

LAWS1027/5022 Criminal Law, Process, and Research I

Notes and Scaffold

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Principles and Tiers of Justice

Principles in the criminal justice system	The right to personal liberty	<ul style="list-style-type: none"> the most elementary and important common law right A person is not to be imprisoned otherwise than upon the authority of a justice or a court except to the extent reasonably necessary to bring him before the justice to be dealt with according to law – <i>Williams v The Queen</i> e.g. Bail Act emphasise a person's right to liberty, even when charged with a criminal offence, unless there are substantia and unacctepable risks.
	The presumption of innocence	<ul style="list-style-type: none"> The one golden thread of the English Criminal Law is the duty of the prosecution to prove the prinsoner's guilt. – <i>Woolmington v DPP</i>
	No detention without legal cause	<ul style="list-style-type: none"> Law basis of detention mut be written in statute
	No punishment without conviction by due process	<ul style="list-style-type: none"> Pre-trial detention should only beentertained if clearly justified on other grounds (e.g. the likelihood the person may commit a serious offence while on bail, or threaten the safety of a particular person) limitations on preventative detention
	The right to a fair trial	<ul style="list-style-type: none"> Defendants have an adequate opportunity to instruct counsel, and to prepare for and participate in their defence Trial by jury? <ul style="list-style-type: none"> S80 of the Constitution (Cth offence): the trial on indictment of any offence against any law of the Common wealth shall be by jury NSW no such protection The right to legal representation <ul style="list-style-type: none"> <i>Dietrich v The Queen (1992) 177 CLR 292</i> Dietrich was charged with importing Heroin He sought legal aid, who assessed the case as being very strong so they refused Dietrich insisted on going to trial, but he had no legal representation

		<ul style="list-style-type: none"> ○ Appealed to the High Court cause his trial had miscarried because he was not provided with legal representation <ul style="list-style-type: none"> • Held: When an unrepresented accused is charged with a serious offence, and they're in a situation not able to pay for the legal representation, the trial should <u>only proceed in exceptional circumstances</u>
	Individualised justice and consistency	<ul style="list-style-type: none"> • Individualisation justice requires the court to impose a sentence and pre-trial release that is just and appropriate in all the circumstances of the particular case. • Consistency and predictability require cases be treated alike – contributes to public confidence in the justice system. • These two principles can be accommodated by a simple, clear and principled approach – by simplifying the provisions and establishing fundamental principles
	Special provision for young people	Treat young people differently, reflecting their lesser maturity and capacity to make considered decisions.
Two Tiers of Justice	Summary Proceedings	<ul style="list-style-type: none"> • Disposed of in a manner as <u>expedient for the efficient enforcement</u> of certain statutory regulations with respect to the <u>maintenance of the quiet and good order of society</u>. • Defendant is given a sufficient opportunity to appear which he may exercise • The defendant is dealt with <u>by magistrates</u> who judge both the law and fact • No jury
	Indictment	<ul style="list-style-type: none"> • The prisoner is brought to the bar of the Court in his own proper person - <u>judge and jury</u> • Unless permitted or required to be dealt with summarily, an offence should be dealt with indictment

	NSW Three tiers	<ul style="list-style-type: none"> • Penalty notice (on-the-spot fines) • Matters proceeding summarily in lower courts • Trials on indictment in higher courts
	Why proceed to indictment?	If they want their trials to be heard by a jury, have their matter determined - whether they are innocent or guilty.
	Why factors the Prosecutor consider?	<ul style="list-style-type: none"> • Saving the witness or victim survivor from testifying in the process of charge negotiation • If the prosecutor thinks they have a strong prosecution case, they might consider it would be preferable to go to proceed on indictment • If the matter proceeds in the local court, does that give enough scope to the magistrate in the local court to sentence this person appropriately in regards to the criminal conduct <ul style="list-style-type: none"> • If summarily – might be too light (2 years in maximum)
Technocratic Justice	Drive towards efficiency	<ul style="list-style-type: none"> • Expansion of the penalty notice regime • The expansion of matters proceeding summarily • The move to majority verdicts • - Judge-alone trials
	Downside	<ul style="list-style-type: none"> • Pat O'Malley (1984) refers to the 'demoralisation of crime' and that adversarial justice 'has become the exceptional rather than the prevailing form' (cited in Brown et al (2025) 347) • Justice means adherence to the formal procedures which protect individual against the arbitrary exercise of power • This reflects the conflict between due process and the technocratic and administrative rationalisation of justice. • This make law nothing more than an instrument by means of which authorities enforce obedience.

