

Criminal Justice System: Aims and Processes

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The Figure on “Flow of cases through the criminal justice system” could not be reproduced in this version of the chapter. It can be obtained at the Australian Bureau of Statistics website.

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Chapter 15. Criminal justice system: Aims and processes

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Abstract

Key words: discretion, crime control and due process models, funnelling pattern, police powers, prosecution, plea bargaining, three tiers of criminal courts, processual and dispositive decisions, sentencing theories, proportionality and crime prevention, retributive and utilitarian punishment, backward and forward orientation to punishment

Introduction

[15.10]

This chapter considers the purposes, aims, and values of a criminal justice system and the controversy surrounding each of its terms: system, justice, and criminal. It describes the agencies that form the justice system and the passage of cases through it. Central to the criminal process is the exercise of *discretion* by police officers, prosecutors, defence lawyers, judicial officers, probation officers, and community and institutional correctional staff. Just as important are the roles of ordinary citizens in reporting crime, working with officials, and participating in the process. Ordinary citizens and justice system workers have strong beliefs about what a criminal justice system should try to achieve. These debates are reviewed in this chapter, and models of the criminal process are described. Major theories of punishment and their changing popularity and relevance across two centuries are also discussed.

The character of the criminal justice system

System or collection of agencies?

[15.20]

We often hear reference to the “criminal justice system”, but it is not a *system* at all. Rather, it is a convenient arrangement of a number of state-run bureaucratic institutions that deal with offending and offenders. These institutions have an *investigative* arm (police and prosecution

authorities, together with specialist investigative agencies such as the Australian Criminal Intelligence Commission), *adjudicative* arm (the criminal courts), and *correctional* arm (prisons, community corrections, and probation and parole services). The picture becomes more complicated when we add the State-based offices of the Director of Public Prosecutions (DPP), the State and Commonwealth Attorneys-General departments, and the standing justice commissions that have been established in some States (for example, the Queensland Crime and Misconduct Commission, the West Australian Corruption and Crime Commission, the South Australian Independent Commissioner Against Corruption [Office of Public Integrity] and the New South Wales Independent Commission Against Corruption). Indeed, anyone describing the “system” must also include mention of the vast array of government institutions and agencies that carry out regulatory functions, such as the Australian Securities and Investments Commission (ASIC) and the agencies that are designed to address public corruption such as the various police integrity commissions and the State and Commonwealth offices of the Ombudsman. Nor must we forget the role in justice administration of the non-government sector, including policing by private security firms, and the important “watchdog” role of public interest advocates, such as civil libertarian groups and investigative journalists.

Notwithstanding the breadth and diversity of these public and private entities, most people understand the “system” as the sum total of the three “arms” referred to above. Moreover, they assume a degree of inter-connectedness between them. The fact remains that although there is some interdependence, each arm of the justice “system” operates quite independently of the others.

Another problem with the phrase “criminal justice system” is that it trains our attention, wrongly, to visualise the response to crime as being only that which agency officials such as police officers, magistrates, and corrections officers do. As Lacey (1994: 8) astutely notes, “the most under-noticed feature [of the criminal process] is that its whole operation depends on the decisions and actions of ordinary citizens.”

Citizens play many roles (Lacey 1994: 8-10). First, they elect people to represent them in making laws, and indirectly, in enforcing them. Secondly, and most crucially, they play a substantial role, more so than the police, in detecting and reporting crime. British data suggest that over 75% of crimes recorded by the police came via citizens' or victims' reports, not police detection (Office for National Statistics 2015). Police and prosecutorial investigation and evidence gathering depend heavily on the goodwill and participation of citizens as witnesses and victims of crime. Thirdly, citizens serve on juries. Fourthly, those who are victims of crime may, in addition to their role as witnesses, be asked to participate in court diversion, pre-sentence, or post-sentence schemes such as conferencing (see Chapter xx). Fifthly, citizens work as volunteers and paid workers in criminal justice agencies and in organisations that serve criminal justice agencies.

Two other groups have significant influence on the criminal process: politicians and those working in media organisations. Politicians can directly affect the criminal justice system by passing laws, such as “truth in sentencing”, that constrain the discretion of sentencing officials and increase the numbers of people in prison. Passage of legislation on social and economic policies also has an indirect effect on the crime rate, when, for example, there are cutbacks to unemployment benefits or a new road is built, which cuts through a town and may disrupt social

cohesion. The role of the media is principally to entertain and far less to inform and educate the public about crime and the criminal justice system. By viewing television news, crime reality shows, and courtroom dramas (both real and fictional, and often from far-flung lands), citizens learn about the criminal justice system and form impressions, often inaccurate, about its practices in Australia.

