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1A – Course Introduction and Themes

Introduction to themes (pg.1)

[pg.1] Introduction

- **THREE main themes:**
 - Criminal law can be apprehended and approached in different ways
 - Major r/s between substantive criminal law and criminal process and procedure, seen through
 - Pre-trial procedure
 - Empirical and historical analysis
 - Criminological analysis
 - Political dimensions of criminal law (ie. the emergence of “preventative justice”)

[pg.1-3] What is criminal law

- Criminal law is a **mode of regulation** in society, which encompasses day-to-day behaviour of individuals and corporate bodies
- It has a significant influence over our behaviour, especially when compared with other social factors (age, religion, education, etc)
- **Political factors** will often influence criminal legislation (ie. drug decriminalisation)

[pg.7-8] General principles

- There are both “general” and “specific” parts of criminal law
 - **General criminal law** → doctrines which establish the **preconditions** of criminal responsibility (ie. principles which apply to any offence, irrespective of how the offence is created)
 - **Specific criminal law** → relates to the **definitions of particular offences**

[pg.9] Definitions

Actus reus	A criminal act must be considered in TWO parts, one being the physical act of the crime (actus reus)
Mens rea	The second part that needs to be considered is the mental intent to do the crime (mens rea)
Fault element	An alternative means of adopting common law actus reus and mens rea. <ul style="list-style-type: none"> • For example, the general principles of criminal responsibility in the Criminal code defines criminal responsibility in terms of proof of the physical element and fault element (ie. intention, knowledge, recklessness, negligence)
Physical element	This may be conduct, a result of conduct, a circumstance in which conduct, or a result of conduct occurs
Intention	Intention is a state of mind . <ul style="list-style-type: none"> • Draw an inference from facts which you find established by the evidence concerning the defendant’s state of mind. • Entitled to infer such intent if the evidence leaves you satisfied beyond reasonable doubt that it is the only reasonable inference open on that evidence

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Recklessness	<p>A person is reckless with respect to a circumstance if:</p> <ul style="list-style-type: none"> • The person is aware of a substantial risk that the circumstance exists or will exist; and having regard to the circumstances known to the person, it is unjustifiable to take the risk. • the person is aware of a substantial risk that the result will occur; and having regard to the circumstances known to him or her, it is unjustifiable to take the risk. • The question whether taking a risk is unjustifiable is one of fact. Recklessness can be established by proving intention, knowledge or recklessness.
Negligence	<p>A person is negligent with respect to a physical element of an offence if his or her conduct involves:</p> <ol style="list-style-type: none"> (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and (b) such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment for the offence.
Knowledge	<p>A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.</p>
Strict liability	<p>There is no mens rea requirement (mental intent) – conviction can be secured by proving the actus reus (physical act).</p> <ul style="list-style-type: none"> • However, if an honest, reasonable mistake of fact (HRMF), the prosecution needs to negate that claim beyond reasonable doubt
Absolute liability	<p>There is no mens rea requirement (mental intent) – conviction can be secured by proving the actus reus (physical act)</p>
<ul style="list-style-type: none"> • Ultimately, there should be consensus with the use of this terminology <ul style="list-style-type: none"> ○ In practise, there is still considerable degree of confusion and disagreement • General principles in criminal law are inadequate → criminal responsibility depends upon circumstances (state of mind, acts/omissions) → cannot simply apply general principles <ul style="list-style-type: none"> ○ Circumstance as a physical element is a crucial component ○ Attribution of fault to the relevant circumstance is a crucial and complex decision 	

[pg.10-11] Development of general principles

- Criminal law → developed in the common law by the courts but then redefined by parliament
- In Australia:
 - Parliamentary supremacy (parliament has the final say)
 - No constitutional / statutory bill of rights
 - This essentially means that legislatures are able to modify or override **safeguards and presumptions** RE criminal law
 - Courts NOT constitutionally empowered to disallow criminal laws which fail standards of fairness
 - Parliament *only* restrained by tradition, public opinion and the political process
- In AUS, courts focus on **procedural issues** rather than on the way in which **criminal offences are defined (substantive)**
- Parliament in AUS → increasingly addressing issues of responsibility

