

CRIMINAL LAW SUMMARY



LAWSKOOL.COM.AU

LAWSKOOL PTY LTD

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF CASE LAW 6

TOPIC 1: PRE-TRIAL PROCEDURES 15

1.1 DISCRETION TO ARREST 15

 1.1.1 *Internal police guidelines* 15

 1.1.2 *Legality of arrest* 16

1.2 POLICE INTERVIEW IN CUSTODY 17

1.3 DETENTION 17

1.4 ADMISSIBILITY OF EVIDENCE 18

TOPIC 2: ELEMENTS OF A ‘FAIR TRIAL’ 19

2.1 GENERAL MATTERS 19

2.2 JURYS 19

 2.2.1 *The Constitutional status of the ‘right to jury’* 19

 2.2.2 *Requirements of jury trial* 20

2.3 INCOMPATIBILITY DOCTRINE 21

TOPIC 3: MISCARRIAGE OF JUSTICE 22

3.1 PRINCIPLES 23

3.2 PROBLEMS 23

3.3 QUESTIONS OF LAW 23

TOPIC 4: ELEMENTS OF A CRIME 25

4.1 PHYSICAL ELEMENTS 25

Results or consequences of conduct 27

4.2 VOLUNTARINESS 27

4.3 CAUSATION 28

4.4 A BREAK IN THE CHAIN OF CAUSATION: *NOVUS ACTUS INTERVENIENS* 31

4.5 FAULT ELEMENTS 35

 4.5.1 *Intention* 35

 4.5.2 *Knowledge* 37

 4.5.3 *Recklessness* 39

 4.5.4 *Negligence* 40

4.6 STRICT LIABILITY AND ABSOLUTE LIABILITY OFFENCES 42

4.6.1 <i>Strict liability</i>	43
4.6.2 <i>Absolute liability</i>	43
4.7 CONCURRENCE OF PHYSICAL AND FAULT ELEMENTS	44
4.7.1 <i>Series of acts</i>	44
4.7.2 <i>A continuing act</i>	45
TOPIC 5: MENTAL STATE DEFENCES	46
5.1 AUTOMATISM.....	46
5.1.1 <i>Test for automatism</i>	47
5.1.2 <i>Causes of automatism</i>	48
5.1.3 <i>Consciousness and automatism</i>	49
5.1.4 <i>Sane and insane automatism</i>	49
5.1.5 <i>Summary of the automatism defence</i>	50
5.1.6 <i>Burden of proof & prosecution process</i>	51
5.1.7 <i>Insane automatism</i>	51
5.2 INTOXICATION	52
5.2.1 <i>Burden of proof</i>	53
5.2.2 <i>Summary of intoxication defence</i>	53
5.2.3 <i>General steps to follow in raising this defence</i>	54
5.2.4 <i>Direction to jury when intoxication is raised to specific intent crime (Makisi)</i>	55
TOPIC 6: UNLAWFUL KILLING.....	55
6.1 LEGISLATION.....	56
6.2 PHYSICAL ELEMENTS OF UNLAWFUL KILLING.....	56
6.3 FAULT ELEMENTS OF MURDER AND MANSLAUGHTER.....	58
1) <i>Murder</i>	58
2) <i>Manslaughter</i>	61
3) <i>Negligent manslaughter</i>	63
4) <i>Criminal negligence manslaughter by failure to act</i>	65
6.4 DEFENCES	66
6.4.1 PARTIAL DEFENCES	66
1) <i>Provocation</i>	66
2) <i>Infanticide</i>	71
6.4.2 SELF-HELP DEFENCES	72
1) <i>Self-defence</i>	73
2) <i>Duress</i>	74

