



LAWS1014: CIVIL AND CRIMINAL PROCEDURE

Course Notes

S1 2019

University of Sydney
Faculty of Law

Table of Contents

Lecture I: Introduction into Criminal Procedure	8
1. Procedural Law and Substantive Law	8
1.1 Substantive Criminal Law	8
1.2 Procedural Criminal Law	8
1.3 Adversarial System	9
1.4 Fair Trial	10
1.5 Court Hierarchy and Jurisdiction	11
2. Where an Offence Will be Heard	11
2.1 Strictly Indictable Offences: District Court or Higher	11
2.2 Hybrid Offences	11
2.3 Summary Offences: Local Court	13
3. Two Tiers of Justice and Technocratic Justice	15
3.1 Two Tiers of Justice and Technocratic Justice	15
Lecture II: Police Powers and Discretion	16
1. Sources of Police Powers	16
1.1 Legislation	16
1.2 Common Law	16
1.3 Consent	16
2. Overall Theme: Liberty vs. Criminal Justice System	16
2.1 Striking a Balance Between Individual Liberty and Police Powers	16
3. Consent	16
3.1 Consequences of No Consent	17
4. Reasonable Suspicion	17
4.1 Range of Search Powers in the Unit of Study	18
4.2 Police Powers Without Warrant (LEPRA) (s 11, 21, 36, 99)	18
5. Arresting Without Warrant	20
5.1 Flow Chart	20
5.2 Arrest as a Last Resort	22
6. Safeguards to Police Powers	23
6.1 LEPRA s 201-203, 204A	23
6.2 Evidence Act 1995 (NSW) s 138	23
6.3 LEPRA s 230-231: Use of Force	24
7. Requirements After Arrest	25
7.1 LEPRA s 122(1): Duty to Caution	25
7.2 LEPRA s 123: Right to Communicate with Friend/Relative/Guardian/Lawyer etc.	25
7.3 LEPRA s 114: A person may be questioned once arrested	25
7.4 LEPRA s 115: Investigation Period	25
8. Interrogation, Right to Silence and Electronic Recorded Interview of a Suspected Person 26	
8.1 Evidence Act 1995 (NSW) s 89A: Right to Silence	26
Lecture III: Bail and Appeals	27
1. Competing Imperatives: Individual Liberty vs Community Safety	27
1.1 Bail Trends	27
1.2 Old vs. New Bail Models	28
2. Bail Procedure	29
2.1 Right to Release: s 21	29

2.2 No Right to Release.....	30
2.3 Show Cause Offences: s 16A + 16B	30
2.4 Unacceptable Risk (s 17-19).....	33
2.5 Bail Conditions: ss 23, 25, 26, 27, 28, 29 and 30.....	34
2.6 Additional Considerations for Bail	35
2.7 Bail Flow Chart	36
3. Appeals	36
3.1 Appeals: Local to District.....	37
3.2 Appeals: Local to Supreme – Limited.....	37
3.3 Appeals: District/Supreme to CCA	38
3.4 Appeal to High Court.....	39
3.5 Prosecution Right to Appeal	39
3.6 NSW Law Reform: Double Jeopardy	39
Lecture IV: Pre-Trial Process, Decision to Prosecute and Mandatory Defence Disclosure ..	42
1. Role of Legislation and Reform: Shifting from Adversarial Culture	42
1.1 District Court Delays	42
1.2 Pre-Trial Disclosure	43
2. Role of the Prosecutor	44
2.1 Independent of the Government: Director of Public Prosecutions Act 1986	44
2.2 ODPP Guideline 2: Role and Duties of the Prosecutor	45
2.3 ODPP Guideline 3: Fairness.....	45
2.4 DPP Prosecutors.....	46
2.5 Independent of the Courts?.....	46
2.6 ODPP VS Police Prosecutors.....	46
3. Prosecutorial Discretion	47
3.1 ODPP Guideline 4: The Decision to Prosecute	47
3.2 ODPP Guideline 12: To give reasons for decisions	49
3.3 ODPP Guideline 8: Election for offence to be dealt with on indictment.....	49
3.4 ODPP Guideline 7: Discontinuing Prosecutions (Outcomes of a Pre-trial process).....	50
4. Charge and Plea Negotiations	51
5.1 ODPP Guideline 6: Settling Charges (Which offence(s) to prosecute?)	51
5.2 ODPP Guideline 20: Charge Negotiation	51
5.3 Guilty Plea	52
5.4 The Role of the Court in Charge and Plea Negotiation.....	53
6. Decision to Prosecute/Settling Charge/Discontinuing Prosecution/Charge Negotiation Flow Chart	54
6.1 Decision to Prosecute Flow Chart	54
6.2 Settling Charge	54
6.3 Discontinuing Prosecution	55
6.4 Charge Negotiation	55
Lecture V: Sentencing and Punishment	56
1. Sources of Law	56
1.1 Legislation	56
1.2 Common law	56
2. Justification for Punishment.....	56
3. Purpose of Sentencing: CSPA s 3A.....	57
3.1 Judicial Discretion	57

