

3. CRIMINAL TRIAL PROCESS

3.1 COURT JURISDICTION

SOURCES: STATUTE LAW, COMMON LAW, CONSTITUTIONAL SEPARATION OF POWERS

STATUTE LAW

Made by Parliament and known as legislation. New laws, reforms and amendments must pass through a number of stages as the bill is proposed through three stages through the House of Representatives and a similar process through the senate before it may be passed and then given royal consent and gazetted.

In addition to these Acts of Parliament, there are some things that are so complex that government ministers/departments are granted the power through an act of Parliament to make additional laws for a technical subject. These laws are called *subordinate legislation*. They include; *regulations, rules, orders*.

COMMON LAW

JUDGES CAN MAKE LAW IN TWO WAYS

- By developing the principles of the common law, and;
- By interpreting the words in acts and regulations and ruling if law applies to the case before the court.

THE OPERATION OF THE DOCTRINE OF PRECEDENT

The basis of the doctrine of precedent is the principle of *stare decisis* – ‘to stand by what has been decided.’ The doctrine effectively means that lower courts are bound to follow the decisions of higher courts (in the same hierarchy) in similar cases. This establishes the authority of the superior courts (courts of record) in the creation of **legal principles** and promotes the **3 C’s – CONSISTENCY, CERTAINTY AND COHERENCY** in the application of the law. The doctrine of precedent allows for two types of precedent – **binding and persuasive**.

Binding precedent operates where an inferior court is bound to follow the legal principles delivered in a **similar case** by a **superior court** in the **same hierarchy**. Generally, binding precedents are created in the Court of Criminal Appeal or the High Court, which has the highest authority.

Persuasive precedent exists where a court is not bound to follow a previous decision, although the relevant *ratio decidendi* will often be considered closely and may prove highly influential in determining the legal principles relevant to the case.

Judges, in the absence of a binding precedent, may be influenced by *obiter dictum*. These are statements made during a judgement that are not part of the *ratio decidendi*, that is, the reasons for the decision. However, the court may decide to apply the principles contained in the obiter statements thereby creating new precedent.

THE ABILITY OF JUDGES TO MAKE LAW

Judges can only develop a law or change the law when an appropriate case is brought before them.

Judges can make laws on a new issue that has not previously been considered by either the courts or parliament. If a precedent has been created in a higher court on a similar issue, the court is bound by that decision. However, the techniques of reversing, overruling, distinguishing and disapproving provide the doctrine of precedent with a degree of flexibility and existing precedents can be removed or avoided.

There are a range of factors that influence the ability and preparedness of judges to change existing precedent and create new legal principles.

- The position of the court in the hierarchy, for example, most new precedents is established at the Supreme, Federal and High Court level.
- The jurisdiction in which the case is being heard. The great majority of new precedents are created in the appellate rather than original jurisdiction.

Examples of cases and issues where judges were not prepared to develop judge-made law are:

Trigwell's case 1979 (High Court of Australia) is a good example of a test case. Under common law, owners of land adjoining a road owed no duty of care to road users, and were under no legal obligation to fence in their animals to prevent them from straying onto the road. This principle was based on a longstanding British precedent dating back to when farms did not have fences, there were no major highways and cars had not even been invented.

The law challenged in *State Government Insurance Commission v Trigwell* (1979) related to the liability of farmers when their animals strayed onto highways. But an appeal to the High Court decision in *Trigwell* case confirmed that the principles developed in *Searle v Wallbank* were upheld and farmers were not held liable for the stray sheep that caused the car accident. The insurance company had to pay for the injuries caused to the Trigwell family.

- Teoh Case – his deportation order by the Immigration department as he was found guilty of importing heroin was overturned by federal court on appeal due to potential hardship caused to his family.
- Rape in marriage law (amendments relating to sexual assault in the *Crimes Act* in 1981).

On the other hand there are judges who see their role as adapting the common law to reflect society's changing needs and attitudes. Examples of this approach are:

- Donoghue v Stevenson 1932 (House of Lords).
- Grant v Australian Knitting Mills 1936 (South Australian Supreme Court).
- Mabo 1992 (High Court of Australia).
- Wik Peoples 1996 (High Court of Australia).

