SEMINAR 1

(I) CONCEPTS OF CRIMINAL JUSTICE AND BIAS

OVERVIEW OF ATSI OVER-REPRESENTATION

https://www.alrc.gov.au/wp-content/uploads/2019/08/sr133_04._summary_report.pdf

In 1991, the *Royal Commission into Aboriginal Deaths in Custody (RCIADIC*) found that the Aboriginal population was grossly over-represented in custody constituting 27% of the national prison population. This is both a persistant and growing problem with rates increasing 41% between 2006-2016

The RCIADIC looked at indicators of disadvantage that contributed to this disproportionate representation, finding:

- It can be attributed to **their economic position** as their low socio-economic status in relation to non-indigenous people can suggest that they don't have sufficient access to legal representation.

- **Poor health levels** and a reliance on alcohol and other drugs affect the likelihood of criminal behaviour as they may be motivated by economic and social factors.

- The high rate in which indigenous women experience **family sexual and physical violence** plays a large role in the level of crime as there is a prevalence of women perpetuating this same violence in their later life.

TYPES OF RACISM

1. Internalised racism: Acceptance of attitudes, beliefs or ideologies by members of stigmatised ethnic/racial groups about the inferiority of one's own ethnic/racial group (e.g. an Indigenous person believing that Indigenous people are naturally less intelligent than non-Indigenous people).
2. Interpersonal racism: Interactions between people that maintain and reproduce avoidable and unfair inequalities across ethnic/racial groups (e.g. experiencing racial abuse).
3. Systemic racism: Requirements, conditions, practices, policies or processes that maintain and reproduce avoidable and unfair inequalities across ethnic/racial groups (e.g. Indigenous people experiencing inequitable outcomes in the criminal justice system). This type of racism is also referred to as institutional racism.

Racism against ATSI people has been legislated under the *Australian constitution* which has a **clause that permits systemic racism**, specifically section 25 which allows people to be potentially disqualified from voting in state elections because of their race.

Also White Australia policy OR *Immigration Restriction Act (1901*) which although now is dismantled, at its time was a key indicator of the prevalence of institutional racism in Australia's legal system.

(I) SOLUTIONS TO ATSI OVER-REPRESENTATION

JUSTICE REINVESTMENT

A pathway to reduce the incarceration of indigenous people involves the use of use of the justice reinvestment approach. This aims to redirect expenditure within the criminal justice system away from incarceration to communities that have a high concentration of incarceration in order to implement community led initiatives like circle sentencing, YJC and drug rehab that address the causes of crime and reduce contact with courts. This is effective as:

- Focuses on the causes of incarceration, as these are often external to the justice system for ATSI people, and justice reinvestment involves a commitment to invest in front-end strategies to prevent criminalisation.
- It is a place-based approach and emphasises working in partnership with communities implement reforms. Aligns with findings that effective policy change to address ATSI disadvantage requires partnership with their culture and community

BAIL REFORMS

Up to 1/3 of Aboriginal and Torres Strait Islander people in prison are held on remand awaiting trial or sentence.

Currently the regular employment, previous convictions for often low-level offending, and a lack of secure accommodation too often disadvantages ATSI people in obtaining bail. The ALRC recommends fixing this by reforming bail laws to give consideration to cultural background and issues arising from that (curfews and exclusion orders can conflict with cultural obligations).

COMMUNITY BASED SENTENCING

Where the offender does not pose a demonstrated risk to the community, greater accessibility and flexibility to community-based sentencing is needed as this will play a key role in reducing contact with jails. Once community-based sentences are uniformly available, consideration could be given to abolishing short terms of imprisonment and suspended sentences.

Although community-based sentences are available as a form of sentencing within the CJS, there is too often a reliance on incarceration used as a general deterrent leading to the high numbers of indigenous people within the court system. This due to the trend of judges handing out short and suspended sentences of imprisonment meaning if the offender comes into contact with courts again, judges look at this history of previous sentences and therefore consider them to be a risk to the community and not suitable for community-based sentencing.

SEMINAR 2

(I) STRUCTURE AND SOURCES OF CRIMINAL LAW

COMMONWEALTH VS STATE CRIMINAL LAW

Criminal laws at State and Commonwealth levels operate in parallel.

COMMONWEALTH

The Federal Government does not have a specific power in the Constitution to make criminal laws in Australia, so any federal criminal law must relate to another power in s 51, such as 'quarantine' (s 51(ix)), 'copyrights, patents of inventions and designs, and trade marks' (s 51(xviii)), or 'the influx of criminals' (s 51(xxvii)).

