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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.