Custody and Bail

Custody

The process as punishment	<p><i>R Hogg, 'Policing and penalty'</i></p> <ul style="list-style-type: none"> • In many summary matters, the process is the punishment – arrest, detention, denial of bail and prolonged pre-trial custody in police cell precede formal legal adjudication of guilt. • The vast majority of police detain are not for dangerous crimes or even serious property crimes <ul style="list-style-type: none"> ◦ Most from drunkenness or other minor offences • Being detained in police is more likely to result a person injured or dying than prison custody (60% of the deaths in 1980-1988 occurred in police custody)
Unfair treatment to Aboriginal and Torres Strait Islanders	<p>M McAlister, <i>Death in Custody Australia</i> - Brown et al (2025) 293-298</p> <ul style="list-style-type: none"> • In Aboriginal communities, 27 times the rate of non-Aboriginal people detained – more likely to be arrested and imprisoned, contributing factors are (institutional racism): <ul style="list-style-type: none"> ◦ unequal position (socially, economically and culturally) of Aboriginals – emerging from the fact that they were dispossessed of their land without the benefit of treat, agreement or compensation. ◦ Criminal law also contributed – what conduct is labelled as criminal + failure to use arrest as the last resort + refusal of bail + failure of custodial authority to take the health issue of people in custody seriously • 2022-23, 40 deaths in police custody and custody-related operations, 10 were Aboriginals • Aboriginal and Torres Strait Islanders takes up 3% total population, but made up 33% of prisoner <ul style="list-style-type: none"> ◦ 2022.7-2023.6, 31 Aboriginal people dead in custody, accounting for 28% of all death in custody • The ongoing Aboriginal people deaths in custody and failure of the criminal justice system to hold police officers to account reflect entrenched institutional racism (a system of group differentiation that backed by the power of legal authority, the outcome of which can occur independently of the intentions of individual actors) – <i>Brown et al (2025) 315</i>
Future suggestions	<p>Royal Commission into Aboriginal Deaths in Custody, Final Report, 1991</p> <ul style="list-style-type: none"> • A bail decision maker must take into account any issues that arise due to the person's Aboriginality, including

	<ul style="list-style-type: none"> ○ Cultural background, including his ties to extended family or place ○ Any other relevant cultural issue or obligation <ul style="list-style-type: none"> • Diversion from police custody, imprisonment as a last resort <ul style="list-style-type: none"> ○ No detention for minor offence, use alternatives, such as community service, caution, rehabilitation etc. • Self-determination in criminal affairs (e.g. community court, rehabilitation dominated by Aboriginal people) • Equal opportunity, including economic opportunity, housing <p>Australian Law Reform Commission (ALRC) Pathway to Justice recommendations: (see the last section for details)</p> <ul style="list-style-type: none"> • Support justice reinvestment trials initiated in partnership with Aboriginal communities <ul style="list-style-type: none"> ○ Divert funds for prison to community resources (e.g. housing, education, health...) • Review provisions that criminalise offensive language with a view to repeal or narrowing application to threatening or abusive language <ul style="list-style-type: none"> ○ Only real threatening or abusive language should be punished • Greater practical independence, accountability of investigations of complaints against police - Wotton <ul style="list-style-type: none"> ○ More independent legitimate investigation authorities ○ Improve accessibility and transparency of complaints
Death on Palm Island (Wotton (No 5) [2016]FCA)	<ul style="list-style-type: none"> • 2004, Mulrunji swore at the police officer in intoxicated • Police had already been told his liaison, but still drove to where he was and arrested him <ul style="list-style-type: none"> ○ The arrest for baseless and unjustified, as it was solely for checking outstanding warrants, and he had already walked away without impeding anyone • Mulrunji died for force applied on him in custody • Investigator ignored accounts from Aboriginal witnesses, and passed incorrect and stereotypical information about Mulrunji to the coroner • Conflict between local Aboriginal community and police was escalated, the police station was set on fire.
Ban Spit Hoods Campaign	<ul style="list-style-type: none"> • Latoya Aroha Rule's brother Wayne Morrison died in custody when he was put on a spit hood • She started campaigns to stop black death in custody and ban spit hoods (suffocating, trauma, unnecessary) • Promoting the implementation of the suggestions by RCIADC