The Constitution gives power to the commonwealth to make laws in respect of certain matters that are contained within it as well as giving power to the federal parliament to make laws. These are the only matters they can legislate on, based on the principle that **you can only exercise powers when you have authority to.**

- *Exclusive powers*: matters on which only the commonwealth can legislate on

  e.g. s.51 outlines commonwealths' exclusive powers to make legislation including currency, defence, trade and commerce, entering international agreements, and immigration

Limited power of **Commonwealth** to make criminal law (power must derive from the *Constitution.* The generalist body of commonwealth criminal laws include:

- *Crimes Act 1914 (Cth)*
- *Criminal Code Act 1995 (Cth);* sets out wide ranging provisions that deal with terrorism
- Commonwealth criminal law has also been spread over other legislation like the *Customs Act 1901.* This contains commonwealth provisions in relation to the criminal import and export of drugs based on their 'trade and commerce' powers granted in s 51 of the Constitution

STATE

The primary responsibility for the making of criminal laws fall to states due to the restricted power of the commonwealth. Remember: pursuant to s 109 of the Constitution, where there is an inconsistency between Commonwealth and State criminal laws, the Commonwealth law prevails to the extent of the inconsistency. As criminal law is the jurisdiction of each states, there are differences in criminal law – most explicitly the distinction between **common law** and **codified law**

Common law States: NSW, VIC, SA

The *Butterworths Legal Dictionary* defines common law as: 'The unwritten law derived from the traditional law of England as developed by judicial precedents, interpretation, expansion and modification. The Common law system is a system that originates from when the King appointed judges over England to determine disputes between people. Over time methods were developed so that similar cases would be decided in a similar manner i.e. in cases judges would make a similar decision on the same set of facts

Common law states rely extensively on the common law for criminal law, despite the existence of state criminal legislation. NSW, Victoria and South Australia are recognised as common law jurisdictions. In NSW we use *Crimes Act 1900* (NSW) as our primary source of criminal law as it collates a number of offences and prescribes penalties for these.

While these States are not pure common law States, they are referred to as such because:

- They still use the common law as the source of their criminal law;
- Many of the criminal laws legislated reflect the common law;
- Many defences are still established by the common law (e.g. necessity); *R v Loughnan* [1981] VR 443 at [448] and *R v Cairns* [1999] 2 Crim App Rep 137
- Fundamental elements of criminal responsibility are drawn from the common law.

We can sometimes look to decisions made to code states if the law is comparable or the High Court is interpreting a principle alsp relevant to common law offences e.g. *Illich v The Queen* (1987) 162 CLR 110.

Code States: QLD, WA, TAS, NT, ACT

A Code is legislation purporting to cover exhaustively a complete system of law or a particulare area of the law as it existed at the time the Code was enacted. In these jurisdictions their criminal code has replaced any previous common law rules or definitions. (but does NOT completely displace common law) meaning for an offence to be established it must be in the code.

The decisions from Code states are not bound in NSW when considering the law

CLASSIFICATION OF OFFENCES

The distinction between summary and indictable offences is the most significant classification of offences and relates primarily to the mode of trial or hearing (Local, District or Supreme Court).

SUMMARY	INDICTABLE
o A less serious offence tried by magistrate in local court o Judgement/punishment is determined by magistrate o The charge is usually laid by police officer or government officer o Punishment is less severe like a fine o Summary offences are found in 'Summary Offences Act 1988. o 2-5 years sentence	o A more serious offence tried by a judge + jury o Judgement is determined by jury and punished by the state o Charge brought by public prosecutor working for the state o Punishment will result in imprisonment or heft fine o Many indictable offences are 'triable summary' meaning they can elect to be heard by magistrate (local) or judge/jury (district)

Criminal Procedures Act 1986

- **Table 1**: indictable offences that are to be dealt with summarily unless prosecutor or person charged elects otherwise
- **Table 2:** indictable offences that are to be dealt with summarily unless prosecutor elects otherwise
- Section 5 outlines "certain offences to be dealt with on indictment"
- Section 6 outlines offences that must be dealt with summarily

