Criminal Trial Process

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**Court Jurisdiction**

An important point to note is the NSW Court system is hierarchal & therefore provides opportunities for appeal.

This is a just outcome for individuals & society as the Crown can appeal if the sentence is inadequate.

achine generated alternative text:
High Court of Australia 
Court of Criminal Appeal 
(a division of the Supreme Court of NSW) 
Supreme Court of NSW 
NSW District Courts 
NSW Local Courts 

1. LOCAL COURT - Local Court Act 2007 (NSW)

* Jurisdiction of summary offences (less than 2 years gaol) & maybe some indictable offences
* Conducts committal hearings for indictable offences e.g. murder (make sure prima facie case is there, where will your case)
* Presided by Magistrate = decides rules of law, bail hearings, no jury
* 91% of prosecutions in local court

1. CHILDRENS COURT - Children's Court Act 1987

* Established under Childrens Court Act 1987 (NSW)
* Criminal cases: summary & less serious indictable offences
* Accused under 18 or 21 if offence committed under 18
* Punishment focus = rehabilitation as shown in R v GDP 1991 & care and protection of children
* Specialist children's Magistrate/Judge
* There are 13 specialist children's Magistrates who are appointed under s7 - Children's Court Act 1987 NSW for periods of up to 5 years

1. CORONERS COURT

* Cause & manner of a person's death
* Unexplained deaths
* Fires
* Can commit a person to trial
* Coroner conducts a coronial inquest into death

1. DISTRICT COURT = INTERMEDIATE COURT

* Trial court
* Bulk of serious criminal cases e.g. armed robbery, sexual assault (anything except murder, treason, privacy)
* Appeals from local court - appellate jurisdiction
* Jury decides court (beyond reasonable doubt), Judge decides sentence
* Same level is Drug Court, deals with offenders who are dependant on drugs e.g. heroin - send people usually to rehabilitation

1. DRUG COURT

* Deals with non-violent criminal offences committed by drug dependant offenders - usually possession
* NSW Bureau of Crime Statistics & Research has shown a significant reduce in RECIDIVISM RATE of those who complete the program
* 3 drug courts not one at downing centre
* Youth Drug & Alcohol Drug Court was axed in 2012 due to budget cuts - issue 50% of young offenders are dependant on drugs & alcohol

1. SUPREME COURT = SUPERIOR COURT

* Original jurisdiction over: murder, manslaughter & attempted murder, aggravated sexual assault in company e.g. Skaf case
* Judge & jury
* Kiesha Abrahams, Roger Dean, 2013 Jacobs who killed Constable Rixon - life sentence for murdering a police officer
* Kieran Loveridge - manslaughter

1. COURT OF CRIMINAL APPEAL

* Hears appeals from drug court, district and supreme court
* Usually 3 judges, not the whole trial again, look at transcripts to see if there was a mistake of law
* Crown can appeal: July 2014 Kieran Loveridge sentence for killing Thomas Kelly doubled on appeal
* NSW Court of Criminal Appeal resentence Loveridge to a minimum of 10 years, 2 months jail for the night of the violence. This included increasing the minimum sentence for manslaughter offence from 4 to 7 years
* Found the previous sentence had been "manifestly inadequate"
* It upheld all 7 of the appeal ground put forward by the Crown, most crucially that sentencing Judge Stephen Campbell failed to properly consider the need for general deterrence

Offender/Individuals have:

* Right to appeal
* Milat v R & Conhen v R (who pleaded guilty) appealed the severity of their sentence handed down by Justice Jane Mathews
* SMH 2014: Mathew Milat loses appeal for axe murder

Does double jeopardy exist?

* In 2006 the Crimes (Appeal & Review) Act was amended to allow people to be put on trial again: serious offence (15+ years), new & strong evidence (witness - lying originally, jury misconduct) double jeopardy not relevant & prosecution can appeal - trial again

1. HIGH COURT

* Hears appeals from Court of Criminal Appeal
* No criminal cases go straight there…constitution yes
* Only if special leave (permission) to appeal, very rare e.g. Keli Lane refused
* SINGLE JUDGE
* High Court (full court) appeal = seven judges = very, very rare

**The Adversary System**

The Adversarial System is used in common law countries such as England & Australia which relies on the skill of representatives for each side (e.g. prosecution & defence lawyers) who present their case to an impartial decision maker

The Inquisitorial System is where the court (i.e. the Judge) is actively involved in conducting the trial & determining what Q's to ask, used in countries with civil legal systems e.g. Europe, Japan, Indonesia

Judge Judy, asks a lot of questions, Japan similar system, 3 judges run the trial - delay minimal, most countries use this system

What is common to both systems?

