those the court would impose; must set a timeframe for implementation
- BOSCAR – '*Participant satisfaction with Youth Justice Conferencing*' – more than 85% of offenders and victims reported being satisfied or very satisfied with most aspects of YJC

6. International Crime

- Broad term, covering any crime with international origins or consequences
- Issue of state sovereignty complicates the control and punishment of international

- 6.1** Categories of international crime
 - 6.1.1** Crimes against the international community
 - 6.1.2** Transnational crimes
- 6.2** Dealing with international crime
 - 6.2.1** Domestic measures
 - 6.2.2** International measures
 - 6.2.3** Limitations

crime

- Technology and globalisation has changed the way international crimes and the general level of public awareness of these crimes

6.1 Categories of international crime, including:

6.1.1 Crimes against the international community

- Disrupt the operation, peace and security of the international community
- Systemic abuse of other human beings – erodes morals and ethics; so fundamentally wrong that the international community considers it worthy of severe sanctions
- Prosecution of these crimes can be difficult since they are often committed in the context of military conflict and can be politically motivated or committed by the state itself
- However, other states can condemn such action and prosecute the offender under the claim of universal jurisdiction

Genocide

- A specific act committed with the intent to destroy, in whole or in part, a national, ethnic, religious or racial group – Genocide Conventions (1948)
- Acts are deemed to constitute genocide (as clarified by ad hoc tribunals in Yugoslavia and Rwanda) when committed with the requisite intention are:
 - Killing members of the group

- o Causing serious bodily or mental harm to members of the group
- o Deliberately inflicting on the group conditions of life calculating to bring about its physical destruction in whole or in part
- o Imposing measures intended to prevent births within the group
- o Forcibly transferring children of the group to another group
- The definition is the basis of a prosecution before the ICC – must prove intent and group membership
- Definition of genocide under international law does not protect all groups (i.e. political or social) – a shortfall of ICC as cannot prosecute members of the Khmer Rouge who exterminated their *political* opponents

Crimes Against Humanity

- Defined in Article 7 of the Rome Statute as any of the following acts ‘when committed as part of a widespread or systemic attack directed against any civilian population, with knowledge of the attack’
- Includes murder, extermination, torture, rape, political racial or religious persecution and other inhumane acts

War Crimes

- Defined in Article 8 of the Rome Statute; extensive definition that includes grave breaches of the Geneva Conventions
- Rome Statute provides for command responsibility, provided that a military commander will be held criminally responsible for crimes committed by forces under his/her effective control if they knew or should have known in the circumstances, of the unlawful behaviour of subordinates but failed to take reasonable measures to prevent or punish them
- ICC does not have jurisdiction to prosecute if the offender is under 18
 - o Geoffrey Robertson claims this is a weakness and age should be a mitigating factor in punishment – not a reason to exonerate them from the crimes they have committed

Crimes of Aggression

- Refer to the ‘planning, preparation, initiation or execution by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression, which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’

The Nuremburg Tribunal (1945-46)

- Indicted 22 German political and military leaders to be tried for war crimes
- In 1945, the Charter of International Military Tribunal (Nuremburg Tribunal) was the first instrument to codify international crimes that had long been recognised as part of customary international law

- The evolution of modern International Criminal Law came out of the Nuremburg and Tokyo Tribunals. In 1946, the UN affirmed in a unanimous resolution of the General Assembly the principles of International Criminal Law enshrined in the Nuremburg Charter
- A significant outcome was the ‘recognition of individual responsibility’ under international law
 - *‘The principle of international law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings ...’*
- Since Nuremburg, the international community has developed a wide variety of international laws and mechanisms to deal with crimes against the international community

6.1.2 Transnational crimes

- Initially take place within one nation, but have international legal consequences (e.g. drug importation, illicit arms trade, people trafficking)
- Are often economically-driven crimes
- Dr Sandy Gordon, the AFP’s National Coordinator of Intelligence states ‘Increasingly, there is a new jurisdiction for both criminal and police – the international one. And with it, a new set of knowledge, skills and tools. The problem is, it is not really a jurisdiction, or at least not yet. And this fact confers an advantage on the criminal and disadvantages on police. For international criminals depended on the ability to exploit differences and inefficiencies between jurisdictions. And globalisation has greatly enhanced their prospects of doing this’.

