

Criminal trial process

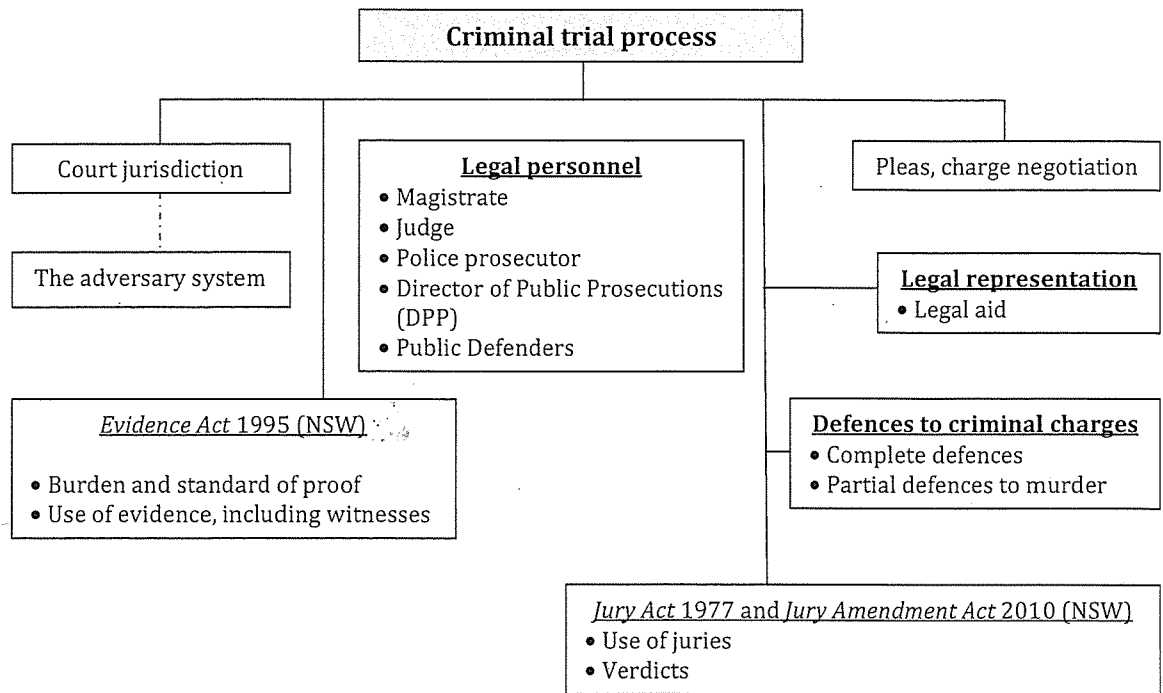


Figure 6 – A summary of the relevant elements of the criminal trial process

Court jurisdiction

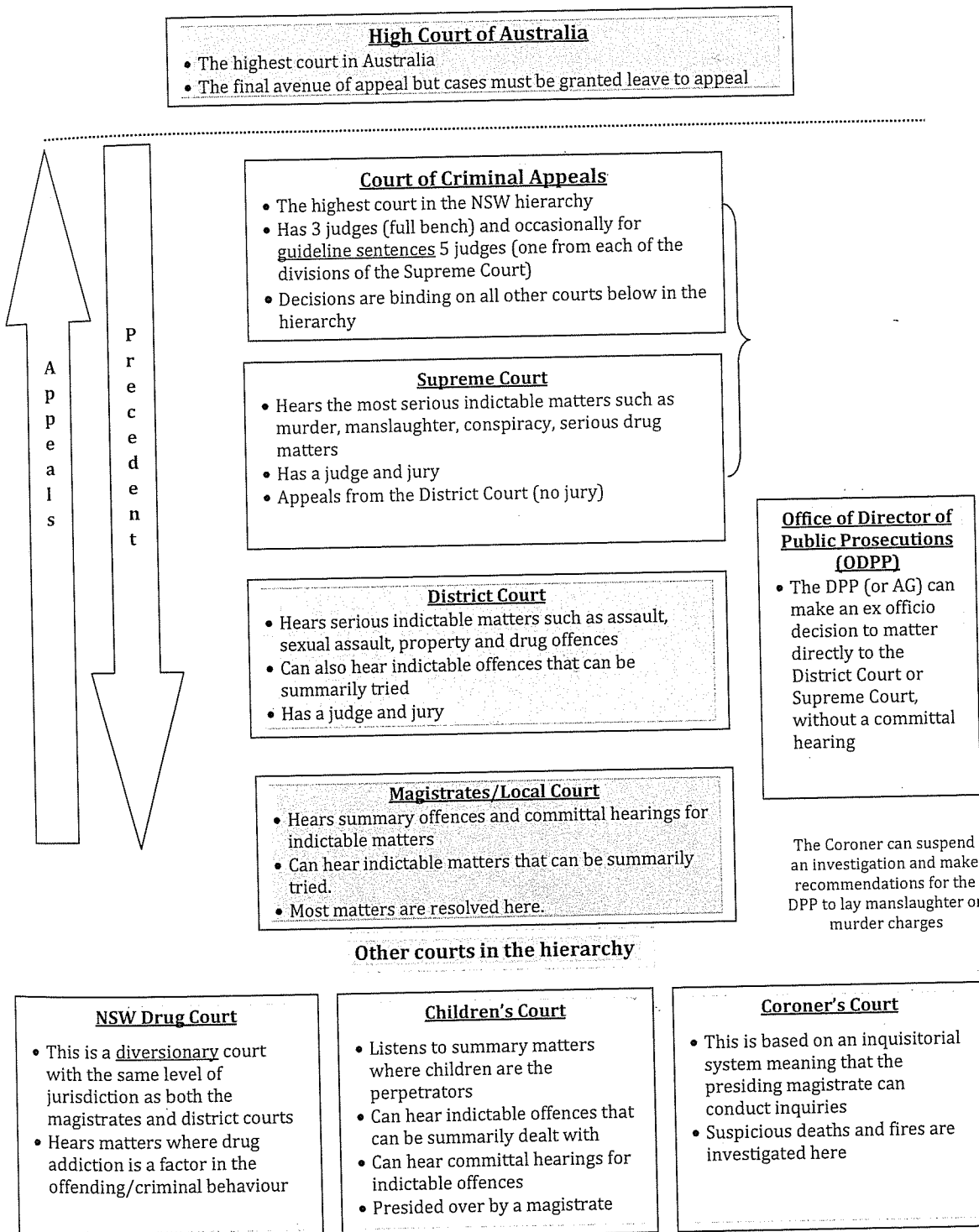


Figure 7 – A summary of the criminal court jurisdiction (NSW)

