LAWS1014 – Tutorial

Part 1: Criminal Procedure

Tutorial 1 – Introduction to Criminal Procedure

Class Agenda

- Introductions & reminders
- Courts and types of offences problem question
- Connecting relevant common law principles to statutory protections
- Discussion - Classification of offences and criminal process
- Discussion of The Trial reading
- Wrap up & what's next

Task: sign up to the on-call

Class starts: 1:45pm → 15 mins to ask questions

1. Courts and types of offences

In every topic of the criminal part of this unit you need to be able to identify
(i) whether a trial will be heard summarily or indictment;
(ii) in which court; and
(ii) the applicable maximum penalty.

Later in the unit you will be expected to identify and analyse these issues without being explicitly asked as they often form pre-requisites for a complete response to a more complex problem.
Answer the following questions.

You must reference all relevant legislation, and factors affecting the exercise of any discretion.

a. Jason was charged with offensive language in a public place under s 4A of the *Summary Offences Act 1988*. A police patrol had stopped and asked Jason what he was doing and he responded, "None of your fucking business". Jason thinks the charges are a "load of bollocks" and wants a jury trial:
   - Will the trial be heard summarily or on indictment?
   - In which court will the trial proceed?
   - What is the maximum penalty that Jason could face?

b. Tarik has been charged with property damage under s 195 of the *Crimes Act 1900* for allegedly throwing a milk crate through a shop window. The cost of repairing the damage to the window amounted to $4500. Tarik hopes the matter will be heard in the Local Court. Where will the matter be heard and why? What is the maximum penalty he could face?

c. Susan has been charged with dealing with property valued at $20,000 suspected of being proceeds of crime under s 193C of the *Crimes Act*. Susan wants the matter heard before a jury, but the prosecution wants the matter heard summarily. What would you advise Susan about how the matter will proceed and the issues that Susan should consider?

Issues:

- Trial to be held summarily or on indictment?
- In which court?
- With or without a jury?
- Maximum Penalty?
- MUST reference legislation and any matters affecting the exercise of discretion

Question 1a)

- Will the trial be heard summarily or on indictment?

- Under **s16B(1)(f)** → an offence under s10 of the *Drug Misuse and Trafficking Act 1985* (NSW) (the "DMTA") is a "show cause offence" → cocaine weighed 400g – amounts to commercial quantity → thus is a "show cause offence"

- **Has the accused shown cause?**
  - FOR (defence):
    - *R v Yates* → Residential rehabilitation (strong case) + loss of employment
    - *R v Kirby* → long period of liberty to be denied to Monique = unjustified
    - *R v Najem* → lack of appropriate medical treatment in custody
  - AGAINST (prosecution):
    - The onus of proof is on the accused to show cause that their detention is not justified → this has onus has not been satisfied
    - Further offences is highly likely, and very severe offence (400g of cocaine)
    - Number of factors (Moukhallaletti)
    - *R v Yates* → case here is not as strong; Monique's willingness to attend residential rehabilitation is based on the safety of her employment, not her desire to cure her cocaine addiction (as in *R v Yates*)
- ***Tikomaimaleya***
  - Since this is a show cause offence, the two-step process outlined in *Tikomaimaleya* must be followed
  - After considering the show cause requirement, the second step requires consideration of whether there is an unacceptable risk if Monique were to be released
- **Is there an unacceptable risk of Monique's bail?**

  AGAINST (Defence):
  - Monique values her job, promotion to senior solicitor, graduated from university = has strong connection ties → it would be detrimental to the life she has built for herself if she were to be put in custody (may lose her job – from stigma)
  - She has learnt from her past criminal record and wants to recover from her crime and drug addiction by going into residential rehabilitation
  - She has no contact with criminal system in 16 years
  - Connection with Erin (police officer) = strong community ties
  - Prosecution has not demonstrated that concerns are unacceptable risk – conditions may be implemented – e.g. residential rehabilitation (which requires her to stay in that area) and to submit to regular drug testing by police to address the Prosecution's bail concerns
  - **S18(1)(b)** – seriousness of offence – distinguish the level of seriousness – its serious, but its not of a serious nature that is contemplated under **s18(2)**
  - Weak prosecution case that accused would not show up – she did not know cocaine was there as she never looked in beer cabinet

