

CRIMINAL PROCEDURE

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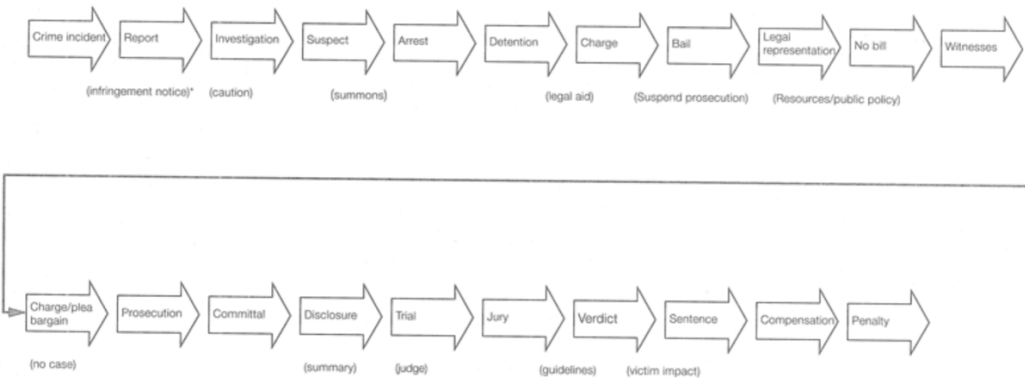
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1. OVERVIEW/INTRO

The criminal justice process



Procedural	Substantive
<i>Provides for access to justice in measured, predictable way. Limits state power, defines how various actors/agents interact & engage at various times throughout the process</i>	Sets out criminal offences (defines what crime is + punishment, gives Rs & responsibilities given by legislature & courts)

PRINCIPLES UNDERPINNING CJS

Golden thread: *P bears onus of proof to prove accused's guilt* → *Woolmington v DPP*

Importance of procedure

- RoL in action, due process of justice, *freedom* → RoL, put into action by individual's discretion
- Balances state power w individual's R's
- Crim procedure affects perceptions of legitimacy & fairness of justice

Tyler's elements of fairness

1. Opportunities for participation
 - ⇒ (ability to make a substantive contribution, ie for accused to raise substantive issues at various stages in the process)
 - ⇒ That those in the system should be able to have a say in the outcome that's determined
2. Neutrality of the decision maker
3. Trustworthiness of the authorities
 - ⇒ Clear, apparent & consistent exercise of discretion, → goes to capacity of entire apparatus to build trust
4. Degree to which people receive treatment with dignity & respect

⇒ (even when they receive adverse decision)

FEATURES OF ADVERSARIAL SYSTEM:

1. Party based interactions,
2. Significantly guided by precedent
3. Lengthy trials, extensive evidence
4. No proactive role of judges
5. Parties bare costs of litigation generally
 - All influenced by parliament (usually to make it easier for prosecution)
 - *Crimes Act s527C* – amends Golden Thread

CL PRINCIPLES

1. Right to personal liberty
2. Presumption of innocence → *Woolmington v DPP* (Golden Thread)
 - ⇒ (Even if born out of RTS)
3. No detention without legal cause
 - ⇒ (related to (1) – the right to personal liberty).
 - ⇒ Allegation of offence capable of being assessed to see if there's prima facie case of that → requirement to bring accused before magistrate in a timely way
4. No punishment without conviction by due process.
 - ⇒ Entire trial process
5. A fair trial → *Dietrich v The Queen (1992)* (HC)
 - ⇒ CL protection to afford an accused representation in a trial
6. Individualised justice & consistency in decision making.
 - ⇒ Transparent
7. Special provision for young people.

Fair Trial

- S 80 of Constitution (only for Cth Offences for trial by indictment)

Limited by → *Kingswell v R (1985)* HC

- S 80 doesn't give rise to a R to trial by jury for serious offences, only indictable offences. Up to parliament to specify which offences are indictable/must be dealt with summarily - seriousness of offence irrelevant..
 - Note issues though! *Can still accumulate 5 yr sentences in the LC for minor offences*

Right to Legal representation → *Dietrich v R (1992)*

- A trial where a person proceeds on a serious matter ought to be stayed until legal representation is found before that matter then proceeds.

