

# LAWS1061

## COURT PROCESS, EVIDENCE AND PROOF

*Comprehensive Course Notes*

Evidence Act 1995 (NSW) | Uniform Evidence Law

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Weeks 1 - 10 | All Topics and Readings

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# WEEK 1: FUNDAMENTAL PRINCIPLES, RIGHT TO SILENCE AND TRIAL PROCEDURE

## 1.1 The Accusatorial System of Justice

Australian criminal law operates on an accusatorial (adversarial) model. The prosecution bears the burden of proving every element of an offence beyond reasonable doubt, and the accused is not required to say or do anything until the prosecution has presented its case. This principle was affirmed in *X7 v Australian Crime Commission* (2013).

Key features of the accusatorial system include:

- The prosecution must make available to the accused particulars of the evidence it proposes to rely upon before the accused is required to respond.
- An accused may plead guilty or not guilty. A not-guilty plea entitles the accused to put the prosecution to proof of every element.
- The accused has no ultimate burden of proof at any stage.
- The adversarial model is underpinned by parties pursuing their own self-interest, with the court ensuring adherence to procedural rules.
- Juries (12 randomly selected citizens) adjudicate on indictable offences, though judge-alone trials are permitted in most Australian states for serious offences.

The trial remains the public face of criminal justice even though, statistically, the majority of defendants plead guilty and proceed directly to sentencing. In NSW courts from July 2018 to June 2019, of approximately 140,000 defendants, nearly 88,000 pleaded guilty. The indirect impact of trial rules, however, is profound in shaping charge decisions and plea negotiations.

## 1.2 Right to a Fair Trial

The right to a fair trial in Australia is not primarily an inquiry into objective truth but into procedural truth. Relevant protections derive from the International Covenant on Civil and Political Rights (ICCPR) and the common law. Key aspects include:

<b>ICCPR Art 14.1</b>	Equal treatment before courts and tribunals; fair and public hearing by a competent and impartial tribunal.
<b>ICCPR Art 14.2</b>	Presumed innocent until proven guilty.
<b>ICCPR Art 14.3</b>	Right to be informed of the nature of the charge; trial without undue delay; right to examine or cross-examine witnesses; privilege against self-incrimination.
<b>Open Justice</b>	Proceedings generally conducted in open court, with exceptions (e.g. suppression orders, closed hearings for certain witnesses). Virtual courtrooms were adopted during COVID-19.
<b>Power Imbalances</b>	The adversarial system is premised on moderation of power imbalances between the state and the individual.

**Dietrich v R (1992) 177 CLR 292:** Per Gaudron J: questioned whether the trial has the capacity to remedy lost rights. Concerned the right to legal representation for unrepresented accused in serious criminal matters.

### 1.3 Outline of Trial Procedure for Indictable Offences

The standard procedural sequence for an indictable offence tried with a jury in NSW is as follows:

1. Jurisdiction determined; indictment filed.
2. Arraignment and pre-trial rulings (e.g. separate trials, closed court, evidentiary rulings).
3. Empanelment of jury under the Jury Act 1977 (NSW).
4. Judge's opening address.
5. Opening addresses by Crown, then defence (defence may only open to identify issues in contention).
6. Crown witnesses called (typically including the victim and expert witnesses).
7. Judicial warnings and directions given as appropriate.
8. Rulings on admissibility of evidence (voir dire if necessary).
9. Conclusion of Crown case; possible direction for acquittal if case, taken at its highest, is insufficient.
10. Defence case (optional).
11. Case in reply (limited).
12. Closing addresses: Crown, then Defence.
13. Judge's summing up to the jury.
14. Jury deliberations and verdict.

### 1.4 Competence and Compellability

#### General Rule (section 12)

*Except as otherwise provided by this Act: every person is competent to give evidence, and a person who is competent to give evidence about a fact is compellable to give that evidence.*

#### Section 13: Competence and Lack of Capacity

A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):

- The person does not have the capacity to understand a question about the fact; or
- The person does not have the capacity to give an answer that can be understood to a question about the fact, and that incapacity cannot be overcome.

A person who lacks the capacity to give sworn evidence may be competent to give unsworn evidence if the court has told the person that: it is important to tell the truth; they may be asked questions they do not know the answer to and should say so; and that they should only agree with statements they believe are true. It is presumed that a person is not incompetent.