The criminal jurisdiction of the courts

The courts system in relation to criminal matters is arranged in a hierarchy. This means that there are courts of varying importance and hearing matters of varying significance. The purpose of the courts is to ensure that there is justice in how the law is enforced, and as such the courts are separated from the legislature and the executive. Each of the courts within the hierarchy has its own jurisdiction. 'Jurisdiction' here means authority granted under the law to hear particular matters.

Original and appellate jurisdiction

Original jurisdiction is a reference to the matters over which a court has prior right to hear. It is where a case will first be heard. The original jurisdiction of criminal courts varies – with the Local Court having original jurisdiction over summary matters and the District Court having original jurisdiction of indictable matters. The NSW Supreme Court has original jurisdiction only over the most serious of indictable offences.

Appellate jurisdiction is a reference to the capacity of a court to hear an appeal. All intermediate and higher courts have appellate jurisdiction, but the Local Court, Children's Court and Drug Court do not have appellate jurisdiction. The Court of Criminal Appeal has no original jurisdiction and only appellate jurisdiction.

State and Commonwealth offences

The NSW courts are able to hear both State and Commonwealth criminal matters. This means that judges need to be able to apply both Commonwealth and State laws. The vesting of such powers in State Courts stops the need to have a parallel system of federal criminal courts.

Local Court

Also called the Magistrates' Court, this is at the lowest part of the hierarchy and it entry into the criminal justice system. Most matters are heard and finalised in this court with up to 97% of all matters heard in this court. The Local Court is presided over by a magistrate and has no jury. The Local Court has original jurisdiction to hear summary matters, indictable matters that can be summarily tried and committal hearings for indictable offences. A person appearing for a criminal matter in the Local Court is called a defendant.

Matters heard in the Local Court are tried summarily, meaning that they are decided on the spot.

District Court

This is the intermediate court in the NSW hierarchy and has original jurisdiction to hear all indictable matters except murder, treason and piracy offences. It also has appellate jurisdiction to hear appeals from the Local Court and the NSW Children's Court. There is no jury on an appeals case.

The District Court is presided over by a judge and will mostly hear matters with a jury. Sometimes, an accused person can waive their right to a trial by jury. This court hears matters through a trial system whereby the state brings its case against the defendant, who is called the accused. A trial can run for a few days or for several weeks.

Supreme Court

This is the highest court in NSW and is called the superior court or superior court of record. It hears the most serious criminal matters. In 2012 one hundred and thirty trials commenced, 93 of which involved a homicide and 28 where the accused plead guilty once the trial commenced. Trials are mostly heard before a judge and jury. The average trial can take four to five weeks but some matters can take up to five months to finalise.

In its appellate jurisdiction the NSW Supreme Court has no jury. The Supreme Court can hear appeals from the District Court or the Local Court.

Court of Criminal Appeals ('Full' court)

The highest avenue of appeals is to the full court or Court of Criminal Appeals. This court normally will have three judges though on some appeals there will be only two judges. If the Attorney General seeks to clarify sentencing in a particular area of criminal law then the court may decide to pass a guideline sentence. If it opts to do so then five judges (the Chief Justice of NSW and a judge representing each division) will hear the matter.

Other courts in the hierarchy

There are several other specialist courts in the NSW hierarchy. These are the Coroner's Court, the Children's Court and the Drug Court.

Coroner's Court

The Coroner's Court hears matters related to deaths where the circumstance of the death is suspicious. The Coroner's Court conducts an autopsy to determine the cause of death. The Coroner can conduct an inquest and can question witnesses in order to determine whether there is a case to answer. If so, the Coroner can suspend the inquest and make recommendations to the ODPP that charges be laid. If this occurs then the ODPP can opt to take the matter to trial in the District or Supreme Court (by making an *ex officio* – administrative – decision).

Children's Court

This is a specialised court that, in its criminal jurisdiction, hears matters where the alleged offender is a minor or was a minor at the time the offence was committed. It can hear all summary matters, indictable matters that can be tried summarily and committal hearings for indictable offences. More about this court can be read about under 'Young offenders'.

NSW Drug Court

This is also a specialised court that will take referrals from the Local Court and District Court. Offenders appearing in this court must be drug dependent and must be considered likely to benefit from a Drug Court program.

For an offender to be eligible they must be facing imprisonment, must be over the age of 18-years and must have indicated they would plead guilty. They cannot have been involved in a crime of violence or sexual assault and must be dependent on illegal drugs.

The adversary system

In the Australian criminal justice system the trials are adversarial. This means that they are contested by two parties, each putting a case forward. The prosecution aim to prove beyond reasonable doubt that their version of events is true. The defence raise questions with the aim of creating “enough doubt” so that the prosecution cannot achieve the criminal standard of proof. The court acts as the ‘fact finder’ and thus is there to ascertain what the actual facts of a matter are. Once the facts are established then the court can make decisions about what to do.

The adversary system is about a contest and thus representation can make a very big difference. This means that people who have money and thus can afford expensive and experienced barristers can be better represented and present a better case before a court. This is an issue of equality of access.