* The Government is in charge of prosecuting cases
* Procedural fairness during Trial and balancing the rights of the defendant/victim/society
* Defendant has a right to prove his/her innocence

Differences between Adversarial and Inquisitorial systems

* AS = prosecution v defendant in search for justice whereas
* IS = Judge based on search for TRUTH

* AS = Lawyers in control - expensive and time consuming whereas
* IS = Judges in control - faster trials

* AS = Lawyer quality is vital - less chance of conviction whereas
* IS = Lawyers play little role

* AS = Jury system - passive, democratic randomly chosen from the electoral roll, still only for indictable offences, therefore use small, there are significant concerns e.g. errant jurors in gang rape trial on investigations, do not understand what a reasonable doubt is
* IS = No jury trials except serious cases which might have 3 judges with 9 jurors

* AS = Only certain evidence allowed, mostly ORAL evidence
* IS = All evidence is allowed because Judges make the decisions, evidence is mostly written

* AS = Better for defendant, right to silence only reasonable doubt required for not guilty verdict, can plead guilty and get a lesser punishment
* IS = Better for society, no right to silence for defendant, no plea negotiation

COMPARISON OF AS + IS

Role of judge:

* In AS, the judge is independent & impartial. They ensure both parties receive a fair hearing
* HOWEVER, in the IS, the judge plays a more active role. They may call & question witnesses & may raise other matters of law or fact. Judges aim is to uncover the truth of the matter

Legal representation:

* Legal representation ensures parties are able to present their best case as they are familiar with rules of evidence & procedure. This assists in achieving a just outcome --> AS
* HOWEVER, in the IS legal representation have a lesser role. They assist the judge to find out the truth which may include further questioning of witnesses

Burden/Standard of proof:

* Ensures the party bringing the case has to prove it to the required standard --> AS
* HOWEVER, in the IS there is no formal burden or standard of proof. Judges responsible for bringing evidence & the pursuit of truth is the main objective

Rules of evidence & procedure:

* AS --> aim to keep the contest fair & ensure the truth should emerge through questioning
* HOWEVER, IS --> no strict rules of evidence & procedure. The judge determines what evidence is permissable & witnesses are allowed to tell their stories rather than respond to questioning

**Legal Personnel**

Magistrate:

* Presides over local court
* Hearings: summary offences - makes decision (guilty/not guilty) & the sentence/punishment e.g. fine, good behaviour bond Hannibal 2015, suspended sentence R v Lyttle (2015)
* Committal hearings for indictable offences - decide is Prima Facie case for indictable offences (will a JURY convict)

Judge:

* Conducts trials in courts higher than LC
* Make sure rules of court are followed (e.g. illegally obtained or irrelevant evidence not allowed)
* Advise juries on legal Q's and
* Also SUM up the case at the end of the trial
* Judge makes decisions on sentencing if found guilty at another date e.g. Roger Dean = life, R v Jacobs life (however no judicial discretion)

Prosecutors:

* Have to prove the guilt (burden of proof) of the defendant (at a standard of) beyond reasonable doubt, if defendant is found guilty, prosecutor argues for a penalty that fits the crime
* Police prosecutors --> summary cases in LC, as well as a lot of committal hearings --> specially trained police officers
* 91% of prosecutions in LC
* Director of Public Prosecutions (DPP) who runs the office of the director of public prosecutions
* Full of crown prosecution lawyers e.g. Mark Tedeschi in the Robert Xie case, Crown Prosecutors found in the DC, SC, committal hearings for indictable offences. At sentencing focus on aggravating factors to increase sentencing

efence:

* Defence Lawyers: represent the defendant, try to create reasonable doubt e.g. Winston Terrancini is Harriet Wran's defence lawyer
* Public Defenders: represent defendants in District Court & Supreme Court who have been given government assistance, includes cases from the legal aid commission & Aboriginal legal service. They are paid salaries. At sentencing focus on mitigating factors to lower sentencing
* FYI: Senior Public Defender is Mark Lerace SC

**Pleas, Charge Negotiation**

Note: Different concepts

Pleas - A formal statement of guilt or innocence of the accused

* Person charged with a crime are asked to enter a plea

Three choices:

1. Not guilty
2. Guilty (approx 25% discount)
3. No plea (taken as not guilty)

In over 80% of criminal cases accused pleas guilty

Charge Negotiation

* ISSUE: Trials take long time, costs, sometimes no conviction
* Prosecutors came up with charge negotiation
* Charge negotiation is the process by which the prosecutor agrees to withdraw a charge on the promise of the accused to plead guilty to others
* It is resource efficient --> there is a justice issue, balancing rights of victims, role of discretion
* According to ABC Law Report charge negotiation saves $10,000 a day (cost of a trial)

Means of achieving justice

* It is controversial…
* DPP perspective: Court system would not cope without charge negotiation & guilty pleas
* Victims/Witnesses: Don’t have to go through the trial process e.g. being cross-examined specifically sexual assault offences, DPP will go for a guilty plea through charge negotiation if there is a scared or vulnerable witness
* Individual/Defendant: will get a reduced but general NOT an insufficient penalty

Victim perspective:

* In NSW, the Charter or Victim Rights (NSW) amended in 2009, victim has to be consulted before a charge agreement is decided but only for serious cases of violence, including sexual violence/prosecutors now need to get a certificate signed that proves that the victim were properly consulted (do not have to agree) before agreement reached (to improve compliance)
* Victims support group VOCAL (Victims of Crime Assistance League) that most of the time the DPP gets it right, however some feel the required of consultation was not being enforced

Judges perspective:

* They have to sentence on the charge presented & then they are critised for being too lenient e.g. Kieran Loveridge "Four years for a life"
* Some judges also think that lawyers don’t charge negotiate EARLY when discount is higher 25%. They wait until the trial starts 12.5%

Community:

* Efficient, quick, inexpensive = resource efficiency as there is not a court hearing
* May feel justice is not served… lesser sentence
* Criminal Case Conferencing Trial Act 2008 codifies discount for guilty plea - 25% before committal & 12.5% after committal

Issue of Kieran Loveridge:

* DPP: charges dropped from murder to manslaughter not enough evidence, resources, however, Crown Prosecutor Pat Barrett wants a sentence that will send a 'clear message to the community'
* Victim (Thomas Kelly) family: angry at the dropping of the charges, feels that legal system treats offenders with "kid gloves", "legal system let us down", Mr & Mrs Kelly read out VIS at sentencing but it cannot be taken into account
* Justice Campbell - sentencing judge will listen to in OPEN COURT: 8 victim statements, as well as defence's written submissions on Kieran Loveridge's life, assessing his intelligence, mental state & remorse

**Legal Representation**

* No rights to legal representation/Lawyer but in the AUS legal system a defendant has the right to a fair trial (Dietrich v R 1992)
* Therefore if murder, serious complicated case the defendant has a right to a lawyer if they cant get a fair trial without one

Legal Aid

The more serious the charge the more complex & detailed the legal arguments will be. Legal representation is not guaranteed in AUS, unlike the USA where it is enshrined in the Bill of Rights (Charter of Rights)

However, our High Court in the Dietrich case implied the right to representation when it stated that a person who is represented might not receive a fair trial, a historical right that all are entitled to

If a defendant cant afford legal representation -->

* Legal aid commission was set up in 1979
* For socio-economic disadvantaged
* Improves access to justice
* Also provides 15 mins of free legal advice to everyone

3 tests for legal aid:

1. Jurisdiction test --> what type of case will legal aid cover --> criminal cases get priority especially where serious penalties like gaol
2. Means test --> Income, assets, ability to get a loan
3. Merits test --> Reasonable chance of winning --> most people would fail this test (maybe asked to enter a plea of guilty/represent you at sentence)

Who will always get legal aid? Youth under 18

ISSUE: of legal aid according to Law Council of Australia - Report:

* There is an erosion of legal representation in AUS justice system
* Cuts to legal aid funding 2012 12000 people were turned away from community legal services because of lack of funding
* Serious impact on our justice system - more people representing themselves which causes delays
* Less experienced lawyers take legal aid cases
* Defendants are being pressured to plead guilty or give up their case because they don’t have a lawyer
* Long delays in court, cases too long

Justice?