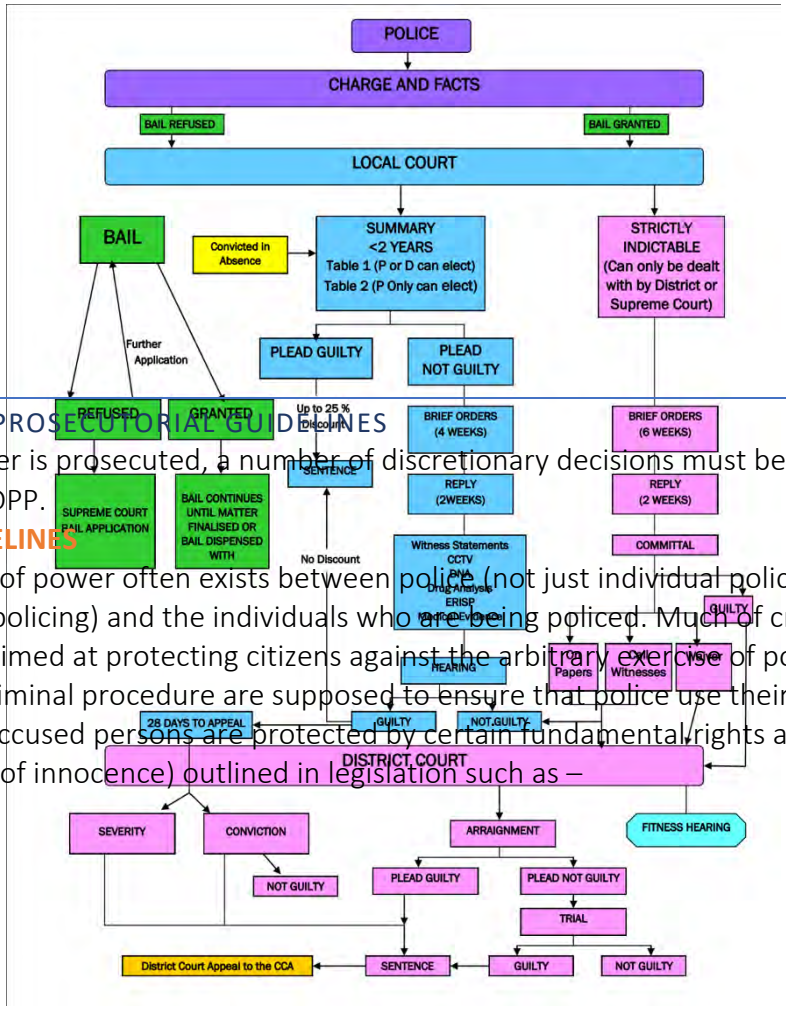
Some matters are strictly indictable (such as commercial quantity drug offences) and must be finalised in the NSW District Court. Murder and treason are heard exclusively in the NSW Supreme Court in its original jurisdiction.

JURISDICTION

In Harris v Caladine (1991) 172 CLR 84, Toohey J said *'Jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or impliedly conferred by the legislation governing the court'*

In s 77 of the Constitution, it means *the authority to decide matters that are presented to it for formal decision.*

Jurisdiction to try criminal cases is generally territorially-based. That is, the reach of the criminal law is based on the offence having taken place within the territory of NSW.



POLICE AND PROSECUTORIAL GUIDELINES

Before a matter is prosecuted, a number of discretionary decisions must be made by the police or the DPP.

POLICE GUIDELINES

An imbalance of power often exists between police (not just individual police officers, but the institution of policing) and the individuals who are being policed. Much of criminal law and procedure is aimed at protecting citizens against the arbitrary exercise of power. Accordingly, the rules of criminal procedure are supposed to ensure that police use their power responsibly. Accused persons are protected by certain fundamental rights and presumptions (presumption of innocence) outlined in legislation such as –

Law Enforcement (Powers and Responsibilities) Act 2002, police retain the power of:

- Detain and question suspects
- Search property and seize evidence
- Use reasonable force if necessary
- Use particular technologies to assist investigation like phone taps
- Arrest and interrogate suspects

The NSW Police Force also follows a specific code of behaviour called the *Code of Practice for CRIME* (Custody, Rights, Investigation, Management, Evidence) which set out the rights of suspects and the manner that investigations should be carried out

The burden and standard of proof also proffer protection against the arbitrary exercise of power by the state.

PROSECUTORIAL GUIDELINES

The Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales cover important ethical and practical issues in the prosectuon of individuals.

Prosecutors also have special professional duties pursuant to rule 29 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) and rules 83-95 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW). These include a duty of full disclosure of evidence to the defence, and fairness and impartial conduct in court.