Deficit disclosure	<p>William Fogarty, et al. <i>Deficit Discourse and Indigenous Health: How Narrative Framings of Aboriginal and Torres Strait Islander People Are Reproduced in Policy</i>. Lowitja Institute, 2018, vii.</p> <ul style="list-style-type: none"> • Refers to a narrative that frames individuals or groups in terms of deficiency, absence, or failure. It typically locates responsibility for problems within the affected individuals or communities themselves, while ignoring the broader structural and systemic causes. • Key features: <ul style="list-style-type: none"> ○ Focuses on "problems", "failures", and "dysfunction" (e.g. repetitive use of ‘cognitive deficit’, ‘failure to respond to supervision’ in Pre-Sentence Reports) ○ Ignores structural factors (e.g. colonial trauma, systemic inequality, only contribute their bad behaviours to ‘personal choice’ or ‘lack of morality’); ○ Reinforces implicit bias that "Indigenous people themselves are the problem" (e.g. they are incooperative); ○ Proven to obstruct improvements in health and justice outcomes.
Strength-based disclosure	<p>Anthony Hopkins et al. "Indigenous Experience Reports: Addressing Silence and Deficit Discourse in Sentencing." <i>University of New South Wales Law Journal</i>, vol. 46, no. 2, 2023, pp. 615–49, 630-632</p> <ul style="list-style-type: none"> • Definition: Emphasises the strengths, resilience, cultural values, community connections, and individual capacities of Aboriginal and Torres Strait Islander peoples as the basis for overcoming adversity and supporting change. • Key features: <ul style="list-style-type: none"> ○ Starts from the notion of “assets” and “protective factors”; ○ Focuses on community, family, cultural connection, and healing; ○ Employs decolonising methodologies that centre Indigenous knowledge systems and worldviews; ○ Supports self-determination – i.e., recovery and service design should be led by Indigenous peoples themselves. • Assets and protective factors – assets not only include money, but also their aspirations, family connectedness, positive social norms and cultural connectedness. • Decolonising approaches – Advocate Indigenous conceptions of health (holistic and multidimensional, encompassing emotional, cultural, spiritual, and communal wellbeing) – these are actual healing needs of Aboriginal and Torres Strait Islanders

	<ul style="list-style-type: none"> Strength-based sentencing - situate the person in their community, cultural, family, and aspirational contexts, and not reduce them to a list of failures.
Bail	
Application	<ul style="list-style-type: none"> Where the accused is in custody, he or she may make a release application – s49 If the accused is at liberty, the Prosecutor may make a detention application – s50
Preamble	<p>The Parliament of New South Wales, in enacting this Act, has regard to the following—</p> <ul style="list-style-type: none"> (a) the need to ensure the safety of victims of crime, individuals and the community, (b) the need to ensure the integrity of the justice system, (c) the common law presumption of innocence and the general right to be at liberty. <p>The moving of these preambles does not diminish the presumptions – principle of legality requires any taking away of common law right have to be in clear and explicit words.</p>
Right to release	<p>21 Special rule for offences for which there is a right to release</p> <p>(1) The following decisions are the only bail decisions that can be made for an offence for which there is a right to release—</p> <ul style="list-style-type: none"> (a) a decision to release the person without bail, (b) a decision to dispense with bail, (c) a decision to grant bail to the person (with or without the imposition of bail conditions). <p>(2) There is a right to release for the following offences—</p> <ul style="list-style-type: none"> (a) a fine-only offence, (b) an offence under the Summary Offences Act 1988, other than an excluded offence, (c) an offence that is being dealt with by conference under Part 5 of the Young Offenders Act 1997. <p>(3) Each of the following offences under the Summary Offences Act 1988 is an excluded offence—</p> <ul style="list-style-type: none"> a. an offence under section 5 (obscene exposure) if the person has previously been convicted of an offence under that section,