+ Right to legal representation in serious cases has been established as in the Dietrich case - common law

+ Legal Aid NSW provides legal assistance & representation to people who are socially & economically disadvantaged to ensure they have equittable access before the law

**Burden & Standard of Proof**

* In a criminal case it is the prosecution/state/crown/Regina/R/ that has to prove the person committed the crime (not the defendant)
* Therefore PROSECUTION bears the burden of proof (burden = it is their job) to prove the defendant is guilty
* Burden of Proof = Prosecution
* Local Court - PP
* District/Supreme - CP
* The PROSECUTION has to prove the defendant is GUILTY BEYOND REASONABLE DOUBT - this is the standard of proof for criminal cases
* Standard of proof = beyond reasonable doubt

**Use of Evidence (Including Witnesses)**

* Police will need to gather enough evidence to support a charge against the accused in court
* The use of evidence in court is bound by the Evidence Act 1995 (NSW), which defines when evidence can be admissable

ISSUES: Scientific evidence is sometimes used incorrectly but juries believe it is always correct. The e.g. being DNA: Farah Jama 2010 found guilty of sexual assault - spent 16 months in prison, DNA evidence only evidence used & it was contaminated. SMH Blinded by Science - Juries understanding of DNA - they don’t understand it & if they don’t believe it to be correct

Witnesses:

* Witnesses - need to be competent - have to answer Q's (crown cannot call the defendant because of their right to silence)
* Witnesses must be sworn in before giving evidence, either by making an oath or affirmation
* While witnesses will have given prior written statements to the police, it is required in a criminal trial that evidence be given orally
* Witnesses are cross-examined by opposing counsel with the aim of testing the truth of their evidence
* Any inconsistencies in witness accounts provide a rich field for defence counsel to pursue in cross examination - to create doubt
* Note: the defence will have had prior access to the prosecution witness written statements
* Special rules govern the provision of evidence by child victims in sexual assault cases. Such evidence may be given via CCTV to save the child from the trauma of having to confront the alleged perpetrator in a court room.

Rules of evidence:

* Hearsay evidence --> what witnesses heard/saw not what someone else told them happened
* Opinion evidence --> Cannot give opinion unless expert witness
* Character evidence --> Evidence cannot be given about the bad character of an accused

**Defences to criminal charges**

A defence is a claim made by the defendant that attempts to explain or justify their conduct & therefore reduce their criminal liability

A person who admits to a criminal offence may adopt a defence that justifies or excuses their actions

* Revolves around the mens rea of the accused
* Defences achieve justice by considering circumstances behind the accused actions

2 types:

1. COMPLETE DEFENCES (7) - no charge, no conviction, acquitted
2. PARTIAL DEFENCES (2) - drop from murder to manslaughter, lead to reduced liability & therefore reduced penalties e.g. charged with murder. A partial defence e.g. extreme provocation may reduce to manslaughter

**Complete/absolute defences**

A justification that excuses the defendants actions & results in an acquittal

* Infancy - In NSW the age of criminal responsibility is 10 but infancy can still be used as a defence up to the age of 14, as was used in the R v LMW 1999 case - corey davis case
  + Prosecution must prove mens rea - knowledge on the part of the defendant that the act was morally wrong

* Mental illness or Insanity
  + Responsibility of the defence to prove the defendant was insane --> No mens rea --> Places them under supervision in a mental health facility
  + The leading case for insanity is the M'Naughten's Test 1843
  + R v Waterlow 2011 NSW not guilty on grounds of mental illness
  + Achieves justice?
    - A defendant such as R v Waterlow 2011 should not be responsible if they do not understand it is wrong due to mental illness
    - Test as per the M'Naughten's Test 1843 to prove mental illness is rigorous this achieves justice for the community
    - In addition the Community is protected --> defendant is in mental institution