The decision to prosecute is regulated by OFPP Guideline 4: The Decision to Prosecute. This makes the general **public interest** the paramount criteria in deciding to prosecute. This involves consideration of:

- whether **admissible evidence** is available to establish each element of the offence
- whether it can be said there is **no reasonable prospect of conviction** by a reasonable jury or a tribunal of fact?
- **whether discretionary factors** dictate the matter should not proceed in the public interest? The prosecution might decide it is not in public interest if the offender is very old/dying or if the offence occurred years earlier and witness' are no longer reliable

(II) INDIGENOUS ISSUES: IMPACT OF CJS AND DISCRETION

PENALTY NOTICE

In 2007 NSW police were given the power to serve penalty notices, or CINS, for a limited number of minor criminal offences, including offensive language and offensive conduct, as proscribed in ss 4 and 4A of the *Summary Offences Act 1988* (NSW) ('*SO Act*') (*Criminal Procedure Regulation 2010* (NSW)

Penalty notices are notices to the effect that, if the person served does not wish to have the matter determined by a court, the person must pay the amount prescribed for the offence within a fixed time period (*Criminal Procedure Act 1986* (NSW) s 334).

CRIMINAL INFRINGMENT NOTICES

Section 5 of *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* gives NSW Police the power to issue CINs to a person >18 (must be issued by police officer) for the following crimes:

- $500 for offensive language in a public place (previously $150);
- $500 for offensive conduct in a public place (previously $200); and
- $1100 for the continuation of intoxicated and disorderly behaviour following a move-on direction

General issues

Criminal infringement notices were introduced with the purpose of aiding with the congestion experienced in an overstretched court system (NSWLRC 2012). However, a key issue with the introduction of these is the 'net widening' of CINs issued as found by the NSW ombudsman as they are too often imposed in circumstances where a warning or caution would have been more appropriate, or where a court would have issued an acquittal.

Police officers can instead choose to ignore the behaviour, use their common law power to issue an informal warning, issue a caution, or serve a court attendance notice ('CAN'

The introduction of $500 CINs for offensive language and conduct amplifies an already excessive police power over the everyday activities of the public. With the increasing use of CINs for these crimes, it essentially overrides the separation of powers as police are performing the function of the judicial function. Essentially this is a contentious issue as It gives excessive discretionary power to police as they are to determine what is offensive according to each situations, little regulation and accountability for police function as (NSW Ombudsman 2014:4) found that there is very low rates of internal review requests or elections to challenge CINs in court.

Current legislation does not require police officers to consider the vulnerabilities of the recipient when deciding whether to issue a CIN or instead issue an informal warning or a caution (NSW Ombudsman 2014:100). It is this preliminary decision that is most critical to vulnerable recipients. If police were to use their discretion 'appropriately', that is to only impose CINs where necessary and give greater consideration to the factors affecting individuals ability to pay fines, there is a possibility to not only act as a more effective deterrent than the current system, but also assist the patterns of social disadvantage.b

IMPACT ON MINORITIES:

In 2009, the NSW Ombudsman found that Aboriginal people accounted for 7.4 per cent of all CINs issued

- CINs have had a disproportionate impact on vulnerable groups as in the first 12 months of the new offence of intoxicated and disorderly behaviour being added following a move-on direction, the NSW Ombudsman found that 40% of all fines and charges issued by police were to marginalised groups (NSW Ombudsman 2014:3). Again, Aboriginal people were overrepresented, accounting for 31% of the fines and charges issued in the review period

- Vulnerable people are often unable or unwilling to pay CIN fines, and can hence be subjected to more serious fine enforcement measures, which can increase the chance of secondary offending as motivated by economic factors(NSW Law Reform Commission 2012:xxi; NSW Ombudsman 2014:5, 100).

- Driver licence sanctions have a damaging impact on Aboriginal people living in regional, rural or remote communities where private vehicles are often the only practical means of transport available to access work or basic services such as education, food, health, government services and legal aid (NSWLRC 2012:17).

(III) DISCRETION

POLICE DISCRETION

The hidden nature and low visibility of the exercise of discretions need to be brought to the surface to ensure a fairer and just approach to criminal justice. In regulating discretion, both legislation and a common interpretive approach are required.

One of the key examples of police discretion is seen in the implementation of the *Young Offenders Act 1997* (YOA) which introduced various alternatives to court as a diversionary scheme for young people.