A more accurate term for *criminal justice system* would be a “collection of interdependent justice agencies”, each having its own function.

As Davies, Croall and Tyrer (2005: 10) observe, “the criminal law does not enforce itself”. Although forces external to criminal justice may affect its focus or operations, it is people working within particular agencies who enforce criminal law: that is, police officers, prosecutors, magistrates and judges, and probation and prison personnel. Table 15.1 below lists each agency and its functions in Australia and other countries that have an adversarial (also termed “accusatorial”) criminal justice system. Adversarial criminal justice is associated with common law systems found in countries such as Australia, New Zealand, the United States, Canada, and the United Kingdom. It means that the two parties in the case — the prosecution and the defence — bring evidence before a magistrate, judge, or jury, each of whom acts as a fact finder. An alternative model, inquisitorial criminal justice, is found in countries such as Germany, Sweden and France. In this model, the prosecutor or police officer assembles the case (or dossier), but the judge calls witnesses and examines them (see Sanders & Young 1994: 7-12).

Table 15.1. Major criminal justice agencies, personnel, and agency functions in Australia

Police

(Police officers)

- Investigate crime
- Prevent crime
- Arrest and detain suspects
- Maintain public order
- Control traffic
- Respond to criminal and non-criminal emergencies

Prosecution

(Prosecutors)*

- Filter out weak cases, keep strong cases
- Prepare cases for prosecution
- Prosecute cases in Youth/Children’s Courts, Magistrates Courts, District Courts, and Supreme Courts, including preparing cases for trial

Courts

(Justices of the peace, magistrates, and judges)**

- Decide on bail and remands (whether there is to be detention or not in the pre-trial period)
- Protect the rights of the defendant
- Preside over the trial and plea process
- Decide on guilt (magistrate, judge, or jury)
- Sentence the defendant
- Hear appeals against conviction and sentence
- Provide public arena so that justice “can be seen” to be done

Community corrections

(Community corrections officers)

Provide information to the court on a defendant's appropriateness for bail or probation

Prepare pre-sentence reports

Work with offenders with probationary orders or community service orders

Supervise released prisoners or pre-release work with persons in custody

Prisons

(Corrections officers)

Hold people on remand (in custody in pre-trial period)

Hold people who are sentenced to a term of imprisonment

Maintain appropriate conditions for those in custody

Provide activities (such as rehabilitation programs) that encourage learning and life skills

Prepare inmates for release

Other key organisations and actors

Victim support groups: counsel and assist victims at all stages of the criminal process, from arrest of the perpetrator, through bail applications, sentence and post sentence

Defence lawyers: provide advice to and advocate on behalf of suspects, accused persons, and sentenced individuals at all stages of the criminal process.

*In Australia, prosecution is carried out by the police in some courts such as the Youth or Children's Courts and some Magistrates Courts in non-metropolitan areas. Prosecution is carried out by the officers of the Director of Public Prosecutions in Magistrates Courts, District Courts and Supreme Courts.

**Courts handle both criminal and civil matters.

Source: Adapted and revised from Davies, Croall and Tyrer 2005 (p 11) with permission of the authors.

Beyond Australia, there is yet another layer of criminal law and justice: international criminal justice, which is embodied in transnational bodies such as the International Criminal Court and *ad hoc* United Nations tribunals (Daly & Proietti-Scifoni 2011; Roberts 2002).

Conflicts over aims of criminal justice stem from the particular functions of each agency. For example, the police are to investigate crime and to arrest and detain suspects, while the courts are to protect the rights of the defendant. Conflict may also emerge from the bureaucratic interests of each agency. For example, police may cut corners in following procedure so they can charge suspects as quickly and easily as possible, whereas prosecutors, as lawyers with duties to the courts, may insist on the letter (as well as the spirit) of the law being followed. Linked to conflicts in aims are conflicts over values, that is, what the criminal justice system *ought* to be doing. For example, is it more important to handle cases *efficiently* or to ensure that people are *not subject to abuses of state power*?

State or federal law?