* Self-Defence
  + Must admit to committing the crime --> mens rea & actus reus
  + May not use greater force than reasonably necessary e.g. you can't shoot someone if they are about to punch you
  + Assess?
    - The use of self defence achieves justice because --> even though it is called self defence you can defend someone else
    - Defence can only be used if the force used in self defence was necessary & reasonable
    - Jury accepts the plea of self defence in Kasparian case 2012 & Catherine Smith

* Necessity
  + This is when the defendant claims that the act or omission committed was necessary to avert serious danger. The case of R v Dudley & Stephens (1884) showed that the defence of necessity was not available for murder, however, may be used for careless driving
  + Assess:
    - The defence of necessity is a difficult defence to prove & usually applies to cases where people fear that they will be killed or injured seriously
    - R v Backshall 1998 defences - Duress of circumstances - necessity - available for careless driving & dangerous driving

* Duress
  + The defence of duress involves an extremely serious threat to an accused or their family involving the death or serious injury of the accused or their family
  + This defence is rarely raised in a criminal trial --> not for murder or manslaughter
  + R v Palazoff 1986 a case where duress was successfully pleaded for a drug offence
  + Asses:
    - Threats must be proven
    - People can protect themselves and families

* Consent
  + A victim cannot consent to murder or grievous bodily harm; therefore this defence cannot be raised in relation to some offences such as murder
  + Most commonly raised in sexual assault cases; the term assault implies an absence of consent
  + Consent must be freely & voluntarily given
  + It must be proved beyond reasonable doubt that:
    - The victim was not consenting; and
    - The defendant was aware at the time that the victim was not consenting
  + R v Meuller 2005 where the victim lacked the capacity to consent
  + Asses:
    - Law makes sure consent is given freely & voluntarily not by fraud or force
    - Justice in cases of sexual assault is extremely poor (NSW Bureau of Crime Statistics and Research (BOCSAR) reported 90% of sexual assaults do not lead to a conviction & 17% ended up in court)

* Other:
  + Automatism - involuntary behaviour e.g. epileptic fit, sleep walking: Karen Brown had a brief period of automatism - R v Karen Brown 2006
  + Infancy - NSW under 10
    - Can be used as a defence up to age 14 e.g. Corey Davis
    - Prosecution must prove mens rea, knowledge that the defendant knew the act was morally wrong

In summary,

Self defence, automatism, infancy, insanity = complete defences for murder

Duress/necessity = complete defence but cannot be used for murder

Consent = Complete defence for sexual assault

**Partial Defences**

* An excuse accepted by the courts which in some way reduces the original charge & may lessen the sentence

* Provocation
  + Defendant claims they were aggravated by the victim --> actions would have caused an ordinary person to lose self-control
  + R v Camplin 1978 is the precedent case in providing guidance about defence of PROVOCATION
  + E.g.s
    - Battered woman syndrome first used by Cherie Russell 2006
    - The Abuse Excuse - Butler case 2012 - kill case relied on provocation
  + KEEP: Achieving justice
  + Law Society, Domestic Violence Coalition says it should stay to PROTECT disadvantaged women who suffered years of domestic violence such as Cherie Russell 2006, or sexual abuse such as Butler 2012 who one day lost control
  + Only 3 of 18 defendants who use this defence are women
  + REMOVE: Not achieving justice
  + When men lose control because they were provoked by verbal abuse such as Singh 2012 (6 years for the killing) or adultery such as Won case 2012 (7.5 years) --> creates a culture of blaming the victim
  + Media: SMH 2013 Time to Act - Provocation must be rejected as an excuse for murder
  + Catalyst of the change: R v Singh 2012
    - Legislation: An amendment to the Crimes Act (NSW) Crimes Amendment (Provocation) Act 2014 (NSW)
    - Purpose: Makes it harder for people to use 'provocation' as an excuse for murder - previously as seen in the Singh case this defence placed biased against women & blamed the victim for their own murder

* Substantial Impairment of Responsibility/Diminished Responsibility
  + Used when the accused is suffering from a mental impairment/disorder/abnormality of the mind that caused them to commit the crime e.g. Low IQ, mental retardation, long term use of alcohol or drugs may be sufficient to prove diminished responsibility
  + 2012 NSW Mum not guilty of murdering baby, guilty of manslaughter on the grounds of substantial impairment
  + Chayna v the Queen
  + Woman jailed for killing ex

