

COMMON LAW AND NON-COMMON LAW SYSTEMS COMPARISON TEACHER AND STUDENT RESOURCE

Note: The following table focuses only on criminal trials in the superior courts of WA (The Supreme Court of WA: max. sentencing option = life imprisonment, e.g. murder, armed robbery, Commonwealth drug smuggling and arson) and France (The Court of Assize: sentencing option is more than 10 years imprisonment, e.g. murder or rape).

	Western Australian Adversarial System/Common Law System	French Inquisitorial System/Non-Common Law System
Binding force of case/common law	Previous decisions by higher courts are binding on lower courts.	<p>In theory there is little use of judicial precedent (case/common law) and Judges are free to decide each case independently of previous decisions, by applying the relevant statutes. There is, in theory, therefore heavier reliance on comprehensive statutes/codes of law.</p> <p><i>The reality is that judges do refer to previous decisions by higher courts (case/common law) as such decisions should, and would, guide the Court.</i></p>
Investigation	<p>“The primary responsibility for investigating and charging offences resides in investigative agencies, such as the Western Australia Police (WAP)...The investigation and prosecution of offences are separate and distinct functions within the criminal justice system. In some cases, whether because of complexity, sensitivity or for some other reason, it will be appropriate for the WAP or investigative agency to seek the opinion of the Director [of Public Prosecutions for Western Australia] as to whether a charge should be laid. In such cases, the decision to charge will still be one for the WAP or investigative agency, although they will be entitled to</p>	<p>The typical criminal proceeding is divided into 3 phases: the investigation phase, the investigating Judge phase, and the trial.</p> <p>In France in the investigation phase, the police under the control of the prosecutor collect evidence. The prosecutor instructs the police on how particular cases are to be handled and can set areas of priority for investigations. The prosecutor decides whether to press charges.</p> <p><i>An investigating judge (juge d'instruction) takes control of</i></p>

	<p>act on the recommendation of the Director.” (From <u>Statement of Prosecution Police and Guidelines 2005</u>)</p> <p>Criminal proceedings only continue when a case is well-founded with reliable and admissible evidence. There must be a <i>prima facie</i> case – in other words – a case for the accused to answer with evidence where a jury or trier of fact may conclude beyond reasonable doubt that the offence has been committed.</p> <p>Any matters proceeding in the Supreme Court’s jurisdiction first take place in the nearest Magistrates Court: the first appearance. At the first appearance the charge is read to the Court and the Accused has the opportunity to apply for bail. A police prosecutor represents the State at the first appearance. The matter is then adjourned to the next sitting of the Stirling Garden’s Magistrates Court. A lawyer from the Office of the Director of Public Prosecutions (ODPP) represents the State from this point onwards.</p> <p>The ODPP has the final say as to whether an indictable matter proceeds. The test is whether or not there are reasonable prospects of conviction. In the event that the ODPP considers this test met, then a consideration must also be given as to whether or not the prosecution is in “the public interest”.</p> <p>The State’s record of evidence (the Brief) must be fully disclosed to the accused. Even evidence that may not be relied upon by the State must be disclosed, and this includes both incriminating evidence and evidence that is favourable to the accused.</p> <p>There is no requirement for the accused to disclose anything to the State, except in limited circumstances (i.e. the provision</p>	<p><i>the matter quickly for serious criminal offences such as those in jurisdiction of the Court of Assize.</i></p>
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	of expert evidence and notice of alibi evidence).	
The investigating Judge phase	<p>There is no investigating judge phase. Independent evaluation of the evidence collected during investigation is left to the trial.</p> <p>After the State has disclosed its entire record of evidence (the brief) to the accused, the defence is given an appropriate amount of time to review the case and then the accused must plead guilty or not guilty.</p> <p>If the accused pleads guilty the matter proceeds to sentencing.</p> <p>If the accused pleads not guilty the matter proceeds to trial.</p>	<p>The investigating judge phase is always conducted in writing.</p> <p>The investigation file is always open to both parties.</p> <p>The police are now under the control of the investigating judge. The investigating judge has powers the police don't have.</p> <p>At this stage the investigating Judge would direct expert analysis from the Court, e.g. psychiatric analysis, DNA analysis etc.</p> <p>Note: the Court uses its own experts, however either party can seek expert analysis from non-court appointed experts. This is very rare.</p> <p>There is a thorough investigation of the accused including full historical background including education, family background and criminal record. The victim is also investigated.</p> <p>This is the crucial stage as the investigating judge completes and reviews the written record and decides whether the case should proceed to trial.</p>
The trial	<p>The parties in the matter are the prosecution and the defence.</p> <p>The burden of proof is on the prosecution.</p> <p>The standard of proof is beyond reasonable doubt.</p> <p>The accused is presumed to be innocent until proven guilty.</p>	<p>The parties in the matter are the prosecution, the accused and the victim is entitled to be a special party. The victim is a special party by invitation but is under no obligation to do so.</p> <p>The burden of proof, when compared to the common law system, is shared: Burden of production of evidence AND</p>