[15.30]

Under the Australian federal constitutional structure, State and Territory governments, not the Commonwealth government, are given responsibility for most of the policing and justice functions. Only when law enforcement necessarily extends into areas under the auspices of the federal parliament (eg people smuggling, drug importation, and customs fraud) is the Commonwealth involved. For this purpose, and for policing in the Australian Capital Territory (ACT), there is an Australian Federal Police (AFP) service. There can be some role for the federal courts in relation to criminal matters, for example, when people have committed criminal offences set out in the *Crimes Act*, *Family Law Act*, the *Competition and Consumer Act*, and the *Bankruptcy Act*. There are criminal courts, too, in the Australian Capital Territory; and the High Court (also located in Canberra) is the ultimate court of appeal. Except for these courts or activities, there are no Commonwealth criminal courts as such. Likewise, until recently, there was no Commonwealth-run correctional facility; all have been run by the States and Territories. The first federal prison, the Alexander Maconochie Centre in Canberra, took its initial prisoners on 30 March 2009.

Criminal codes or common law?

[15.40]

Criminal law in Australia is principally governed by the States and Territories, each with its own set of laws. In all jurisdictions, criminal laws are either enacted through parliament in the form of “statutes” or Acts (legislation), or formulated by judges through judgments made in the courts (common law). Although there are some core legal principles common to all jurisdictions, each differs in fundamental ways such as the definition of offences, their relative seriousness, defences and excuses to crime, and prescribed punishments. Confusingly, some jurisdictions (Queensland, Western Australia, and Tasmania, plus the Northern Territory and the Australian Capital Territory) operate with the guidance of their respective criminal codes, while others (South Australia, New South Wales, and Victoria) employ the common law alone. These different approaches give rise to inconsistencies in the charging, convicting, and sentencing of offenders. In addition, they can create incompatibilities in data collection and statistical analysis.

Due process or efficiency?

[15.50]

Herbert Packer (1968) famously depicted two value systems in the criminal process, calling them the Crime Control Model and the Due Process Model. The Crime Control Model is concerned with the *efficiency* of the criminal process, whereas the Due Process Model is concerned with the *accuracy and reliability* of the decisions made. An efficient criminal justice system calls for weeding out what Packer referred to as the “factually guilty” from the “non-guilty” cases as early as possible by police officers and prosecutors, who make decisions based on talking with witnesses and reviewing the evidence. Once this screening is accomplished, the case proceeds

through successive stages until it is disposed of. During the later stages, Packer said that officials operate on a *presumption of guilt*, meaning that, based on earlier informal investigations, they assume that innocent individuals have been weeded out.

The Due Process Model has less faith in the reliability and accuracy of decisions made in the early stages of the criminal process. Greater reliance is placed on formal fact finding in the adjudication phase of the criminal process. Judicial officers are supposed to operate on a presumption of innocence, meaning that they must “ignore the presumption of guilt” in their treatment of the accused. The Due Process Model distinguishes between the factually and legally guilty, whereas the Crime Control Model does not. *Factual guilt* is based on evidence of a person's commission of a crime, whereas *legal guilt* is based not only on this evidence, but also on evidence that the state has acted legally in obtaining evidence and proving its case beyond reasonable doubt.

Andrew Ashworth (1998: 27-28) points out several problems with Packer's models, among them: he failed to discuss the relationship between Due Process and Crime Control, he paid insufficient attention to financial pressures on the state's response to crime, and he was silent on victims. He also pointed out some logical lapses. Ashworth says that in emphasising the value of speed in the Crime Control Model, Packer ignored the equal concern that a Due Process Model would give to “unreasonable delay” (1998: 28). On the relationship between the models, he suggests that we might view Crime Control as “the underlying purpose of the system, but that it ... should be qualified out of respect to Due Process” (1998: 27).

Doreen McBarnet (1981) and others have also identified a way to view the relationship between the two models. The Crime Control Model, they say, is more evident in Magistrates Courts, which dispose of the less serious cases, typically by guilty pleas, and where trials are uncommon. The Due Process Model is more frequently observed in the District and Supreme Courts, which handle more serious cases, where a higher proportion of matters are dealt with by trial, and where the full repertoire of legal arguments and options is utilised, given the potential for a lengthy prison term if a defendant is convicted.

Justice or injustice?

[15.60]

Many dispute the phrase criminal justice system, saying we should call it the criminal *injustice* system. Indeed, several Australian books have been published with this title (for example, Zdenkowski, Ronalds & Richardson 1987). What are they saying? Some are criticising practices by the police, prosecutors, or courts that suggest a “too harsh” enforcement of laws. Members of this group would say that the police more often target certain groups for arrest, typically members of racial-ethnic minority groups, and that this selective use of police discretion leads incrementally to the disproportionate imprisonment of racial-ethnic minority group members. Others are criticising practices that suggest a “too lax” enforcement of laws. Members of this group would say that suspects and defendants are too easily let free by not being arrested or prosecuted; or if they are found guilty, by not being “punished enough” for an offence. Thus,

justice for some is injustice to others; injustice for some, justice to others. This alerts us to the always contested and political nature of what is considered a *just* response to crime, and to different concerns people have in *seeking justice*.