A criminal law example is R v Dincer [1983] 1 VR 460; where a conservative Muslim father killed his daughter who had run off with a young man where provocation was successfully raised as a defence.

CONSTITUTIONAL SEPARATION OF POWERS

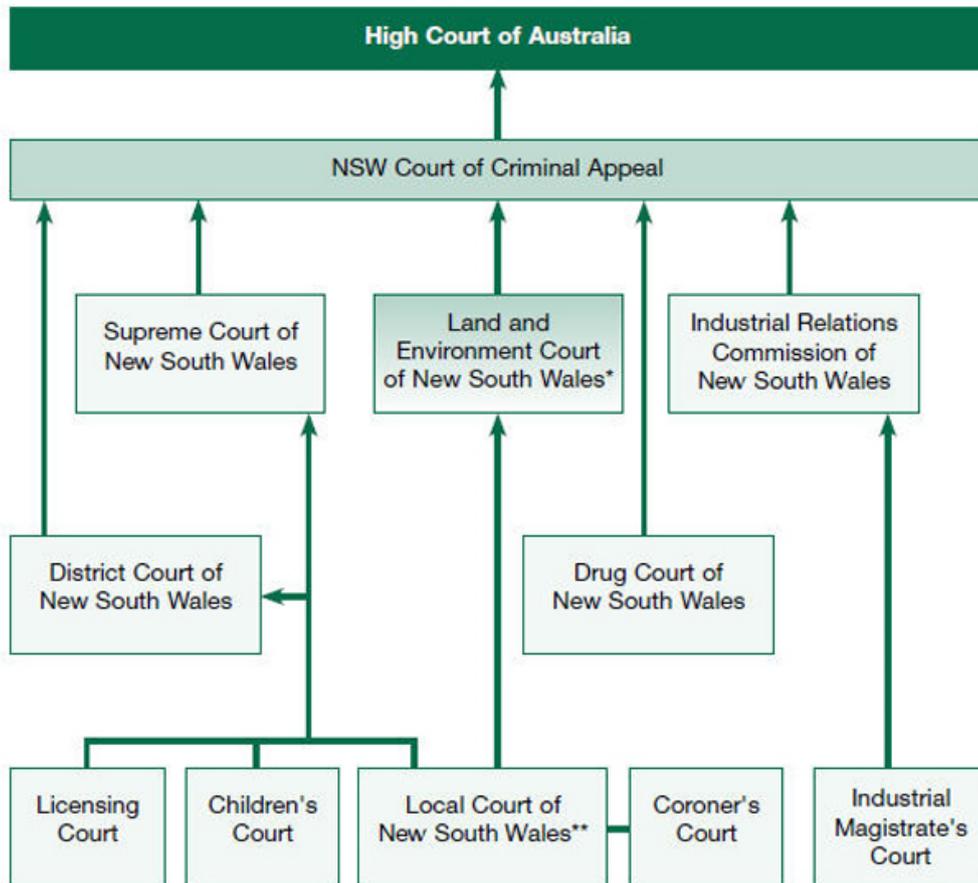
This doctrine is central to the Australian constitution. It states; the Legislature (Parliament) creates laws and alters or repeals them as required. The Executive (Prime Minister and cabinet) ensures the law is carried out and the Judiciary (courts) interpret and apply the law and make judgments on the rule of law. It enables a system of checks and balances on the power of these arms of the government. *(This concept has been tested numerous times in the multiple choice in the HSC).*

Mandatory sentencing is a challenge to this doctrine as it takes away the independence of the judiciary and makes the legislature more powerful. The eight year mandatory sentencing under the new *Crimes and Other Legislation (Assault and Intoxication) Act 2014* NSW is one such example.

THE COURT STRUCTURE

(Role of Local Court, District Court, Supreme Court, Court of Criminal Appeal and High Court in relation to criminal cases)

NSW court system - criminal jurisdiction



Source: http://www.lec.lawlink.nsw.gov.au/lec/about.html#The_Court's_place_in