3.2 Striking the Balance.....	57
4. Confining Judicial Discretion.....	58
4.1 General Power to Reduce Penalties: CSPA s 21.....	60
4.2 Determination of Penalty.....	61
4.3 Options Available to the Sentencing Court.....	61
5. Aggravating/Mitigating Factors	63
5.1 Principle of Proportionality	63
5.2 Aggravating Factors: s 21A(2)	64
5.3 Mitigating Factors: s 21A(3)	64
5.4 Guilty Plea Discounts for non-indictment/indictment offences: ss, 22, 25D	64
5.5 Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017 (NSW)	64
5.6 Guideline Judgments.....	65
5.7 Instinctive Synthesis.....	67
6. Sentencing Process Summary.....	68
Lecture VI: Civil Process, Open Justice, Fairness, Adversarial System.....	69
1. Substantive vs Procedural Law	69
1.1 Substantive Law	69
1.2 Procedural Law.....	69
2. Civil Procedure.....	69
2.1 Sources of Civil Procedural Law	70
2.2 Civil Court System in NSW.....	70
3. Adversarial Litigation & Justice Principles	71
3.1 Characteristics of the Adversarial System	71
3.2 Open Justice	72
3.3 When Courts can Depart from the Principles of Open Justice	72
4. Fair Trial	74
5. Perceived Problems with Civil Procedure	75
5.1 Case Management - Keeping the “civil” in civil procedure.....	76
5.2 What is Case Management?	76
5.3 Case Management in NSW Courts	77
5.4 Judge’s Role in Case Management	78
5.5 Key Issue in Civil Procedure	79
Tutorial 6: Resolving Disputes without Litigation: ADR, Costs and Ethics.....	80
1. Types of ADR Processes.....	80
1.1 Court-Annexed Mediation	81
Lecture VII: Matters Proceeding Litigation and Commencing Proceedings	83
1. Jurisdiction – Where to Commence Proceedings	83
1.1 Factors where to commence proceedings:.....	83
1.2 Jurisdictional Cross-Vesting	84
1.3 Transfer Pursuant to the Cross-vesting Act	85
2. Limitation Periods.....	85
2.1 Time limits-for commencing proceedings – Limitation periods	85
2.2 What is a Limitation Period	86
2.3 Rationale of a Limitation Period	87
2.4 Different Limitation Periods: Limitation Act 1969	88
2.5 Issues/Problems with Limitation Period	87