Criminal?

[15.70]

The term *criminal* needs to be considered in this context. What separates criminal from non-criminal acts, or actions that are subject to a civil or administrative process rather than a criminal process? The correct answer, albeit unsatisfying, is in the form of a tautology. A criminal act is that which has been defined by the state as a crime and subject to criminal penalties. But what is and is not a crime varies across time and by jurisdiction, as do the penalties associated with a particular crime. As pointed out in Chapter 1, *crime* and *criminals* are societal definitions: they are created, affirmed and mobilised in the daily lives of ordinary citizens, as well as those who work within criminal justice.

In summary, the *criminal justice system* could best be defined this way: a loosely coupled collection of interdependent agencies, each having bureaucratic interests, and each having specific functions (which can be in conflict with other agencies) that are subject to legal regulations, for which agency workers have great discretion in making decisions when responding (or not responding) to harms defined as criminal by the state, and where value conflicts exist within and across agencies and in the general population about the exact meaning of “justice”. This is a long and complicated definition, and for brevity's sake, we shall use the shorthand phrase “criminal justice system”. However, we must always remain mindful of the complexity and controversy associated with this term.

The flow of the criminal process

[15.80]

Figure 15.1 shows how cases move through the criminal justice system, beginning with *entry into the system* and ending with *exit out of the system*. Along the right side of the figure are the major phases of the criminal process and each agency's functions: investigation and charging, presentation of the case in the pre-trial period, adjudication (that is, deciding on guilt or innocence or entering a guilty plea), sentencing, and managing offenders. At each phase, people make decisions to keep the case in the system or to drop or to divert it.

Figure 15.1. Flow of cases through the criminal justice system

This flow diagram is indicative and does not include complexities of the justice system or variations across jurisdictions.

Source: Australian Bureau of Statistics, 1301 – Year Book Australia, 2009-10

Reporting crime to police

[15.90]

People first enter the criminal justice system when their activities have been reported to the police and the police act upon the report. Many more common crimes, such as assaults and theft, occur more often than are reported to the police. Rates of reporting crime also vary considerably by the type of offence. National victimisation data for 2008-09 show that Australian victims of motor vehicle theft and completed break and enter incidents were more likely to report these incidents to the police (87% and 76% respectively), than were victims of violent crime. Less than half (45%) of physical assault victims, 39% of robbery victims, and 31% of sexual assault victims¹ said they reported the incident to the police (Australian Bureau of Statistics 2010: 1).

Once an offence is reported, the police may decide not to investigate it or they may be unable to identify a suspect. If they do identify a suspect, that person may not be apprehended or arrested, or charged with a crime if the evidence against them is insufficient or inconsistent. If a suspect is arrested and charged, the case may go to court, but the charges may be dismissed or withdrawn. If a case is finalised in court by conviction (typically by the accused entering a plea of guilty to the offence or to a less serious offence, and less often, by trial), the defendant may receive a non-incarceration sentence. This narrowing of cases from a large number experienced by victims to a trickle of defendants convicted and sanctioned has the appearance of a funnel.

Indeed, a study completed 30 years ago revealed the following “funnelling” pattern. For every 1,000 crimes committed, about 400 are reported to police, 320 are officially recorded by the police as offences, and 64 are cleared up (60 of these by arrest); 43 persons are convicted, and one is imprisoned. So, even if we doubled our imprisonment rates, we would only be affecting only one fifth of one per cent of criminal offending (Mukherjee et al 1987: i).

Daly and Bouhours (2010) provide us with a useful and more contemporary example. They analysed rape case attrition in five countries, including Australia. The findings for Australia from 1990 to the present were that of 100 complaints recorded by the police, 20 were adjudicated in court, and 11.5% resulted in convictions for any sexual offence.

- 1 Rates of report to the police for sexual assault depend on how questions are asked and the degree to which the interview context is supportive of victims. Specialised victimisation surveys of violence against women in five countries (including Australia) reveal that rates of reporting sexual assault range from 6% to 20%, with an overall average of 14%, and for Australia, 15.5% (Daly & Bouhours 2010: 574-75).