- In public eye → desire to be seen as doing something about the crime problem in communities
- However, this is addressed in a way which **expands the scope beyond common law limits**

The Criminal Process and Competing Versions of What the Law “Is” (pg.17)

[pg.17] Substantive VS “adjectival”

- **Substantive** criminal law → refers to the **legal and formal definitions** of offences and excuses
- **“Adjectival”** criminal law → **mechanisms / procedures** which govern the **process** from suspicion to guilty, or filtering those not guilty from guilty
 - Criminal law has historically excluded coverage of criminal procedure (‘adjectival’)
 - Focus on substantive offences (ie. homicide, sexual offences, property offences)
 - Offences perceived as **codifications of moral values** → focus on appeal court judgements AND legislation
 - However, NOTE **Brown et al.** → “impossible to assess the role played by substantive criminal laws when they are divorced from their procedural content”
 - “There is a strong inter-relation between substantive law and process”

[pg.17-19] Pre-trial process

- **Substantive** criminal law (legal definitions) is applied throughout society:
 - Members of the **public**
 - For example, a witness deciding whether they will **define ambiguous behaviour** as a breach of the criminal law in the first place
 - **Enforcement agencies (ie. police)**
 - Discretionary aspects involved with the pre-trial criminal process
 - Selective application when dealing with certain class, race, gender, culture, etc
 - Prosecutors → developed their own versions of what **enforceable criminal law “is”**
- **Criminal offences → often defined in vague terms – makes development of specific guidelines v. difficult**
 - **“Offensive behaviour”** → still defined by appellate courts in NSW in **broad** terms
 - Still not clear what Crown is required to prove by fault / mental element
 - Shows an apparent inconsistency and uncertainty
 - → Core elements still CANNOT be defined yet thousands of these offences are processed by the courts each year
 - Thus, to understand an offence, necessary to look beyond magistrate and appellate decisions to the **practices of the police**
 - Gives police sufficient power to prevent members of the public from being harassed
- Burden of proof → prosecution must show how the behaviour and state of mind of the defendant fell within an offence defined by the **substantive criminal law**
- However, difficult to assess:
 - **Malcolm Feeley** argues that “punishment starts well before an adjudication of guilt”

SAM NOTES – SEMESTER 1 (2017) – CRIMINAL LAW

- Police can *arrest* to diffuse a situation → bring in somebody for **questioning** rather than for **prosecution**
- Criterion → **reasonable suspicion** → question of FACT rather than LAW
 - Becomes FACT and LAW when framed in broad terms (ie. “offensive behaviour”)
 - Decision of police → rests on *their* version of:
 - what the law of “offensive behaviour” is in context
 - This version of law is NOT questioned unless there that person brings civil proceedings or complains to the ombudsman

[pg.19] Aims of codification

- **1985 English Law Commission Report** → aims of codification are:
 - Comprehensibility → make the law intelligent
 - Consistency → in application of principle and policy
 - Certainty
- At the moment, **substantive criminal law** is very different in the hands of police VS legislation / appeal courts
 - Although discretionary, this does NOT make it random or arbitrary (rather, it is structured and institutionalised)
 - No real gain by codifying the above values → rather, should be espoused by those participating in the pre-trial criminal process (ie. law enforcement agencies such as the police)

[pg.60-61] A Ashworth, “Is the criminal law a lost cause” (2000)