SOURCES OF CRIMINAL LAW

1. *Criminal Procedure Act 1986* (NSW) ('CPA')
2. *Criminal Procedure Regulation 2017* (NSW)
3. *Bail Act 2013* (NSW)
4. *Evidence Act 1995* (NSW)
5. *Law Enforcement (Powers & Responsibilities) Act 2001* (NSW)
6. *Crimes (Sentencing Procedure) Act 1999* (NSW) ('CSPA')
7. Legislation regulating each of the courts eg:
 - a. *Local Court Act 2007* (NSW)
 - b. *Supreme Court Act 1970* (NSW)
8. *Director of Public Prosecutions Act 1986* (NSW)
Office of the Director of Public Prosecutions Guidelines
9. Case law from NSW + all other jurisdictions

NSW JURISDICTION

	Jurisdiction conferred by	Type of offence	Decision Maker
Local	<i>Local Court Act 2007</i> (NSW)	Minor/summary offences (<i>CrimPA</i> ss6, 7)	Magistrate

District	<i>CrimPA</i> <i>District Court Act 1973</i> (NSW) ss9, 166: - All indictable offences (except murder & treason → <i>CrimPA s46, Crim Proc Reg 115</i>)	Indictable offences not required to be dealt with summarily (<i>CPA s8</i>)	Judge &/ jury
Supreme	'All jurisdiction' <i>Supreme Court Act 1970</i> (NSW) s23 All indictable offences: → <i>CrimPA s46</i>	Indictable offences not required to be dealt with summarily → <i>CPA s8</i>	Judge(s) &/Jury

WHERE WILL OFFENCE BE HEARD? DISTRIBUTION OF CRIMINAL MATTERS

Must be dealt with on indictment unless required to be dealt with summarily under CPA (/other Act) → s 5 *CPA 1986* (NSW)

1. Determine category of offence

- a) **Indictable only?** If indictable check if a hybrid offence → Tables 1 & 2 *CrimPA 1986*
- To be dealt with by the SC (murder & treason, query manslaughter) or DC.
 - Offences not within the jurisdiction of the District Court
 - = ss12 (treason),
 - 19A (murder) *Crimes Act 1900* (NSW):
 - s46(2) CPA; Reg 115 Criminal Procedure Regulation 2017.

2.

a) Summary only?

→ s 6 *CPA 1986* (NSW)

1. Those required to be finalised summarily by the CPA or other Act, unless positive election made
2. Offences labelled as summary offences
3. Offences punishable by a maximum penalty up to two years (unless it is an offence required or permitted to be dealt with on indictment; & an offence listed in CPA Schedule 1, Tables 1 or 2)

→ s 7 *CPA 1986* (NSW)

Offences permitted or required to be dealt with summarily are to be dealt with by the Local Court

→ s 260 *CPA 1986* (NSW) *Offences to be dealt with summarily unless election made to proceed on indictment*

→ s 261 *CPA 1986* (NSW) *If no election for offence in Table 1 or 2 – deal with summarily as normal.*

→ s 262 *CPA 1986* (NSW) s (1) *If election for offence in Table 1 or 2 deal with as indictable offence*

(2) if election made & person charged pleads guilty before LC & Court accepts the plea, offence to be dealt with in accordance with Part 2 of Chapter 3, as if the person charged had pleaded guilty under that Part to the offence

→ s 267 *CPA 1986* (NSW) (1) *Max penalties for Table 1 Offences*

→ s 268 *CPA 1986* (NSW) (1) *Max penalties for Table 2 Offences*

3. Look at provision that creates offence & note max penalty

***exams have Q on hybrid offences that are indictable with the presumption- be able to navigate s260, 267, 268 of CPA.

- s 260 CPA – sets up the Table 1 & Table 2 mechanism of election: offences to be dealt with summarily unless positive election made to proceed on indictment
 - Tables 1 & 2 are in CPA Schedule 1
 - They “define deviance down” (Garland) by shifting indictable offences into the summary jurisdiction.
 - Table 1 offences (generally speaking = more serious elective offences) - **both P & 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 & Table 2 offences?
 - Why would a D not elect to proceed to trial on indictment?
 - Why would a D elect to proceed to trial on indictment?
 - What factors might influence the P in deciding whether or not to elect for a trial on indictment

