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1: Components of Crim Justice System, Sources of law, Major Themes (Chapter 1); Courts Exercising Criminal Jurisdiction (Chapter 2)

Components of the Criminal Justice System
Four components of the criminal justice system

- Defining crime (elements of offences, defences – crim law)
- Rules & Principles by which guilt or innocence is determined
- Mechanisms by which people are brought within crim justice system
- Sentencing

This unit focuses on component 2 + 3

- Law governing CP derives from case law and statutory law – main statute is Crimes Act 1958 (Vic) (CA)
- In 2008, Vic Parliament completed a wholesale reform of the law relating to CP
- Changes contained in Evidence Act 2008 (Vic) (EA) and Criminal Procedure Act 2009 (Vic) (CPA)

Major themes relating to CP

- Preventing crime: If people believed they could commit crime with impunity, crime would escalate out of control
- Protecting individual rights: If investigative officials or judicial officials are given too much power, this has the tendency to erode fundamental rights and ultimately cause unrest in the community
- Balancing the competing considerations: Difficult to balance these two things, standard of criminal guilt too low – large number of innocent people will be convicted of crimes; standard too high – far too many guilty people would be acquitted
- “It is better than ten guilty men walk free than one innocent person is convicted”

S 25 of Charter of HR and R – Rights in criminal proceedings

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

Dietrich v The Queen (1992) – Facts discussed later

HC held that there had been a miscarriage of justice b/c an accused who could not afford a lawyer was forced to represent himself in a trial lasting 40 days. Accused charged with a serious crime has a CL right to a fair trial.

The concept of evidence

- The term evidence denotes the materials which courts will consider in deciding disputed issues of fact
- The manner in which the inquiry into evidence is undertaken is as follows:
  1. First and most basic rule of exclusion is that no evidence is admissible unless either directly or indirectly 'relevant' to a fact in issue in the proceeding must render the existence or non-existence of that fact more or less probable that would be the case if that item of evidence were not presented for consideration by the tribunal
  2. Relevant evidence may be caught under another rule of exclusion, such as the hearsay, similar fact or opinion evidence rules
  3. Evidence that is relevant and not caught under any evidentiary rule of exclusion is regarded as 'legally admissible'

Objectives of the rules of evidence

Truth is not the only or ultimate end of evidence law. Two other broad aims which search for truth

- The 'disciplinary' principle leads to the exclusion of certain forms of 'wrongly' obtained evidence – some cases admissions and illegally obtained evidence is excluded from playing field in a bid to discourage law enforcement officers from adopting inappropriate practices in their detection and investigation of crime
- The 'protective' principle which requires the accused persons should be treated fairly and protected from the possible prejudice of juries. Hence, similar fact evidence is normally inadmissible, accused have the right to remain silent and in some cases, parties close to the accused are not compelled to give evidence

Overview of main themes in evidence

Exclusionary rules: there are a number of exclusionary rules. An important one is the hearsay rule. Hearsay is evidence of an assertion which is made out of court which is tendered for its truth. Normally excluded b/c it is believed to be unreliable.

An adversarial system

The proceedings are in the hands of the parties (evidence, arguments, witnesses); judge as referee reflected in:

1. Gathering evidence for trial
2. Trial
3. Discretion
4. Nature of the trial process
5. Role of the victim

**Key features of adversarial system**

- Presumption of innocence (prosecution must prove case against accused)
- Right to silence (prosecution must prove case against accused)
- Right to fair trial
- Exclusionary rules of evidence (explained above)

**But these matters must be increasingly qualified:**

- Right to silence – some statutory reform in Aus, reforms in UK
- Duty to prosecutors to disclose evidence
- Right to confront witnesses – *R v Darmody (2010)*
- Contemporary developments – ‘therapeutic jurisprudence’ collaboration of accused (and defence counsel) eg assessment and referral court (ARC) at Melb Magistrates Court