Police act upon the report: arrest and questioning

[15.100]

Most people enter the criminal justice system by way of arrest. The common law authorises an arrest when there are reasonable grounds to believe that the suspect has committed or is committing an “arrestable” offence. Police officers can also detain any person upon suspicion that the person might be about to commit an offence. If their suspicions turn out later to be incorrect, they are generally immune from a legal suit (for example, alleging false imprisonment) so long as their grounds for suspicion were well founded. In general, police officers are permitted, by legislation, a defence of reasonable suspicion or honest exercise of power.

In the absence of specific legislation, the arrest process cannot be used to detain suspects simply for questioning. Once the statutory time period, during which suspects can be detained after arrest, has expired, they must be charged or released. Under section 403 of the *Police Powers and Responsibilities Act 2000* (Qld), for example, a person cannot be detained for investigation and questioning for more than eight hours, during which questioning must not extend beyond four hours. If the police detain a suspect beyond the statutorily authorised time limits, the arrest becomes unlawful. Any evidence obtained by the police (for example, a confession) during a period of unlawful detention may be excluded at a later trial.

The power to question suspects is subject to certain safeguards and duties, specifically, the obligation to inform arrestees of their right to remain silent and of their right to communicate with a relative, friend, and legal practitioner and to have access, where relevant, to an interpreter. A further important safeguard is the requirement that, to be admissible in evidence at trial, confessions made during police interviews must be recorded either via audio or, increasingly, on video.

The right to silence is not absolute. In some situations, suspects are required to disclose specific information. For example, in all Australian jurisdictions, legislation now requires pre-trial notification to the police or prosecution of any alibi that the defendant claims. Under section 190(4) of the *Criminal Procedure Act 2009* (Vic), by way of example, notice of an alibi must contain information on the alibi such as the location and time the accused was there, the name and last known address of any witness to the alibi, and if the name and address of a witness are not known, any information which might be of material assistance in finding the witness. In some jurisdictions, the defence must notify the prosecution of any expert evidence that the accused will be relying upon.

Once charged, a suspect can be released on police bail or taken before a magistrate to have the question of bail determined.

Prosecution

[15.110]

After a suspect has been formally charged, the case moves from the investigative to the prosecutorial stage. The state, through the process of prosecution, acts on behalf of citizens against the accused person (also termed the defendant). The police generally determine what charges will be laid against a defendant and have responsibility for prosecuting the charges in the lower courts. At the pre-trial stage, prosecutors advise the defendant's legal representatives of the prosecution evidence. This ensures that the defendant knows precisely what case he or she is required to meet. In recent years, by amendments to practice directions, prosecutors also must disclose any matters that might be useful to the *defence* case.

Prosecutors have a wide discretion in determining whether to charge and what charges to prosecute. “Plea bargaining” is the term applied to negotiations between the prosecution/police and defendants (and their legal representative) ahead of any plea. The aim of such bargaining (with respect to the facts to be agreed and the charges to be laid) is to achieve pleas of guilty in exchange for some benefit to the defendant. Typically, the benefit is a possible reduction in the defendant's sentence. This is not the same as US-style plea bargaining, where the judge is part of the process and a sentence may be indicated. Australian judges are not involved in the process, and they do not indicate a potential sentence. The Australian experience is better described as *charge* bargaining (occurring between the police or prosecution and a defendant's legal representative only).

From the state's point of view, “plea bargaining” has the benefit of avoiding the need for, and the expense of, a trial. It also eliminates the chance — feared by the prosecution — that an accused person may be found not guilty, if a more serious charge goes to trial, and thus exonerated completely. The advantage to the defendant of a plea bargain is that it often results in fewer (or less serious) charges and, therefore, in a potentially reduced sentence upon a plea of guilty.

The problem with such bargaining is that innocent defendants (or defendants with a viable defence) may be induced to plead guilty because of the pressure to do a deal (a plea of guilty can lead to a sentence discount of between 25–40%) or because they view that their attempt to challenge the prosecution evidence (albeit flawed) may be fruitless. Moreover, a plea of guilty does not expose to the scrutiny of a trial any irregularity in police practices, investigations, or the exercise of a prosecutor's discretion.

The hearing: the criminal courts

[15.120]

There are generally three tiers of criminal courts in each State and Territory: lower courts, intermediate courts, and superior (higher) courts.

Magistrates courts

[15.130]

About 95% of all criminal matters in Australia are resolved in Magistrates Courts, which deal with less serious criminal matters. In New South Wales they are called Local Courts.

The Magistrates Court is presided over by a stipendiary (paid) magistrate; or in some jurisdictions where there is no available magistrate, two (unpaid) Justices of the Peace (JPs) may hear minor matters. The severity of the fine or sentence that can be imposed in a criminal case is limited (usually only up to two or three years' imprisonment and with maximum fines usually ranging from \$120,000 to \$150,000). Decisions in these courts are made without a jury and are referred to as “summary” decisions.