The inquisitorial system

The Coroner’s Court does not apply an adversarial approach to coronial inquests. As the term ‘inquest’ suggests the orientation is inquisitorial. This means that the judge can actually request people attend the court, can directly ask questions and in some senses can act as an advocate for the deceased and their family.

Review Activities – Court jurisdiction and the adversary system

1. List the FOUR (4) main courts and THREE (3) specialist courts involved in the criminal justice process in NSW.
2. Distinguish between original and appellate jurisdiction.
3. Outline the role of the Local Court with respect to criminal matters in NSW.
4. What proportion of criminal matters are finalised in the Local Court?
5. Explain what a committal hearing is and establish its purpose.
6. Outline the role of the District Court in respect to criminal matters in NSW.
7. Define the term appeals.
8. What is the role of jury in a criminal trial?
9. What role, if any, does a jury play in an appeal?
10. Describe the role of the NSW Supreme Court with respect to criminal matters.
11. How many judges in the Supreme Court hear appeals from the Local Court or the District Court?
12. What is the Court of Criminal Appeals and where is it located?
13. Outline the role and importance of the Coroner's Court.
14. What is an inquest?
15. Outline the role of the NSW Children's Court.
16. Detail the role of the NSW Drug Court.
17. How can an offender be eligible to have a matter brought to the NSW Drug Court?

The adversary system

18. Define the term adversarial.
19. Distinguish between the adversarial system of trial and the inquisitorial system of trial.

Legal Personnel

Magistrate, Judge, Police Prosecutor, Director of Public Prosecution, Public Defenders

There are several different legal personnel who may be seen in the criminal trial process. Such personnel include judicial officers such as judges and magistrates. All judges and magistrates are called "Your Honour." There will also be prosecutors who represent the state and the defence legal team seeking to assist the defendant or accused.

Judge

The person who presides over a case in an intermediate or superior court is called a judge.

Magistrate

The person who presides over a case in the Local (Magistrates) Court, in the Coroner's Court, in the NSW Drug Court and in the Children's Court is a magistrate.

Roles of a magistrate

- To preside over cases in an impartial manner and apply the relevant law
- To listen to summary matters and to preside over committals (to determine whether a *prima facie* case has been established)
- Can hear some bail matters
- To determine what is admissible as evidence
- To determine the sentence when a person is proven guilty

Roles of judges

- To preside over cases in an impartial manner
- To advise the jury on matters or questions of law and direct them to the relevant law applicable to the case being heard
- To determine what is admissible as evidence
- To determine the sentence when a person is proven guilty

Appeals are judge only (no jury) as they are understood to best understand the law and how it is to be applied.

Prosecutors

There are three main parties that can act as prosecutors in a criminal case. They are:

1. Police prosecutors
2. The Director of Public Prosecutions (DPP)
3. The Attorney General (AG)

1. Police prosecutors

The police are the prosecutors in both the Local Court and the Children's Court. They represent the state for minor or summary matters. The police officers work for Police Prosecutions Command (see below). Such police officers are trained by the Prosecutors Support section and must complete the Prosecutor Education Program before they can act as police prosecutors. Usually these police officers are training to become lawyers. Since 2008 law graduates can also become police prosecutors

When the police prosecute matters the case will be titled: "*The Police vs _____*".

Police Prosecutions Command

Prosecution Operations

Police Prosecutors prosecute about 95% of criminal cases on behalf of the NSW Police Force and various other government agencies in court of summary jurisdiction, enjoying a success rate of 90% or above. They provide advocacy services for victims of domestic and family violence and re available 24/7 to provide operational legal advice to all levels of the NSW Police Force.

Coroners Court

Police prosecutors continue a fine tradition of assisting the State Coroner in the conduct of inquests. They support major policing operations and serious crime investigations with strategic legal advice.

Source: https://www.police.nsw.gov.au/about_us/structure/specialist_operations/police_prosecutions_command

2. The Director of Public Prosecutions (DPP)

The main prosecuting body for the state is the Office of the Director of Public Prosecutions (ODPP). This office prosecutes the most serious (indictable) crimes that occur in NSW. The ODPP must follow the prosecution guidelines. These are a series of detailed guidelines that guide the conduct of the office and indicates how prosecution needs to be approached within the jurisdiction of NSW.

Cases brought by the DPP will be titled: "*DPP vs _____*".

About the ODPP

The ODPP is NSW's independent prosecutorial body, created in 1987 by the *Director of Public Prosecutions Act 1986*. It is a medium sized government agency with about 600 staff, comprising of solicitors and administrative officers from the Solicitors Office and Crown Prosecutors. We handle approximately **18,000** matters a year involving offences under the laws of New South Wales, including

- Trials for indictable offences in the District Court and the Supreme Court
- Committal proceedings for indictable offences in the Local Court
- Appeals to the District Court from the Local Court
- Appeals in the Court of Criminal Appeal and the High Court
- Appeals in the Supreme Court and the Court of Appeal
- Some summary hearings in the Local Court including where a police officer is a defendant and when a defendant has been charged with a sexual assault offence against a child

All prosecutions are conducted in accordance with the *Prosecution Guidelines*.

Source: <http://www.odpp.gov.nsw.au/about-the-odpp>

The DPP has the power to act as the prosecution for indictable offences and initiate appeals. It should be noted that the current DPP of NSW is Lloyd Babb. The DPP also has some powers similar to those of the Attorney General (AG) in that they can claim a particular offence is an indictable one and they can bring cases to an end by saying there is not enough evidence. For most indictable offence the ODPP is the relevant authority.