	<p>The prosecutor, acting on behalf of the State of WA, and the defence counsel, acting on behalf of the accused, offer their versions of events and argue their case before an impartial judge and a jury.</p> <p>It is important to note that the defence is not required to present any evidence.</p> <p>The lawyers for each party are primarily responsible for introducing evidence and questioning witnesses.</p> <p>A single judge presides at trial.</p> <p>In the majority of cases a jury is responsible for determining an impartial verdict. Judge alone trials are possible, however these are the exception rather than the norm.</p> <p>Each witness gives their evidence-in-chief (orally) through questioning. Each witness may then be cross-examined through questioning by the opposing counsel and may then be re-examined.</p> <p>Documentary evidence is also presented throughout the trial. A 'document' means any record of information. (s79B Evidence Act WA 1906)</p> <p>The prosecutor presents the State's case first including all the evidence they intend to submit to the court. Once the prosecutor has closed the case, the defence counsel then has the opportunity to present or adduce any evidence.</p> <p>After all evidence has been presented, the prosecutor gives a closing address to the jury followed by the defence counsel's closing address. After the closing addresses, the judge gives</p>	<p>Burden of persuasion. The investigating judge and senior judge at trial have the burden of production of evidence: the responsibility for preparing the investigation file and for bringing out all of the evidence in the investigation file at trial. The prosecution has the responsibility for persuading the judges and jurors that the accused is guilty and the defence aims to create doubt.</p> <p>The standard of proof is your inner conviction (<i>intime conviction</i>). The inner or moral certainty of the trier of fact: judges and jury in the Court of Assize.</p> <p>The accused is presumed to be innocent until proven guilty.</p> <p>As a result of the thoroughness of the investigation phase, a record of evidence has already been prepared by the investigating judge. The record of evidence is equally available to the prosecution, defence and victim well in advance of the trial.</p> <p>The main function of a trial is to present the case, as brought out by the file from the investigating Judge phase, to the trial Judges and the Jury and to allow the lawyers to present oral argument in public and for the accused to express himself. The whole process is transparent.</p> <p>The facts of the case and the background of the accused come out in trial. The order of witnesses may vary according to whether the background of the Accused is to be addressed first or whether the facts are to be presented first.</p> <p>There is narrative testimony, in which the witness gives their version of events without shaping by questions from</p>
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	<p>directions to the jury which includes a summing up of the evidence, as agreed by both parties, presented in the trial, explanations of matters of law and the guidelines to the jury on their role in reaching a verdict.</p> <p>If the accused is found guilty it is rare for the sentence to be handed down immediately. In 2013 the Supreme Court aimed to hand down a sentence within 12 weeks after a person had been found guilty at trial.</p> <p>If found guilty, the background of the accused is often scrutinized once s/he has been found guilty as part of the pre-sentencing process.</p>	<p>the prosecution, defence or victim. The witnesses testify without interruption then the judge, prosecutor, victim (if represented by a lawyer) and defence ask any further questions.</p> <p>While there is no cross- and re-examination of witnesses, each of the parties has the opportunity to question and challenge witnesses. The judges and jurors also have the opportunity to question witnesses.</p> <p>There is no ability for the accused to plead guilty in the Court of Assize.</p> <p>Three judges preside in a trial; the senior judge and two other judges.</p> <p>The victim's lawyers, prosecution, defence give closing addresses and then the accused has the last words.</p> <p>If the accused is found guilty the sentence, as agreed by the three judges and the jurors, is handed down immediately after the guilty verdict is announced.</p>
<p>Role of the trial Judge and Counsel</p>	<p>The judge ensures there is a fair hearing of the matter, ensures both parties follow the rules of the Court, settles legal argument between parties including the admissibility of evidence, summarises evidence as agreed by both parties and instructs the Jury on matters of law.</p> <p>If the accused is found guilty, or pleads guilty, the judge sentences the offender as per the penalties identified in the WA Criminal Code. The judge is guided by precedents when sentencing, and is assisted by submissions from both the</p>	<p>The trial judges are different to the investigating Judge.</p> <p>Of the three judges, only the senior judge has access to the record of evidence (the investigation file) prior to the trial. The other trial judges only hear what is said in court.</p> <p>The senior judge is required to direct the court room debate and to come to a final decision. The senior judge assumes the role of principal interrogator of witnesses and the accused, and is under an obligation to take evidence until</p>

