

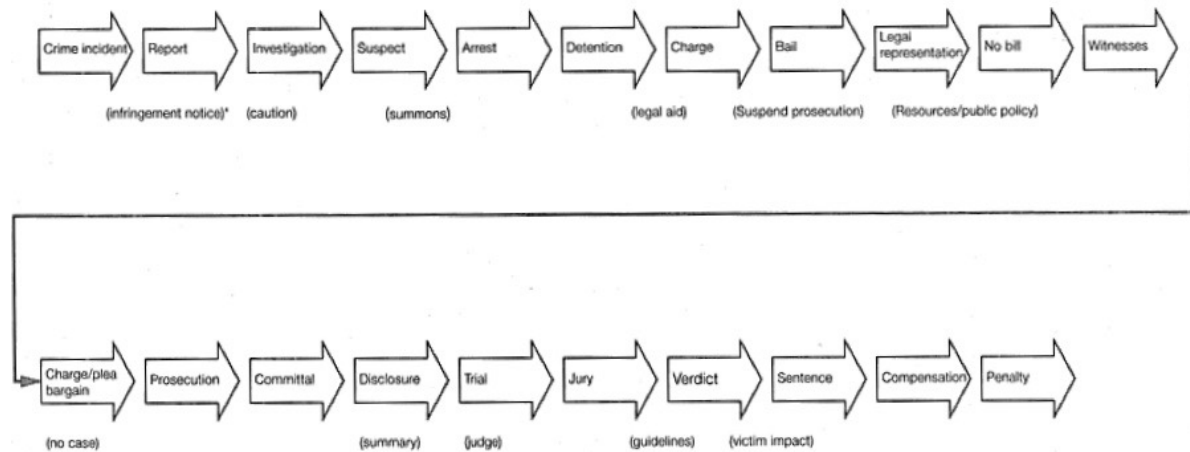
# LAWS1014 Civil and Criminal Procedure Full Notes

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## CRIMINAL PROCEDURES

### The criminal justice process



## PROCEDURAL CRIMINAL LAW

### Substantive vs Procedural Criminal Law

Procedural law = how a proceeding concerning the enforcement of substantive law will occur

Substantive law = how the facts in the case will be handled and how the crime is to be charged

- Substantive criminal law:
  - Sets out rights and responsibilities defined by the legislature and courts and elements of offences
  - Defines what crime is and sets out the punishment for contravention
  - Determine whether a crime or tort has been committed
  - Tests the validity of executive processes and decisions
- Procedural criminal law:
  - Implement the objectives of substantive criminal law
  - Application of the Rule of Law
  - Governs the mechanics of how a legal case flows → trial processes
  - Traditional distinction between pre-trial processes (focused on criminal investigation) and the trial process (where criminal responsibility and punishment are decided).

### Common Law Principles underlying Criminal Justice

- Right to personal liberty
- Presumption of innocence (right to silence)
- No detention without legal cause (right to personal liberty)
- No punishment without conviction by due process
- A fair trial: *Dietrich v The Queen* (1992) 177 CLR 292
- Individualised justice (case by case basis) and consistency in decision making (precedent)
- Special provision for young people

### FAIR TRIAL

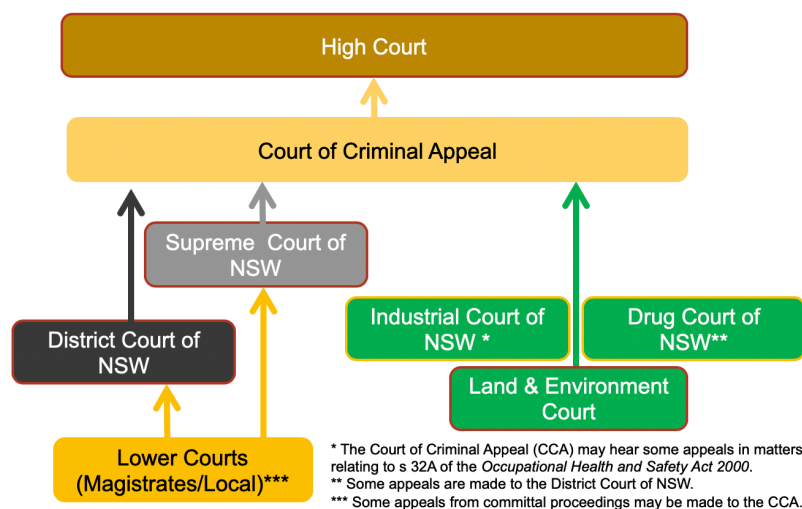
- *Dietrich v The Queen* (1992) 177 CLR 292
- Trial by jury - *Constitution* s 80
  - Right to a jury trial on indictment of any offence against any law
  - Even though NSW have departed from unanimous verdict otherwise mistrial

- But a trial for Commonwealth charge must be by unanimous verdict
- **Kingswell (1985) HC, Brown (1986) HC, Cheng (2000) HC** → limits of this right, capacity of parliament to produce a procedural standard of some regularity that allows for the creation of summary offences / for the determination of factual elements in offences on indictment
- Right to legal representation – **Dietrich (1992) HC** determine that “a trial where a person did a serious matter ought to be stayed until legal representation or at least pro bono help is found before that matter proceeds on indictment before judge and jury”