**Commonwealth jurisdiction**

- Each state and territory in Aus has its own courts and unique substantive and procedural laws for dealing with criminal matters
- Federal offences operate differently than all other criminal matters
- While the fed govn has its own police force, there are no fed courts which deal with fed crim matters
- Instead, conduct that is made criminal under commonwealth law is prosecuted in state courts
- Commonwealth offences are dealt with in Vic courts
- Pursuant to ss 68 and 79 of the *Judiciary Act 1903 (Cth)*, state laws and rules of procedure can be applied to deal with Commonwealth crim matters
- S 68 confers jurisdiction on state courts to deal with commonwealth offences.
- S 79 states that when state courts adjudicate commonwealth offences, state laws of procedure and evidence are to be applied, absent a clear intention to the contrary as expressed by the comm parliament.
- Commonwealth law effectively adopts the state rules of procedure and evidence in dealing with fed crim matters.
- S 68 provides that state law shall apply regarding the arrest and charge of commonwealth offenders; the same is true with regard to the procedures for bail, committal hearing, trial, sentencing and appeal

**Section 79 State or territory laws to govern where applicable**

The laws of each state or territory, including the laws relating to procedure, evidence and the competency of witnesses, shall, except as otherwise provided by the constitution or the laws of the commonwealth, be binding on all courts exercising federal jurisdiction in that state or territory in all cases to which they are applicable

**Section 68 Jurisdiction of state and territory courts in criminal cases**

The laws of a state or territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:

a) their summary conviction; and
b) their examination and commitment for trial on indictment;

See page 33 for continuation

**Jurisdiction – State v Federal**

In Australia, crim law & procedure is largely the responsibility of State Governments... why?

*Commonwealth of Aus Constitution Act*

- 39 areas of national significance identified in Constitution (s51) (NOT CRIME)
- Matters can be referred to the Cth by state parliaments (s51(xxxvii))
- Cth has concurrent jurisdiction over state offences with a ‘federal aspect’

**Federal:**

- Police/ investigating agencies /prosecutorial authorities
- The federal government and the Australian federal police have roles in relation to some offences, especially drug trafficking and terrorism
- But relies heavily on state criminal courts, state crim prosecution

**State:**
In Vic, the Vic parliament makes most of our laws relating to crime and CP (including penalties and police powers). The Vic govn manages funding for police and courts legal assistance and the prison and parole system. Vic police are funded by the Vic Govn and the Chief Commissioner is appointed by the Police Minister.

**Jurisdiction – persons**

**Natural persons** – the original object of the CL (physical sanctions)

**Corporations** may be prosecuted. Liability attributed through actions of employees acting within scope of their authority and mental states of persons of managerial authority of the corporation.

**Unincorporated associations** generally cannot be prosecuted as such, but individual members can.

**Foreign nationals** can be prosecuted for offences committed within jurisdiction.

**Immunities**

- **Sovereign**
- **Diplomatic**
- **Children**
  - Under age 10 – conclusively presumed to be incapable of any criminal offence: *Children, Youth and Families Act 2005, s344; Criminal Code s7.1*
  - 10-14: Common law: rebuttable presumption that they lack the necessary level of mental culpability (ie prosecution must prove child know his/her conduct was wrong) *ALH (2003) 6 VR 276* (see especially the discussion by Cummins AJA); *Criminal Code s7.2*
- **Law enforcement**
  - No general doctrine of immunity but special statutory provisions may operate for activities within the scope of their duties eg undercover operations for illicit drugs: *Drugs, Poisons and Controlled Substances Act 1981 s51; child pornography: Crimes Act 1958 ss68(2) & 70(4).*
- **Witness indemnity**
  - May be granted by Attorney-General or DPP
  - Witness receives from prosecutor a written undertaking of immunity from prosecution if s/he gives evidence on behalf of crown. The effect is to render the person a compellable witness for the crown.
  - If crown subsequently reneged on decision not to prosecute, court could exercise inherent power to stay later prosecution as oppressive and abuse of process (*Fox, 2010, 21*).

**Jurisdiction – Time**

- **Victoria:**
  - Indictable offenses: at common law, prosecution may take place at any time after their commission. Also *s7(2) CP Act* (BUT some statutory time limits / procedural preconditions may exist for specific offences)
  - Levels 1 to 6 are presumed to be indictable offences in the absence of a clear legislative intention
  - If limitation period passed or precondition not met, an accused cannot be convicted of the offence, even on a plea of guilty: *R v Tait (1996) VR 662*
    - Offences: generally:
      - **Adults:** charges must be filed within 1 year of the date on which the offence alleged to have been committed: *CP Act 2009 s7(1)*
      - **Children:** charges must be filed within 6 months of the date on which the offence alleged to have been committed: *Children Youth and Families Act 2005 s344A*
      - **Offences which have a max penalty b/w levels 7 to 12 are summary offences**
  - Federal:
    - Like Victoria, refer to specific Acts but generally:
      - For individuals:
        - where maximum term of imprisonment for 1st offence is > 6 months: prosecution may be commenced at any time. If less, prosecution must be commenced within 12 months of commission of offence: *Crimes Act 1914 (Cth) s15B*
      - If offender is corporate entity:
        - where maximum penalty for 1st offence is 150 penalty units or more: prosecution may be commenced at any time. If less, prosecution must be commenced within 12 months of commission of crime: *Crimes Act 1914 (Cth) s15 (1A)*