3. The Attorney General (AG)

The AG is a senior member of the government who runs the Attorney General's department which deals with legal issues and the way such matters relate to government. Acts as the prosecution for matters referred to them by the Coroner or the 'Crown' – that is, serious indictable offences. It is usual that the AG refers matters referred to them to the ODPP. The Coroners Act 2009, ss78 and 79 allow that the coroner can suspend and inquest and refer matters to the ODPP who, with the Attorney General, can decide whether to proceed to trial. When the AG proceeds with a case it is then called "*ex-officio*", meaning that the matter did not go through the committal hearing stage in the Local Court.

The Attorney General has a role to play in the criminal trial process with respect to appeals and also in the matter of deciding whether to appeal specifically in order to request the court make a guideline judgement.

Defence lawyer

This legal representative acts in the interests of the defendant and seeks to put the case which will create enough doubt to cause the jury to decide that there is 'reasonable' doubt. They really do not need to prove the defendant or accused is innocent. However, if the defendant opts to plead guilty, the role of the defence lawyer will shift to trying receive a lesser charge or penalty through:

- Charge negotiation in order to reduce the charge and thus the penalty
- Applying a defence, eg self-defence, necessity, duress, provocation or substantial impairment of responsibility
- Emphasising the remorse felt by the defendant and their good character (mitigating factors)
- Emphasising weaknesses in the prosecution argument

When a person pleads a defence then the role of the lawyer does change somewhat. This is because they no longer seek only to create doubt, but for a defence to be successful the defence must prove it.

Public defenders

Appointed to those accused of committing an indictable offence who qualify for legal aid. They may be briefed to advise or appear in a matter through the Legal Aid Commission, the Aboriginal Legal Services, a private solicitor, or any community based legal group. As well as assisting in cases for indictable offences (committals, representation in trials, sentencing and appeals), public defenders can assist in legal education by giving lectures and seminars, writing papers and providing work experiences for students and new barristers. They can also assist solicitors and members of the Bar with advice on criminal law practice and procedure.

Review Activities – Legal personnel

1. Define the term legal personnel.
2. Explain the role of each of the following parties to a criminal matter:
 - a. Magistrate
 - b. Judge
 - c. Police prosecutor
3. Distinguish between a police prosecutor and the prosecutors in indictable matters
4. Outline the role of defence lawyers.
5. Research the role of the Public Defender's Office. Assess the importance of this office to the criminal justice system.

Pleas, charge negotiation

At the start of a trial, an accused is asked how they plead. This is undertaken during an *arraignment*. They have 3 options:

- Guilty
- Not guilty
- Silence (this is taken to be a plea of 'not guilty')

Charge negotiation

This is also called *plea bargaining*. Here a person may plead guilty to *lesser charges or charge*. The effect is to go straight to sentence. This means that the trial is bypassed and the case goes straight to the sentencing hearing. This is resource efficient and the process is encouraged by the DPP (state) as it speeds up trial processes, secures a conviction, and eliminates the need for witnesses and juries. However, charge negotiation can create uncertainty and cause frustration amongst witnesses and victims, as well as the general public who are empathetic to the situation.

Arguments in favour of charge negotiation:

- Decreases costs and time delays, which is beneficial to all parties
- Increases the rate of criminal convictions
- A conviction on a lesser charge is better than no conviction at all

Arguments against the use of charge negotiation:

- Crimes may go unpunished or insufficiently punished
- May result in an accused pleading guilty to a crime for which they are innocent
- May lead to bullying or manipulation of the accused to forfeit their right to a trial
- Prosecutors may threaten more serious charges to intimidate the accused to plead guilty to the lesser charge

Charge Negotiation (formerly called charge bargaining)

Negotiations during a criminal trial, between an accused person and a prosecutor in which the accused agrees to admit to a crime (sometimes a lesser crime than the one set out in the original charge). A plea of guilty generally attracts a discounted sentence and avoids the expense of a public trial. Negotiations are conducted in accordance with the Prosecution Guidelines of the Office of the Director of Public Prosecutions.

Source: <http://www.lawsociety.com.au/about/news/Glossary/index.htm>

Review Activities – Pleas and Charge negotiation

1. Define the term plea.
2. Outline the different ways a person can plead.
3. What is an alternative name for the term charge negotiation?
4. In your own words outline THREE (3) arguments in favour of charge negotiation.
5. In your own words outline THREE (3) arguments against charge negotiation.

Legal Representation, Including Legal Aid

This is free legal support provided by Legal Aid Commissions (LACs) for those who qualify. Legal aid takes a number of forms:

- Legal representation
- 15 minutes of free legal advice for anyone. This can be by phone or face to face
- Some provision for interpreters

There are three tests that must all be passed for a person to qualify for legal aid. An exception is that all people under the age of 18-years will be given legal aid. This is offered even if they come from a very wealthy family. A fourth test is generally applied. That particular test is called the 'Availability of funds test'.

The three tests for determining if a person will be granted legal aid are:

Means test

There are two strands to this test: how much a person earns (income test) and how much a person owns (asset or wealth test). In income test is very important as a person often cannot afford to get representation and thus how much they earn is a significant factor.

Merits test

If an accused is likely to serve a term of imprisonment if they lose a criminal matter then legal aid will be provided. This is the case for an original hearing for a criminal matter. This aspect of the merits test focuses on determining the disadvantage or harm a person may face if they are denied legal aid.

On appeal, the test shifts and the focus is more on "how likely is a victory in the appeal?" Thus, the focus on disadvantage changes to a focus on probability of success. The reason for a shift reflect the nature of the Legal Aid scheme – that limited public funds are available to support people in need of legal support.

Jurisdiction test

The question is "has the state given funding for these types of criminal matters?" Legal Aid can only be applied for if the matter in the court is one for which legal aid is given.