1. Distinguishing criminal offences by reference to their content

- There is NO single test or set of related texts in criminal law due to the sheer bulk of cases
- Thus, there can be **NO single workable definition of crime in English law** that is **content-based**
- A 1997 survey revealed:
 - Most offences → “regulatory”
 - Characterised by strict liability, omissions liability and reverse onus provisions for exculpation → inconsistent with **presumption of mens rea (mental element)**
- However, Ashworth noted that the government does profess principles of criminalisation
 - **Lord Williams of Mostyn** → offences “should be created only when absolute necessary”
 - Further, the following factors are important:
 - Whether the behaviour is **sufficiently serious**
 - Whether mischief could be dealt with by **existing legislation / other remedies**
 - Offence is **enforceable** in practice
 - Offence is **tightly drawn** and **legally sound**
 - Penalty is proportionate (**commensurate**) with the **seriousness of the offence**
 - Consistency across **sentencing frameworks**

[pg.107] S Hall, “Reformism and the legislation of consent” (1980)

- **Wolfenden Report** → crim offences should be confined to activities that offend against **public order** or which expose an **ordinary citizen** to something which is **offensive and injurious**
 - Thus, primarily concerned with **appearances** and **visibility**

- Public vs private distinction

[pg.109] NOTES

- Morality is assumed to be the prior state of affairs
 - 1) **Positive morality** changes from time to time, place to place
 - 2) R/s between law and morality is complex

[pg.109] T Duster, "The Legislation of Morality" (1980)

- Changes in the law RE drug use can lead people to think that an activity is **immoral**, even though they had NOT thought so previously
- Gives an example of the development of the law in relation to heroin:
 - **1900s** → anyone could buy heroin, no moral stigma attached to narcotic use
 - **1920s** → purchase of narcotics was made criminal (1914) → people become assured that it was immoral to purchase drugs
 - However, **lower class addicts** were treated differently than **higher class addicts**
 - **Lower class** → tramps, hoboes, idlers, loaders, criminals → seen as a disorder
 - **High class** → doctors, lawyers, ministers → morphine-addiction is not immoral and they can be cured

Thus, it can be seen that social categories can lend themselves to more moral condemnation than others

- **Lower and working classes**
 - **1900** → smallest proportion of addicts
 - **1969** → constituted overwhelming majority of known addicts
- **Blacks**
 - **1900** → less than 10% of addict population
 - **1980** → constitute >50% of known addicts
- **Women**
 - **1900** → more women addicted than men
 - **1980** → ratio is 7:1 to men
- **Middle-aged**
 - **1900** → dominated addicted
 - **1980** → youth dominate addiction
- What can be seen is that **moral hostility** is directed more towards a **young, lower-class Negro male** than a middle-aged, middle-class white female

The law has altered the conditions producing shifts in these categories

[pg.110] Racial elements in criminalisation

- Racial element in criminalising **opium** in Australian jurisdictions
 - **Opium** → regarded as a **symbolic object** allowing the community to deposit their anger and their frustration

SAM NOTES – SEMESTER 1 (2017) – CRIMINAL LAW

Criteria for criminalization (how do we categorise a criminal):

- Harm
- Risk / preventative justice
- Morality
- Offensiveness
- Public VS private
- Gender issues (prostitutes → some women driven to it by poverty)
- Historical Contingency

CLASS NOTES

What is criminal → look at the current content of the criminal law

What *ought* to be criminal → normative theories / guidelines / principles to aspire to

Things which weren't a crime but are now a crime

- Homosexuality (1984)
- Abortion (cf. USA where is it a constitutional right)
- Medical marijuana
- Opium
- Suicide
- Aboriginal rights

2A – Criminalisation Part 2

The rule of law, colonialism and the Indigenous peoples [2.3.3]

[pg.82] Introduction

- NSW = “settled colony” (NOT acquired by conquest or treaty)
 - “Settled colony” → a legal form of colonisation
 - Dependent on the doctrine of **Terra Nullius** → colonised land was either NOT inhabited at all OR the people were so primitive that they have no laws and no ownership of the land
 - **Mabo v Queensland (1992)** → “terra nullius” is now RE as a policy which has **no place in the contemporary law of this country**
- Effect of colonisation on Aborigines:
 - White laws applied to everyone (including Aborigines)
 - Although earlier governors tried to conciliate (appease) and protect Aborigines, there was still **black resistance to the invasion**
 - This eventually led to a **virtual suspension of the criminal law (especially murder and rape)** in relation to Aboriginal victims
 - This was a form of **de facto decriminalisation (practise of policy) based on race**
 - Only occasionally were whites punished for murder

