

Effectiveness of the Law in:

I. ACHIEVING JUSTICE FOR INDIVIDUALS

The concept of **justice** is difficult to define. However, various aspects of a just law can be defined and applied to criminal law to see how effectively the criminal justice system achieves justice for individuals and society.

Factors to be considered when evaluating the effectiveness of criminal law in achieving justice for individuals include:

- **Equality**
- **Accessibility**
- **Enforceability**
- **Resource efficiency**
- **Protection and recognition of individual rights**

■ Equality

For the criminal law to act justly, one of the most important aspects of our legal system is that all people need to be treated equally at all stages of the criminal justice process. However many groups including ABTSI people, women, migrants and people from low socio-economic backgrounds find it difficult to gain equality. The lack of equality displayed by the criminal justice system towards various groups in society is particular evidence in the case of Aboriginal people.

Aboriginal and Torres Strait Islanders and the criminal justice system

In the NSW prison system, Aboriginal and Torres Strait Islanders are over-represented in both adult and juvenile goals and are disadvantaged in the entire criminal justice system. These disadvantages include:

- Aboriginal people are often disadvantaged in court proceedings due to language and cultural barriers
- Aboriginal people are more likely to plead guilty in a hearing
- Aboriginal people are often subject to police discretion and discrimination
- Aboriginal people have a high criminal visibility
- Aboriginal children are often victims of the street laws
- Aboriginal people are less likely to be represented by a lawyer than non-Aboriginal people
- Aboriginal people are more likely to be sentenced to prison than non-Aboriginal people

The *Crimes (Sentencing Procedure) Act 1999* (NSW) has a disproportionately detrimental effect on Aboriginal people because people who are imprisoned for less than 6 months are not eligible for parole. Many Aboriginal people are convicted of minor crimes and imposing short goal sentences means they are not eligible for parole. Despite recommendations of the **Royal Commission of Aboriginal Deaths in Custody in 1991**, equality for ABTSI people in the criminal justice system has not been achieved.

Police discretion and discrimination – For a legal system to be just, laws must be applied consistently, that is, similar cases must apply the laws in the same way. **Police discretion and discrimination** could interfere with the law being applied consistently. Magistrates and judges may also treat different groups in society differently in their dealing with the criminal justice system. Some recent cases involving rape have highlighted the lack of sensitivity of some judges to the effect of rape on women.

Sometimes police receive information from someone who is associated with alleged criminals, often someone who is also a criminal (informers). Police are often criticised for using informers because of the secrecy involved and the possibility of corruption and misinformation. However, informers can sometimes provide police with the vital information that leads to the solving of a serious crime. Informers in custody may also be given a 'discount' on their prison sentence. It is argued that this practice may encourage some prisoners to **invent information** in order to be released from prison earlier. This is not consistent with justice. In 1991, an informer index was established to allow more informed decisions to be made about the reliability of such witnesses but its success has been limited.

The adversarial system – The success of the adversarial system depends on both sides being represented equally. However, the adversarial system promotes inequality. The experience and ability of the legal team may be more important in determining the verdict than the quality of the evidence, particularly in jury trials. In summary criminal matters, it is quite likely that the prosecution will have more expertise and experience than will the defendant's solicitor who may deal with many different legal problems while the prosecution deals only with criminal matters. Cuts to legal aid funding reduce the change for equality of representation.

Juries – The use of juries may prevent justice from being applied equally. Juries are more likely to acquit the accused than a judge sitting alone but juries are used in less than one per cent of all criminal cases. The possible influence of the media may make it difficult for a jury to treat a defendant in an objective manner

Key Question/Issue: Is the adversarial system the best system for achieving justice in criminal trials?