Case: *Dietrich vs The Queen (1992) HCA*

This was an appeal as seen in the fact that Dietrich brought the case and it was an indictable offence as it is against The Queen, rather than the police. Here it was held that we do not have a general or universal right to legal aid. However, Australians do have a right to a fair trial. So, the HC held that Dietrich's conviction did not hold and he had to have a retrial. It concluded that if a trial will be unfair without legal aid, that person deserves and needs legal aid.

Availability of funds test

This test assesses the available pool of funds contributed by the State of NSW for supporting people in NSW cases. If the case is a Commonwealth offence then an assessment may be made of the pool of funds available to support those facing Commonwealth criminal charges.

When there are limited funds available then administrative discretion will have to be applied to determine which matters get the benefit of funding.

Review Activities – Legal Representation

1. Explain the benefit of legal representation.
2. Define the term legal aid.
3. Who provides legal aid and why?
4. List THREE (3) tests applied to determine whether a person will be granted legal aid.
5. Explain the means test that is applied to legal aid determinations.
6. Outline the merits test for legal aid
7. What is the jurisdiction test and what does it say about resource efficiency?
8. Explain the purpose of the 'Availability of Funds' test.

Burden and Standard of Proof

The onus, or burden, of proof in a criminal matter lies with the state or the prosecuting authority. This is because the starting point for a prosecution is that a person is deemed “innocent until proven guilty”. The prosecutor must therefore prove that the person is guilty of the offence the state is alleging.

The standard of proof for criminal matters is beyond reasonable doubt, as detailed in section 141 of the *Evidence Act*. This section also indicates upon whom the onus or burden lies.

Evidence Act - s141: Criminal Proceedings

1. *In a criminal proceeding, the court is not to find the case of the **prosecution** proved unless it is satisfied that it has been proved **beyond reasonable doubt**.*
2. *In a criminal proceeding, the court is to find the case of a **defendant** proved if it is satisfied that the case has been proved on the **balance of probabilities**.*

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/ea199580/s141.html

It can be seen from the above s141(1) that the burden is on the state (prosecution) to prove a matter beyond reasonable doubt. This is a very high threshold and means that it must be clearly established beyond any doubt that the accused committed the offence.

Exceptions

If an accused person brings a defence then they accept that they committed a crime but also claim they have a reason for it which will lead to the removal of all charges or at least lessen the seriousness of the offence. In such cases, where a defence is brought, the onus of proof shifts to the defendant to prove their defence on the balance of probabilities. This can be seen by reading carefully through s141(2).

Review Activities – Burden and standard of proof

1. Define the term ‘burden of proof’.
2. What is the name of the law that details the burden and standard of proof for both the prosecution and the defence?
3. Why is the burden of proof and the standard of proof listed in the *Evidence Act* 1995 (NSW)?
4. What is the burden of proof for the prosecution and why is the threshold so high?
5. Explain the burden of proof on an accused in the event they bring a defence.
6. Why does the burden of proof differ for the prosecution and the defence?

Use of Evidence, Including Witnesses

The act which guides how evidence is to be used in a criminal case in NSW is The *Evidence Act* 1995 (NSW). This act tells us what can be given, and will be accepted, as evidence in a court. There are very strict rules around the admissibility or not of evidence. There are also very strict rules about gathering, holding, securing and moving of evidence.

Evidence

Information supporting a case used to establish facts in a legal investigation or admissible as testimony in court; evidence may be either tangible or intangible.

Admissible evidence

This is evidence that is relevant to the case and that is legally obtained by the investigating police officers. There are a few exceptions to the 'legally obtained' aspect, but generally evidence must be lawfully obtained.

Inadmissible evidence

Inadmissible evidence is evidence that cannot be considered by a judge or jury in court; this may be because police have obtained it illegally (unless a special exception is made by the judge), it is deemed irrelevant, it is not direct (ie it is just hearsay), if it simply relates to a person's opinion (unless it is that of an expert or professional being sought) or if it has been compromised. Therefore, hearsay evidence, opinion and relevance are grounds for an 'objection' to be raised.

Physical evidence

This must be secured whilst in police custody so that it cannot be tampered with, altered, damaged, stolen, or in any way interfered with. This means that weapons, drugs and other 'exhibits' taken into custody must be secure at all times and their whereabouts known and recorded.

Witnesses

Either victims or those who hear/see/report the crime can be called to give evidence in court by either the prosecution or the defence and may be examined by either. A witness used by a defendant will give evidence that sheds doubt on the prosecution whilst witnesses who corroborate the evidence and version of events tendered by the police or prosecution will tend to strengthen the case put by the state.

Expert witnesses

Sometimes expert witnesses are called to give evidence - they are used as independent sources of information for the court. Expert witnesses can be useful for either the prosecution or the defence case.

There is some controversy over the use of expert witnesses for a number of reasons:

- Expert witness may give evidence that is highly complex and this can be difficult for a jury to understand
- Expert witnesses may be very technically competent but not very good communicators
- Sometimes expert testimony can be in an areas not exactly relevant to the case and this can be a distraction
- Sometimes expert testimony can be wrong – incorrect DNA conclusions have been known to occur, for example.

Genetic evidence

Genetic material (such as hair, blood and saliva) that can be used to link a suspect with a crime scene or criminal offence. Usually samples will be matched from victims and perpetrators. DNA samples can be taken from under a victim's nails as they might have tried to defend themselves.

Review Activities – Evidence

1. Define the term evidence.
2. What is the name of the Act that details the burden of proof, the standard of proof and the evidentiary rules?
3. Distinguish between admissible and inadmissible evidence.
4. List THREE (3) types of inadmissible evidence.
5. Why should physical evidence be secured at all times?
6. State the importance of expert witnesses.
7. Can expert witness be a problem in criminal trials? Explain
8. Explain the benefit and value of genetic evidence.