| Level 1 | Life |
| Level 2 | 25 years |
| Level 3 | 20 years |
| Level 4 | 15 years |
| Level 5 | 10 years |
Fines can be imposed in addition to the respective terms of imprisonment

Retrospectivity and CP

- The presumption against retrospectivity does not apply to procedural and evidentiary matters
- A person who allegedly has committed an offence is to be tried according to the practice and procedure prevailing at the time of the trial (not at the time of offending): *Rodway* (1990)
  (but be mindful of transitional provisions)

The trigger – reporting crime to police

- Vic police record and investigate crime and also have a crime prevention role
- BUT not all crime is reported to police or reported by them (especially assault, sexual assault and family violence) which can affect the accuracy of police crime statistics
- **2011/12:**
  - 391,325 offences were recorded by Victoria Police.
  - Police dealt with 178,897 alleged offenders during this period (approx. 3% of the Victorian population), 208,100 victims of crime.
  - Significant increase in family violence offences

Police questioning and investigation

- Major issues re admissions/confessions now addressed through technology – recording of police interrogations
- Police questioning regulated by statute and common law
- Search & seizure regulated by statute and common law
- Scientific aids to investigation – fingerprinting, DNA testing & other forensic procedures largely governed by statute

Charging

- Charges can be laid by the police and the Office of Public Prosecution (OPP)
- OPP: an independent, government-funded agency which prosecutes serious crimes while police prosecutors prosecute less serious crimes
- Police: For some minor offences, police can caution or fine a person. For other offences, police will charge them
- If the alleged crimes are serious offences such as rape, assault or murder, the police may first obtain advice from the Office of Public Prosecutions (OPP) before laying charges
- Although both the police and OPP consider the views of the victim, decisions about what charges to lay are based on the evidence collected during the investigation, legal principles and the public interest

Bail and Remand

- For some offences, the police will arrest the suspected offender and take them into custody
- **Bail** is the release of the person from custody upon their agreement to return to court to respond to the charges against them
- Bail can be granted by police, a bail justice, a magistrate or a judge
- An accused person can apply for bail more than once and may do it at any stage between being charged and the date when their charges are heard by the court. If they are refused bail the first time, they can apply again. They must show the court that there are ‘new facts and circumstances’ since their first application
- **Bail conditions:** can be imposed, such as not approaching the alleged victim or paying money that will be lost if the person does not attend court. If a person is granted bail but does not attend court, they can be arrested and may be charged with an additional offence

Remand

- If the court refuses bail, the accused person will remain in custody. They are known as a ‘remand’ prisoner and will be held in custody until they successfully apply for bail or until the end of their trial – where they may be found guilty and sentences to prison, or found not guilty & released
- Remand prisoners are innocent until proven guilty at trial
• In Vic from 2005-10, about 18% of prisoners were on remand (the remaining 82% were serving prison sentences)

Prosecution
• Prosecution is the process of presenting evidence in court which seeks to prove that a person committed the crime they are charged with
• The police and the office of public prosecutions (OPP) prosecute charged:
  o Police: summary offences, Magistrates’ Court
  o OPP: indictable offences, higher courts
• Police and the OPP have discretion to prosecute someone. In broad terms, they will prosecute a person if it is reasonably likely the court will find them guilty and it is in the public interest to charge them
• The prosecution acts on behalf of the State of Vic, not the victim of the crime (all crimes are said to be committed against the state)
• However, there are range of support services for crime victims and witnesses. In Victoria, the Victims’ Charter sets out the rights of victims in relation to the investigation and prosecution of crimes, including rights to:
  • Be treated fairly
  • Be kept informed
  • Make a victim impact statement if the court decides a person is guilty