2.6	Limitation Issues that may arise in personal injury claims	87
3.	Preservation Orders	89
3.1	Search Orders (Anton Piller Orders)	89
3.2	Requirements for search orders: UCPR 25.20	90
3.3	Freezing Orders (Mareva Injunction)	90
3.4	Requirements of Freezing Orders	91
4.	Originating Process and Introduction to Service	91
4.1	Originating Process	91
4.2	Duties as a Legal Professional	92
4.3	Service – How to Notify Other Parties	92
4.4	Service (r 10.5, 10.6, 10.13, 10.14, 10.20, 10.21)	93
4.5	When to Serve?	93
4.6	Personal Service	93
4.7	(Impersonal) Personal Service	94
4.8	Other forms of service where personal service is not required	94
4.9	Service Outside Jurisdiction	94
4.10	Proving Service	94
4.11	Service Conclusion	95
4.12	Options for Persons Served with Originating Process	95
5.	Appearance – 3 Types	96
5.1	Conditional appearance	96
5.2	Unconditional appearance	96
5.3	Submitting appearance	96
Lecture VIII:	Pleadings and Particulars, Gathering Evidence	98
1.	Commencing Proceedings	98
1.1	Contents of a Statement of Claim	98
2.	Pleadings and Particulars	98
2.1	Pleadings and Originating Process	98
2.2	What are Pleadings r 14.14	99
2.3	Process:	99
2.4	Amending a Statement of Claim: UCPR r 19.1	99
3.	Responses to Pleading.....	100
3.1	Defence to Statement of Claim	100
3.2	Plaintiff's Reply Pleading	100
3.3	Purpose of Pleadings	100
3.4	Drafting Pleadings – UCPR	102
3.5	No Surprises – UCPR 14.14	102
3.7	For Defendants: Failure to Traverse = Admission (14.26)	103
3.8	Joinder of Issue (14.27)	103
4.	Particulars	104
4.1	Facts/Particulars/Evidence	104
4.2	Particulars v Evidence	104
5.	Amendment of Pleadings	105
5.1	Power to Amend	105
5.2	Defective Pleadings – UCPR 14.28	106
6.	Strike Out Applications	106
6.1	Summary of Defective Pleadings	107

7. Discovery	107
7.1 Procedures to gather evidence: Part 21 UCPR	108
7.2 What is discovery	108
7.3 Discovery Process – UCPR r 21.2.....	109
7.4 Orders for Discovery	110
7.5 Difficulties with “class” and “categories” of documents	110
7.6 Method of Giving Discovery.....	111
7.7 Excluded Documents.....	111
7.8 What supporting documents must accompany the list?.....	111
7.9 Access of documents – discovery and technology	111
7.10 Continuing obligation to give discovery.....	112
7.11 Non-disclosure of discovered documents in other proceedings – UCPR 21.7	112
7.12 What about destruction of documents	112
7.13 Discovery Abuse	112
7.14 Discovery in Personal Injury.....	115
8. Subpoenas to Produce	115
9. Additional Method of Gathering Evidence	116
Flow Chart of the Civil Procedure	117
Lecture IX: Opposing Disclosure, Objecting to Production and/or Access: Privilege	119
1. The Law of Privilege	119
1.1 Invoking a Privilege	119
2. Religious Confession Privilege	119
2.1 Recommendation 35.....	120
2.2 Section 127 Evidence Act 1995 (NSW).....	121
2.3 Religious Confessional Privilege – Who to sue?	121
3. Client Legal Privilege	121
3.1 Seen as a right	122
3.2 Specifics of CLP.....	122
3.3 Why have CLP?.....	123
4. Dominant Purpose Test	123
4.1 Communications Where Privilege Attaches	124
5. Loss of Client Privilege	124
5.1 Waiver of Privilege	124
6. Settlement Negotiation Privilege	126
6.1 Two Sources of Settlement Negotiation Privilege	126
6.2 s 30 Civil Procedure Act: Mediation Communication	126
6.3 Evidence Act s 131	127
6.4 Interaction of s 131 Evidence Act and s 30 CPA	128
Lecture 10: Trial or No Trial	130
1. Adjournment	130
2. Summary Disposition – Disposition without Trial	130
3. Default Judgment	130
3.1 When is a defendant in default? UCPR 16.2	131
3.2 Procedure where defendant in default	131
3.3 Setting aside default judgment.....	131
4. Summary Judgment	132

5. Summary Dismissal	133
5.1 Common bases for dismissal.....	134
5.2 Dismissal for Want of Prosecution.....	135
5.3 Factors a court considers for dismissal	136
6. Discontinuance	136
6.1 Effect of discontinuance	136
7. Settlement	136
7.1 Incentives to Settle	136
7.2 Policy Interests in Offers to Compromise	137
7.3 Settlement Correspondence	137
7.4 Offers of Compromise under UCPR r 20.26	138
7.4a Summary of Offers of Compromise:	138
8. Offers and Costs	139
8.4 Where offer accepted and no provision for costs	141
8.5 Costs with respect to interest	141
9. Calderbank Letters	142
9.1 Calderbank offers v Rules offers	143
10. UCPR Provisions for Reference	144
10.1 Time offer must be left open	144
10.2 Making offer.....	144
10.3 Acceptance of offer.....	144
10.4 Withdrawal of Acceptance.....	144
10.5 Failure to comply with accepted offer	145
10.6 Disclosure of offer to court or arbitrator	145
11. Appeals	145
11.1 Access to Appeals.....	145

Lecture I: Introduction into Criminal Procedure

1. Procedural Law and Substantive Law

1.1 Substantive Criminal Law

- Sets out what a criminal offence is and the elements of that offence.
- The requirement to prove the elements.

