

# Criminal Law

## Chapter 1 Readings

### General principles

#### Definition of Crime

- Lord Aitken – the only thing that made conduct criminal was that the state had prohibited it and provided that a person who engaged in that conduct was to be punished
- Criticism of Lord Aitken's definition – doesn't take into account matters that seem to be criminal at first but only result in a 'civil penalty'. Civil penalty is where a person is ordered to pay a penalty without having been classified as having been convicted of a crime. E.g. not paying tax.
- What distinguishes a civil penalty from a criminal punishment? *Grapes v CBA Ltd* (1979) 27 ALR 87 states it is a matter of statutory interpretation.
- Key considerations according to Hayne J are whether or not the defendant is subject to convictions, and the words used by the legislature to how they describe the offence.

#### Burden of Proof

- A person cannot be found guilty of an offence unless the prosecution can show that the accused is guilty 'beyond reasonable doubt'
- The crown has the burden of proof, the defendant does not have to offer a rebuttal or prove anything. All the accused has to do is raise a doubt in the Crown's argument and then they are entitled to the benefit of that doubt.
- Where there is a defence available to the accused, the burden lies with the accused. The standard of proof is on 'the balance of probabilities'

#### Discretion

- Discretion allows for circumstances of the offence to be considered and ensures that that a prosecution is warranted both on the law, and in the circumstances.
- However, it can also be dangerous as the decision maker can make the decision for a variety of reasons that may, or may not, be appropriate.
- Examples of discretion:
  - A person may witness a crime and not report it
  - Police decide who to charge and with what offence
  - A magistrate may decide there is insufficient evidence at committal and discharge the defendant
  - A jury may decide to acquit a clearly guilty person
  - A judge/magistrate decides what punishment to apply
- Summary matter – police decide on offence
- Indictable matter – police decide on initial charge but DPP may decide that a different charge should be brought at the trial

## Elements of a crime

- The Crown needs to prove all elements of a crime, if it cannot then the accused is set free
- 2 categories of elements – physical (actus reus) and fault elements (mens rea)
- 3 categories of physical elements:
  - Prohibited action (e.g. speeding)
  - Prohibited effect (e.g. causing death)
  - Circumstances of the action are part of the required physical element (e.g. consensual sex is not a crime, unless one of the parties is under 16)
- 4 types of fault element:
  - Intention – where the accused foresaw the consequences of his or her actions and desired those consequences
  - Recklessness – where the accused foresaw the consequences of his or her actions but proceeded in the face of that foresight
  - Knowledge – where the accused was aware of the physical element required for the offence, for example, that he or she had something in their possession such as an illegal drug
  - Negligence – although the accused did not foresee that the consequence of their actions would occur, a reasonable person would have.
- ‘wilful blindness’ may be used as evidence to decide if the accused had necessary knowledge, intention or foresight, or was reckless, depending on the fault element required for the crime in question. This is where the accused purposely doesn’t make enquiries in order to avoid finding out essential facts (*R v Dykyj* [1993])
- Motive is irrelevant in criminal law
- Both the physical and fault elements must be proven at the same time in order to constitute an offence.

## Strict and Absolute Liability

- Sometimes there is no need to prove any particular fault element, such crimes fall into two categories:
  - Crimes of strict liability
  - Crimes of absolute liability
- Strict liability crime – established if the prosecution can prove that the accused performed the physical elements. No need to prove that the accused intended or was aware that they performed the act.
- “It is necessary for the prosecution to prove that the accused knew that he was doing criminal act which is charged against him, that is, he knew that all facts constituting the ingredients necessary to make the act criminal were involved in what he was doing. If this is established, it is no defence that he did not know that the act which he was consciously doing was forbidden by law” [*Otrowski v Palmer* (2004)]
- Absolute liability – established if prosecution provides that the defence of mistake of fact is not available
- Whether a criminal offence requires proof of some fault element, or if it is a strict liability of offence, or an absolute liability offence is determined by an analysis of the statute.

## Chapter 11 Readings

### Bail

- Bail effectively places the accused in community custody, often for lengthy periods, while the police continue their investigations.
- Bail is first considered by police. Once a person is charged with a criminal offence, police may:
  - Dispense with bail, which means allow the person to leave the police station with restriction; Bail Act s 10
  - Grand unconditional bail, which allows the person to remain free after signing an agreement to appear at court on the set date; Bail Act s 36
  - Grant conditional bail; which allows the person to remain free after they agree to certain conditions; Bail Act s 36
  - Refuse bail; Bail Act s 14
- Where police don't release a person on bail, they must bring a person to court to make a determination regarding bail: Bail Act s 20
- The Bail Act 1978 classifies offences as those for which there is:
  - A right to bail: s8 – a person is entitled to receive bail, except in special circumstances
  - A presumption in favour of bail: s9 – bail should be granted unless there are special circumstances to show it should not be allowed
  - A presumption against bail: ss 8A, 8B, 8C, 8D, 9C, 9D – bail should not be granted unless there are special circumstances to show it should be allowed
  - No presumption either way: ss 9A, 9B
- S 36, 36A and 36B of the Bail Act specify the conditions of bail that may be imposed:
  - The accused must behave or refrain from certain behaviour
  - An 'acceptable person' may have to be found to say that the accused person is responsible and will likely comply with the bail conditions
  - The accused person agrees to forfeit a sum of money if the accused does not comply with the conditions
  - The accused must agree to a drug/alcohol assessment or go to a rehab centre
  - The accused must not contact certain people or go to certain places
- A person who fails to comply with bail conditions may be arrested and brought to court so the conditions can be changed or bail refused: Bail Act s 50
- If a person on bail does not show up to court on the required date, they could face 3 years imprisonment: Bail Act s 51