Courts and Trials
• Most accused plead guilty and appear before the courts for sentencing e.g. Western Australia
  o 1997: 68% of charges in the higher courts were determined by a plea of guilty
• …the vast majority of those who are prosecuted in the courts plead guilty to the charges against them. Indeed, if only a small percentage of those who at present plead guilty decided to contest the charges, our courts would break down under the pressure of cases for trial, and not simply for sentence.
  • Waller & Williams (2001) 20.
• If someone pleads not guilty, a court hearing will determine whether the person committed the crime they are accused of. The prosecution must prove BRD that the accused person committed the crime and the accused person can present evidence seeking to show they did not commit the crime

Magistrates Court
• Magistrates Court Act 1989 (vic)
• > 50 locations in Vic
• Trials of less serious offences (summary offences) are heard in the Mag Court without a jury. The mag decides the facts and law, whether the person is guilty & sanction
• Single magistrate
• The mag court also hears committal hearings for indictable offences. At a committal hearing, a decision is made about whether there is enough evidence for the case to go to trial in the County or Supreme courts. Summary matters stay only in the Mag court
• In Vic, about 92% of alleged offenders are dealt with by the Mag court. Prosecution mainly by police prosecutors
• 2 years imprisonment for a single offence (3 years for certain proscribed offences)
• 5 years total for more than one offence

County Court and Supreme Court
Trials of indictable offences (more serious offences) like murder and rape are heard in the Supreme Court or the County Court
• A jury hears the evidence, decides the facts and applies the facts to the law, as directed by the judge, to determine whether the accused person is guilty
• Juries are made up of citizens randomly selected from the Vic community
The County Court is the largest trial court in the state. It hears serious criminal cases including rape, armed robbery and serious assault, which are prosecuted by the Office of Public Prosecutions
The Supreme Court of Victoria is the highest court in the state. The supreme court has locations in Melbourne and 11 regional areas of Vic. The Chief Justice presides over the court, which is divided into two divisions:
  • The court of appeal: hears appeals against decisions made by single judges of the supreme and county courts
  • The Trial Division: trial division of the supreme court hears very serious criminal cases including rape and murder, which are prosecuted by the Office of Public Prosecutions
  • Appeal to the court of appeal is not a right – not automatic right to appeal → must seek leave
Next avenue of appeal is to the HC of Aus – not of right → seek special leave – court will make decision whether they will hear appeal or not

2011-12: 102 cases finalised in trial division (48 plea hearings, 54 trials)

In Vic, only around 2% of alleged offenders are dealt with by the Supreme or County Courts

### Children and Young People

- Trials of children and young people accused of crimes normally happen in the Children’s Court which handles around 5% of alleged offenders
- **Jurisdiction**: to hear and determine charges against young people aged between 10 and 17 years at the time of committing the alleged offence. If a young person has turned 19 by the time their court case is commenced in the Children’s Court the case will be transferred to the Magistrates’ Court: *Children, Youth and Families Act 2005* s516

- The Children’s Court may deal with all charges except:
  - Murder
  - Attempted murder
  - Manslaughter
  - Child homicide
  - Defensive homicide
  - Arson causing death, and
  - Culpable driving causing death

### Sentencing

- If a person pleads guilty, or if the court finds them guilty, the judge/magistrate will decide their penalty (Over 90% of crim cases heard in Vic courts result in a guilty finding – either through a guilty plea or a guilty finding after a trial). The process of deciding a penalty is called sentencing. Under Vic law, the five purposes of sentencing adults are to:
  - **Retribution** – ie punch the offender to an extent and in a manner that is just in all of the circumstances
  - **Deter** – the offender or others from committing similar offences
  - Establish conditions that will facilitate the offender’s **Rehabilitation**
  - Make it clear that the court **Denounces** the offender’s behaviour
  - **Incapacitate** – thereby protecting the community from the offender

Sentencing is not the end point of criminal justice system → everyone gets a sentence – minimum; then may be able to apply for parole

### Factors taken into account in sentencing

- A judge will take a range of factors into account in setting the penalty including:
  - the maximum penalty
  - current sentencing practices
  - the nature of the offence
  - any harm caused and the impact on the victim
  - whether the offender pleaded guilty and at what stage
  - the offender’s responsibility for the offence
  - the offender’s character including any criminal history.