Defences to Criminal Charges: Complete Defences, Partial Defences to Murder

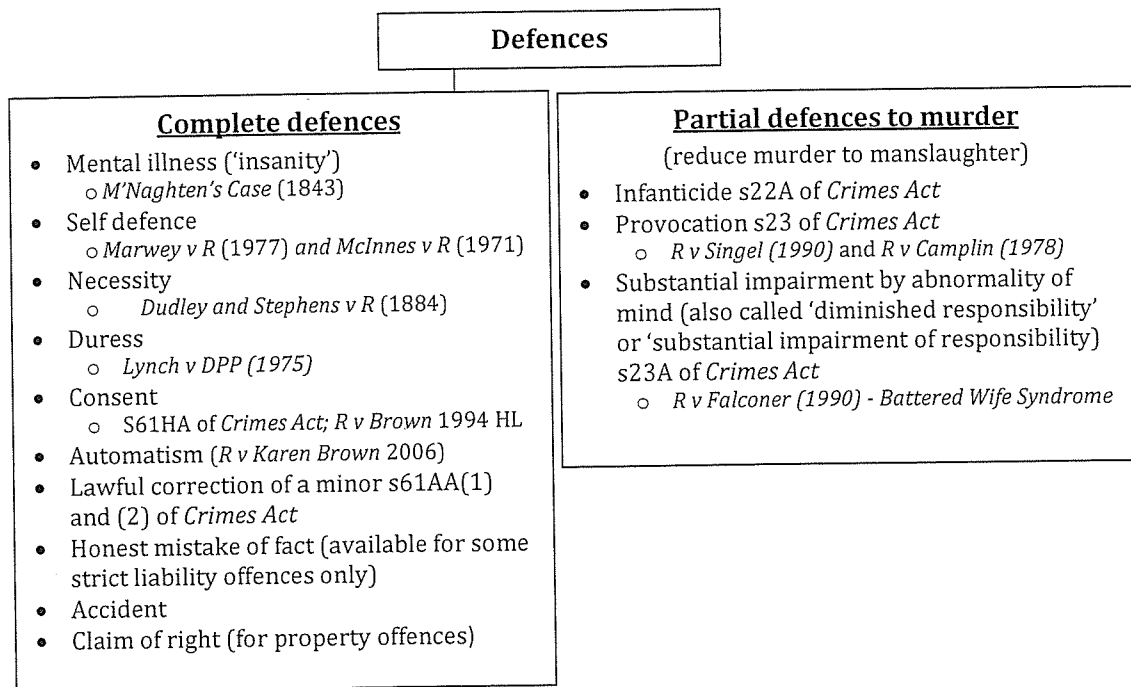


Figure 8 – A summary of the defences – complete and partial

The purpose of using defences

Any person accused of an offence has a right to be presumed innocent. The person also has the right to present a defence or to explain the circumstances of their behaviour. In this process the accused seeks to absolve themselves of blame or have the court understand and accept their actions.

In using a defence the accused is either justifying their actions or aiming to explain their conduct in order to reduce or absolve them from criminal liability. Defences aim to deny *mens rea*, *actus reus* or both.

Defences may be either complete or partial. A complete defence if successfully argued totally negates criminal liability and leads to charges being dropped and no conviction being recorded. A partial defence if successfully argued reduces the seriousness of a charge (for example, murder downgraded to manslaughter) or can be used as a mitigating consideration during the sentencing process.

A person can argue more than one defence at a time. It is common, for example, for a person to claim self-defence (a complete defence) but if that defence fails they may argue that, in the alternative, they acted out of provocation. In this way an accused can use every opportunity available to obtain a fair hearing for their version of events.

The *Evidence Act* 1995 (NSW) details the standard of proof required when an accused is defending a criminal charge. The onus is always on the party bringing the legal action to prove the matter, but this changes when a defence is argued. The burden of proof generally shifts to the defendants when they are arguing a defence and s141(2) of the *Evidence Act* states that the standard of proof for a defence is 'on the balance of probabilities'.

Evidence Act 1995 - s141 - Criminal proceedings: standard of proof

1. In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.
2. **In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.**

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/ea199580/s141.html

Complete defences

The effect of a successfully argued complete defence is a total negation of criminal liability allowing the accused to be set free without charge. The general rule is that the defence must be proven to the standard of 'on the balance of probabilities'. The complete defences are:

- Mental illness
- Self-defence
- Necessity
- Duress
- Automatism
- Lawful correction of a minor
- Honest mistake of fact

Mental illness ("insanity")

This defence challenges the *mens rea* element of a crime. There are two different arguments that an accused can assert:

- i. "I did it; I didn't know it was wrong" or "I didn't know what I was doing" (ie they are amoral).
- ii. "I didn't do it", but the accused has committed the offence and they are deluded - hence cannot distinguish reality from delusion.

A person successfully arguing this defence will be detained in a mental health facility as a forensic patient. There is no sentence decided upon, and they will only be released if the Governor deems they are fit enough. Therefore, this can be worse than a sentence otherwise would be. In NSW, some forensic patients are held in Long Bay Gaol Hospital.

Leading Case: M'Naghten's Case (1843)

M'Naghten attempted to murder the Prime Minister of England because he believed that the PM's political party were out to kill him, therefore he was acquitted on the ground of insanity as the court held he was unable to know what he was doing was wrong because his mind was so defective of reason. He was the first person to successfully argue mental illness.

Self defence

Crimes Act 1900 - s419 - Self-defence - onus of proof

In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s419.html

Here a person argues that they acted in defence of their person, another person, or property that was under threat. A person should usually try and avoid confrontation - that is, tell the other party to stop - however this is not always the case. The force used must be *proportional* to the perceived threat (but this is determined by how a reasonable person would perceive it) and cannot be vengeful.

Crimes Act 1900 - s419 - Self-defence - onus of proof

In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s419.html

Necessity

Here the accused argues that the crime was necessary in order to avoid a greater harm. Therefore, this defence is unusual in that the accused does not deny either mens rea or actus reus. Instead, the defence relies on the fact that the accused believed they had no choice.