CIVIL PROCEDURE

1. OVERVIEW/PROCESS/PRINCIPLES

Overarching themes

1. The social purpose(s) & function(s) of the civil justice system
2. Possible degradation of civil justice, including through increased use of ADR
3. Distribution of power & resources & how courts can control imbalances
4. Interrelationships & interactions amongst different parts of the civil justice system
5. Public vs private aspects of civil justice
6. Role of the Overriding Purpose of the CPA
7. **Balancing competing objectives:**
 - 1) Open justice & fair trial;
 - 2) The tension between efficiency (cost & delay reduction) & justice – see *AON v ANU* & *Queensland v JL Holdings*
 - 3) Access to Justice & the role of litigation in society
 - 4) The role of judicial discretion in managing cases.

Procedural Law

Definition: → *McKain v R W Miller & Co*

- “Rules which are directed to governing or regulating the mode or conduct of court proceedings”

Purpose:

- Provide rules that facilitate dispute resolution
- Provide procedural fairness & due process to litigants
- Promote access to justice
- Address issues of cost & delay
- Promote the legitimacy of the legal system
 - Procedure important bc of the way it relates to the substantive outcome & promotes finding of correct decision
 - Having fair procedures makes losing more acceptable

Sources:

- (1) CPA 2005 (NSW). → **S 56: OVERRIDING PURPOSE OF CPA**
- (2) UCPR 2005 (NSW).
- (3) Court Rules:
 - i. Supreme Court Rules 1970.
 - ii. District Court Rules 1973.
 - iii. Local Court Rules 2009
- (4) Practice notes (created by judges in accordance with CPA & UCPR)

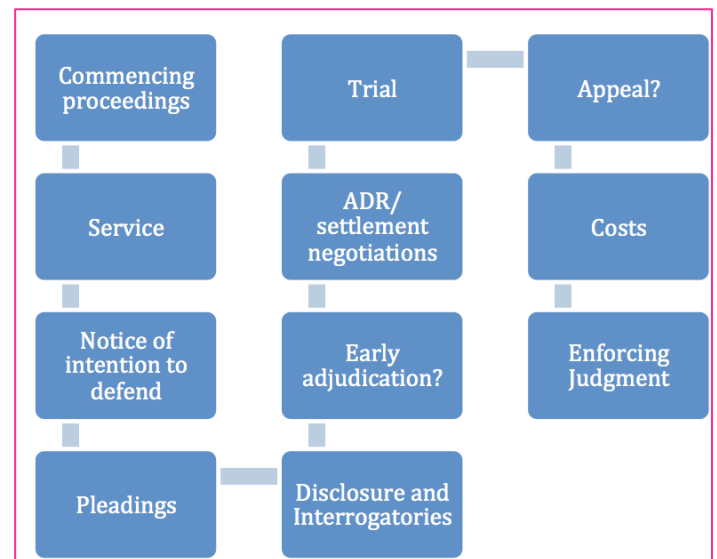
Courts in NSW

→ *Ashy v Cth of Australia* [2012]

- “Courts have **an unlimited power** over their own processes to prevent those processes from being used for the purposes of injustice. . . .
 - Proceedings that are seriously/unfairly burdensome, prejudicial/damaging, or productive of serious & unjustified trouble or harassment are egs of abuse of process. So too are proceedings where the Court’s process is employed for an ulterior or improper purpose, or in an improper way, or in a way that would bring the administration of justice into disrepute among right thinking people.”