### Sentencing orders

- The court can impose a range of sentencing orders including:
  - **Diversion**, a process for some minor offences where the offender admits responsibility and takes action such as apologizing to the victim or giving money to a charity
  - **Fine**, a monetary penalty paid to the state
  - **Community corrections order**, an order to do community work or other things
  - **Suspended sentence**, this option is being phased out
  - **Prison**
  - **Other orders** for certain crimes, like an order to pay compensation, to cancel the person’s drivers licence or to put them on the sex offenders register.

**2004/05**: Victorian courts sentenced 87,040 people in criminal cases: 15% received prison sentences, 85% received non-prison sentences like fines or community orders.

### Sentences and parole

- If the court punishes an offender with prison, in many cases it will set a minimum and maximum term.
- Prisoners become eligible for conditional release on parole after serving the minimum term.
• **Parole** is intended to supervise their reintegration into the community and has been shown to reduce reoffending.

• The **Parole Board** decides when someone is eligible for parole and what conditions apply to their parole and can cancel parole in some circumstances.

**Appeals – criminal procedure act 2009**

• A convicted person can appeal against sentence and/or conviction:
  ○ From Magistrates’ Court to County Court: ss254-256
  ○ From County Ct / Supreme Court to Ct of Appeal:
    ✗ Against sentence: ss278-286
    ✗ Against conviction: ss274-277

• The Crown may appeal against sentence:
  ○ From Magistrates’ Court to County Court: ss257-259
  ○ From County Ct / Supreme Court to Ct of Appeal: ss 287-294

**Determination of appeal against conviction**

(1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that—

(a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or

(b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or

(c) for any other reason there has been a substantial miscarriage of justice.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 274.

Eg *Sibanda v The Queen* [2011] VSCA 285

**Interlocutory appeals**

- S297 CP Act provides for appeals to be made to the ct of appeal during a trial before a verdict is reached – interlocutory appeal

- Trial judge’s consent should be sought, appeal should not unduly delay trial, must be in interests of justice, should be on a significant matter that might otherwise generate a later appeal (ss295(3))

- Appeal is not of right.; leave to appeal must be granted by the ct of appeal

- *MA v The Queen* (2011) VSCA 13

**Key themes and tensions**

- Inherent tensions:
  ○ Effective crime investigation V protection of rights
  ○ Rights of victims V rights of accused
  ○ Privileged processing of some crimes V equal processing of all crimes
  ○ Efficient case management v justice
  ○ If effective crime investigation was the sole aim…mandatory DNA databases of the entire population, coercive interrogation, etc BUT this might result in convicting the innocent, innocent accused ‘copping a plea’ (lawyer too costly, stress & uncertainty of trial, sentencing discount for pleading guilty eg *R v McKenzie* (2000) 113 A Crim R 534

- Liberal democracies balance the aim of effective investigation with protection of human rights

- Key rights/themes at common law: Right to be presumed innocent, right to silence, right not to be subject to arbitrary detention, right to fair trial, rule against double jeopardy (right not to be tried or punished more than once for the same offence)….

- Also – Victoria since 2006:

  - *Charter of Human Rights and Responsibilities Act 2006* (Vic)
    ○ s13 Right to Privacy – search & seizure?
    ○ s21 Right to liberty & security of person – arrest, bail?
    ○ s23: Children in the criminal process
    ○ s24: Right to be a fair hearing – no legal aid?
    ○ s25: Rights in criminal proceedings – victims giving evidence by CCTV?
    ○ s26: Right not to be tried or punished more than once – reform of double jeopardy?

**Key themes in Evidence**

- *The foundational inclusionary rule: Relevance*
  ○ All relevant evidence is admissible; evidence that is not relevant is not admissible (no discretion): s56

  - *Evidence Act 2008*

- *The exclusionary rules (discretionary), including:*
  ○ Hearsay: s59 (some exceptions, ss60-75)
Illegally/improperly obtained evidence

Now governed by s138 Evidence Act 2008:

1. Evidence that was obtained—
   (a) improperly or in contravention of an Australian law; or
   (b) in consequence of an impropriety or of a contravention of an Australian law
— is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained

Balancing test? S138(3) provides some guidance

Under s138(3), when deciding whether to admit the unlawfully/illegally obtained evidence, the court must take into account the following matters:

(a) the probative value of the evidence
(b) the importance of the evidence
(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding
(d) the gravity of the impropriety or contravention
(e) whether the impropriety or contravention was deliberate or reckless
(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights
(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention
(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law

Also builds on previous common law

R v Ireland (1970) CLR 321
- facts?
- Jurisdiction?
- Legal issue?
- Law?
- Outcome?
- Reasoning?