  FOR (Prosecution):
  - Connection with boyfriend who supplies her cocaine - she is allegedly involved in a large cocaine selling chain (but is this evidence reliable??? – not really as her boyfriend is not a reliable source – as he is not impartial – he may get reduced sentence for his own crimes if he gives evidence against Monique)
  - Breached bail several times previously
  - No family in Sydney – as she travels a lot for work
  - Prior history of violence
  - Although prior offences were juvenile (when she was young), they were serious offences (and sometimes on bail) – assault police, drug offences again = similar nature to previous crimes
  - Maximum penalty for possession of drugs and use of drugs = very high penalty, so objectively serious + it is a strictly indictable offence = serious offence!!
  - Strong prosecution case – good indication she knew of cocaine in her beer cabinet → drug found due to execution of search warrant → needs to be a reason for that search warrant (on the basis of evidence prior to that search)

noticed the document at her feet, unclear facts that she heard the DJ's announcement, and if she knew it was directed towards her

The process server is incredibly frustrated by this stage so she decides to investigate further the residential premises of the defendant. As luck would have it, another third party informs her that the defendant has recently relocated to a new address. The process server locates the address and rings the bell several times but no-one answers. She then attempts to slide the claim through the letter box. While doing so, her hand is caught in the letter box and she is alarmed to hear that a dog is approaching the door and a person is encouraging the dog to attack her. The server manages to pull her hand just in time, having let go of the claim, and she leaves swiftly in her car.

f) Has service been effected under UCPR?
g) Would your answer differ if the defendant had taken the statement of claim in her hand?
h) Would your answer differ if the document had been affixed to the outer door of the premises?

f) Limb 1 (UCPR 10.21(1)) is not met → since no effective service on the person (since the person behind doors)
   - 10.21(2) is considered, since there is a threat of violence → but we don't know if the person was the defendant
   - *Graczyk* case → saw the actual defendant in the house → door shut, so process server made announcement of the nature of the document → so is different to this case
   - 10.26 (Personal service on person who keeps house) → document in mail-box and outer door → or fixed to other part of house AND 24-hour notice by POST
   - Can you keep house in a hotel? → yes, because hotel room is a place where other people have no authority to enter the premises → lobby is a different issue
   - Service can be alleged under several sections: 10.21(2) and 10.26

g) Yes → 10.21(1) → if someone takes document from you, then that is sufficient

h) No → 10.26 not effective as no 24-hour post

settlement) → **compare with *Field v Commissioner of Taxation*** (statement to medical advisor, instead of legal solicitor)

- In regards to the parties' drafted position papers (which were delivered to the other side), these papers included the parties' case, and thus constituted documents that were prepared in connection to the attempt to negotiate settlement → thus, settlement negotiation privilege would apply under **s131(1)(b)**
- Since privilege applies to both the position papers and oral statements, the defendant will not be able to adduce both evidence at the final hearing → unless one of the statutory exceptions under **s131(2)** is satisfied to prevent privilege
  - The most likely exception to apply to the oral statement is found in **s131(2)(g)** → where evidence of a communication is needed to contradict or qualify evidence that would otherwise be likely to mislead the court → the client claimed that he injured himself as he fell because the train had began moving without warning as he was about to get off, and the expert evidence from Mr Whistle which provides that the client's injuries were due to the defendant's failure to warn of the train's departure, allowing the train to move while doors were open (to support the claim that the client had fallen due to a moving train as he went to get off), and that the train drove in a jerking manner → the statement made by the client in mediation, that a passenger on the platform may have pushed him, contradicts the prior evidence provided to the court and is likely to mislead the court →
    - The statement contradicts the claim that the defendant was negligent → as the accident occurred from another passenger pushing the client
    - Thus, the oral statements may be admissible under **s131(2)(g)** in the final hearing
  - Otherwise, no other exception is likely to apply (there had been no implied/express consent to disclose, fully or partly, the substance of the evidence from mediation → and there was no fraud or deliberate abuse of power)

4. Use of "found" evidence

The plaintiff's brother, Jack Fernando attended the offices of the SRA and looked through their recycling bins which were located outside the building. Jack Fernando discovered a statement from the driver of the train. In this statement the driver admits that he had been drinking before the train accident that injured the plaintiff. The plaintiff's brother also found an internal SRA memorandum which included investigative findings on the cause of the accident. The investigation was conducted by an insurance investigator and engineer employed by the SRA. We seek Counsel's advice as to whether the SRA can claim privilege to resist admissibility at the hearing.