* Asses
  + Defences are reasons/excuses for committing a crime that doesn’t mean you don’t get the full punishment
  + Complete defences
    - Defendant is found NOT GUILTY
    - Mental illness
    - Self-Defence
    - Necessity
    - Duress
    - ConsentM
  + Partial Defences (Only for murder)
    - Defendant found GUILTY of manslaughter ie. Reduced charge from murder to manslaughter
    - Provocation
    - Substantial impairment of responsibility
  + Defences --> need to look at circumstances case by case --> complete or partial defences should be considered
  + Defences are CONTROVERSIAL --> Good for DEFENDANT
  + But VICTIMS & SOCIETY aren't always happy (media focuses on this)

**Juries**

|  |  |
| --- | --- |
| For | Against |
| * + Reflects community values   + Provides for trial by ones peers   + Safeguard against an abuse of power by the State   + Safeguard against bias   + Spreads the responsibility for deciding a verdict   + A jury is not necessary part of the adversary system of trial e.g. no jury in the Local Court   + Can choose no jury as seen in Gittany 2013 - Judge alone trial, decision of the Judge, risk of jury tampering | * + Adds to the cost of the trial already expensive…$10k/day   + Don’t always understand judges instructions   + Adds to delays, extends the length of the trial   + The law today is too difficult for juries e.g. DNA & expert evidence as seen in Wood & Gilham case which both resulted in acquittals after appeals in the NSW Criminal Court of Appeal   + Do not represent a cross section of the community - should we have professional jurors?   + Social media makes jury trials difficult: issue the defendant might be able to argue that he cant get a fair trial   + Juries cant be forced to listen, or understand evidence or self investigate - e.g. 2008: Jurors playing Sudoku a DC judge had to discharge jurors on a drug trial --> 60 days $1mill, 105 witnesses |

Majority Verdicts:

* Usually 12 jurors, amendment to the Jury Act 2006, 15 jurors lengthy criminal trial e.g. R v Wood 2008 Caroline Byrne --> murder at gap, (only 12 make decision), Robert Xie 2015
* Since 2006: the Juries (Amendment) Act 2006 (NSW) brought in majority verdicts
* This means that in a criminal trial the voting can be 11 to 1, 10 to 1 allowed under 2006 amendments (8 hours have to be passed of deliberations) not in QLD or ACT

|  |  |
| --- | --- |
| For | Against |
| * + Majority verdicts 11/12, 10/11 after 8 hrs of deliberation   + Quick, easy, less pressure on jurors to achieve conformity, negates effect of a rogue juror, consistent with civil proceedings, & most other AUS jurisdictions (NSW only for murder) | * + Law reform commission report in 2005 against majority verdicts   + Verdicts may be reached after insufficient negotiation, contrary of the required standard of proof, implies a distrust of the jury system, constitutional protection of unanimous jury |

Role of Juries:

* Juries decide on Q's of fact
* They decide on the verdict - guilty/not guilty
* Jury trials are RARE - 3% criminal trials in NSW last year DC & SC
* Defendants can apply since 2011 not to have a jury e.g. Simon Gittany 2013 - this will be granted by a judge - if it is in the best interest of justice
* Can only use the evidence the Judge allowed in the trial they are not allowed to INVESTIGATE
* Jury duty & the selection of jurors is regulates by the Jury Act 1977

NSW juries are selected from electoral rolls, 18 years old

Who is disqualified?

Convicted criminals - last 10 years in NSW served a prison sentence

Last 3 years found guilty of an offence

Who is ineligable?

Executive, judiciary, legislature, police, non-english speaking, legal profession - lawyer, convicted criminals, disabled people - sickness

Who can claim an exemption?

Pregnant, full time carer, religious order, dentist, doctor, fire, ambulance, rescue, aged 70 & over

* Prosecution and defence have a right to challenge selection of jurors
* Peremptory challenge --> based on appearance (age, gender, clothing) 3 only
* Challenges for cause --> believed the juror will be prejudicial (victim of similar crime, acquainted with the defendant, ineligable) unlimited but must show cause
* If jurors DO NOT comply - maximum 2 years prison