	<p>b. an offence under section 11A (violent disorder) if the person has previously been convicted of an offence under that section or of a personal violence offence,</p> <p>c. an offence under section 11B, 11C or 11E (offences relating to knives and offensive implements) if the person has previously been convicted of an offence under any of those sections or of a personal violence offence,</p> <p>d. an offence under section 11FA (custody or use of laser pointer in public place),</p> <p>e. an offence under section 11G (loitering by convicted child sexual offenders near premises frequented by children).</p> <p>(4) An offence is not an offence for which there is a right to release if the accused person has previously failed to comply with a bail acknowledgment, or a bail condition, of a bail decision for the offence.</p>	
Note	<ul style="list-style-type: none"> • Release without bail (s9)– only done by a police officer • Dispense with bail (s10)– done by a court or authorised justice • **although release without bail and dispense with bail has the same outcome that a person is to remain at liberty until required to appear before court, the difference is that the person released in the former situation is not issued a bail acknowledgment (which is a written doc requires a person to appear before a court at a particular date/time – s33) 	
Show Cause Offence	Category	<p>16B Show cause offences (extract, full in Appendix)</p> <ul style="list-style-type: none"> • an offence that is punishable by imprisonment for life (s 16B(1)(a)). • a serious indictable offence that involves— (s16B (1)(b)) <ul style="list-style-type: none"> ○ (i) sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years, or ○ (ii) the infliction of actual bodily harm with intent to have sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years, • a serious personal violence offence, or an offence involving wounding or the infliction of grievous bodily harm, if the accused person has previously been convicted of a serious personal violence offence (s 16B(1)(c)). <ul style="list-style-type: none"> ○ serious personal violence offence means— ○ an offence under Part 3 of the Crimes Act 1900 that is punishable by imprisonment for a term of 14 years or more, or

		<ul style="list-style-type: none"> ○ an offence under a law of the Commonwealth, another State or Territory or any other jurisdiction that is similar to an offence under that Part. • a serious indictable offence that is committed by an accused person while on bail or parole (s 16B(1)(h)). • And more...
	Requirement	<p>16A Accused person to show cause for certain serious offences</p> <p>(1) A bail authority making a bail decision for a show cause offence must refuse bail unless the accused person shows cause why his or her detention is not justified.</p> <p>(2) If the accused person does show cause why his or her detention is not justified, the bail authority must make a bail decision in accordance with Division 2 (Unacceptable risk test—all offences).</p> <p>(3) This section does not apply if the accused person was under the age of 18 years at the time of the offence.</p>
	After conviction	See s22B(2) below
	Judicial Guidance	<ul style="list-style-type: none"> • How should the bail authority determine why detention is not justified? <ul style="list-style-type: none"> ○ 2 step approach: - DPP v Tikomaimaleya [2015] NSWCA 83 (see facts in Appendix) <ul style="list-style-type: none"> i. cause must first be shown as to why detention is not justified, and ii. if it is shown, the bail authority must then consider the unacceptable risk test ○ It is important not to conflate the two tests in show cause matters . • Every bail application presents its own unique factual matrix, therefore decisions of a single judge of the Supreme Court provides guidance (unless they contain legal principles), but is not binding. – Tsintzas v DPP • Each case must be assessed according to its own facts and circumstances. A particular factor or (more usually) a combination of factors may result in an accused showing cause. – Moukhallaletti v DPP • Cause does not require something special and exceptional – Moukhallaletti v DPP