An “indictable” offence is a more serious offence, and it is usually heard in a higher court. A person charged with an indictable offence will have a right to a trial before a jury if they plead not guilty. In some jurisdictions, a person charged with an indictable offence can elect to have the matter heard summarily (that is, by a magistrate) although in South Australia, defendants can only elect this course of action if they have been charged with a *minor* indictable offence.

All defendants who will be heard, or who elect to be heard, in the higher courts (intermediate or supreme courts) must first appear before a magistrate at a “committal” hearing. The magistrate decides whether there is a “case to answer”, that is, whether the evidence against the person (either oral argument, or a written argument – a “paper” or “hand-up” committal) is such that a jury *could* (not would) find them guilty of the offence. If the magistrate finds there is a case to answer, the accused is committed for trial in the higher court. If there is no case to answer, the charge is dismissed.

Intermediate courts

[15.140]

In New South Wales, Queensland, South Australia, and Western Australia, the intermediate courts are called District Courts; in Victoria they are called County Courts. In the Australian Capital Territory, Tasmania, and the Northern Territory there are no intermediate courts at all. District/County courts hear matters involving more serious crimes (but not usually murder, attempted murder, or manslaughter). Trials in these courts are presided over by a judge, and usually involve a jury unless the defendant has elected to be tried by “judge alone”.

Supreme courts

[15.150]

This court is the highest court in each State. The most serious crimes are usually dealt with in this court. Again, a jury will usually hear the case. Appeals from the lower courts and from the Supreme Court are heard by the Court of Criminal Appeal (three Supreme Court judges). In rare

circumstances an appeal can be made directly to the High Court. The rules relating to appeals vary among the States and Territories.

Court decision-making and sentencing

[15.160]

There are two types of decisions in the criminal process (Ashworth 1998). One is *processual*, that is, decisions about “the processing of the case from initial charge through to trial” (Ashworth 1998: 10); these include police procedures in questioning suspects and gathering evidence, and prosecutorial decisions on what charges to lay. Another is *dispositive*, that is, decisions about “the disposal of the case” (Ashworth 1998: 10). Sentencing is a dispositive decision. Although the distinction between processual and dispositive decisions can blur in practice, it alerts us to the different values that guide each decision. Processual decisions are guided by values of *legality* (for example, not convicting the innocent, integrity in methods of investigation, a minimum of burdens on a defendant in the pretrial period), and *equality before the law* (consistency of treatment and avoiding discriminatory practices) (Ashworth 1998: 50-61). Dispositive decisions are guided by values of *proportionality* and *crime prevention or reduction* (Ashworth 1998: 61-63). From the beginnings of modern criminal law, legal scholars and philosophers have debated the relative importance of the values of proportionality and crime prevention in punishment. The two values are often in conflict. For example, crime prevention is more likely to occur where the swiftness of the process sends a deterrent message. But a swift process is less likely when there are requirements relating to the principles of legality.

Upon conviction by plea or trial, the defendant is sentenced by a judge. The purposes of sentencing are varied, as exemplified by section 5(1) of the *Sentencing Act 1991* (Vic), which states the following (emphasis added):

The only purposes for which sentences may be imposed are

- (a) *to punish* the offender to an extent and in a manner which is just in all of the circumstances; or
- (b) *to deter* the offender or other persons from committing offences of the same or a similar character; or
- (c) to establish conditions within which it is considered by the court that the *rehabilitation* of the offender may be facilitated; or
- (d) to manifest *the denunciation* by the court of the type of conduct in which the offender engaged; or
- (e) *to protect the community* from the offender; or
- (f) a combination of two or more of those purposes.

Proportionality: Desert theory and retributive punishment

[15.170]

In Victoria's *Sentencing Act 1991*, items (a) and (d) — to punish and denounce crime — are associated with the value of proportionality. This value is embodied in desert theory and retributive punishment. The core idea is that the penalty structure should reflect a relationship between crime seriousness and punishment seriousness (harshness), and that the absolute level of punishment should be in proportion to the harm. Thus, for example, we recognise that shoplifting is a less serious offence than robbery, and it should receive a less harsh punishment; and we recognise that five years in prison is an excessive punishment for shoplifting. A retributive justification for punishment means that a crime must be censured and that a punishment (penalty or sanction) should reflect the degree of blameworthiness that we attach to the act. The aim is to punish a crime that has occurred in the past, and thus, we may say it takes a *backward* orientation to punishment (von Hirsch 1985). Retributive punishment is popularly associated with “punitiveness” or a “get tough” approach to crime, but this is not accurate. It has an important proportionality aspect to it. For example, the Hebrew Bible phrase “an eye for an eye” was a retributive expression; it meant that *only an eye* can be taken for an eye, not a *life* for an eye (and so forth).