1.2 Procedural Criminal Law

- **Governs who can do what and when; who can raise a defence and at what time.** For example, the prosecution is permitted to raise the case against the accused first, in court, which the accused can then present a defence when they choose to.
- In other words, designed to implement the objectives of substantive criminal law.
- There is a traditional distinction between pre-trial processes (focused on criminal investigation) and the trial process (where criminal responsibility and punishment are decided). However, increasingly there is a blurring of boundaries between the two.

E.g. policing powers and public order offending – both a substantive offence but also used as a means of engagement for the purpose of exercising police powers - search, seizure, arrest

Tyler's four essential elements of fairness:

1. Opportunity for participation: allow the accused to raise substantive points during the trial process at certain times.
 - a. Issues: can victims also participate? Traditionally victims are not identified and are only a source of evidence. The prosecution raises the substantive points.
2. Neutrality of the decision maker
3. Trustworthiness of the authorities

- a. Set of guidelines and practices that authorities abide by to ensure consistency. Allows the public to see the decision making process of the authorities
4. Dignity and respect: all people brought within the system receive dignity and respect.

1.3 Adversarial System

- The criminal justice system in Australia is based on an adversarial system of law. The adversary system relies on a two-sided structure of opponent sides ('adversaries') each presenting their own position, with an impartial judge or jury hearing each side and determining the truth in the case. The adversary system applies to both civil and criminal matters.
- **The adversarial system gives fundamental protections to the accused,** including rights to access counsel and most importantly, rights to silence. This ultimately changes the way criminal procedure is conducted, and allows the accused not to speak to defend themselves if they don't want to.
 - **The Prosecution bears the onus of proof** (rationale: state has infinite resources; element of fairness: better 10 criminals go free than 1 innocent go to jail) **and the accused cannot be compelled to give evidence for the Prosecution.**¹
 - This fundamental principle is derived from Woolmington v DPP [1935 AC 462 at 469-70 per Lord Sankey LC. See Brown et al 235: **'Throughout the web of the English criminal law one golden thread is always to be seen – that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject to any statutory exception.'**

Some issues that are present with the golden thread principle is when Parliament has ratified so within statute that compels the accused to defend themselves. For example,

¹ Her Honour Justice Kiefel in Lee v NSW Crime Commission (Lee (No 1)) [2013] (Henning et al, The Trial)

in cases where there is a speeding ticket (CIN/CAN), forces the accused to speak up in court or otherwise pay the fine. In other aspects, possession of drugs which the *mens rea* requirement is an objective standard, it may be necessary sometimes for the accused to defend themselves. See Crimes Act 1900 (NSW) s 527C: *mens rea* is judged on an objective test.

1.4 Fair Trial

What constitutes a fair trial in the criminal context?

- Trial by jury?
 - s 80 of the Constitution (Cth offences only): “The trial **on indictment** of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the state where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.”
 - Note the limits of this right: *Kingswell* (1985) HC, *Brown* (1986) HC, *Cheng* (2000) HC
- The right to legal representation?
 - There is no absolute rule that allows individuals the right to legal representation. Indeed there have been cases where even up to the High Court, the accused does not have legal representations.
 - Even at a local court level, it is not uncommon for the accused to be charged with multiple offences which increase the 2 year threshold.
 - *Dietrich* (1992) HC

1.5 Court Hierarchy and Jurisdiction

Jurisdiction can mean a variety of things:

- Geographical jurisdiction
- Offence jurisdiction
- Court jurisdiction

See *R v Ward (No 2)* [1980] VR 209

2. Where an Offence Will be Heard

Three categories of offences:

- 1. Strictly Indictable**
- 2. Hybrid**
- 3. Summary only**

2.1 Strictly Indictable Offences: District Court or Higher

Offences must be dealt with on indictment unless required to be dealt with summarily under the CPA or another Act².