Note the difference between **de facto and de jure decriminalisation**

- ‘De facto’ decriminalisation → matter of practise or policy
- ‘De jure’ decriminalisation → matter of law

[pg.83] H Reynolds, “Frontier” (1987)

Range of ideological justifications for white violence

- Europeans (whites) began to kill, shoot and massacre black people
 - **Rockhampton Bulletin** (1865) → “hundreds of blacks are shot down in the Colony every year”
 - **Northern Miner** (1861) → frontier brutality exemplified by the fact that “settlers would fire into them for no purpose”
 - **Edward Eyre** (1840) → there was “a recklessness that led [Europeans] to think as little of firing at a black, as a bird”
- The practise of killing Aborigines was justified because it brought “**pleasurable excitement**”
- White people believed they were released from **normal moral restraints** and could **do as they pleased**
- They had a **physical advantage** of being in a position of **absolute power** over Aborigines
 - White men → take black women away from their kin and remove from their country
- First Aborigines → NOT regarded as men but rather **brutes** → NO reasoning facilities and incapable of instruction (regarded as **sub-human**)
 - Europeans topped the chain from highest to lowest species
 - Aborigines are the “missing link” (therefore, compared to monkeys)

Divergence between legal and moral judgements: the *irrelevance of motive* [3.1.3.2]

[pg.150]

Norrie in Law and the Beautiful Soul (2005)

- **Mens rea** → murder → focus on whether the accused **intended** to kill or cause serious bodily harm (or realised that there was **considerable risk** that their actions would put the deceased's life at stake)
 - **Good or bad motives** are generally NOT taken into account to determine guilt
 - **Mercy killing** = murder (even if done from the best of motives)
 - **Compassion** is irrelevant (ie. Robin Hood robbery)
 - These factors are **NOT** taken into account **in determining guilt but in punishment**
- **Motive** → an emotion or force prompting someone to act → it is a **vital part of a person's state of mind**
 - However, there is reluctance to acknowledge motive due to the link between **motives and social causes**
 - Motive generated by social conditions, such as:
 - Unemployment
 - Racism
 - Bad housing
 - Unequal opportunity
 - Example: poor thieves could justify theft of food from private property by saying that their motive was *need* or they acted on *right*
 - **Motive** → threat to legal control
 - Link between **crime** and **disadvantaged socio-economic backgrounds**

[pg.151] Legal and ordinary explanations

- Alldridge → Criminal law has a **limited and rigid vocabulary** of mental states
 - D charged with murder → intended vs not intended to kill
 - D pleading provocation → lost self-control or not
 - D charged with offence requiring 'subjective' recklessness → foreseen the harm or not

Constituting legal personhood [3.1.4]

[pg.150]

- **Model of criminal responsibility**
 - Look at the **external events** which someone brought about
 - Look also to the **state of mind** at that time
 - *But not every human mind is capable of bearing criminal responsibility*
- Presumptions:
 - It is presumed that **adults** have the necessary mental capacity, unless they are insane

- **Children under 10 in NSW** are incapable of committing criminal offence
- **Between 10 – 14** → presumed that they are **incapable of wrongdoing (doli incapax)**
 - To rebut **doli incapax** → P must prove, beyond reasonable doubt, that the child knew that the act was seriously wrong “as distinct from mere naughtiness or mischief” (**C (A Minor) v DPP**)
 - Prove that the child knew that it was **seriously wrong** as a matter of morality
 - Test is a **subjective** one → **NOT what the child ought to have known, but what the child actually knew**
 - **Surrounding** circumstances taken into account
- **CRH** → the child **concealed** the act
- **BP; SW** → the victim was clearly **showing distress**
 - But **NOTE** that these factors are NOT enough → by itself, they CANNOT prove reasonable doubt