3) <i>Necessity</i>	75
6.4.3 BATTERED WOMAN SYNDROME	77
TOPIC 7: ASSAULT	80
7.1 COMMON ASSAULT	80
7.1.1 <i>The physical elements</i>	80
7.1.2 <i>The fault elements</i>	82
7.2 AGGRAVATED ASSAULT	82
7.2.1 <i>Assaults accompanied by an intention of a certain kind</i>	82
7.2.2 <i>Assault on certain classes of people</i>	83
7.2.3 <i>Assaults resulting in a certain kind of harm</i>	84
7.2.4 <i>Fault elements for aggravated assault</i>	85
7.3 LAWFUL ASSAULT	86
7.4 THREATS	86
TOPIC 8: SEXUAL ASSAULT	87
8.1 LEGISLATION	87
8.2 THE MEANING OF SEXUAL INTERCOURSE	88
8.3 LACK OF CONSENT	88
8.3.1 <i>Capacity to consent</i>	88
8.3.2 <i>Marital rape immunity</i>	89
8.3.3 <i>Consent: a question of fact</i>	89
8.3.4 <i>Lack of physical resistance</i>	89
8.3.5 <i>Consent obtained through violence, threats or fear</i>	89
8.3.6 <i>Consent obtained through fraud or mistake</i>	90
8.4 FAULT ELEMENTS FOR SEXUAL ASSAULT	91
8.4.1 <i>The fault element of intention</i>	91
8.4.2 <i>The fault element of recklessness</i>	91
TOPIC 9: DISHONEST ACQUISITION	92
9.1 LARCENY	92
9.2 AGGRAVATED OFFENCES	98
9.2.1 <i>Aggravated larceny: robbery</i>	98
9.2.2 <i>Other related aggravated offences</i>	100
9.3 EXPANSION OF PROPERTY OFFENCES	101
TOPIC 10: COMPLICITY	111
10.1 LEGISLATION	111

10.2 AIDS, ABETS, COUNSELS, OR PROCURES	112
10.3 THE PHYSICAL ELEMENT OF ACCESSORIAL LIABILITY	113
10.3.1 <i>An accessory by doing nothing?</i>	113
10.3.2 <i>Providing supplies to the offender</i>	115
10.3.3 <i>Withdrawal of support or encouragement by an accessory</i>	115
10.3.4 <i>The fault element of accessorial liability</i>	115
10.4 JOINT PRINCIPAL OFFENDERS	116
10.5 INNOCENT AGENCY	117
10.6 ACTING IN CONCERT	117
10.7 THE DOCTRINE OF COMMON PURPOSE	118
10.8 CONSPIRACY	118
TOPIC 11: SENTENCING	119
11.1 SENTENCING FACTORS	119
11.2 SENTENCING OPTIONS	120
11.3 LEGISLATIVE CHANGES	121
1) <i>Victorian Expungement Scheme</i>	121
2) <i>Victorian Jury Directions</i>	121
3) <i>Victorian Sexual Offences</i>	122
4) <i>Queensland Domestic Violence</i>	122
5) <i>NSW Bail and Firearms</i>	123
6) <i>Commonwealth Counter-Terrorism Review</i>	123
MINDMAPS	124
MANSLAUGHTER	124
HOMICIDE	125
DEFENCES	126
INSANITY DEFENCE	127
<i>Automatism and substantial impairment defence *note the overlap with the insanity defence</i>	128
<i>Provocation</i>	129
<i>Self defence</i>	130
ASSAULT	131

TABLE OF CASE LAW

Cases

Adams v Kennedy 16

Ancuta 115

Anderson v Judges of the District Court of New South Wales 105

Andrews v DPP 61

Andrews v R 101

Anic v The Queen 93

Attorney-General's Reference (No 1) 112

Balcombe v De Simoni 106

Banditt v R 88

Baraghith 68

Barton v Armstrong 79

Beal v Kelley 79, 80

Boughey v The Queen 38, 59

Bratty 46, 49

Broome v Perkins 48

Brownlee v R 20

Bruce v R 104

Burgess 49

Callaghan v R 40

Callaghan v The Queen 63

Chamberlain v R (No 2) 23

Cheatle v R 20, 21

Chhay 68, 69

Chiou Yaou Fa v Morris 41

Christie v Leachinsky 16

Clarence 89

Coelho v Durbin 107

Collins v Wilcock 81

Croft 70

Donyadideh 49

DPP v Camplin 67

DPP v Carr 15

DPP v Lynch 74

DPP v Morgan 90

DPP v Ray	107
DPP v Smith.....	57, 84
Edwards	69
Ex parte Parker: Re Brotherson.....	113
Ex parte West	84
Fagan v Commissioner of Metropolitan Police	79
Fagan v Metropolitan Commissioner	44
Falconer	47, 49, 50
Foster v R	94
Francipane	101
Gerakiteys v R	117
Giorgianni v R	38
Giorgianni v The Queen.....	114, 115
Gipp v R.....	23
Goodsell v Yunupingu.....	97
Green	70
Greene v R.....	107
He Kaw Teh v R.....	34
He Kaw Teh v The Queen	35, 42, 57
He Kaw The v The Queen	37
Hennessy	49
Hibbert v McKiernan	93
Holman v The Queen.....	89
Hyam v DPP	36
Ilich.....	91
Ilich v R	94
Jiminez.....	49
Jiminez v The Queen.....	48
Jones v United States	64
Kable v DPP.....	21
Kay v Butterworth.....	26
Kennison v Daire.....	93
Kingswell v R	20
Kolosque v Miyazaki	94
Kural v The Queen.....	35
La Fontaine v The Queen	35, 57
Leonard v Morris	35