The adversarial system was designed to be used with trial by jury. Though the adversarial system has served common law countries well for centuries, there are problems with it. These include:

- (a) The adversarial system may be less likely to discover the truth because of the high standard of proof and the rules of evidence such as hearsay, opinion and relevance.
- (b) The adversarial system was developed for juries, which are infrequently used today.
- (c) Oral examination of witnesses, allowing them to respond only to questions asked, may prevent the full truth from being known. Valuable information may never come to light.
- (d) The skill of barristers and solicitors may differ, therefore the person with the better lawyer could be advantaged.
- (e) Witnesses, through they may be truthful, can give a bad impression, so they may be disbelieved.
- (f) Some people argue that it is fairer to look at past records of the accused. In the adversarial system, the past record of the accused is generally only admissible during sentencing, not during the trial.

Advantages and disadvantages of trial by jury and summary hearings

Trial by jury	
Advantages <ul style="list-style-type: none"> • More reliable than a single judge because it draws strength and creditability from numbers. If 12 people find the offender guilty, then there is more chance that the offender is guilty. • Ordinary people are involved in the criminal process so that the community is confident that the system is operating fairly. • Current values and community standards are applied. • Trial by jury is a fundamental right which protects the individual from abuses of state power. 	Disadvantages <ul style="list-style-type: none"> • Juries are inclined to be more emotional than judges and thus may not look at the facts objectively. • Juries may not understand court proceedings or technical evidence. • Juries may be easily intimidated and thus may be too scared to ask for matters to be explained. • Juries are more likely to acquit the accused. • Juries may be easily swayed by clever barristers. • A unanimous verdict may not be reached which means a second trial must be held, involving more time and expense. • Trial by jury is more expensive and time consuming. • Jury duty is an imposition on ordinary people who have their own lives to lead. • Because of exemptions, juries may not be really representative of the community. • Juries may be influenced by the media. Although jurors are instructed to base their verdict only on the evidence they hear in court, in a case where there has been a lot of media coverage, it may be very difficult for jurors to ignore the media.
Summary hearing	
Advantages <ul style="list-style-type: none"> • Much cheaper and quicker than a jury. • A judge is more experienced in weighing up evidence and will not be swayed by clever lawyers. • Less danger of pre-trial publicity affecting the judge's decision. 	Disadvantages <ul style="list-style-type: none"> • Judges often come from a different background to the accused and may be unsympathetic to the accused. • The accused is not judged by ordinary people who reflect community values. • There is more room for possible abuses of state power because the community is not involved in the justice process. • The general public may have less faith in the system. • Denies the fundamental right of the accused to trial by jury.

Plea-bargaining and guilty pleas – Plea-bargaining may also promote inequality in criminal law. For example, in a recent sexual assault case involving the gang rape of two sixteen-year old girls, the Department of Public Prosecutions (DPP) entered into a plea bargain with the accused. In return for guilty pleas, the DPP agreed not to mention that a knife had been used in the attack. This was done without the knowledge of the victims. Many people, including members of the Government, questioned whether this was a fair and just outcome for the victims and for society.

Plea-bargaining also creates problems for equality in that two people who commit the same crime may be treated different if one receives a plea bargain because those who do not engage in plea bargaining may be found guilty of a more serious crime and receive a more severe sentence. Although guilty pleas reduce the cost and delay in the court system, guilty pleas also lead to reductions in sentences for the offender. This means that those who plead guilty are generally given a lesser sentence than those who are found guilty by the court. Some innocent defendants may be willing to accept a plea bargain rather than take the risk of going to trial or because they cannot afford to defend themselves effectively.

Key Question/Issue: What are the implications of plea-bargaining for the notion of justice for the accused, the victim, the community and the efficiency of the court process?

In over 80 per cent of criminal cases, the accused person pleads guilty to the charge. Sometimes plea-bargaining occurs. In plea-bargaining the prosecution and defence meet before the trial and the defence agrees that the accused will plead guilty if the prosecution reduces the charge.

Plea-bargaining is one of the main ways **discretion** is used in the court and adjournment processes. The accused and the prosecution decide whether there will be a definite conviction, the nature of the charge and thus the likely severity of the sentence. An example of a plea-bargaining is a person with attempted murder agreeing to plead guilty to malicious wounding, which carries a much smaller maximum penalty, in return for the prosecution dropping the attempted murder charge.