Factors to look for in problem questions (evidence of wrongfulness that may rebut the presumption)

- Running away
- Tearfulness
- Distress
- Used force
- Stifled defendant’s crime
- Ceased offence when adult arrived
- Told defendant not to tell anyone
- Low intelligence of the child
- **It cannot be assumed that the infliction of hurt and distress involves serious wrongdoing → you need more (HC in RP v The Queen (2016))**

Actus Reus and Mens Rea [3.2]

[pg.155]

- There are **TWO components** of criminal offences:
 - **Prohibited conduct (actus reus)** → “physical elements” | **guilty act** |
 - Refers to the prohibited event spelt out in the definition of an offence (ie. the act/omission, the circumstances in which it takes place, consequences)
 - **Mental element (mens rea)** → “fault elements” | **guilty mind** |
 - The accompanying fault elements, if any are spelt out
 - **This is the difficult part to prove → what was their subjective, elusive state of mind**
- Reflects **doctrine of dualism**
- In a criminal trial:
 - **First issue** → whether D performed the **actus reus** (eg. hijacked property, sexual assault, caused death)
 - **Second issue** → whether they had the **mens rea** specified in the offence definition (eg. dishonesty, knowledge that the other was not consenting, knowledge that he/she had drugs, intent to kill)

Steps in the exam

1. Did A perform the actus reus
2. If so, did A intend to do it (posses the mens rea)
3. Is there a defence

11B – Public Order Offences

Introduction [6.1]

[pg.509]

- **Why do we criminalise some public behaviour?**
 - The public setting imports a degree of blameworthiness (based on morality or diminished public amenity) or risk that is NOT associated with private displays of the same behaviour
 - The public is an **important site for expression and socialisation** → indeed, in the Australian context, the street has become a place for the working-class traditions to use
- However, what constitutes a public space is often debated
- **McNamara (2015)** → public order is a **complex and contested site** → there are divergent views about what the public space should be used for
- **White (2012)** argues that the social construction of public space is dominated by a series of inter-related developments including the **rise of consumerism, the mass privatisation of public space and the intensification of social regulation**
- Arguably, there has also been a **blurring of boundaries** between “public” and “private” spaces (eg. shopping centres and shopping malls are a prime example)
- Public spaces are the site of increasingly complex regulatory mechanisms:
 - Police centred regulation (move on powers, sobering-up centres)
 - Measures taken by site agencies (local government licensing schemes)
 - Private sector (CCTV cameras and shopping mall security)
 - These forms of regulation **blur the boundary between:**
 - Criminal and civil
 - Legal and administrative practices
- Although public order offences are characterised as “minor” and very rarely feature in appellate courts, they **represent a major component of the criminal law**
 - Thousands of people come into contact with the criminal justice system because of their behaviour in the public
- **Public order offences** also link to many of the **KEY THEMES**
 - Offences give a significant degree of **discretionary power** to the police (**police powers**) → although discretion is rarely exposed to review
 - Handled by summary justice
 - Scrutiny by magistrate only occurs in limited instances
 - Discretion comes in the form of:
 - Whether to report the observed crime
 - Whether the conduct is criminal or whether it was offensive behaviour → which is answered by **whether a REASONABLE PERSON** would be “offended”