	<p>prosecutor and defence counsel.</p> <p>The judge is often referred to as the judge of the law.</p>	<p>all of the relevant material has been submitted.</p> <p>It is the senior judge that carries out most of the examination of witnesses, arising from their obligation to inquire into the charges and to evaluate all relevant material has been submitted.</p> <p>The role of the three judges is to ensure a fair trial, to settle any legal argument and determine compensation.</p> <p>The judges and the jurors deliberate on the verdict and the sentence.</p> <p>If the accused is found guilty, the 3 judges decide on the compensation, if a victim has asked for compensation.</p>
<p>Use of juries</p>	<p>In the majority of cases a jury is responsible for determining an impartial verdict.</p> <p>A jury can be made up of 12-18 people, however that number is reduced to 12 when the jury goes to deliberate.</p> <p>In murder trials and commonwealth criminal matters only a unanimous verdict will be accepted. For all other matters a majority of 10 of the 12 jurors agreeing will be accepted.</p> <p>It is assumed that the voting on the verdict by the jurors is done by the raising of hands</p> <p>The jury has no role in determining the sentence if the accused is found guilty.</p> <p>The jury is often referred to as the judge of the facts.</p>	<p>A jury of six people share the responsibility with the three judges for determining an impartial verdict <i>and</i> an appropriate sentence.</p> <p>6 of the 9 are required to agree for the accused to be found guilty.</p> <p>The voting on the verdict by the judges and jurors is done secretly by ballot (The judges and jurors mark yes or no on a ballot paper and place that paper in a box).</p> <p>The judges and the jurors also determine the sentence. 5 of the 9 are required to agree on the sentence, except for the maximum penalty to be applied (in this case, agreement of 6 of the 9 is required).</p>

<p>Rules of evidence</p>	<p>Generally, there are two trial theories – the State’s version of events and the defence’s version of events. The facts in issue are identified and must be proved by way of admissible evidence. Evidence can be admitted either orally or through the use of documents. There are strict rules that determine the admissibility of evidence.</p> <p>The first test to determine the admissibility of evidence is relevance. If the evidence is not relevant to a fact in issue, it is inadmissible.</p> <p>The courts have a number of ways to contain a trial to matters legally at issue. This is done through presumptions, judicial notice, formal admissions and agreed facts.</p> <p>Both parties have the opportunity to call upon expert witnesses to prove a fact in issue. Generally, only expert witnesses are permitted to give an opinion during a trial and that opinion must be within their field of expertise.</p> <p>Another exclusionary rule is the rule on ‘hearsay’.</p> <p>“At the heart of the hearsay rule is the idea that, if the court is to discover the truth, it is essential that parties have the opportunity to verify the information provided by the witnesses, which is difficult to do if the court receives evidence in writing or via a third party (and are therefore unable to cross-examine the person).” (Justice Gov’t NZ)</p> <p>Generally, an accused person’s prior convictions are not revealed during a trial. However, there are some exceptions to this rule.</p> <p>The accused is not required to give evidence or respond to</p>	<p>Everything is admissible.</p> <p>There is no ‘hearsay’ rule.</p> <p>In reality the senior judge determines if evidence is relevant. It is not in the interest of either party to present irrelevant evidence and circumstances where this issue arises are the exception rather than the norm.</p> <p>The jury is present should there be legal argument.</p>
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	evidence. The jury is not present should there be legal argument.	
Rights of the Accused	In both systems the accused is protected from self-incrimination and guaranteed the right to a fair trial. The accused is presumed to be innocent until proven guilty.	In both systems the accused is protected from self-incrimination and guaranteed the right to a fair trial.
Role of the victim	Victims are not a party to proceedings. Prosecutors act on behalf of the State and do not represent the victim. Victims are often used as witnesses for the prosecution during a trial. In WA, victims can provide a victim impact statement to the Court at sentencing which the judge takes into account when determining the offender's sentence.	As a special party the victim's lawyer has a formal role in the pre-trial investigative stage, including a recognised right to request particular lines of inquiry or to participate in interviews by the investigating authority. At the trial, a victim has independent standing as a special party if they are represented by their own lawyer. If they are not represented by their own lawyer they are simply a witness in the trial.
Organisation of the courts	WA courts have defined broad jurisdictions to adjudicate a wide range of cases. The organisation of the West Australian courts can generally be classified into three levels: The Supreme Court, The District Court and the Magistrates Court.	Non common law systems tend to have specialist courts (and specialist appeal courts) to deal with constitutional law, criminal law, administrative law, commercial law, and civil or private law and this is the case in France.

The table above has been developed and adapted from the New Zealand Ministry of Justice [Appendix B: a comparison of the inquisitorial and adversarial systems](#) online resource.

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