Lowe v Hooker	94
Lowery v King	116
MacPherson v Brown	81
Markarian v R.....	118
Martin	75
Masciantonio.....	70
Masciantonio v The Queen	68
Mattingley v Tuckwood	107
Mazzina.....	101
Meyers v The Queen	43
Miller and Connors.....	103
Mobilio.....	89
Morgan v Colman.....	72
Mraz v The Queen	60
Mungatopi	70
Murphy	107
Murphy v R.....	100, 107
Murray v The Queen	27
Neal v The Queen.....	119
New South Wales Sugar Milling Co-op Ltd v EPA.....	41
Nydam v The Queen.....	40, 41, 51, 62
O’Conner.....	49
Osland.....	70
Osland v R	78
Osland v The Queen.....	116
Papadimitropoulos v The Queen	89
Parker v The Queen.....	65, 67
Pemble v The Queen.....	38, 61
People v Lewis.....	32
People v Lovecamp	75
Pereira v DPP	38
Peters v R	95
Plomp v The Queen	56
Police v Bann	47
Potsik v R.....	93
Quick.....	47, 49
R v Abusafiah.....	74

R v Barbouttis	117
R v Barnard	107
R v Beck.....	112
R v Belfon	82
R v Bellamy	104
R v Bingham	32
R v Blaue	30
R v Brown	20, 39, 58, 73, 74, 85
R v Burr.....	48
R v Buttsworth.....	63
R v Calhaem	112
R v Campbell	81
R v Chan-Fook.....	83
R v Cheshire	33
R v Chhay	67, 77
R v Chisam	72
R v Clarence	89
R v Clarke	104
R v Clarke and Wilton	115
R v Clarkson	113
R v Cogan and Leak	116
R v Cogdon	47
R v Coleman	39, 84
R v Coney	25, 112
R v Cooke	67
R v Coomer.....	61
R v Cottle	48
R v Crabbe.....	39, 58, 59
R v Creamer.....	61
R v Davies.....	93
R v Dawson.....	61, 62
R v Day	80
R v Demirian	57
R v Dincer	67
R v Doherty.....	62
R v Donovan	83, 85
R v Dudley and Stephens	75

R v Dutton	66
R v Evans (No 2).....	29
R v Falconer.....	45
R v Fien.....	103
R v Forbes and Webb	82
R v Ghosh	95
R v Gleed	103
R v Gnosil	97, 98
R v Gommers	119
R v Goodfellow.....	61
R v Gotts	73
R v Gray	119
R v Guthrie	51
R v Hall	103
R v Hallett	29
R v Holland	32
R v Holness.....	63
R v Howe	73
R v Hunt.....	107
R v Hurley and Murray	73, 74
R v Hutty	56
R v Instan.....	25, 62
R v Jensen and Ward	114
R v Jordan.....	33
R v Joyce	48
R v Kitchener	88
R v Krakouer.....	30
R v L.....	88
R v Lane.....	73
R v Lavender.....	63
R v Lawrence	74
R v Lees.....	66, 68
R v Leslie Peter Faure	59
R v Lloyd	94
R v Loughan.....	75
R v Loughnan.....	75, 76
R v Love.....	107

R v Lukins;	67
R v MacNamara	79
R v Masters	117
R v McCallum.....	61
R v McDonald	94, 97
R v McKenna	104
R v Michael	35
R v Middleton	93
R v Miller	44, 84
R v Minor.....	47
R v Mobilio	89
R v Morrison.....	84
R v Mowatt	84
R v Munro	60
R v Newland.....	117
R v O'Connor	47
R v Olugboja	88, 89
R v Pagett	29, 32
R v Peisley	66
R v Pollock	98
R v Quartly	66
R v Raad	103
R v Radford.....	48, 49
R v Riley.....	96
R v Rook	114
R v Russell.....	25, 62, 64, 113
R v Salisbury.....	81
R v Sault Ste. Marie	42
R v Saunders	34, 57
R v Silverman.....	107
R v Sinanovic	104
R v Smails.....	94
R v Smith	29, 33
R v Spratt	81
R v Stokes and Difford	115
R v T	119
R v Taktak.....	63, 64