## Section 17: Defendants in Criminal Proceedings

A defendant is not competent to give evidence as a witness for the prosecution. An associated defendant is not compellable to give evidence for or against a defendant unless being tried separately.

### 1.5 Right to Silence

#### Section 20: At Trial

The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, any comment must not suggest that the defendant failed to give evidence because the defendant was, or believed themselves to be, guilty of the offence.

The judge or any party (other than the prosecutor) may comment on the failure of the defendant's spouse, de facto partner, parent or child to give evidence, but must not suggest this was because the defendant was guilty.

#### Sections 89 and 89A: Pre-Trial Right to Silence

Section 89: In a criminal proceeding, an unfavourable inference must not be drawn from evidence that a party failed or refused to answer questions, or respond to a representation, put by an investigating official during the investigation of an offence.

Section 89A operates as an exception to s 89 in relation to serious indictable offences, allowing adverse inferences in certain circumstances.

### 1.6 Post-Offence Conduct

A lie told by an accused to bystanders, police, family members or while testifying may be used as an inference of guilt or self-belief of guilt: SW [2013] NSWCCA 103. However, consciousness of guilt will not be inferred if the jury accepts there are innocent explanations, including: panic; desire to protect another person; desire to avoid consequences unrelated to the offence; confusion; poor memory; or innocent misunderstanding.

**Zoneff (2000) 200 CLR 234:** The jury must be directed NOT to reason that, merely because a person told a lie, that lie is evidence of guilt. The above principles also apply to post-offence conduct such as flight: Cook [2004] NSWCCA 52.

### 1.7 Inferences from Failing to Call a Witness

**Dyers v R (2013) 248 CLR 92:** The prosecution said to the jury: 'My friends haven't called Wendy Tinkler... You may think that whoever Wendy is, that person cannot assist the defence case.' Held: this breached accusatorial justice principles because the accused is not bound to give evidence and it is for the prosecution to prove its case beyond reasonable doubt. Per Gaudron and Hayne JJ (Kirby J and Callinan J agreeing).

Restrictions apply to Dyers: civil proceedings are different (Jones v Dunkel remains applicable); restrictions apply specifically to comments on the accused's failure to call witnesses.

## WEEK 2: PROSECUTION, PROCEDURE AND STANDARDS OF PROOF

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### 2.1 Plea Negotiations

Australia, unlike the United States, does not have a formalised system of plea bargaining, but plea negotiations occur. The NSW Early Appropriate Guilty Plea (EAGP) scheme operates as follows:

- The prosecutor discloses the brief of evidence and certifies the charges to proceed.
- A formal conferencing procedure between parties takes place.
- A sliding scale of mandatory sentence discounts applies, with larger discounts available the earlier the plea is entered. Discounts are reduced as the time before trial shortens.

Advantages of a guilty plea include sentence discount, avoidance of public trial, reduced costs and potential for charge reduction. Disadvantages include the consequences of a conviction becoming public, belief that the justice system is biased, and issues with legal representation.

### 2.2 Indictment and Prosecution Pleadings

Indictments are informations presented or filed as provided by law for the prosecution of an offence: s 4 Crimes Act 1900 (NSW). Indictments are filed for serious offences triable by jury. A 'committal stage' in NSW involves pre-trial steps: service of the brief of evidence, charge certificates, and case conferencing (formal committal proceedings no longer occur in NSW).

Key requirements for pleadings:

- The relevant person with jurisdiction must have commenced the proceeding: *A-G (NSW) v Built NSW Pty Limited* [2013] NSWCCA 299.
- Charges must be clear and not duplicitous; each charge must be for a single offence: *EPA v Truegrain* [2013] NSWCCA 204.
- The summons must charge an offence known to law; the prosecutor must ensure subsections are correct.
- Summary offences may be time-barred if not charged within six months of the alleged offence: s 179 Criminal Procedure Act 1986 (NSW) (CPA).
- Criteria for granting separate trials for multiple accused: *R v Webb & Hay* (1992) SASR 563; *R v Middis* (unreported, NSWSC 1991); *R v Pham* [2004] NSWCCA 190.