- Under **s119 and s118**, client legal privilege would apply to confidential documents or communications that was created for the dominant purpose of obtaining legal advice on that evidence or legal services in relation to litigation
  - In relation to the train driver's statement, the driver (a third party) communication made to SRA, the client (rather than to SRA's lawyers), may be protected by client legal privilege, if the function of the communications is to enable the client to obtain legal advice or for legal service in litigation (**in the matter of Southland Coal**) → this evidence could be <u>objectively</u> (***Esso; Sydney Airports***) said to be for the purpose of investigation of the cause of the accident, and for the purpose of finding evidence for the purpose of litigation → however, given the fact that this evidence was not actually used in litigation, and there is no evidence that it was disclosed to SRA's lawyers → the evidence can be held to have a dominant purpose of being for investigation → thus, privilege does not apply under **s118 or s119**

    Consider why it was obtained → for litigation, investigation, business

    Drafts in the bin → inadvertent disclosure as inconsistency with maintenance of privilege, so can use **s122**
  - In relation to the investigative findings on the cause of the accident → the investigations again, were for the dominant purpose of finding the cause of the accident; while there may have been some intention to use it in litigation, there is also no evidence that SRA's lawyers had this evidence

individual assessments (s157(2)(a)), costs of class actions will substantially increase where individual damages assessments are necessary. The court may order discontinuance of proceedings where the costs of class action exceed those of individual proceedings (s166(1)(a)).

Practice Exam [2018 Semester 1]

Question 1 [Criminal Procedure]

1.a)
An arrest was occasioned by Officer Tango's action of grabbing Riley's elbow, and words directing her to "come with me…to the station", as they demonstrate Riley is "no longer a free person" (*O'Donoghue*).

Question 2 [Civil Procedure]

1)
All forms of ADR; negotiation, mediation and arbitration, can enable faster and cheaper settlement than litigation through avoiding court delays and costs, thereby providing Parker access to justice, given her current lack of funds while enabling her to fulfil duties to assist the court achieve just, quick and cheap resolution (s56 *Civil Procedure Act* (CPA)). ADR is also confidential, which is appropriate for this situation, as the defendant will be motivated to participate in ADR to protect his reputation as a celebrity financial advisor and business from being severely damaged by a public litigation.
Cost and time benefits of ADR requires actual settlement, which can be achieved by selecting the most appropriate ADR for the situation. While negotiation is flexible as resolution is left entirely in the control of the parties (KLVM p.203), the likelihood of success is low without a third-party facilitator, especially where Parker would have unrealistic expectations and unwillingness to compromise (as indicated by her hard bargaining approach as a corporate merger specialist). Mediation would be more appropriate as a third-party neutral can encourage settlement by providing expert advice to enable parties to assume realistic expectations, whilst retaining a facilitative, not determinative role to provide parties the opportunity to participate. Parties collaboratively, in an informal setting, reach a suitable solution that satisfies both parties, rather than working against as in litigation, thereby causing less stress and more satisfaction than litigation. The informality of mediation also provides room for negotiation of more flexible and creative solutions than litigation.
Success of mediation depends on negotiation strategy, and ability to understand the other side's interests. Parker knows D'Antonio's fundamental interest of keeping his fake education a secret, and may use it as a strategical basis for negotiation. Interest-based negotiation; focusing on collaboration to satisfy interests, is arguably more effective than positional negotiation; focusing on competing position and asserting rights (KLVM p.204-6). Parker may however, be prone to engaging in positional bargaining and avoid sharing information, due to her background as a corporate mergers specialist, and this may prevent her from using information about the defendant's fake education to negotiate an appropriate resolution.