Offences dealt with on indictment are to be dealt with by the Supreme Court (murder and treason, query manslaughter) or District Court.

- While the District Court has jurisdiction over all indictable offences, s 46(2) of the CPA provides exceptions: As per Reg 115 Criminal Procedure Regulation 2017: treason³ and murder.⁴

2.2 Hybrid Offences

- **Most historic indictable offences (found in the Crimes Act) are now hybrid.**

² *Criminal Procedure Act 1986* (NSW) s 5.

³ *Crimes Act 1900* (NSW) s 12.

⁴ *Ibid* s 19A.

- Hybrid offences are offences that can be dealt with either summarily or indictment.
- **Schedule 1: Table 1 and Table 2 mechanism of election**: offences to be dealt with summarily unless **positive election** made to proceed on indictment.⁵
 - They “define deviance down” (Garland) by shifting indictable offences into the summary jurisdiction.
 - **Table 1 offences (generally speaking = more serious elective offences)** - both P and D have the power to elect to proceed on indictment
 - **Table 2 offences (less serious elective offences)** – only P has power of election.
- What is the rationale for the distinction between Table 1 and Table 2 offences?
 - Why would a D not elect to proceed to trial on indictment? → exposure to the maximum sentencing.
 - Why would a D elect to proceed to trial on indictment? → have grounds to believe that they can convince the jury of acquittal where a magistrate would not.
 - What factors might influence the P in deciding whether or not to elect for a trial on indictment? → Expose the accused to the maximum sentence for the interests of the community

Significant reductions in penalty if hybrid offences are proceeded summarily. For example, reckless GBH (Crimes Act s 35) carries a penalty of up to 14 years’ imprisonment if dealt with on indictment. If tried summarily, the maximum penalty is reduced to 2 years.⁶

⁵ CPA s 260.

⁶ CPA ss 267 and 268

2.3 Summary Offences: Local Court

- Offences labelled as summary offences⁷
- Offences permitted or required to be dealt with summarily are to be dealt with by the Local Court.⁸

- **Summary Offences Maximum Penalties:**
 - Having the matter heard summarily reduces the sentence of one offence to a maximum of 2 years.⁹
 - Aggregate sentences (incl. cumulative/consecutive and corroborative/concurrently), max. 5 yrs (see ss 53B, 58 Crimes (Sentencing Procedure) Act 1999)

⁷ CPA s 6.

⁸ CPA s 7.

⁹ Ibid ss 267 and 268.

Criminal Procedure Act 1986 (NSW) ss 6 & 7:

s 6: Certain offences to be dealt with summarily

(1) The following offences must be dealt with summarily:

- (a) an offence that under this or any other Act is required to be dealt with summarily,
- (b) an offence that under this or any other Act is described as a summary offence,
- (c) an offence for which the maximum penalty that may be imposed is not, and does not include, imprisonment for more than 2 years, excluding the following offences:
 - (i) an offence that under any other Act is required or permitted to be dealt with on indictment,
 - (ii) an offence listed in Table 1 or 2 to Schedule 1.

(2) An offence may be dealt with summarily if it is an offence that under this or any other Act is permitted to be dealt with summarily or on indictment.

s 7: Certain summary offences may be dealt with by Local Court

- (1) An offence that is permitted or required to be dealt with summarily is to be dealt with by the Local Court.
- (2) This section does not apply to an offence that, under this or any other Act, is required to be dealt with summarily otherwise than by the Local Court.

3. Two Tiers of Justice and Technocratic Justice

3.1 Two Tiers of Justice and Technocratic Justice

If due process of law is required in the ideology of democratic justice,¹⁰ it is counterintuitive that a clear majority of cases (98%) are subjected to a crime control model.¹¹ While the notion that the lower courts do not afford due process because of triviality and a lack of legal relevance can be rejected,¹² what may actually be at stake is court delay and backlog. Between 2007 and 2014, trial delay in the NSW District Criminal Court increased 34% for defendants on bail and 44% for those on remand.¹³ This issue is especially exacerbated for those on remand (such as in *R v Dustin Baldry*) – delving into the issue of pre-trial punishment.¹⁴ Another exacerbation is perhaps for victims awaiting justice. Due processes or efficiency, like all balancing acts, does not have a clear resolution.