R v Thurborn	94, 96
R v Tolmie	90
R v Tsigos	48
R v Tumanako	66
R v Vasic	107
R v Vickers	45
R v Walsh	100
R v Ward	100
R v Watson	61
R v White	92
R v Williscroft	118
R v Wills	63
Re Wakefield	49
Reynhoudt	83
Royall v The Queen	28, 31, 39, 58
Rozsa v Samuels	80
Runjanjic v R	78
Ryan v Kuhl	80
Ryan v R	45, 60
Ryan v The Queen	26, 43, 48
Schultz v The Queen	36
Slattery v The King	101
Smith v Desmond	98
Stingel	70
Stingel v The Queen	67, 68
Sullivan	49
Sweet v Parsley	37, 42
Thabo Meli v The Queen	43
Thambiah v The Queen	112
The Queen v R	66, 68
Tietie	114
Viro v The Queen	51, 73
Wallis v Lane	93
Walsh	107
Watmore v Jenkins	47
Wilcox v Jeffery	112
Williams v Phillips	93

Wilson v Pringle	80
Wilson v The Queen	61, 62
Wogandt.....	49
Woolmington v DPP.....	26
Zanker v Vartokas	80
Zecevic.....	72
Zecevic v DPP	72, 73

Sample

Statutes

Act 1958 (VIC)65

Crimes (Sentencing Procedure) Act 1999 (NSW)..... 118

Crimes Act 1900 (NSW)..39, 51, 55, 56, 57, 58, 59, 60, 65, 67, 72, 79, 82, 83, 84, 86,
87, 88, 89, 91, 111

Crimes Act 1958 (VIC).....51, 58, 59, 65, 72, 79, 82, 83, 87, 89, 91, 111

Criminal Code 1899 (QLD)51, 55, 57, 58, 60, 65, 67, 72, 79, 82, 83, 86, 91, 111

Criminal Code 1913 (WA).....60

Criminal Code 1983 (NT).....58, 65, 72, 73, 86, 91

Criminal Code 2002 (ACT).....34, 51, 72, 91

Criminal Code Act 1913 (WA).....34, 51, 58, 65, 67, 72, 73, 74, 79, 82, 88, 89, 91

Criminal Code Act 1924 (TAS).....60, 65, 72, 74, 79, 82, 91

Criminal Code Act 1983 (NT).....79, 82

Criminal Code Act 1995 (Cth).....25, 117

Criminal Consolidation Act 1935 (SA).....59

Criminal Law (Sentencing) Act 1988 (SA) 118

Criminal Law Consolidation Act 1935 (SA)58, 60, 72, 79, 82, 83, 86, 89, 91

Criminal Procedure Act 1986 (NSW) 104

Evidence Act 1995 (NSW) 15

Inclosed Lands Protection Act 190192

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)..... 15

Law Enforcement (Powers and Responsibilities) Regulation 2005 (NSW)..... 17

Sentencing Act 1991 (VIC) 118

Transplantation and Anatomy Act 1978 (ACT)56

TOPIC 1: PRE-TRIAL PROCEDURES

1.1 Discretion to arrest

Arrest involves depriving a person's liberty. It may be the physical seizure of the arrested person or advising the person the fact of arrest.¹ The police have the discretion to either arrest; proceed by way of a summons² or a Field Court Attendance Notice (FCAN)³. This power is derived from s 138 of the *Evidence Act 1995* (NSW). In addition, the discretion to arrest is also controlled through internal police guidelines. In *DPP v Carr*,⁴ the issue was whether the police had misused their discretion to arrest. It was held that whether a police had acted 'improperly' by arresting instead of issuing a summons was determined through factors such as police knowledge of Carr's address, and the fact that they arrested him because it was quicker than issuing a process later on.⁵

The Magistrate emphasised that in relation to less serious matters, arrest is a measure of last resort.⁶

1.1.1 Internal police guidelines

The NSW police have a code of practice called *CRIME*⁷, which is regulated by LEPR.⁸ Under these guidelines, before a police officer is to arrest someone, they are to consider various factors. These factors include:

- the seriousness of the offence;
- the need for medical examination, fingerprints, identification parades;
- the likelihood the offender would if not apprehended:
 - abscond;
 - offend again;
 - interfere with the evidence;

¹ Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 4th ed, 2010) 47.

² This is prepared by the police to bring a person before the court.

³ This is a notice which the arrested person signs to acknowledge that he or she will attend court.