Case: Dudley and Stephens v R (1884)

A group of men were adrift on a boat for 20 days with seemingly no prospect of rescue, so in order to survive, they killed a boy who was close to death and ate his flesh. Whilst the court heard that the men would have died had they not eaten the boy, the ruled that necessity did not apply and therefore they were convicted.

Duress

Like necessity, this defence does not deny either mens rea or actus reus. Here, a person under threat may commit a crime for fear of harm being brought on themselves or others. Duress is a rarely used defence. In *Killick's case* (see below) the pilot was never charged with a crime. If he had been charged with assisting a person to escape lawful custody he could have successfully argued duress.

A pilot under duress...

John Killick, 71, broke out of Sydney's Silverwater jail in 1999 after his girlfriend, Lucy Dudko, forced the pilot at gunpoint to land on the prison's exercise oval. The couple were on the run for 45 days before they were captured and the case made worldwide headlines.

Source: <http://www.abc.net.au/news/2013-07-19/armed-robber-john-killick-refused-parole/4830546>

Consent

Here the accused argues that the victim agreed, therefore there is no "guilty mind", or *mens rea*. It is often applied to sexual assault cases. Consent cannot be applied to homicide - is not a defence available to charges of aiding suicide or euthanasia. Consent is a controversial defence because it often relies on one person's word as against another.

Leading case: R v Brown 1994 HL

Here, consent was not a defence. This was a controversial case as all of the men participating in violent sex games with one another were voluntary participants in the activities of the group.

See: <http://www.austlii.edu.au/au/journals/PLPR/1994/21.html>

Case: "Skinny jeans" case

Where consent was successfully argued as a defence, as the man argued he could not have gotten her skinny jeans off without her assistance. She claimed she had been raped as the man she accused of raping her was one of her boyfriend's best friends and her boyfriend found out about their intimacy.

Summary of the case

Can a woman wearing skinny jeans be raped? Or are they so tight they can be taken off only with her consent? These are some of the questions a jury asked before acquitting a Sydney man of sexual assault.

Nicholas Eugenio Gonzalez was accused of raping the 24-year-old as she consoled him about breaking up with one of her friends.

The jury of six men and six women heard Mr Gonzalez, 23, had allegedly pushed the woman on to his bed, ripping off her size six skinny jeans and underpants before the attack.

In his defence, Mr Gonzalez, a navy cook, said the sex was consensual.

Excerpt from B Kontominas, "Rape of woman in skinny jeans 'not possible'", 01.05.10 <http://www.smh.com.au/nsw/rape-of-woman-in-skinny-jeans-not-possible-20100430-tzai.html#ixzz2l8LxSi62>

Automatism

Here a person argues there was no guilty act or *mens rea* because the action was uncontrollable (eg they were sleep walking, had a stroke, had a seizure, sneezed and so forth). People who are unable to control their actions cannot be liable for a crime, unless they know that there is a high risk and continue regardless. Consider, for example, the case of a person who has diagnosed epilepsy but drives and does so knowing that seizure is possible.

Case: R v Karen Brown (2006)

In this case, security guard, Karen Brown, was beaten with knuckledusters in the head and dragged along the ground by her backpack by a robber who tried to steal about \$43,000 in cash. Whilst still reeling from the effects of the attack and with blood running down her face, Karen Brown walked to the victim's car and shot him dead.

She had no recollection of her actions and suffered concussion which lasted for two months. The defence of automatism was successfully applied as it was held that she was acting involuntarily and was not in control of her actions, either due to the direct effect from the brain injury she sustained in the assault or the emotional trauma arising from believing her life was in danger.

Hence she was completely acquitted of both murder and manslaughter charges. Brown's actions, though seemingly deliberate were not seen as self-defence as witnesses told the court Karen Brown appeared to have given up and walked away before turning towards the robber and shooting him.

Lawful correction of a minor

Section 61AA (1) and (2) of the *Crimes Act* allows for a child to be lawfully beaten beneath their neck to correct their behaviour, but there are limits to how much force can be used.

Honest mistake of fact

This defence can be applied to some strict liability offences only – such as if there is a change in speeding zones that has not been alerted or for drink driving offences.

Claim of right

Here a person can claim they were owed money and were simply taking back that which was theirs. This defence relies on an understanding or belief in the accused that they had a proprietary right and that the right could only be exercised by themselves as the victim has not honoured the claim.

Review Activities – Complete Defences

1. Define the term 'defence'.
2. Why might an accused bring a defence?
3. Distinguish between a complete defence and a partial defence.
4. Can more than one defence be argued in a case?
5. What happens to the burden and standard of proof if an accused brings a defence?
6. List EIGHT (8) complete defences.
7. Outline the application of the defence of mental illness, and refer to a relevant case.
8. Outline the central rule that applies to the defence of self-defence.
9. Explain the defence of necessity with reference to a case.
10. Do you think duress is a legitimate defence? Justify your response.
11. Detail the defence of consent and evaluate the defence with respect to a case.
12. Describe the defence of lawful correction of a child.
13. Outline the defences of honest mistake of fact and lawful claim of right.
14. Evaluate the use of defences in providing justice for those accused of a crime.

Partial defences

These defences relate only to murder, reducing the charge from murder to manslaughter. There are three defences in NSW: infanticide, provocation and substantial impairment of responsibility (diminished responsibility).

Infanticide

Section 22 of the Crimes Act reduces murder to manslaughter if it is of a baby under the age of 12 months by their mother due to post natal depression (PND).

Provocation

Under this defence the accused argues that they temporarily lost control as a result of particular words or gestures and that caused the action. The particular feelings of the accused and the effect of the provocation on them must be understood. This is outlined in section 23 of the *Crimes Act*.