Child abduction – Italian sisters

- Family Court ordered four sisters be deported after their mother brought them to Australia for a holiday in 2010 and never returned
- The situation follows a ruling by the Family Court in Brisbane that there were no exceptional circumstances allowing it to disregard Australia’s obligations under the Hague Convention on child abduction
- Court has an obligation to consider Australia’s responsibilities under the Hague Convention, which requires signatory countries to make arrangements to return children who have been “wrongfully removed” from their country of primary residence. The custody dispute is before the Italian courts

Mark Newton and Peter Truong – paedophile ring

- Mark Newton and boyfriend Peter Truong were tried in America for sexually abusing the boy they had “adopted” after paying a Russian woman \$8000 to be their surrogate in 2005
- Police believe the pair had adopted the boy “for the sole purpose of exploitation”
- Both pleaded guilty – Newton sentenced to 40 years
- While the couple were visiting family in the US, Queensland police searched their Cairns home and found enough evidence to alert their US counterparts who raided their Los Angeles base and took the boy into custody

R v. Tang

- August 2008, High Court considered a provision of the Criminal Code covering “offences against humanity”, in particular “slavery, sexual servitude and deceptive recruiting”
- The definition of slavery in the *Criminal Code 1995* (Cth) is very similar to the definition contained in Article 1(1) of the International Convention to Suppress the Slave Trade and Slavery [1927] ATS 11
- In *R v Tang* [2008] HCA 39, the respondent, the owner of a licensed brothel, was found guilty in the Victorian County Court of a number of charges of “possessing” and “using” a slave contrary to section 270 of the *Criminal Code 1995* (Cth)
- The charges related to five women who were recruited from Thailand to work in brothels in Australia. The woman had entered Australia on illegally obtained visas, their passports and return air tickets were kept by the respondent, and they had limited English and no money

6.2 Dealing with international crime:**6.2.1 Domestic measures**

- 2011 Australian Crime Commission Annual Report stated:
 - “Transnational networked criminal enterprises pose a jurisdictional and logistical challenge to law enforcement and regulatory agencies and present difference but equally important challenges to lawmakers and policy agencies.
 - The best defence against transnational crimes is a multi-national and multi-agency investigation designed to disrupt the international networks at key hubs where trafficking routes intersect and where they may be vulnerable

- o Timely exchange of intelligence with affected countries and agencies is also critical. The increasing spectre of transnational crime argues for the collaboration to extend to agencies from foreign countries and to world bodies.”
- Australian mechanisms include the courts, AFP, Department of the Attorney-General, Australian Crime Commission, Commonwealth DPP, Department of Immigration, Australian Customs and Protective Services, etc
- Virtual Global Taskforce (9 international child protection enforcement agencies) ran Operation Rescue, which targeted offenders involved in a global child abuse ring – 184 offenders were arrested and prosecuted domestically
- Australia’s response can be prosecution, extradition or mutual assistance
- *Extradition Act 1988* (Cwth) allows Australia to make requests for extradition from other countries, and receive requests to extradite to other countries (e.g. Dragan Vasiljkovic to Croatia for war crimes)
- *Mutual Assistance in Criminal Matters Act 1987* (Cwth)
- Key prosecutions incl. *R v Wei Tang*, *R v Dobie* and *R v Mclvor and Tanuchit*

Universal jurisdiction

- No authoritative definition of ‘*universal jurisdiction*’, though a ‘practicable’ definition is, “the ability of the prosecutor or investigating judge of any state to investigate or prosecute persons for crimes committed to outside the state’s territory which are not linked to that state by the nationality of the suspect or of the victim or by any harm to the state’s own national interests.”
- International crimes that are subject to universal jurisdiction have been universally condemned by states or offend against the international community as a whole by infringing universal values

6.2.2 International measures

- Generally the most successful means of dealing with international crime is for nation-states to prosecute within their own jurisdictions
- International agencies used in investigation – Interpol, Europol, Virtual Global Taskforce, UN agencies and NGOs
- International community responds to ‘*hosti humani generis*’ (an enemy of humankind) and is therefore amenable to the jurisdiction of all states (e.g. ad hoc tribunals, ICC and nation-states using domestic legislation to prosecute)