#### SOURCES OF CRIMINAL PROCEDURAL LAW

- *Criminal Procedure Act 1986 (NSW) (CPA)*
- *Criminal Procedure Regulation 2017 (NSW)*
- *Bail Act 2013 (NSW)*
- *Evidence Act 1995 (NSW)*
- *Law Enforcement (Powers and Responsibilities) Act 2001 (NSW) ('LEPRA')*
- *Crimes (Sentencing Procedure) Act 1999 (NSW) ('CSPA')*
- Legislation regulating each of the courts eg:
  - *Local Court Act 2007 (NSW)*
  - Court Rules eg Supreme court Rules 1970 made under the *Supreme Court Act 1970 (NSW)*
- *Director of Public Prosecutions Act 1986 (NSW)*
  - *Office of the Director of Public Prosecutions Guidelines ('ODPP')*
- Case law from NSW and other state courts, as well as the HC

#### COURTS HIERARCHY



	<b>Criminal jurisdiction in NSW</b>	<b>Type of offence</b>	<b>Decision maker</b>
Supreme Court	'all jurisdiction' ( <i>SCA 1970 (NSW) s 23</i> ); all indictable offences ( <i>CPA s 46</i> )	Indictable offences that are not required to be dealt with summarily ( <i>CPA s 8</i> )	Judge and jury (not in all circumstances)
District Court	Jurisdiction conferred by the <i>CPA (DCA 1973 (NSW) ss 9, 166)</i> ; all indictable offences except murder and treason ( <i>CPA s46, Crim Proc Reg 115</i> )	Indictable offences that are not required to be dealt with summarily ( <i>CPA s 8</i> )	Judge and jury (not in all circumstances)
Local Court	As conferred by law <i>LCA 2007 (NSW) s 9</i>	Offences permitted or required to be dealt with summarily ( <i>CPA ss 6 &amp; 7</i> )	Magistrate

### 3 CATEGORIES OF OFFENCES

- Indictable only (strictly indictable) – found in the Crimes Act that have to go before judge and jury
- Hybrid (elective) – all indictable heard summarily unless positive election is made → Tables 1 and 2: *CPA s 260; s 352 Schedule 1*
- Summary only – Summary Offences Act, dealt with by the Local Court (*CPA s 7*)

### TWO TIER OF JUSTICE

*Munday v Gill (1930) 44 CLR 38*

- Highlights the division between the lower courts and higher courts
- Nature of the difference between summary hearing and trial on indictments
- Called 'summary trial'

→ Summary hearings

- expedient for efficient enforcement of statutory regulations
- maintenance of quiet and good order of society
- magistrate *CPA s 6*

→ Trial upon indictment

- highest crimes, gravest liabilities
- formally and solemnly determined
- judge and jury *CPA s 8*

Hybrid offences = check *CPA Schedule 1, Tables 1 and 2*

- Table 1 offences are indictable offences that will be disposed of summarily unless positive election is made for it to be heard indictment → more serious
  - o **both P and D** have the power to elect to proceed on indictment
- Table 2 offences are indictable offences that will be disposed of summarily but only the prosecution can elect to have it to be heard indictment by District or Supreme → less serious
  - o Not in District Court = *Crimes Act 1900 ss 12* (treason), *s 19A* (murder); *CPA s 46(2)*; *Criminal Procedure Regulation 2017 Reg 115* (terrorism)
  - o District = *CPA s 6* (sexual assault, etc)
  - o **only P** has power of election

Rationale for the distinction between Table 1 and Table 2 offences

- Why would a D elect OR not elect to proceed to trial on indictment? (a prosecutor elects to take it up to District/Supreme)
  - (1) For the prosecution, it is to expose the accused to the statutory maximum sentence before a judge and jury trial → might be for public interest, set precedent, etc
  - (2) Accused might insist, despite being exposed to the statutory maximum, to take a matter before a judge and jury trial because they want to appeal to the jury sensibilities and empathy that the magistrate perhaps may not be convinced of, to raise prospects of acquittal
- Technocratic justice → movement towards hybrid offences
  - o Criminal cases that were traditionally dealt with on indictment are now heard summarily, and trivial offences that were originally court matters are now dealt with on-the-spot
  - o Expansion of summary jurisdiction and regulatory policies promotes technocratic justice in contrary to the inefficient and irrational jury trials
  - o Not always politically popular → may erode the rule of law and formal traditional procedures
- Maximum penalty for these offences if they are dealt with summarily
  - o 2 years – *CPA ss 267 and 268*
  - o Aggregate sentences (including cumulative/consecutive and corroborative/concurrently), max. 5 years (*ss 53B, 58 Crimes (Sentencing Procedure) Act 1999*)
  - o See *s 179* as to time limits for prosecution of summary offences; does not apply to hybrid offences, see *s 270*
  - o Does not apply to hybrid offences → indictable even though disposed of summarily
- Downward classification of indictable offences to hybrid offences