Guilty pleas often attract a lesser sentence and thus alleged offenders may feel inclined to plead guilty rather than trust in the court process to establish their innocence. Guilty pleas, however, mean quicker, less expensive court processes and fewer traumas to victims.

It is hard to determine how much plea-bargaining occurs in NSW, as it is not an open, officially recognised practice.

Advantages and disadvantages of plea bargaining

<i>Advantages</i>	<i>Disadvantages</i>
<ul style="list-style-type: none"> • Saves witnesses from the ordeal of giving evidence and being cross-examined. The distress of this may be great if the witness is a victim of the crime. • It is efficient, quick and inexpensive. • Its efficiency may save all participants (the victim, accused, witnesses) and the community from unnecessary pain and expense. 	<ul style="list-style-type: none"> • It puts pressure on the accused to plead guilty to something he or she may not be found guilty of in a court hearing. • The accused may get a lighter sentence than he or she really deserves. • This lighter sentence may mean the victim of the crime and the general community lose trust in the justice system. • The lighter sentence means that the accused may re-offend. • It does not demonstrate the ideas of justice or the court systems to the community. • It is a secretive process and may prevent the court system from operating to achieve justice

Victim's rights – These have long been ignored by the criminal justice system though the law has provided more assistance to victims in recent years. Some problems in this area still remain, particularly with the payment of compensation to victims and the use of victim impact statements. Victims of serious sexual assault still face very harrowing questioning in the courts. It is often argued that the rights of the victim are secondary to the accused. Some improvements have been achieved in this area.

■ Accessibility

The criminal justice system must be accessible to all members of society if it is to be considered fair. It must provide everyone with the opportunity to defend themselves and receive justice. Not everyone has equal access to the legal system in Australia, primarily because of differences in wealth and power. Mounting a legal defence can be very expensive and beyond the reach of many Australians. Yet, without proper legal representation it is unlikely that an accused person will receive a fair trial.

Cases such as *Dietrich v. Queen* (1992), demonstrate that without legal representation it is very difficult for people to defend themselves in the adversarial system. Legal Aid is available but it is not a right, and many people are not given assistance because the limited financial resources of the Commission are directed to those most in need.

Factors, which may hinder inequality and accessibility in criminal law include:

- **Cost** (legal representation is expensive)
- **Time** (lengthy trials cost more and waiting increases anxiety)
- **Knowledge** of the system and its procedures

Cost – The cost of justice means that it would be impossible for many people to access the legal system without the provision of legal aid. Legal aid is vital if people are to have equal access to the legal system. Yet, legal aid is not available to everyone and is based on 3 tests: means test, merit test and strict policy guidelines. Funding cutbacks have been occurring since the 1990's and this has reduced access to legal aid. If legal aid is not available then the legal system is restricted to those people with considerable economic power. This does not promote a just legal system. Ways of reducing legal costs are being considered by state and federal governments and by the legal profession itself.

Delays – A criminal case can take over a year to get to court. Delays in the legal system are a matter of concern in Australia and particularly in NSW at present. Insufficient courts and judges have resulted in civil cases sometimes being delayed for up to five years, while criminal cases are sometimes delayed for over a year. In 1998, for example, the Australian Bureau of Statistics shows that NSW has the longest delays in criminal court cases in Australia, with 14 months being the average time for criminal cases to be finalised. In 1998-99, criminal cases held in the higher courts of NSW had a shorter waiting time – 35 weeks – than the average of all cases in NSW. This is the longest waiting time for higher courts out of all the states. However, the delays for civil court cases have significantly reduced since 1996.

Some factors, which contribute to the delays, are:

- The fact that we have an adversarial system of trial, which is based on confrontation, not a quick resolution of the case.
- Courts may sit for only a few hours each day.
- Increasing numbers of cases.
- Lack of time management practices by judges, magistrates and lawyers.

Effects of these delays include:

- Victims can suffer from severe ongoing trauma because the wrongdoer is still free or unpunished.
- Witnesses may forget details and so a case becomes harder to prove.
- Alleged offenders who are on remand and found not guilty suffer an enormous infringement of freedom.
- It reduces public expectations of the efficiency of the criminal justice system.