¹⁰ Doreen McBarnet, *Conviction* (Palgrave MacMillan, 1981) 143-53 quoted in David Brown et al, *Criminal Laws: Materials and commentary on Criminal Law and Process of New South Wales* (The Federation Press, 6th ed, 2015) 4.3.11.

¹¹ Ibid.

¹² Ibid.

¹³ Don Weatherburn and Jacqueline Fitzgerald, 'Trial court delay and the NSW District Criminal Court' (Research Paper No 184, Bureau of Crime Statistics and Research, August 2015).

¹⁴ Malcom Feeley, *The Process is the Punishment* (Russel Sage Foundation, 1979) cited in David Brown et al, *Criminal Laws: Materials and commentary on Criminal Law and Process of New South Wales* (The Federation Press, 6th ed, 2015) 4.3.1.

Lecture II: Police Powers and Discretion

1. Sources of Police Powers

1.1 Legislation

- *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA)
- LEPRR 2016 (Regulations)
- NB: there are other sources such as the *Road Transport Act 2013* (NSW)
- *Criminal Procedure Act* (NSW) 1986
- *Evidence Act* (NSW) 1995

1.2 Common Law

1.3 Consent

2. Overall Theme: Liberty vs. Criminal Justice System

“A police service which cannot act due to lack of discretionary powers is near useless; a police service whose acts are free from check or oversight is likely to be dangerous.”

- Gareth Griffith, *Police Powers in NSW: Background to the Law Enforcement (Powers and Responsibilities) Bill 2001*, Briefing Paper No 11/2001 (NSW Parliamentary Library Service)

2.1 Striking a Balance Between Individual Liberty and Police Powers

Legislation granting police powers ‘seeks to reconcile in a balanced manner the conflicting interests involved in ensuring the efficacy of police investigations ... and respecting the rights of citizens.’

- Spigelman CJ in *Rondo* (2001) 120 A Crim R 502

3. Consent

If a person consents to accompanying police to assist them with their inquiries, the police are not invoking their power of arrest (or search, if invited) at law and the limitations on the power do not apply.

How do we know if someone has consented?

S and J (1983) 32 SASR 174

Facts of the case:

- Case involved two part-Aboriginal youths who were accused of break and enter in several locations.
- Police apprehended them and sought to question them in Port Adelaide CIB Office.
- Police reiterated that they were not under arrest and were free to go at any time. J agreed to accompany the police.
- However, the youths were separated for a substantial time, and were guarded. They were put into separate police vehicles.
- Together these factors were enough to put in the minds of the youth, ambiguity as to their legal position.

Principles:

- Whether a reasonable person in the circumstances would believe there was no genuine choice.
- Factors to be considered:
 - Did the police say they are not under arrest and are free to go at any time?
 - Tone of the police
 - Limits on movement (i.e. in a police car, being guarded etc.)
 - Separation (if more than one suspect)

3.1 Consequences of No Consent

The questions are then:

- What sources of power are the police invoking?
- Have the police complied with the law in regard to the powers?

4. Reasonable Suspicion

There is a fundamental difference between exercising police powers with and without a warrant. Both have different pre-conditions of when the powers may be invoked in LEPR: A:

- **Part 4 (without warrant):** 'reasonable suspicion'
- **Part 5 (with warrant):** 'believes on reasonable grounds'

The threshold for reasonable suspicion is less than reasonable belief.

4.1 Range of Search Powers in the Unit of Study

- ss 21, 30, 36 LEPR: A (search powers)
 - s 30: searches generally
 - In conducting the search of a person, a police officer may:
 - (a) quickly run his or her hands over the person's outer clothing, and
 - (b) require the person to remove his or her coat or jacket or similar article of clothing and any gloves, shoes, socks and hat (but not, except in the case of a strip search, all of the person's clothes), and
 - (c) examine anything in the possession of the person, and
 - (d) pass an electronic metal detection device over or in close proximity to the person's outer clothing or anything removed from the person, and
 - (e) do any other thing authorised by this Act for the purposes of the search.
- ss 47, 47A (search warrants)

What is at stake with the various search powers? Again, it ties in to the balancing act of individual liberty vs. efficacy of police investigations.