- This introduced a 3 path discretionary approach for young offenders as an alternative to court including warnings cautions and YJC.. In doing this, rehabilitation is promoted in a manner befitting the welfare model of dealing with young criminals as well as showing the positive effects of discretion.

PROSECUTORIAL DISCRETION

Discretion in the prosecution process is regulated by the *NSW DPP Prosecution Guidelines*. Specifically, *Guideline 4 "The Decision to Prosecute*". Under this:
"The general public interest is the paramount criterion"

The exercise of discretion is also central to prosecutorial functions including

(i) Whether to prosecute or not
(ii) Which charge(s) to lay
(iii) Whether to support a "no bill" application (an application not to proceed
(iv) Whether to grant a witness immunity

(IV) APPEALS

- → Appeal against conviction: the appellant argues they did not commit the offence they were found guilty of because of some legal error at law in the handling and prosecution of the case
- → Sentence appeals: offender agues against the severity of their sentence or prosecutor against leniency

You cannot appeal from the district court to the CCA. If you win a **conviction appeal**, your conviction will be quashed and then one of two things can happen: a re-trial can be ordered or you can be acquitted.
If you win a **sentence appeal**, the court will re-sentence you. Before you are re-sentenced you get the chance to put new evidence in front of the court (mostly to bring the court up-to-date about what is happening in your life) which the court will take into account when re-sentencing you. You cannot get a worse result if you are re-sentenced following a successful sentence appeal.
If the prosecution wins a **Crown appeal**, the court will re-sentence you and increase your sentence. Again, you get the chance to put new evidence before the court before you are re-sentenced.

PROCESS

(i) Appeals from the Local Court to District Court

Pt 3 of the *Crimes (Appeal and Review) Act 2001* governs appeals from the Local to District Court. S 11 (1) provides an appeal as of right against conviction and sentence or either conviction or sentence aka an "all grounds appeal. S 23 provides for prosecution appeals against sentence

Note: prosecution cannot appeal against an acquittal under s 11

(ii) Appeals from the Local Court to Supreme Court

There is a right of appeal to the Supreme Court against conviction or sentence but only on the grounds that involves a question of the law alone (s 52) or with leave in relation to a question of fact or a mixed question of law and fact (s 53)

(iii) Appeal from the District/Supreme Court to the CCA

S 5 of the *Criminal Appeal Act 1912* states that a person convicted on indictment may appeal to the court –

(a) Against the conviction on any ground which involves a question of the law
(b) With the leave of the court or where it has been found the case if fit for appeal based on a question of fact alone, mixed law and fact or other sufficient grounds
(c) With the leave of the court against the sentence passed on the persons convictions

(iv) Appeals to the High Court

It is rare for the High Court to grant special leave to appeal from a dingle judge of a State Supreme Court usually it requires an appeal to be heard by the CCA first.

S 35(1) of the *Judiciary Act 1903* gives the High Court jurisdiction "to hear and determine appeals from judgements of the Supreme Court of a state" or "any other court of a State given or pronounced in the exercise of federal jurisdiction{

S 35(2) provides than an appeal "shall not be brought from a judgement" "unless the High Court gives special leave to appeal"

(v) Determination/outcomes of appeals

(1) Dismiss the appeal if it considers that no substantial miscarriage of justice has occurred
(2) If the court allows the appeal under section 5(!) against conviction, quash the conviction and direct a judgement and verdict of acquittal to be entered
(3) On an appeal against sentence if the court believes that another sentence, whether more or less severe is warranted, shall quash the sentence and pass such other sentence in substitution of

DOUBLE JEOPARDY PRINCIPLE

The double jeopardy principle refers to the principle that if a person is acquitted of murder or other serious offences, the accused person cannot be retried under the present system. However the need for reform to the double jeopardy rule was demonstrated by *R v Carroll (2001)* QCA 394 where the murder charge against the defendant was ruled against by the High Court on the grounds of the DJ principle.

This reform was implemented by the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* which states the CCA may order retrial if satisfied –
: "there is fresh and compelling evidence"
: "the acquittal is a tainted acquittal
: "in all circumstances it is in the interests of justice for the order to be made"

(V) THEMES IN THE CJS

TECHNOCRATIC JUSTICE

Technocratic justice is a term used to describe a rnge of enforcement measures such as the imposition of fines, speed cameras and technology that are used to essentially predict and prevent crime. Essentially these are used to fuel the drive for efficiency within both the civil and criminal sphere of australias legal system, reducing the congestion within our current court systems.