- Which method of enforcement should be initiated → (warning/caution, court attendance notice, arrest)
 - An example of discretion found in **s 197** of LEPR → police have the **option** of issuing a move-on direction where there is a reasonable belief that a person's presence in a public place is likely to cause fear to other persons
- The **highly discretionary offence definitions** and **police powers** are a powerful tool kit by which police can **impose a conception of acceptable use of public spaces** and “engage in street sweeping”
 - However, one major problem with this is that **different populations and communities** are subject to different policing practices
 - Indigenous persons, young persons, the poor and the homeless → receive a **disproportionate** amount of police attention
- Public order offences also raise issues such as:
 - (1) **Legislative limits** of the criminal law
 - (2) **R/s between substantive law and procedure** (ie. police powers and operational practices)
 - (3) Recognition that some forms of anti-social behaviour are best addressed by strategies **outside of criminal law and policing** (ie. not sending a person to prison because they have used offensive language)
- **McNamara (2015):**
 - The criminalisation of public law offences has traditionally been ignored by criminal law theorists and scholars
 - In recent years, there has been an intensified **criminalisation of risk or potential for harm** in relation to public order offences
 - Public order laws:
 - Range from trivial status-based offences to serious harm behaviour
 - Diverse range of offence types → subject mens rea to reverse onus offences to strict liability and absolute liability
 - Wide range of enforcement mechanisms → informal police intervention, on the spot fines, court ordered fines)
 - Regulated by social norms, practices and institutes, criminal/civil institutions and non-criminal justice institutions (ie. local councils)
 - **These laws represent a complex inter-r/s between substantive (criminal offences) and the operational (police powers)**
 - To fully understand these laws, a **THICK CONCEPTION of criminalisation is required** → this looks beyond the list of offences in statute, and **considers the status of police powers**. This considers question such as how the police enforce laws and how powers are deployed
- **McNamara: “It is perilous – and unwise- to attempt to separate the substance of the law from its processes ... process is paramount (and drives the law)”**
 - Very **high clear up rate** (the rate for a crime or in an area is the percentage of criminals caught by the police)

Regulating *Public Places* [6.3]

[pg.1085] Overview

- Public order offences → applies to “public places” (behaviour which occurs “in”, “near”, “within view of” or “within hearing” from a **public place**)
- Public-private distinction

Summary Offences Act 1988

- **Section 3** → provides a definition
- **Section 22** → simplified definition for the purposes of regulating **public assemblies**
- Note that the precise terms and geographical ambit for the various offences in this section vary somewhat
 - Some committed in a public place
 - Some committed in, or *within view or hearing of*, a public place (**Stutsel v Reid**)
 - Prohibition in, near, or within view or hearing of a school, church or other specified place
 - Some may be committed in private AND public spaces
- **Ward v Marsh** → what constitutes a public place must be decided on a case-to case basis
- **Statutory definition of “public space”** considered in **Camp**
 - Any place, or part of any premises, which the **public use**, or which is open to the public, even if they are **private premises** or a place **surrounded by private lands** → it is a place where people who use the place do so (even if they are **trespassers**)
 - **Trespassers turn private property into public places**
 - A **public place** is one where the public go, no matter whether they have a right to go or not
 - **Common law test** → NOT based on **proprietary rights** but on **actual user**

[pg.516] **Stutsel v Reid (1990) → NSWSC**

- **Public places → there does NOT need to be anyone in the public place for the offence to be proved**
 - **“THE AIM OF THIS SECTION IS TO PROTECT MEMBERS OF THE PUBLIC WHO ARE IN A PUBLIC PLACE FROM BEING ASSAULTED BY THE SOUND OF SUCH OFFENSIVE LANGUAGE”**

Facts:

- The respondent, an Aboriginal man, was using offensive language on a private premise
- He was charged with using offensive language “within hearing from a public place” (**s 4(1)(b) of the SOA**)
- Magistrate at first instance → dismissed the charge → stated that **no one was in the public place at the time**

Held:

- The Magistrate relied on two cases which were worded differently
- In those cases, the offence was “using indecent language within the hearing of *a person passing* in a public place”
 - This could only be proved by the evidence of that person himself
- However, this is an offence that can be proved, even though there was nobody present when the alleged offence was committed
 - **The offence is made, despite the absence of proof that there was anyone in the public place to be offended**
- **Even though there was a police officer there, this is irrelevant → rather TEST → what would a hypothetical person think**
- Thus, the Magistrate is wrong → sent back to the Local Court