4.2 Police Powers Without Warrant (LEPR: A) (s 11, 21, 36, 99)

Facts of the case:

- Case involved a 20-year-old man driving a coupe with some panel damage.
- When police stopped the man, they saw him putting something into the glove box.
- Decided to search the vehicle and found marijuana and \$860 cash. They then obtained a warrant to search his house and found 59-63 plants and 224g of cannabis leaf.
- Court held that the stop was unlawful as there were no grounds which could have rendered reasonable suspicion for the police.
- Appellant contended that as the stopping was unlawful, the evidence as to the search should not be admitted. Prosecution should not be able to enjoy the fruits of its own illegal conduct.
- Although the court held that the subsequent search of his car was lawful, on the basis that putting something in the glovebox right after the stop does raise reasonable suspicion, it was not until after the unlawful stop that the offence was known. Acquitted.

Principles:

- Reasonable suspicion must be based on some factual basis and cannot be arbitrary (something formed in the subjective mind). For example, reasonable suspicion cannot be derived from someone looking anxious, sweating and so on. Suspicion may be based on hearsay or inadmissible material (though must be probative) → relates to *Hyder*.
- Reasonable suspicion is measured subjectively: information in the mind of the officer exercising the police power at the time. Did that afford reasonable ground for suspicion? Have regard to the source of the information and its content, in light of the whole circumstances.
- *Evidence Act 1995* (NSW) s 138: evidence that was collected from unlawful conduct cannot be admitted in court. However, s 138(3) provides exceptions; circumstances or factors where the evidence can be used.

Facts of the case:

- ATO (in sworn affidavit) alleged H committed offences based on a tax fraud investigator saying that 'Hyder' (H) was 'Haider'.
- Police honestly believed H had committed offence under assumed identity.
- H arrested → charged → released on bail → charge withdrawn.
- H sued police, arguing they didn't have reasonable grounds for believing that H had committed an offence (i.e. Hyder was 'Haider').
- The court held that the police did have reasonable grounds, given that they relied on the information supplied by the ATO, albeit it was inadmissible.
- A reasonable person with the arresting officer's mind would have reasonable grounds.

Principles

- Evidence, even if it's inadmissible, can be used to form reasonable grounds, especially if it's from an authoritative source.
- Objective standard does not require court to look beyond what facts were in mind of arresting officer.

5. Arresting Without Warrant

5.1 Flow Chart

1. Was there consent to not go anywhere?

- Does the suspect agree to go with police/stay where they are? Even if they do:
- Look at *S and J*: Whether a reasonable person in the circumstances would believe there was no genuine choice.

2. If there is no consent, police may rely on **LEPRA s 99**. For an arrest to be lawful, police need to:

- s 99(1)(a): suspect on reasonable grounds that the person is committing or has committed an offence: **Hyder and Rondo**
- s 99(1)(b): be satisfied that the arrest is reasonably necessary:
 - (i) to stop the person committing or repeating the offence or committing another offence,
 - (ii) to stop the person fleeing from a police officer or from the location of the offence,
 - (iii) to enable inquiries to be made to establish the person's identity if it cannot be readily established or if the police officer suspects on reasonable grounds that identity information provided is false,
 - (iv) to ensure that the person appears before a court in relation to the offence,
 - (v) to obtain property in the possession of the person that is connected with the offence,
 - (vi) to preserve evidence of the offence or prevent the fabrication of evidence,
 - (vii) to prevent the harassment of, or interference with, any person who may give evidence in relation to the offence,
 - (viii) to protect the safety or welfare of any person (including the person arrested),
 - (ix) because of the nature and seriousness of the offence.

3. Was the arrest therefore lawful?

- Consider *Williams v DPP* (note this is pre-2013, standards have dropped now).
- Excessive force as per s 231. However, note that the jury is undecided as to whether this renders the arrest unlawful.