Increasing recognition for victims of crime

• Another key theme is the impact of the increasing recognition of the interests of victims of crime. This has significantly impacted upon criminal procedure (and criminal law) during the past four decades, especially in relation to the prosecution of sexual offences.
• Tension because prosecution is on behalf of the State (not the individual victim)
• Many support services established eg Victims of Crime Helpline, information provided by police in the ‘Notice to the Victim’ form and through the publication A Victims Guide to Support Services and the Criminal Justice System.
• Victims' Charter Act 2006 which became law on 1 November 2006. The principles established in the Charter must be followed by criminal justice agencies in their dealings with victims of crime.

Victims' Charter Act 2006 (vic)

Key principles: the right to:
1. be treated with courtesy, respect and dignity by all criminal justice and victim support services
2. be given clear, timely and consistent information about your rights and entitlements
3. be told about the police investigation at key stages
4. be told about the prosecution, including charges laid and any substantial changes to charges, details of court dates and times when you are required as a witness or have indicated a wish to attend, court outcomes and any appeals lodged
5. be told (if you request it) about the outcome of any bail application and any special conditions of bail which are intended to protect you
6. have the court process explained to you, including your role as a witness
7. as far as practicable, be protected from unnecessary contact with, and intimidation by, the accused and their family and supporters, as well as defence witnesses while you are at court
8. prepare a Victim Impact Statement which may be considered by the court in sentencing the offender...

Other reforms
- Manner of giving evidence (ss359-365, 366-389 CP Act)
  - Closed circuit tv, support person, screen in court
- Cross-examination by accused
  - No X-examn of witnesses by unrepresented accused in sex offence cases: CP Act 2009 (Vic) s356; Crimes Act 1914 (Cth) ss15YF-15YG (children only)
  - NSWLRC (2003) Report #101: right of accused to fair trial v right of complainant not to be revictimised – where to strike the balance?
- Manner of cross-examination
  - Evidence Act 2008 (Vic) s41
- Evidence of prior sexual history
  - Restrictions: ss341-343 CP Act
- Time frames for processing trial and related procedures

**Dietrich v the Queen (1992) 177 CLR 292**

Facts: imported heroine
- Importing into melb airport
- Charged with a number of crim offence
- Under commonwealth legislation
- Not Victorian law
- Also found heroine in his apartment and heroine in his body swallowed in a condom
- Imported it at a commercial quantity
- First trial – county court of Vic
- Because he has been charged with a number of serious offences
- There was a 40 day trial – and he represented himself
- Long trial and serious charges if found guilty
- Unsuccessfully applied for legal aid because refused to plead guilty to one count
- The outcome was that he was found guilty of one charge – importing commercial amount of heroine into the country
- Sentence: at least 5 years prison
- HC of Aus upheld D’s appeal

Fairness
- Was there a miscarriage of justice – was the trial unfair – because D was unrepresented by counsel?
- **Majority:**
  - Incorrect to conceive issue as ‘absolute right to counsel’ – rather, should be conceptualised as whether trial of D was unfair because he was unrepresented by counsel.
- **Unfair = loss of reasonable chance of acquittal**
  - = possibility that representation might have affected the outcome of the case
    (Gaudron J [32])
- Adversarial system, consequences of not being represented:
  - No specialised knowledge of criminal law, criminal procedure, evidence
  - No experience in examination in chief and cross-examination
  - Trial strategies? ………..
  - Consequences of unfair trial? Conviction quashed, new trial ordered.
- **Future practice?** High Ct held that if trial of D for a serious crime is going to be unfair because s/he is unrepresented by counsel, trial judge should stay proceedings until legal representation could be obtained.

**Dietrich v The Queen (1992) – Facts discussed later**

HC held that there had been a miscarriage of justice b/c an accused who could not afford a lawyer was forced to represent himself in a trial lasting 40 days. Accused charged with a serious crime has a CL right to a fair trial.

Legislative responses
- s360A Crimes Act 1958 (Vic), then replaced by...
- S197 Criminal Procedure Act 2009 (Vic)

(2) Subject to subsection (3)…the fact that an accused has been refused legal assistance in respect of a trial is not a ground for an adjournment or stay of the trial.
(3) If a court is satisfied at any time that—