⁴ [2002] NSWSC 1994.

⁵ Kenneth Adams, 'Pushing the boundaries of Public Order Law: A Commentary on *DPP v Carr* [2002] NSWSC 194' (2003) *Criminal Law Journal* 277.

⁶ *DPP v Carr* [2002] NSWSC 194, [14].

⁷ NSW Police Service, *Code of Practice for CRIME (Custody, rights, investigation, management, and evidence)* (21 June 2011) NSW Police Force

http://www.police.nsw.gov.au/about_us/policies_and_procedures/legislation_list/code_of_practice_for_crime

⁸ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ('LEPRA').

- intimidate witnesses;
- hinder the police investigation; and/or
- jeopardise the safety and protection of the victim.

1.1.2 Legality of arrest

In order for an arrest to be lawful, the police must inform the person of the grounds of arrest (subject to the exceptions below): *Adams v Kennedy*.⁹ This requirement to inform needs only that the grounds be stated in general terms, and no precise charge needs to be formulated at the time of the arrest.

The police also have to be mindful that arrest has to be executed with minimum force. They then need to be taken to the nearest police station. Only in exceptional circumstances can the police take them on a longer route. The police must endeavour to charge them under their real name.

The courts have held that there are **four situations** where the grounds for arrest **do not have to be communicated** to the suspect: *Christie v Leachinsky*¹⁰.

1. The police may arrest them for one felony (for example, murder), then later charge them with another (manslaughter).
2. The police do not need to communicate the grounds of arrest if the suspect has been caught red-handed.
3. The police do not need to communicate the grounds for arrest where it is important to secure a possibly violent criminal.
4. It is permitted to arrest the suspect for a charge (for example, reasonably suspected of murder), with the view to investigate a second charge.

The consequences of an arrest being conducted illegally are that the police may be liable to civil action (for false imprisonment etc), or the offence may fall over if the arrest was unlawful. If the arrest is found to be unlawful, this will jeopardise the criminal proceedings.

⁹ (2000) 49 NSWLR 78.

¹⁰ [1947] AC 573.

1.2 Police interview in custody

1.3 Detention

CRIME Guidelines:

A suspect may be detained for the purpose of investigations whether he or she has committed the offence for a reasonable period which is not to exceed four hours.¹¹

Determining what is a reasonable time period depends on various factors. These include:¹²

- the person's age, mental capacity and physical capacity;
- whether the presence of the person is necessary for the investigation;
- whether the person is willing to make a statement or answer any questions;
- and the need to visit the place of the offence connected with the investigation.

Note however, that the four hour period is extendable under s 118.¹³

The detained person has rights to communicate with his or her friend, relative, guardian and Australian legal practitioner¹⁴ unless the custody manager believes on reasonable grounds that doing so is likely to result in accomplice, tampering of evidence or bodily injury caused to another person.¹⁵ *Vulnerable persons* There are special guidelines the police must follow in relation to the detention of 'vulnerable persons' as defined in clause 24 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW). Vulnerable persons include indigenous Australians, the mentally disabled, physically disabled, those from a non-English speaking background, and children.

In relation to vulnerable persons, clause 34 stipulates that vulnerable persons need to be cautioned, and appropriate steps must be taken to ensure the person understands the caution. If the vulnerable person is cautioned in absence of a support person, they need to be cautioned again when the support person is present.

Child / impaired individual

¹¹ *LEPRA* s 115(2).

¹² *Ibid* s 116(2). Note: There are many other factors that need to be taken into account but not listed here so make sure you read them if need be.

¹³ There are a number of requirements to be satisfied in order for the authorised officer to issue a warrant to extend the maximum investigation period.

¹⁴ *LEPRA* s 123.

¹⁵ *Ibid* s 125(1).

Clause 32 deals with a child or impaired physical or intellectual functioning – the police need to find the person who is most responsible for their welfare.

Indigenous Australians

Clause 33 sets out the rights of indigenous Australians. An Aboriginal legal representative must be brought in as a support person.

1.4 Admissibility of evidence

Failure to follow these guidelines may result in the court refusing to admit evidence if having regard to the circumstances, it would be unfair to the defendant to use the evidence.¹⁶⁾

Note however that evidence that has been improperly obtained may still be admissible. Such evidence is only admissible if the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.¹⁷



**To order the complete version of the Lawskool Criminal Law
Summary please visit www.lawskool.com.au**

¹⁶ *Evidence Act 1995* (NSW) s 90.

¹⁷ *Ibid* s 138.