

CLASS 1 – INTRODUCTION TO CRIMINAL LAW

Sources of Criminal Law

NSW is a CL state, there's no comprehensive criminal code that has all the criminal law. Whatever the Crimes Act 1990 (NSW) does not cover, common law covers. Common Law is more fluid while legislation is slow and needs to be affirmed through parliament. Defenses like duress, necessity and mental illness are judge-made (not defined in Crimes Act).

Defining Criminal Liability

Society is regulated via competing principles of individual autonomy and community welfare.

Individual Autonomy: Individuals ought to be free to do as they wish with minimal state interference as long as their actions do not infringe upon the rights of others. For example, state power should not criminalize two consenting adults engaging in potentially harmful behavior.

Community Welfare: Overriding of individual interest for the protection of the community. E.g. if an insanity plea is successful, you may still be locked in an asylum for the good of the community even if you are innocent.

- **Brown (1994):** Group of males engaged in extreme homosexual S&M behavior. Prosecuted when police found the tapes while searching the house for a different reason. For common assault, P required to prove absence of consent. In this case, the legislation did not require proving absence of consent. HOL considered societal protection, morality and community welfare over the individual autonomy rights of the individuals – “pleasure derived from infliction of violence is an evil thing”.

Temporal Coincidence Rule: The general principle is that for an offence to be committed, the act and fault element must coincide. If an act is committed by the accused but the necessary intent is not possessed at the time, the accused is not guilty (snapshot view).

- **Thabo Meli:** D agreed to meet up with somebody. Went there with an intention to kill the P. He got the person drunk, hit him over the head and he was knocked out (not dead). D rolled P off a cliff to dispose of the body. He doesn't die from impact, but dies later after exposure to the elements. D thought he was dead and so argued that the actus reus and mens rea didn't match. At the time he did the act, he had no intention to kill. Court decided that at the time the original actus reus was made, everything after that was a continuous series of events - they attached the original mens rea to the subsequent behaviour.
 - o **Reid J:** It is said mens rea is an intention to kill - there can be no intention to kill if he thought the person was already dead. However, it is clear that the D set out to kill, and it is unable to separate the original mens rea just because he was under a misapprehension at one point.

Motive – Euthanasia & Assisted Suicide Case Study

Courts will deal with the law in a way where they will take into consideration the motive of the person. For example, people fly to Geneva, Switzerland to terminate their life (euthanasia). In NSW, assisted suicide is an offence. If I get a syringe with lethal drugs and inject it or give it to the person to inject, it is the same intention.

- **Mathers:** D was 78 years old and his partner was 64. She was in severe pain and had a spinal condition. 78 year old helped his partner overdose on medicine and because she started behaving erratically, he suffocated her. She wanted to die and was competent to form that view. D's motive was love and compassion. Prosecution took his manslaughter plea. However, without that evidence he would have been liable for murder. The judge imposed a suspended sentence.
- **Purdy v DPP:** Applicant wanted to die and court sent a note to DPP that they required clarifying their position on assisted suicide so they wouldn't prosecute her husband. DPP published the public interest factors - 18 factors relating to capacity, motive etc. These lead to a decrease in the number of prosecutions for assisted suicide. Another requirement is to be forthcoming about what they have done.

CLASS 2 – SCOPE AND PRINCIPLES OF CRIMINAL LAW

Subjective approach to Mens Rea: Principle of welfare in Ashworth & Horder does not necessarily conflict with individual autonomy. Three conditions for conduct to be criminal: **Harm** (physical, emotional, severity all relevant), **Wrongfulness Principle/Culpability** (if it infringes on another person) and **Public Crime** (wrong against the community's values).

Minimalist Approach to Criminalisation

- **Human rights:** European Convention - freedom of speech, assembly, thought/religion
- **Right to not be subjected to state punishment:** preconditions for punishment include seriousness of offending & need to use balancing act, and strong justification because a conviction will have an impact on person's life - job etc. Example: one family in a street makes noise, wreckage and harasses neighbours unintentionally by their action. Family can go get a civil order (not criminal), and breaching the civil order may render them to be liable for criminal prosecution.
- **Criminal law should not be enforced if other means appropriate (last resort):** Individual morality (public shame), peer pressure, civil remedies & administrative regulations.
- **Conduct should not be criminalised if it causes more harm than not being criminalised:** Drug addicts (jailing them will not help with the addiction).

Community Welfare Principle: Ashworth discusses the Brown Case as to what stage morality should intervene. Templeman J said that the conduct was evil, where Mustill J said that even if it is repulsive, should we consider consensual conduct criminal? Ashworth & Horder argue that *Brown* should not have been criminalised based on minimalist approach - they see a limited role for paternalism. However, they support criminalising some behaviour that is not harmful, but carries the risk of harm (e.g. dangerous driving). They try to rule out the potential for harm to other people - immediate harm.

- **Remote Harm:** For example, possession of a knife in a public place is criminalised because of the potential for harm. Ashworth argues against behaviour that is itself not criminal (possession) - but counterargument is that it is outweighed by the potential severity of the criminal act if the knife was used.