Offensive Behaviour [6.3]

[pg.518] Overview

- Public order offence provisions → permit police to act where behaviour in a public place is regarded as **offensive, insulting, abusive or indecent**
 - These provisions are **vague and open-ended** → left to the discretion of the police at first instance and then the discretion of the Magistrate
 - The provisions also highlight a **stonk link** between **PROCESS** and **SUBSTANTIVE LAW**

Current Provisions in the **Summary Offences Act 1988**

- **Section 4** → concerns **offensive conduct**
 - *MAX penalty* → 6 PU or 3 months imprisonment
- **Section 4A** → concerns **offensive language**
 - *MAX penalty* → 100h of community work
 - NOTE that imprisonment as a potential (direct) punishment has been **REMOVED**
 - **NOTE that in BOTH cases, the defence of REASONABLE EXCUSE is provided for**

Royal Commission into Aboriginal Deaths and Custody:

- Recommended that the **use of offensive language** in circumstances of interventions **initiated by police** should NOT be occasion for arrest and charge
- There is a need for education and training programs for police and judicial officers

[pg.519] Identifying the elements of OFFENSIVE BEHAVIOUR offenses

- THREE elements:
 - **Physical act component** → conduct or language (*act/conduct*)
 - **TWO circumstances components** →
 - The conduct of language is **offensive** (*1st circumstance*)
 - **Proximity requirement** (*2nd circumstance*) → conduct was in or near or within view or hearing from a public place or school
- **First Q** → concerned with **how to determine** whether conduct/language is sufficiently offensive to warrant criminal punishment
 - The question is then what **fault elements** are applicable to ss 4 and 4A

[pg.520] What is “offensive” to warrant criminal punishment

- Public behaviour/language that should be regarded as **offensive** → this is judged from the point of view of a **“reasonable person”** in the circumstances [**objective inquiry**]
- **Ball v McIntyre (pg. 520)**
 - Political protestor hung on a sign on a statue which said **“I will NOT fight in Vietnam”** → charged with **behaving in an offensive manner**

SAM NOTES – SEMESTER 1 (2017) – CRIMINAL LAW

- A **reasonable man** would readily see that D was engaged in a political demonstration. However, this reasonable man would NOT regard that conduct to be offensive
 - Australians are mature enough to tolerate spontaneous political protests of this kind
 - The so-called reasonable man is **reasonably tolerant and understanding, and reasonably contemporary in his reactions**
 - **Feelings wounded, disgust, outrage or resentment aroused** → **HIGH STANDARD test** to meet the level of offensiveness
- Magistrates do NOT convict simply because one complainant testifies that he/she was offended → rather, consider whether the words/behaviour, **objectively assessed**, have the tendency to be offensive
 - Evidence of **bystanders or observers** → relevant and admissible
 - However, it is NOT essential to the prosecution because of the **objective test** posed

[pg.521] Beck v New South Wales [2012] → NSWSC

- **NOT A USEFUL CASE → WRONG AUTHORITY → TEST** (look to Stutsel v Reid → no one needs to be there)
- **This case occurs in UNUSUAL CIRCUMSTANCES**
- **The meaning of behaving in an “offensive manner” considered in this case**

Facts:

- An off duty police-officer was caught urinating in the street after a big night out
- Makes every effort to be discreet

Held:

- A reasonable person would NOT regard the conduct as offensive
- There were NO persons at all in the vicinity who was capable of seeing what the plaintiff was going → therefore, he had committed NO offence
- Furthermore, P's evidence (which was accepted) was that **he was unable to prevent himself from urinating** → this is a **REASONABLE EXCUSE**

This case highlights the difficulties of making an objective assessment as to whether conduct or language is offensive → judicial officers reach different conclusions (ERROR OF LAW)