Rwanda

- Butare Four (2001) – were convicted for participating in the killings of Tutsi citizens in Rwanda
- The Four fled to Belgium, where they were subsequently tried, convicted and sentenced to 12 to 20 years under Belgian law
- Belgium did not have an extradition treaty with Rwanda at the time – instead the Belgian courts applied universal jurisdiction

Sierra Leone

- Special Court for Sierra Leone
- Prosecution of Charles Taylor (Head of State) for aiding and abetting of war crimes and crimes against humanity, sentenced to 50 years
- Prosecution of Augustin Bizimungu and Augustin Ndindilyimana for preparing extermination lists sentenced to 30 years

Yugoslavia

- 161 indictments for crimes against humanity, war crimes and genocide
- All indictments processed and 126 cases completed

Steven Freeland – Comments on ICC

- Very expensive, and civil society expects results
- Unrealistic aim to ‘end impunity’
- Some nations make it near-impossible to gain evidence (e.g. Sudan and DR Congo)
- Based in the Hague – logistical issues
- Because of the resource implications, governments and NGOs involved, integrity of evidence is an issue
- ICC is treaty based – 18 judges from 18 jurisdictions, all trained in different ways with different backgrounds and views on how the process should work

6.2.3 Limitations

Cost

- ICTY 1993-2011 cost US\$1.7bn, ICC annual budget 90-100m euros

- Though costs are insignificant if the value of the proceeds from many of the transnational crimes are considered

Lack of co-operation

- Australia's issues with Dragan Vasiljkovic
- Though when cooperation does occur, it can be very effective (e.g. ICTY and ICTR)

Lack of commitment to the ad hoc and permanent courts and tribunals

- 120 out of 196 countries have signed up to the Rome Statute
- Lack of commitment of 38% of nation-states adds to the limitations of these measures
- This is especially the case when 2 of these nations are USA and China – reputedly the 2 most powerful nation-states currently

Lack of action by nation-states to prosecute international criminals domestically (universal jurisdiction)

- Canada's prosecution of Desire Munyaneza and Norway's prosecution of Sadi Bugingo are excellent examples of the effectiveness of nations to deal independently due to the principle of universal jurisdiction
- If more nation-states took on this responsibility, other limitations would be reduced, such as time delays and cost

Time it takes to prosecute, and delays once prosecution commences

- Due to the serious nature of these crimes and the jurisdictional issues these time delays can be very long – up to 10 years
- Some of these delays are due to practical issues such as the obtaining of evidence, how to execute arrest warrants and the need for accurate information
- Other issues with witness reliability and language barriers can create time consuming investigations and preparations. The conduct and behaviour of those facing the courts have created many of the deals probably hoping the case will drag out so much that a conviction becomes unlikely (e.g. prosecution of Charles Taylor before the Special Court for Sierra Leone and a number of cases before the ICC)

Gridlock of cases at ad hoc courts, tribunals and ICC

- Courts and tribunals have become gridlocked with cases due to the issues of time, cost and the vast number of indictments
- Other structural, legal and political challenges facing these courts and tribunals add to this gridlock

Challenges specific to the ICC establishment

- Structural – building a new institution, lessons from other international criminal tribunals, harmonisation of cultural practices and expectations and continuity of expertise and work practices
- Legal – legality of court, ambiguities in legal texts, case and trial management, rights of accused, rights of victims, harmonisation of legal principles
- Political – need for state cooperation, peace v justice concerns, attitude of major powers, relationship with UNSC, impunity agreements
- State sovereignty – frustrates international efforts to combat crime, and so international law is dependent on the cooperation of nation-states

Effectiveness

- No specific criteria to judge this
- Steven Freeland – International Law Expert and visiting Professional to the ICC states that we should be looking at four criteria:
 - End all conflict?
 - Reduction in number of wars?
 - Large number of prosecutions?
 - Greater accountability of State Criminal Justice Systems?
- Between 1945 and 1990 at least 180 million people were killed in circumstances related to genocide yet no one was prosecuted after Nuremburg
- Since 1990 due to the ad hoc tribunals and ICC, over 160 prosecutions have occurred
- Nation-state convictions and co-operation has increased significantly
- Current ICTY trial of Radovan Karadzic who was handed over by Serbia, as well as the handing over of Ratko Miadic and Goran Hadzic (the last of the 161 people indicted by the ICTY) is a reflection of the four criteria
- Conviction of Hosni Mubarak in Egyptian Court and sentenced to life in prison for ordering the killing of protestors