Deterrence, rehabilitation, and incapacitation theories and utilitarian punishment

[15.180]

The remaining items in Victoria's *Sentencing Act 1991* (b, c, and e) are associated with the value of crime prevention. This value is embodied in deterrence, rehabilitation, and incapacitation theories and utilitarian punishment. The aim is to prevent future crime, and thus, we may say it takes a *forward* orientation to punishment. The major theories are:

- Individual deterrence (also termed specific or special deterrence): to dissuade or deter an offender from committing a crime in the future.
- General deterrence: to dissuade or deter members of the broader community from committing a crime in the future.
- Rehabilitation: to change the attitudes or behaviour of offenders so they do not commit crime in the future.
- Incapacitation: to protect community members from certain offenders who may pose a threat to their welfare and safety.

Dialogue box 15.1

Punishment in practice

[15.190] R v Pontong SCC 20941474 Supreme Court of the Northern Territory, unreported, January 2011

In July 2009 the defendant and the victim were playing on opposing soccer teams at Nakara Oval in Darwin. Due to the offender thinking (wrongly, as it turned out) that the victim had made a racial slur directed at him, Mr Pontong “king hit” the victim from behind with a clenched fist. This hit caused the victim to lose consciousness for a period of time. He also suffered a fractured jaw that required the insertion of metal plates and screws to fix the fracture. Mr Pontong pleaded guilty to one count of causing serious harm. Justice Blokland made the following remarks in sentencing.

Needless to say, sporting fields are not law-free zones, particularly when the injury is significant and the blow is inflicted to the head or face region. Offenders can expect to serve some term of imprisonment even when caught up in the emotion of playing sport or suffering some offence, real or perceived. ... At the same, it is important that I recognise that, if given the opportunity, this young offender has excellent prospects of rehabilitation given his excellent work record and previous good character. I am persuaded to suspend the balance of the term of imprisonment after serving a short period. ... I must also have concern in relation to the corrupting influence of imprisonment on a young first offender. If not for the plea of guilty, I would have sentenced Mr Pontong to approximately 12 months' imprisonment. With the plea of guilty and a hands up committal ... the sentence will be nine months' imprisonment.

The judge was attempting to accommodate, in her sentencing, the contradictory aims of sentencing. Do you think she succeeded?

Over the past two centuries, we have seen change in the emphasis given to crime reduction or to proportionality in punishment. The most important thing we learn from historical and contemporary practices is that the criminal justice system announces many goals and has a variety of practices, often in direct conflict with one another. This is illustrated well by developments during the 1970s. During this time, two different sentencing policies were in place: desert-based sentencing, which aims to punish *the crime* (often by using “sentencing grids” to set fixed penalties) and mandatory sentencing, which aims to punish *certain people* more harshly (those convicted of selected offences such as burglary or with previous convictions, sometimes referred to as “three strikes” laws) (see Chapter xx). In Australia, there has been comparatively little interest in either sentencing grids or mandatory penalties. There is greater interest in experimenting with new justice practices and specialised courts, which accord attention to individualising responses and which centre on the particular needs and problems of the people appearing before them.

Victims and sentencing

[15.200]

The prosecution is primarily interested in preparing and presenting criminal cases to the court. After conviction and at sentencing, the prosecution role is to assist the court in making submissions on any aggravating factors (mitigating factors will be highlighted by defence counsel) and on statutory provisions such as sentence guidelines. The prosecution also has a role at sentencing in making an application for a reparation order (also called a compensation order) and facilitating the submission of a Victim Impact Statement. The prosecution's application for a reparation order will document the losses the victim incurred from an offence, with the aim of the defendant being required to make good on these losses. A reparation order is part of sentencing legislation, but even after a judicial officer makes it, it is up to a victim to enforce it. Based on an analysis of what occurs in Tasmania, the many hurdles for victims to seek and secure court-based reparation are such that they are no more than “a token gesture” (Warner & Gawlik 2003: 74). A judicial officer is also required to have regard for the impact of the offence on the victim and on the community when sentencing the defendant. Victims of violent offences may also be eligible to apply for money from state-administered schemes for criminal injuries compensation or financial assistance. Such schemes are not part of sentencing, nor is there any strict requirement that an offender be located, charged, or convicted. However, most Australian schemes require that victims will have reported the offence to police.