4. Consequences of an unlawful arrest:

- Element of “acting in the course of their duty” missing:
 - *Crimes Act 1900* (NSW) s 546C: resisting arrest
 - *Crimes Act 1900* (NSW) s 60: assaulting police

- *Coleman v Power*: Failure by police to act lawfully means that they are failing to act in the “**execution of their duty**”. This provides a substantive defence to matters such as assault police, resist arrest, hinder police etc. as a key element of the offence or offences is not made out (i.e. “execution of duty”). **It also has the effect of establishing an illegality such as to enliven the consideration of the exercising of the discretion under Evidence Act s.138** to disallow evidence obtained in consequence of such unlawfulness. Remember that the defence bears the onus of establishing the unlawfulness on the voir dire, and must do so on the balance of probabilities (Evidence Act s.142).
 - In other words, two consequences: provides substantive defence to the additional charges and enlivens s 138 so as to not admit certain evidences.

5.2 Arrest as a Last Resort

DPP v Carr [2002] NSWSC 194.

Facts of the case:

- Case involved Cons Robins who was patrolling in Wellington. Carr and a female companion were throwing rocks and hit the police vehicle.
- Robins got out of the vehicle and questioned the two asking who threw the rocks.
- An argument ensued between Robins and Carr. Carr proceeded to walk away while swearing. Robins cautioned Carr, but he continued.
- Robins proceeded to arrest Carr for offensive language → brief struggle → Carr managed to break free and run → Robins tackled Carr and Carr ripped the officer’s shirt.
- Robins knew Carr’s address and identity as he was a local resident. Aware that he could issue a CAN/summons.

Principles:

Arrest is inappropriate where:

- There is no reason to believe that a CAN would be ineffective.

- Offender's name and address is known.
- No risk of offender fleeing jurisdiction.
- The offence is minor.
- When police engage in such an improper arrest, evidence obtained in consequence may be excluded in the exercise of the court's discretion pursuant to Evidence Act s.138. This may include evidence of further offences such as resist arrest, assault police, intimidate police etc. Such evidence was excluded in Carr, and upheld on appeal.

6. Safeguards to Police Powers

6.1 LEPRA s 201-203, 204A

- What police officers must comply with for the exercise of police powers to be lawful

6.2 Evidence Act 1995 (NSW) s 138

(1) Evidence that was obtained:

(a) improperly or in contravention of an Australian law, or

(b) in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

*In DPP v Carr, Smart AJ noted that the High Court did not define "improper" for the purposes of the common law and went on to state at [27]: "Mr Carr submitted that there is no need to define improper, as what is improper will vary from case to case and will be determined by reference to the relevant facts and circumstances of each case. That submission is correct."

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence, and

(b) the importance of the evidence in the proceeding, and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and

(d) the gravity of the impropriety or contravention, and

(e) whether the impropriety or contravention was deliberate or reckless, and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights, and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

6.3 LEPR s 230-231: Use of Force

- Force that is used in the commission of a police power (230)/arrest (231) is to be that which is reasonably necessary.

7. Requirements After Arrest

There is no power to arrest solely for investigation: Williams v The Queen (1986 HC)

7.1 LEPR s 122(1): Duty to Caution

- (a) caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence, and
- (b) give the person a summary of the provisions of this Part that is to include reference to the fact that the maximum investigation period may be extended beyond 6 hours by application made to an authorised officer and that the person, or the person's legal representative, may make representations to the authorised officer about the application...

7.2 LEPR s 123: Right to Communicate with Friend/Relative/Guardian/Lawyer etc.

7.3 LEPR s 114: A person may be questioned once arrested

7.4 LEPR s 115: Investigation Period

- (1) The investigation period is a period that begins when the person is arrested and ends at a time that is reasonable having regard to all the circumstances, but does not exceed the maximum investigation period.
- (2) The maximum investigation period is 6 hours or such longer period as the maximum investigation period may be extended to by a detention warrant.

8. Interrogation, Right to Silence and Electronic Recorded Interview of a Suspected Person

- Introduction of the ERISP: s281 CPA – Only Table 1 offences and above need to be recorded (not Table 2, and not summary offences).

8.1 Evidence Act 1995 (NSW) s 89A: Right to Silence

‘A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. That is a fundamental rule of the common law which, subject to some specific statutory modifications, is applied in the administration of the criminal law in this country.’