It should be remembered that some measures of reducing court delays might restrict other aims of justice. The use of plea-bargaining is one such measure.

Knowledge of the law – Migrants in particular may not have equal access to the law because of lack of knowledge of the law and the system of law in Australia. Language difficulties can present a barrier both in gaining an education and an understanding of legal proceedings. This can also be true in the case of indigenous peoples, rural people and the socio-economically disadvantaged.

The criminal legal system is very complex, and proper legal training is required in order to understand its complexities. Consequently, both the victim and the accused need help if they are to understand how the process operates and to ensure that they have proper access to the legal system.

■ Enforceability

The main enforcers of the criminal law are the police. The effectiveness of the law in the area of enforcement is thus closely related to the effectiveness of the police service. Police effectiveness has been called into question by the Wood Royal Commission, which revealed the widespread use of corrupt and discriminatory practices by the police. Since the final report to the Commission in 1997, however, measures have been taken to remedy this.

Police corruption has been the subject of much investigation in recent years. A Royal Commission into the NSW police service headed by Justice James Wood was set up in November 1994. It finished its hearings in March 1997 and delivered its final report in May 1997. During the course of the hearings it became evident that there was widespread corruption and misconduct in the NSW police service. The collection and use of illegal evidence was one major area where corrupt practices were widespread. These practices included:

- Planting of evidence
- Using 'verbals'
- Using 'scrum-downs' that is where police get together to make sure they have memorised any fabricated (made-up) evidence correctly
- Use of assault and pressure to get confessions.

Since the Royal Commission, reforms to the NSW Police Service have led to a decrease in the widespread corruption. However, in October 2001, police corruption was found to still exist in some police stations on Sydney's northern beaches.

An important issue is whether police have too much or too little power. This is also linked to the idea that police may have too much discretion.

Arguments for and against more police power

<i>Arguments for</i>	<i>Arguments against</i>
<ul style="list-style-type: none"> Increased crime figures, especially crimes against property, mean that police should have wider powers of search and seizure. Increased police power will decrease crime because it will make detection of crime more likely. Fear of detection will prevent people committing crimes. As criminals use more complex technology to commit crimes, police also need wider powers to detect and investigate crime. Citizens are so concerned about increasing crime rates and lack of police power that they may be tempted to take the law into their own hands. 	<ul style="list-style-type: none"> Increased police power means that ordinary people lose basic rights. For example, increased use of telephone tapping or wider powers of search and seizure will invade people's privacy and infringe their right to be presumed innocent. The presumption of innocent becomes a presumption of guilt. Not all crimes have increased. Violent crimes have decreased over the last century so more police power is not needed. More police power does not alter the fundamental causes of crime such as a drug abuse and social and economic problems More police power does not prevent crime. All it can do is help catch criminals after the crime has been committed. More police, not more police power is the way to improve detection and investigation of crime.

Reporting Crime – Another factor, which casts doubt on the effectiveness of criminal law in the area of enforceability, is the reporting of crime. Many crimes are not reported. There are many reasons for this. What it means is that there are offenders not being caught and punished and victims that receive no justice through the legal system.

■ **Resource efficiency and the protection of individual rights**

In an ideal world the law would be entirely fair and there would be free legal advice for all people. There would be prompt court processes that are presided over by experienced and totally objective judges. Furthermore, there would be compensation for those who are falsely accused. In the real world, however, such things do not always exist. There could become a reality with a massive increase in government funding, but in consequence there would be less money available for other services such as education and health. Alternatively, taxation would have to increase. Society seems unwilling to make either sacrifice, and instead demands that the current legal system operates within the funds it currently receives.

Some measures are need, therefore, to cut costs. These include the controversial use of plea-bargaining. While the practice has attracted considerable criticism for allowing criminals to 'get off lightly', it is an effective way of reducing legal costs and court time.

The **1999 Report on Government Services** estimated that approximately **\$5.6 billion** was spent on justice throughout Australia. The **police forces** and their maintenance consumed most of this, followed by the **courts** and **corrective services**. Diversionary and crime prevention programs received very small budgets in comparison.