- Attitudes about what is offensive are **NOT static** → rather, it is a **dynamic process**
- The **context** in which the behaviour occurs is all-important

[pg.522] Police v Butler [2003] Local Court

- **Considers the use of swear words (ie. “fuck” and “cunt”) and whether they can be the basis for criminal prosecution for offensive language**

Facts:

- An Aboriginal woman was **summoned for the offence of offensive language** [note that in this case, the **police displayed professionalism by dealing with this matter by summons, rather than by arrest** → followed CL principle that **arrest should be the last resort** → CARR → s 99]
- She started swearing at police (repeatedly using the word “fuck” and its derivatives), and this was done about 10m from a public place

Held:

- Words that are legally considered to be offensive language change over time

- “The DC is not here to protect those who have not yet travelled through their anal sensitivities”
- Whether the language used was offensive depends on the **circumstances in which the language was used**
 - For example, the words may be spoken in a **loud voice** and in the **presence of children**
- Must also **assess according to community standards** → ie. the word fuck is extremely common place now
 - “**Fuck**” → become as common in language as any other word → used without intent to offend or without any *knowledge* that others wouldn’t find it normal
 - It is everyday language → means nothing more than “piss off” or “rack off”

Applying to the present case:

- A reasonably tolerant and understanding and contemporary person in his/her reactions would NOT be wounded, angered or outraged at these words
- Rather, it is a **regrettable but NOT uncommon part** of living near people who drink in excess
- **Community standards** have changed → the judge is NOT satisfied that the language used was offensive within the meaning of the Act

This is reaffirmed in earlier cases (ie. Dunn) → the phrase “**fuck off**” could NO longer be regarded as **constituting unlawful offensive language**

Dalton v Bartlett →

McNamara v Freeburn → “fuck” and “cunt” together NOT prima facie offensive on the street (CONTEXTUAL)

McCormack v Langham → “fucking pooftas” → SC held that the language was offensive because there were 30 people around AND **children**

Thonery v Humphries →

Conners v Craigie →

Police v Butler → useful for when the only word said is “fuck”

LOOK TO THE FOLLOWING FACTORS:

- What word was said
- Was it used alone
- Who was around (ie. children)
- Circumstances

[pg.533] J Quilter and L McNamara (2013), “Time to define ‘the cornerstone of public order legislation’: the elements of offensive conduct and language under the SOA 1988 (NSW)”

Important case to understand the application of the He Kaw Teh principles

- He Kaw Teh is an important case because it outlines a **methodology** for construing the elements of a statutory offence
- In regards to **public order offences**, there are questions about what **mens rea is required** for a particular actus reus component and questions as to whether the element is **strict or absolute**
- These issues are rarely judicially considered in the Local Courts (ideology of triviality, high volume of case load offences, etc)

Three elements of the actus reus:

- 1) **Conduct or language** (the act/conduct)
- 2) “**Offensive**” (1st circumstance)
- 3) “**in or near or within view from a public place ...**” → **proximity** requirement (2nd circumstance)

[pg.535] Defence of “reasonable excuse”

- **STATUTORY DEFENCE** → burden shifted to the defendant
- Under the SOA, it is a defence if the accused “had a **reasonable excuse** for conducting himself/herself in the manner alleged”
- **Karpik v Zisis** → explains situations → reflex action VS outrage/provocation
- **Connors v Craigie** → contextual basis → this involves both **subjective and objective** considerations (ie. Aboriginal man who became outraged, take into account his subjective opinion) → It is also an objective test → must be something in ***the immediately prevailing circumstances*** to trigger the reaction, although history of the individual and circumstances can be considered → [**Aboriginal’s and hatred to the police**]
- **Jolly** → reasonable excuse limited to the circumstances, so that the language may not cross the “unreasonable” line
- **Beck v NSW** → **public urination** → if you’re really busting, then it is a reasonable excuse to urinate in public