

## **Nature of Criminal Law**

- mala in se (moral wrongfulness/traditional crimes)
- mala prohibita (modern regulatory offences - wrong as legally prohibited)

## **Classification of Criminal Offences**

### **Indictable Offences:** crimes and misdemeanours

- may or sometimes must be tried in superior courts (District Court, Supreme Court) Superior courts: traditionally judge and jury but now also possibility of judge only trial
- sometimes magistrates can hear indictable offences summarily
- indictment: form of charge that initiates proceedings

### **Non-indictable Offences:** simple offences and regulatory offences

- person may be 'summarily convicted' by a Magistrates Court – for example: *Regulatory Offences Act 1985 (Qld)* and *Summary Offences Act 2005 (Qld)*

### **Sentencing Principles:**

- just punishment in all circumstances
- rehabilitation of offender
- deterrence of the offender and other persons from committing same or similar offences
- denunciation of such behaviour by society (acting through court)
- community protection from the offender
  
- sentencing judges may be bound by precedent
- parliament provides maximum penalties for offences and sometimes mandatory sentences.

### **Principle of Imprisonment:**

- a sentence of imprisonment should only be imposed as a last resort
- a sentence that allows the offender to stay in the community is preferable

### **Over of Offences:**

- homicide: protects the right to live
- non-fatal offences against the person: protects a person's physical integrity
- sexual offences: protects the right to choose whether and with whom to have sex with
- property offences: protects the right own property and to control it

### **Sources of Criminal Law**

- Australia = criminal law mainly matters of State and Territory jurisdiction rather than Commonwealth (matter of criminal law not reserved to CW Parliament by Commonwealth of Australia Constitution Act 1900)
- State/Territory legislation can sanction conduct occurring within their territorial boundaries
- Commonwealth has supplementary power to create criminal offences in areas of specific constitutional jurisdiction (eg: external affairs, trade, commerce, etc)
- State and Commonwealth sources of law operating in Qld:
  - Criminal Code (Qld) Schedule 1 to *Criminal Code Act 1899 (Qld)*
  - *Criminal Code 1995 (Cth)* – Commonwealth criminal law/Commonwealth offences
  - *Drugs Misuse Act 1986 (Qld)*, *Crimes Act 1914 (Cth)* etc

### **Common law and "code" jurisdictions:**

- code jurisdictions = Qld, Tas, NT, WA, ACT – codes as comprehensive statements
- common law jurisdictions = NSW, Vic, SA – reliance on numerous statutes and common law

### **Criminal law in Qld:**

- major work undertaken by Sir Samuel Griffith "The Griffith Code" (was premier of Qld, Qld Chief Justice and Chief Justice of High Court of Australia) code came into force in 1901
- "Griffith Code" adopted by WA in 1902
- since then many amendments of act, eg: criminal procedure

### **Importance of case law:**

- law in Qld is code based but explained, interpreted and applied in case law
- Doctrine of Precedent: Superior court decision within Qld court hierarchy are binding on lower courts. Decision from other jurisdictions are persuasive, where laws are similar (eg: WA has 'Griffith Code' but decisions from WA only persuasive value for Qld as they are different jurisdictions)

### **Evidential/Persuasive Burden of Proof:**

- QCC as such silent on matters of proof
- burdens of proof adopted from common law (*Woolmington v DPP* – established that prosecution ordinarily carries burden of proof regarding all substantive elements – applied to QCC in *R v Mullen*)
- burdens of proof follow from presumption of innocence (presumed innocent until proven guilty or pleaded guilty)

### **Burden of Proof:**

- the person who carries the **evidential burden** must produce sufficient evidence for a particular proposition to persuade the trial judge to consider the issue
- **the persuasive burden** (sometimes referred to as the legal burden) means that the person deciding on the facts (jury, or in case of judge alone trial - the judge) needs to be satisfied of the existence of certain facts to the required standard

### **Standard of Proof:**

- standard to which certain facts have to be established
- the standard of proof for the **prosecution** is mostly **beyond a reasonable doubt**
- in cases where the burden of proof shifts onto the **defendant** (reverse onus) the standard of proof for the defendant is generally a lower standard of **on the balance of probabilities**

### **General rule:**

- prosecution carries the burden of raising on the evidence (evidential burden) and proving (persuasive burden) beyond a reasonable doubt (standard of proof) **all elements of the offence** (including physical and mental elements of the offence) and **negating any possible excuses and defences**
- in regards to excuses and defences under the QCC the **defence must raise the issue on the evidence** (evidential burden) and the prosecution must generally disprove it (persuasive burden) beyond a reasonable doubt (standard of proof)
- prosecution ordinarily has **evidential and persuasive burden of proof** (regarding all of the elements of the offence and for negating possible defences and excuses)
- if prosecution is unable to meet the burdens of proof then presumption of innocence remains
- burden of proof can be reversed and placed on the accused (reverse onus)
- in this case the **defence** carries the burden of raising the issue on the evidence (evidential onus) and proving (persuasive burden) it generally on a **balance of probabilities** (standard of proof) eg: killing of provocation