For the criminal law to be effective for both criminals and the community as a while it should use public money in a way that protects society from crime and at the same time is not wasteful. As well as this, the rights of individuals need to be protected. Factors, which arise in accessing resource efficiency and the protection of individual rights in the operation of criminal law, include:

Openness of the court system – For justice to occur, the operation of the criminal law should be open to public scrutiny. The use of plea-bargaining certainly leads to efficiency but reduces the openness of the criminal justice system.

Legal representation – Provision of legal representation to individuals is costly, either for the individual or for the society as a whole but lack of competent legal representation may lead to miscarriage of justice.

Imprisonment – This is very costly for the community and does not seem to rehabilitate the offender. The use of alternative sentences may be more efficient in terms of resources and may also be more rehabilitative. Courts could consider Community Service Orders in place of short custodial sentences. Introduction of the Drug Court has helped to divert substance dependant offenders away from prison and has show positive results.

Increased police powers – These may increase the efficiency of the police but may reduce the individual's right to privacy. The introduction of surveillance cameras in public streets and DNA testing may also be seen as an unwarranted invasion of privacy. Police corruption may also reduce both the efficiency of the police and infringe on the rights of some individuals. There has been some criticism that more money is spent on police than on diversionary programs to reduce crime before it occurs.

Alternative dispute resolution – Use of alternative dispute resolution (ADR) mechanism such as community justice centres would be quicker and less expensive however, there has been little use of ADR in the criminal area because crime involves the state, not just two individuals. It has been suggested that mediation rather than the criminal process be used in some areas such as vandalism and petty theft. Here the offender and the victim might agree on the best way for the offender to make up for what he or she has done. ADR in some matters involving young offenders has been introduced throughout NSW in Youth Justice Conference (YJC). ADR is not suited to many crimes where there is no clear victim, such as public order offences and victimless crimes, and is not suitable for serious offences.

■ Opportunity for Appeals and Reviews

Individuals can appeal to a higher court against a conviction or against the severity of the sentence. The prosecution can also appeal. This protects the rights of the individuals in the criminal justice system by ensuring they can have the case re-heard if they feel there has been a miscarriage of justice. This right of appeal is not extended to victims of crime, however. Appeals can be costly and time-consuming which raises the question of recourse efficiency, though individuals who appeal may be ordered to pay some court costs if they lose the appeal.

The need for an equitable balance between the rights of the individual as well as the offender and victim, and the rights of society vary widely. Specific issues include:

- (a) The rights of victims to be protected in the community and the justice system.
- (b) The rights of suspects and defendants who must be considered innocent until proven guilty.
- (c) The rights of individual Aboriginal and Torres Strait Islanders in their community and the wider justice system.
- (d) The rights of minority groups, such as migrants and Aboriginals, to have their value systems and culture recognised.
- (e) The rights of prisoners to have fair sentences and rehabilitative and non-violence prison experiences versus society's right to punish offenders.
- (f) The rights of the international community to impose international standards versus the sight of sovereign states to have their own criminal laws. Example: Northern Territory mandatory sentencing laws were criticised by the international community.

The law must attempt to balance the rights of victims and the rights of the accused.

Rights of the Victim	Rights of the Accused
<ul style="list-style-type: none"> ○ To have their allegations investigated ○ To be informed of the process of investigation ○ To be informed of their role as a witness ○ To be protected from the accused ○ To make a victim impact statement 	<ul style="list-style-type: none"> ○ Not to be illegally searched ○ To remain silent ○ To have interviews recorded ○ To be detained only if arrested ○ Not to have prior convictions detailed before the verdict is given ○ Not to be have illegal obtained evidence used against them

2. ACHIEVING JUSTICE FOR SOCIETY

The law primarily protects the rights of the individual, but it is through the law that collective values and traditions of society are maintained. If people who breach the rights of individuals (and therefore the collective rights of society) are not dealt with quickly and in accordance with the wishes of society, the law will be viewed as a failure. However, the rights of the individual are often breached in the course of achieving 'justice' for society. For example, we would all live in a society with a lower crime rate if repeat offenders were imprisoned for life, but this would significantly threaten the individual rights of people.