Leading case: DPP v Camplin (1978)

Here a 16-year-old boy was violently raped by an older man and then the man provoked him by suggesting it was fun and that they do it again. This incensed the already distraught boy who then killed the man by hitting him over the head with a frying pan. His defence for provocation was successful and his charge was reduced to manslaughter.

Leading case: Stingel v R (1990)

This was a successful appeal by Stingel in which he killed a man for provoking him when he found him with the woman he loved.

Substantial impairment (“diminished responsibility”) by abnormality of mind

Section 23A of the *Crimes Act* outlines the defence of substantial impairment by abnormality of mind. The successful application of this defence reduces murder to manslaughter even though all of the elements of murder are proven. For the defence to succeed the accused must show on the balance of probabilities that at the time of the death, the accused’s capacity to understand events, or to judge whether their actions were right or wrong, or to control themselves, was substantially impaired by an abnormality of mind arising from an underlying condition.

Leading case: The Queen v Falconer (1990)

Here it was held that repeated abuse could lead to impaired cognitive function and could thus be used as a defence. Battered wife syndrome (BWS) is an example of substantial impairment and was the defence in this particular case. ‘Substantial impairment’ refers to a temporary loss of mind. This is outlined in section 23 of the *Crimes Act*.

Review Activities – Partial Defences

1. Define the term partial defence.
2. Explain the defence of infanticide.
3. Describe the defence of provocation with reference to a case.
4. Detail the defence of substantial impairment by abnormality of with reference to a case.

The Role of Juries, Including Verdicts

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 80 - Trial by jury

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.

Source: http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s80.html

Section 80 of the Australian Constitution allows for a trial by jury for indictable offence. There are normally 12 people in a jury, however, sometimes 11 jurors are allowed. The role of a jury is to listen to the evidence and to decide which evidence is most truthful. On this basis they give a verdict (decision). Generally a unanimous verdict is required. A unanimous verdict means that all twelve jurors decide guilt. If one disagrees then there is a 'hung jury' and the verdict must be not guilty, or the jury will be discharged for a re-trial.

There are exceptions to the requirement for unanimity. In NSW for example, majority decisions are allowable in some trials. The *Jury Act* that in some trials 11 jurors are allowed and a majority of 10-1 is accepted. Moreover, a majority of 11-1 is also accepted in some cases.

Exemptions from jury

People who have a right to claim exemption from jury is outlined in the *Jury Act 1977* and include:

- Clergy and vowed members of any religious order
- Persons practising as dentists, pharmacists, medical practitioners, mining managers and under-managers of mines or employed in the provision of fire, ambulance, rescue or other emergency services
- Persons who are at least 70 years old
- Pregnant women
- A person who has the (sole) carer, custody and control of children under the age of 18 years
- A person who resides with, and has full-time care of, a person who is sick, infirm or disabled
- A person who resides more than 56km from the place at which the person is required to serve

Challenges

In NSW each side of the adversarial trial are allowed 3 challenges to prospective jurors. This is detailed in section 42 of the *Jury Act 1977*. A challenge means that the juror cannot take part in the trial.

Peremptory challenge

This occurs when the legal team strikes out a juror without needing specific reason. These challenges are therefore based on nothing more than name or appearance.

Challenges for cause

When the legal team strikes a juror because it is believed that for some reason the juror will be prejudicial; these can be because the person is not qualified to serve on a jury, or is suspected of bias perhaps because they know the defendant or have been a victim of a similar crime

Issues with jury trials

There are several issues that arise with respect to the use of jury in trials. The jury system is said to be an application of the rule of law because it allows a person to be judged by their peers. It also allows the public access to the courts and to participate in the dispensation of justice. However jury trials have some limitations. Some such limitations include:

- The availability of information – Jurors are no longer put up in hotels for the duration of a trial. They can go home and can freely access media. It is possible that jurors may read about the case through the media during a trial and this can affect the judgement of jurors.
- Trial by media – where the media shape the perception of the public prior to a trial. This can prejudice a trial.
- Complexity of evidence and use of expert witnesses. Here the argument is that evidence can be too complicated to be understood by jurors and this can distract jurors or confuse them.
- Concentration – Some jurors were recently found to be playing Sudoku during a trial and the jury had to be dismissed and a retrial ordered.
- Jury conducting research of facts – Sometimes jurors take it upon themselves to clarify the facts by visiting the place where an offence occurred.

When a trial suffers an in-jury!

Bilal Skaf and his brother, Mohammed, were part of a gang that raped several young women in Sydney during 2000. They took the girls to remote locations and sexually assaulted them. The Skaf case was heard in the District Court by Judge Finnane in July 2002. Bilal as ringleader was sentenced to 55 years. Skaf appealed and his sentence was reduced by several years. In one of the Skaf appeal cases the judge ordered a retrial because two jury members visited the scene of the crime to look at the lighting in the park at night. The victim refused to testify at yet another trial.

As a result the government amended the *Criminal Procedure Act 1986 with the Criminal Procedure Amendment (Evidence) Act 2005*. This legislation allows transcript evidence to be used in certain types of trials. The latest trial in 2006 again found Bilal and Mohammed Skaf guilty. For this case, there are at least two different issues. Firstly, the sentence given for this crime and secondly, the behaviour of jurors.

In December 2008 the NSW Court of Criminal Appeal reduced the sentences given to Bilal Skaf (from 55 years to 35 years) and Mohammed Skaf (from 18 years to 12 years).

Source: <http://guides.sl.nsw.gov.au/content.php?pid=242811&sid=2147007>

Review activities – The role of juries, including verdicts

1. What is a jury?
2. Describe how the use of jury is basic entitlement for a fair trial for an indictable offence.
3. Who can be exempted from jury trials and why?
4. Outline FIVE (5) issues with jury trials.
5. Research the issue with jury research in Bilal Skaf's trial and summarise the effects of the research on the retrial.