CIVIL COURT SYSTEM IN NSW

1. **Supreme Court of NSW** → s 23 Supreme Court Rules 1970.
 - a. Can hear all matters that aren’t within exclusive fed court jurisdiction
 - b. Unlimited civil jurisdiction; (hears most serious crim cases)
2. **Common Law Division**
 - Civil matters >\$750,000 claimed + crim & admin law matters
3. **Equity Division** (s 134 DC Act for District Court)
 - Cases involving commercial law, corporations law, equity, trusts, probate, family provisions legislation
2. **Appellate Divisions**
 - Court of Appeal, however equitable relief only granted by NSWSC but DC has some equitable jurisdiction



3. **District Court of NSW** → s 44 *District Court Rules 1973*

- a. Jurisdiction for civil + crim matters
- b. Civil matter limit of \$750,000
- c. *Unlimited jurisdiction in claims for damages for personal injuries of motor vehicle accidents or work injuries*

4. **Local Court of NSW** → s 29 *Local Court Rules 2009*

- a. *Small Claims Division* → max \$10,000
- b. *General Division* → btw \$10,000 & \$100,000

(***Jurisdictional limit of \$60,000 for personal injury/death claims) Can also hear criminal summary prosecutions, committal hearings, matters concerning mental health issues, some family law matters, children's criminal proceedings, juvenile prosecutions & care matters, licensing issues & coronial matters

All jurisdictional limits defined by statute

- These can be modified by Parliament

Features of Adversarial system of litigation

- 1) Party controlled dispute
- 2) Use of precedent, procedural rules + laws of evidence
- 3) Impartial judge (supervise, offer direction → *supported by AON v ANU HC case*)
- 4) Reliance on oral testimony, subject to cross examination

Criticisms:

- Costly, can prevent access to J as too \$\$
- Could employ costs as tactical weapon to intimidate other party to discontinue proceedings/accept settlement below what they wanted
- Inconsistent & varying in terms of what lawyers charge & their expertise

Concept of Open Justice

= extent to which the matters are public. (must think of impacts of social media)

- Civil litigation not a private institution but public has overarching sense of interest
- Why open? Achieves accountability (must give reasons for decision), legitimacy & fulfils nature of adversarial justice

Limitations of Open Justice?

Power to close court (prevent public id) from superior court's inherent powers but now

→ **s 71 Business in the absence of the public CPA** (private proceedings in certain circumstances)

→ **Court Suppression & Non-Publication Orders Act 2010 (NSW),**

→ *Rinehart v Rinehart* [2014] FCA

- Sets out principles of open justice: Media reporting is a corollary of open J
- 1. Court must consider the primary objective to safeguard public interest in open justice, (part of the necessity principle).
 - *Possible embarrassment, loss of reputation, consequential loss is generally price parties must pay to litigate.*
 - Recognised exceptions include where openness would destroy justice by vindicating blackmailer or seriously affect commercial value of subject matter.
- **Suppression order must be "necessary" to prevent prejudice to administration of justice under the Act.**
- Key for judicial accountability & faith in our justice system, but it is also a significant invasion of privacy & can involve vulnerable parties eg children & disabled

→ *Rinehart v Welker* [2010].

- tension between open justice & allowing agreements to be held where parties wish them to remain confidential

→ **Pseudonym orders under Court Suppression & Non-publication Orders Act** → *Witness v Marsden* (2000)

- Court allowed him to use Pseudonym (as ordinarily afforded to a child- minimal) name to be prevented of roughness of prison.

→ *John Fairfax Publications v District Court of NSW*

- *"Principle of open justice is one of the most fundamental aspects of the system of justice in Australia...the conduct of proceedings in public...is an essential quality of an Australian court of justice; there is no inherent power of the court to exclude the public"*
- It goes to our HR to understand what ppl are taking to civil courts + what they're getting

→ *Hogan v Hinch*

- (Hinch released names of sex offenders which had statutory basis to conceal their identity, argued that under ch 3 of Constitution, it was against duty of court to suppress people who may be guilty of a crime)

- Parliaments can create powers to protect vulnerable people (including sex offenders) to preserve identity despite ch 3 of Constitution.
- *The Court also didn't think that a power to prohibit publication in these circumstances amounted to an impermissible suppression of the implied freedom of political communication talked about in Lange v ABC (1997) 189 CLR 520.*
- *{HC noted distinction btw law requiring court to conduct its business behind closed doors (Russell v Russel) & one that allows a court to suppress publication of its proceedings if it deems it necessary in the interests of justice }*