### 2.3 Rule Against Double Jeopardy

The rule against double jeopardy prohibits more than one attempt to prosecute the same person for the same crime. The Filipowski maxims from *Island Maritime v Filipowski* (2006) 226 CLR 328 are:

- It is in society's interest that there be an end to litigation.
- What has been adjudicated is taken as the truth.
- No one should twice be vexed for one and the same cause.

The relevant pleas are:

<b>Autrefois acquit</b>	An estoppel preventing the Crown from reasserting the guilt of the accused when that question has already been determined against it: Filipowski at [43]. An acquittal verdict is treated as final: ICCPR Art 14(7).
<b>Autrefois convict</b>	Cannot re-prosecute an accused who has already been convicted of the offence charged on the same facts.
<b>Statutory exceptions</b>	Section 100 Crimes (Appeal and Review) Act 2001 (NSW): the Court of Criminal Appeal may order a retrial after acquittal if there is 'fresh and compelling evidence' and it is in the interests of justice.

## 2.4 Disclosure Obligations

Disclosure obligations arise before trial and do not cease when the trial commences: R v Libke (2007) 230 CLR 559. Under s 142 CPA, the prosecution must disclose material that:

- Might be relevant to an issue in the case (relevance is interpreted broadly): R v Reardon (No 2) (2004) 60 NSWLR 454 at [58] per Hodgson JA.
- Raises a new issue not apparent from the prosecution case.
- Provides a real prospect of a lead on evidence or useful lines of inquiry for the defence: Gould v DPP (Cth) [2018] NSWCCA 199.
- Includes material gathered during investigation but not intended to be used by the prosecution.
- Assists the defence case or is relevant to the credibility of prosecution witnesses.

Under s 143 CPA, the defence must respond to a s 142 disclosure notice. Failure to do so is subject to comment. The defence must disclose: the nature of the defence; factual matters in dispute; points of law; notices of alibi; and allegations of mental impairment.

## 2.5 Staying Proceedings

A court may stay proceedings, usually temporarily and conditionally, to prevent abuse of process where there are fundamental defects that cannot be cured by directions, reconstitution of the prosecution case or other arrangements: UBS AG v Tyne [2018] HCA 45; Strickland (a pseudonym) v CDPP (2018) 266 CLR 325; Jago v District Court (1992) 173 CLR 592. Examples include:

- Entering a nolle prosequi to stop a failing trial and recommence on the same charges.
- Pre-trial publicity or delay making a fair trial impossible.
- Spirit of double jeopardy transgressed through overcharging.
- An unrepresented accused facing serious indictable charges.
- Instituting proceedings for an improper purpose: Williams v Spautz (1992) 174 CLR 509.

## 2.6 In-Court Fair Trial Obligations

Prosecutors must conduct themselves impartially (rules 83, 84, 25 ABR), fairly (rule 85 ABR), and professionally (rule 86 ABR). Prosecutors must present all available and cogent admissible evidence but need not call witnesses where reliability or credibility is demonstrably lacking such that a reasonable prosecutor would refuse to call them: *R v Nguyen* [2020] HCA 23. Prosecutors must not seek to obtain a conviction at all costs.

***R v Wood (2012) 84 NSWLR 581***: A prosecutor making totally speculative closing submissions to the jury that were entirely inconsistent resulted in an acquittal being entered.

## 2.7 Standards of Proof

### **Civil Standard: Balance of Probabilities (s 140 EA)**

In civil proceedings, the court must find the case of a party proved if satisfied the case has been proved on the balance of probabilities. The court may take into account: the nature of the cause of action or defence; the nature of the subject matter; and the gravity of the matters alleged.

***Briginshaw v Briginshaw (1938) 60 CLR 336***: Per Dixon J: reasonable satisfaction is not a state of mind attained independently of the nature and consequences of the fact to be proved. The seriousness of the allegation, the inherent unlikelihood of the occurrence, or the gravity of the consequences are all considerations that affect the answer to whether an issue has been proved to the reasonable satisfaction of the tribunal. (361-362).

***Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449***: Satisfaction of the civil standard depends on the gravity of the allegation and its consequences.

### **Criminal Standard: Beyond Reasonable Doubt**

***Woolmington v DPP [1935] AC 462***: Per Viscount Sankey LJ: 'throughout the web of 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... If, at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to acquittal.' (481B, D).