

Introducing the CJS

The rule of law, colonialism and the Indigenous peoples

- The initial virtual suspension of the laws of murder and rape where the victims were Indigenous, and the enactment of special criminal offences applicable only to Aborigines.

- Legal form of colonisation depended on the doctrine of terra nullius (the land of no one)

- Mabo v Queensland (No 2) (1992) 107 ALR 1

> HC overturned terra nullius doctrine

> Brennan J: 'The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country'.

Colonial legacies: "protection", life and death in custody
CD Rowley, Outcasts in white Australia (1972)

- Conscious government policies of dispossession, forcible "resettlement" and the breaking up of families and communities by the systematic removal of children continued to prevail in many part of Australia well into the 1960s

- Aboriginal adults today grew up under such policies which shaped their material conditions, their life chances and attitudes, just as they continue to shape the lives of their children

Royal Commission into Aboriginal deaths in Custody, Report of the inquiry into the death of Malcolm Charles Smith

- Operation of massacre, Killing, introduced diseases, destruction of food supplies, sexual exploitation, introduction of alcohol, and dispossession of land— these people were

reduced to small remnants

and herded without regard to tribal affiliations into what were in effect, concentration camps known as missions.

- They were denied of civil rights in the name of protection and forced into a state dependency in which many are still enmeshed.
- Without knowledge of history, we will not understand the ill-suppressed hatred which many aboriginals feel towards police and officialdom generally
- “A life destroyed, not by the misconduct of police and prison officers, but in large measure by the regular operation of the system of self- righteous and racist destruction of Aboriginal families that went on under the name of protection and welfare well into the second half of this century”.
Stolen Generation: Penal Welfarism
- Removal policy—illustrated in the Malcolm Smith case removal from family and institutionalisation in juvenile homes cut Indigenous children off from the protection and influence of their families and community
- Profound loss of person identity and security, despair and alienation, manifest in heavy drinking and other damaging behaviours, offending and criminalisation
- Adverse long-term social and mental health effects of removal
- Welfare-based removal policies fostered later criminalisation and disproportionate imprisonment of Indigenous people

Structure of criminal jurisdiction in NSW

Jurisdiction: the power to legislate, to enforce the law, and to hear and decide cases.

Basic division in the structure of criminal courts:

- Lower: Local courts, Children's Courts, Children's Courts, and Coroner's Courts
- Higher: District Courts, and the Supreme Courts

CRIMINAL PROCEDURE ACT 1986

Chapter 2

ss 5 (1) An offence must be dealt with on indictment unless it is an offence that under this or any other Act is permitted or required to be dealt with summarily.

ss 7 (1) An offence that is permitted or required to be dealt with summarily is to be dealt with by the Local Court.

ss 8 (1) All offences shall be punishable by information (to be called an indictment) in the Supreme Court or the District Court, on behalf of the Crown, in the name of the Attorney General or the Director of Public Prosecutions.

Magistrates and Local courts

- Summary Offences (max penalty 2 years)
- Magistrates also preside over committal hearings, a form of preliminary hearing of indictable offences to determine if the case should be committed for trial before a District or Supreme Court (274).
 - Committal hearings governed by the Criminal Procedure act (Div 2)
 - Magistrate is required to conduct a two-step process in establishing whether there is sufficient evidence to commit the accused for trial (look at s61(1) & s62(2))

Supreme and District courts

- Concurrent jurisdictions
- Most serious indictable offences are heard in the District before single judge and jury

Appellate Jurisdiction of the higher courts

- NSW legislature Criminal Appeal Act (CAA) - Local -> District

• Governed by pt 3 Crimes (appeal and Review) Act 2001, s11 appeal as of right against conviction or sentence & s23 prosecution appeals against sentence)

- Local -> Supreme (only when involves a question of the law alone p. 278)

- District-> Supreme-> Court of Criminal Appeal

• CAA s5 (1) A person convicted on indictment may appeal (a)

conviction on grounds involving question of law (b) conviction involving question of fact or any other sufficient grounds (c) Sentence passed

- Supreme -> High court

Determination of appeals

- Section 6 CAA s5(1) against conviction: “.. if it is of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported... judgement of court trial should be set aside on the grounds of the wrong decision of any question of law... or miscarriage of justice”.

Double Jeopardy

- Appeal would rule against Double jeopardy

- The Crimes (appeal and Review) Amendment (Double Jeopardy) Act 2006

CCA may order retrial for a life sentence if satisfied that: 100 (a) fresh and compelling evidence, (b) in the interest of justice. 101 retrial of 15 yrs + (a) acquittal is tainted
Discretion in the criminal process

- “Two Tiers of Justice” (D McBarnet, Conviction 1981)— used to highlight the significant differences between summary justice administered by magistrates and higher court justice administered by judges.

- McBarnet argues that the higher courts “is for public consumption, the arena where the ideology of justice is put on display. The Lower courts, deliberately structured in defiance of the ideology of justice, is concerned less with subtle ideological messages than with direct control”