Appeals

[15.210]

Any person who believes that they have been unfairly convicted or given a sentence they consider to be excessive can appeal their conviction and/or sentence. Tasmania is the only State where the prosecution can appeal an acquittal. All appeals are heard in the Court of Criminal Appeal (in each State) and, ultimately, the High Court (if there is a further appeal). Located in Canberra, the High Court is the highest court in Australia. Most of the High Court's work involves hearing appeals from the courts of the different States and Territories, which have worked their way up through the hierarchy of courts, sometimes (albeit rarely) all the way from a magistrate's decision.

Conclusion

[15.220]

The most remarked upon feature of the criminal justice system is its complexity. It is not one, but many things; and it announces not one, but many goals. Its overarching purposes are instrumental and symbolic: to change the person (or social conditions) that made the wrong possible, and to announce that offending is wrong. The system announces goals of both individualised treatment of offenders *and* equal treatment of “like crimes”. Specifically, one imperative is to fashion responses to individuals based on their circumstances and potential for reform (individual-based, crime prevention). This is joined with a second imperative, which is to punish like offences in a like manner, and in proportion to the harm (offence-based, desert). One can note shifts over time regarding preferred punishment values. Indeed, there have been, and continue to be, conflicts over values in any one time period.

This chapter has outlined how the criminal justice process unfolds. Ideally, the system should bring offenders to account for crime and impose sanctions upon the guilty, it should acquit the innocent, and it should allow victims to be heard and to receive financial assistance in appropriate cases. Whether the Australian justice process is able to deliver on these ideals is a matter for ongoing debate.

Questions

1. What is the difference between people who are viewed as “not guilty”, “factually guilty”, and “legally guilty”? Should the primary focus of the criminal justice system be to apprehend and sanction as many factually guilty people as possible? Or should it be to make decisions according to legal principles and requirements, which may result in releasing a number of factually guilty people?
2. Some jurisdictions have a criminal code, and some operate from the common law. Is one approach preferable to the other? Investigate the potential that the *Criminal Code Act 1995* (Commonwealth) has as the blue print for a national approach to the criminal law. Would such an approach be workable? Explore the political stumbling blocks that have prevented it from being widely adopted to date.
3. Is it possible to separate the *act* from the *actor* in responding to crime, or in sentencing?
4. Plea bargaining has been criticised on a number of fronts. Outline an ideal protocol for how plea bargaining should be conducted in Australian courts. Should we adopt the American position, in which a sentence indication (by a judge) is part of the bargain?
5. Find out about the power of citizen's arrest (see Sarre 2009). How does it differ from the arrest powers of police officers?

6. If you were a defendant, would you prefer to be sentenced under a “just deserts” or an “individualised” model of sentencing? Explain your choice.
7. Consider the sentence handed down by Justice Blokland in the *Pontong* case. Was the judge right to sentence the offender (who was 25 at the time of the offence and had no criminal record) to serve time in prison, and for that length of time? Would you have sentenced him differently? Explain your reasoning by referring to the theories of sentencing discussed in the chapter.
8. Currently, no legislation or process exists in any jurisdiction in Australia that expressly allows victims to indicate a preferred sentence in their victim impact statement. Is there an advantage in giving a victim a say in the sentence? Should juries be involved in sentencing?

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Useful websites

<http://www.ag.gov.au>

Australian Government Attorney-General's Department, which has links to individual States and Territories by clicking on Legal System and Justice, and then Australian Government Law Sites.

<http://www.austlii.edu.au>

Australasian Legal Information Institute

<http://www.abs.gov.au/ausstats>

Australian Bureau of Statistics, National Centre for Crime and Criminal Justice

<http://www.aic.gov.au/publications.aspx>

Australian Institute of Criminology, publications

<http://www.justiceaction.org.au>

Reports on actions taken on behalf of incarcerated people

All Australian States and Territories provide data on crime and justice, but the following States have especially good data and reports on criminal justice processing:

<http://www.lawlink.nsw.gov.au/bocsar>

New South Wales Bureau of Crime Statistics and Research

<http://www.ocsar.sa.gov.au>

South Australian Office of Crime Statistics and Research

http://www.oesr.qld.gov.au/queensland_by_theme/society/crime_justice/index.shtml

Queensland Office of Economic and Statistical Research, Crime and Justice

Figure 15.2. The Adelaide Magistrates Court

Source: Rick Sarre 2011