- Significant reduction in penalty when proceed summarily
  - o Reckless GBH or wounding (*Crimes Act s 35*) → up to 14 years imprisonment
  - o Indecent assault on a child under 10 (*s 61O(2)*) → up to 7 years
  - o Break enter house, commit serious indictable offence (*s 112(1)*) → up to 14 years
- E.g. local court for reckless GBH is 2 years whilst maximum penalty is 14 years

## POLICE POWERS AND DISCRETION

- To require identification, use force, search, divert, arrest and detain, grant and refuse bail
- Assumption: function of police = law enforcement
- Role of the police as gatekeepers in the CJS and to investigate crime, manage public order, bring suspects to court, and has an impact on 'fair trial', disruption of peace in public, against interest of individuals
- Discretion is empowered and constrained by law
- Competing imperatives in the police use of discretion and legislative safeguards
- Need special legal permission to use coercive powers before a person is found guilty and convicted

## ROLE OF THE POLICE IN THE CJS

- Discretion and the 'construction of the criminal population'
- Sources of, and restrictions on, police power and the role of consent
- 'Reasonable suspicion': a prerequisite for police powers
- Regulation and scrutiny of discretion

## Sources of police power and Role of consent

### CONSENT

- Lawfulness application of police power
- If person consents to accompanying police to assist them with their inquiries → police are not invoking their power of arrest (or search) at law and the limitations on the power do not apply
- Police case would be dismissed with improper evidence or arrest

#### APPROACH

Q1. Has the person consented?

- o See *S and J (1983) 32 SASR 174*
- o If yes, no issue of police power arises
- o See protected suspects *LEPRA s 110*

→ If no consent,

Q2. Which power are the police invoking?

Q3. Have the police complied with the law relating to that power?

### *S and J (1983) 32 SASR 174*

- FACTS: Young Aboriginal persons questioned by the police and asked to attend the station, uncertainty as to whether or not that is required
- HELD: exercise of power was lawful, but nature of arrest was questioned, requirement of police to make it clear whether or not they are under arrest, looking at the circumstance and any risk factors that may make it unlawful
- Risk factors e.g. homelessness, minors, language, Aboriginal
- S and J now creates ambiguity → the law clarifies ambiguity
- Threshold around arrest has been lowered post 2013 reform to policing powers → cater situation of ambiguity, undermining voluntary assistances

### LEPRA 2002 (NSW)

- Central mechanism used to manage the power and limits within the role of police
- Not only identifying if the power has been lawfully exercised, but are there any matters that will be raised in court
- Evaluate critically how this power successfully balance the overarching issue regarding procedural law, exercise of police power, interests of state vs vulnerability of individual
- Cater situation of ambiguity
  - o s 110 assists police but not under arrest

#### Questions in relation to each provision

1. What power does the provision give Police?
2. What are the limits of the power?
3. How does the provision reconcile tensions in the role of Police?
4. What is the central mechanism used to reconcile this tension?
5. Is the legislation successful in reconciling this tension?

### *CASE STUDY: Search without warrant and reasonable suspicion*

- WARRANT = from court or person commissioned to issue warrants to provide a check and balance as to the evidence for the police to proceed that threshold physically to arrest, detain, search, seize, *where* the power to proceed without a warrant is not otherwise able to be established with insufficient evidence and information to operate under LEPRA s 99
- Fundamental difference between with or without a warrant
  - o Part 4 without warrant (suspects on reasonable grounds)
  - o Part 5 with warrant (believes on reasonable grounds) → subject to judicial review & approval
- Range of search powers
  - o Search powers LEPRA
    - s 21 all intents and purposes for search powers without warrant
    - s 23-23A search powers on arrest
    - s 24 search powers on custody following an arrest
    - s 30 frisk search
    - s 31 strip search
    - s 36 vehicles (*Rondo*)
  - o Search warrants LEPRA
    - s 47
    - s 47A
  - o Entry by invitation in domestic violence situations LEPRA
    - s 82 without warrant
    - s 83 with warrant
- Without warrant 'reasonable suspicion' or 'suspects on reasonable grounds', a police officer may:
  - o s11(1) require disclosure of identity if the officer *suspects on reasonable grounds* that the person may be able ...
  - o s21(1) without a warrant, stop, search and detain a person ... if the police officer *suspects on reasonable grounds* that e.g. the person has ... anything stolen ...
  - o s36(1) without a warrant, stop, search and detain a vehicle if the police officer *suspects on reasonable grounds* that e.g. the vehicle contains ... anything stolen ...
  - o s99(1) without a warrant, arrest a person if:
    - (a) the police officer *suspects on reasonable grounds* that the person is committing/committed an offence, and
    - (b) the police officer is satisfied that the arrest is reasonably necessary for reasons listed in the legislation
- Consequences of improperly or illegally obtained evidence
  - \*'improperly' = where police use the power of arrest when it is not necessary
  - o Failure to comply with LEPRA may lead to evidence being excluded in court