Factors to be considered when evaluating the effectiveness of the law in achieving justice for society and communities include:

- **Resource efficiency**
- **Community standards and expectations**
- **Opportunities for enforcement**
- **Appeals and review**
- **The balance of individual rights and community rights and standards**

■ Measures of resource efficiency

Justice is expensive to achieve, and competes for funding with other government services such as education, health and public transport. It is therefore right to question the efficiency of the system, especially when the clearance rate – the percentage of reported crimes that are resolved by the police – is often low.

Different measures of efficiency can be applied to each sector of the legal system. For example, the police can be evaluated by their crime clearance rate. The legal profession can be assessed in terms of their conviction rate, while the correction system can be assessed in terms of the number of recidivists brought before the courts.

■ The law as a reflection of community standards

Society will, as a whole, show respect for the law when it is broadly in keeping with societal norms. But how is it possible to determine the attitudes or norms to which society subscribes? The mass media are a source of information, although inherently flawed. The media portray images and attitudes that are sensational and often far removed from the reality of most members of society.

There are three key questions that must be asked when considering **community standards**:

1. What standards are the laws expected to uphold? Do we expect the law to regulate public morality as well as protecting property and ensuring personal safety?
2. Does the law respond effectively to changes in community attitudes?
3. Are those people charged with making, interpreting and enforcing the law really in touch with the community they are there to represent?

It is clear from the rulings and *obiter dicta* of judges that they are often not in step with the standards that the community expects. Judges are as much influenced by their upbringing, gender and age as anyone else, but are required to put aside these influences and deal solely with the facts of the case in relation to the law. In some relatively recent cases judges have shown an apparent inability to do this. For example, a South Australian Supreme Court judge stated that it was acceptable to use 'rougher than usual force' to encourage a wife to have sex. In the Victorian Supreme Court, a judge stated that in many sexual assault cases 'no' often meant 'yes', and a New South Wales magistrate in a radio interview relating to a case in Victoria stated that many women made up stories of sexual assault. A NSW Defence Barrister accused a young victim of sexual assault of being responsible for her attack by wearing a short skirt.

It is important to note that community standards are most commonly reflected by the political decisions made by governments. The electoral power of the public is an extremely powerful force for influencing the legal system.

■ Opportunities for enforcement, appeals and review

The role of the police is to enforce the law, but until 1983 the police were also responsible for directing the prosecution of most summary and indictable offences. Criticism of police in their role in prosecuting matters in court led to the establishment of the independent Department of Public Prosecutions (DPP) in 1983. The DPP is now responsible for the prosecution of most indictable offences, while the police continue to handle most summary offences.

The DPP provides an extra level of legal scrutiny of the police's case against the accused. It does not automatically prosecute; instead it required the police present their case and then makes a decision whether the case is likely to succeed. This reduces the overall number of cases that go before the courts, and ensures that the police remain accountable for their investigations.

It is the right of any person who has been convicted to apply for an **appeal**. The defendant must prove either that the court handed down a sentence that was too severe, or that there was an error in law. The prosecution too has the right to appeal on behalf of society, but the only grounds for appeal in this case are that the sentence was too light.

There are therefore only a few opportunities for appeal and even fewer reasons for the appellate courts to uphold an appeal. Cases such as that of Lindy Chamberlain highlight this fact. Chamberlain claimed that a dingo had taken her daughter while the family was camping at Uluru, but was charged with murdering her daughter and convicted. Chamberlain appealed her conviction, but was unsuccessful because it would not be established that there was an error in law and the sentence she had received was consistent with sentences handed down for other murder convictions. It was only after a review ordered by the Government that it was established that Chamberlain was innocent of the charges.

■ Balancing individual and community rights values

The criminal justice system must find the fine balance between protecting the rights and values of society and ensuring that individuals are not disadvantaged in the process. There have been several high-profile cases that show that the desire of the police or the prosecution to gain a conviction has led to the breaching of individual rights. The case of Choi Tang is on such example.