

# CRIMINAL LAW: EXAM NOTES

## SEMESTER 1 2018

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## Week 1: The Criminal Justice System

### **Key legislation :**

- Crimes Act 1914
- Judiciary Act 1903
- Migration Act 1958
- Customs Act 1901
- Corporations Act 2001
- Criminal Code

### **Federal crimes Investigated by Federal police Prosecuted by Commonwealth DPP in Federal Courts:** certain criminal laws which are federal

- Aircraft, airport and aviation crimes
- Child sex offences by Australians overseas
- Cybercrime against Commonwealth departments or information systems of national significance
- Drug importation and exportation
- People smuggling
- Human Trafficking - including trafficking for slavery, organ harvesting, sexual, domestic and/or labour servitude and forced marriage
- Online Child Exploitation (child abuse material)
- Terrorism
- Fraud against the Commonwealth government
- Theft from the Commonwealth government
- Assault on a Commonwealth official
- Threats against a Commonwealth official

### **South Australia:**

- States and territories prosecute all other crimes
- SA (like Victoria and NSW) is a 'common law jurisdiction'
  - law made by judges rather than law passed by parliament
- **Key legislation :**
  - **Criminal Law Consolidation Act 1935 (SA) - not commonly used**
  - **Summary Offences Act 1953 (SA)**
  - **Road Traffic Act 1961 (SA)**
  - **Controlled Substances Act 1984 (SA)**
  - **Firearms Act 2015 (SA)**

### **Classification of Offences:**

- **Summary Procedure Act 1921 (SA) s 5**
  - **Categories (based on level of seriousness)**
    - Summary (includes expiable)
      - **Expiation of Offences Act 1996 (SA)**
      - Mostly traffic offences
      - Minor theft
      - Doesn't go on criminal record
    - Not expiable: **Summary Procedure Act 1921 (SA) s 5(2)**
      - 2 years or less in prison (inc no prison)
      - Property– \$2500 or less (exc arson and bushfire) (Part 4 CLCA)

- Dishonesty – \$2500 or less (exc bushfire and robbery) (Part 5 CLCA)
- Heard in Magistrates Court
- Prosecuted by police
  - Minor Indictable
    - Summary Procedure Act 1921 (SA) s 5(3)(a)
    - 5 years or less in prison (inc no prison)
    - More than 5 years prison but s 5(3)(a)(iii) applies
    - Tried summarily by Magistrate unless D elects for trial by jury (s 103(3) SPA)
      - Major Indictable
        - Summary Procedure Act 1921 (SA) s 5(3)(b)
        - All other offences – most serious
        - Murder and treason heard in Sup Crt
        - Others heard in District Court
        - D can elect to be tried by Judge alone

### **Definition of crime:**

A crime is an action or, (much less commonly), an omission that the state prohibits by statute or common law, and violation of which it prosecutes and punishes.

All crimes must have a defined physical element or actus reas (proscribed conduct) and may have a defined fault element or mens rea (requisite mental state such as intention, recklessness, knowledge or belief).

Criminal offences may be against the person (e.g. rape, murder, assault); against property (e.g. theft, property damage, criminal trespass); or against both against the person and property (e.g. robbery). Some crimes do not technically involve either persons or property (e.g. drug and firearm offences).

### **Criminal Law vs Civil law:**

#### **Criminal Law**

- Public offence
- State brings action - victim does not decide if matter proceeds
- Punishment (inc. fines, prison, community service)
- Beyond reasonable doubt
- Restrictive rules of evidence
- Public record of finding
- Jury trials in SA (indictable offences)
- Harder to prove than a civil matter as standard of proof is higher

#### **Civil Law**

- Private wrong
- Individual brings action - victim does decide if matter proceeds
- Damages (usually monetary)
- Balance of probabilities
- More permissive rules of evidence
- No public record of finding
- No jury trials in SA (except in Federal court)

### **The Vital Right to a Fair Trial**

- Every suspect is entitled to a fair trial (minor or most heinous crimes)
- It is the fundamental principle of criminal law that a person cannot be convicted except after a **fair trial**.
- This principle applies to all trials, whether conducted summarily or on indictment. No matter how grave or terrible the crime, it applies.
- This may be expressed as ‘every person has a right to be tried fairly’, or ‘every person has a right not to be tried unfairly’. **Dietrich v The Queen (1992) 177 CLR 292**
- Remember too the ‘golden thread’ of the criminal law, the prosecution must prove guilt beyond ‘reasonable doubt’

### **The All Pervading Notion of a Fair Trial**

- 'There is probably no aspect of preparation for trial or trial procedure which is not touched, indeed often determined, by fair trial considerations. As Lord Devlin [in **Connelly v DPP [1964] AC 1254**] once put it:
- ‘Nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see what was fair and just was done between prosecutors and accused.’
- Spigelman CJ, 'The Trust Can Cost Too Much: The Principle of a Fair Trial', the 4<sup>th</sup> Gerard Brennan Lecture, 2003.
- The basic right of any accused person to a fair trial is rightly valued. This right to a fair trial is not just a basic right of every accused but is, as is raised by Chief Justice Spigelman, perhaps the most fundamental right of a defendant.
- The concept of a fair trial pervades the entire criminal justice system, regardless of the gravity of the crime.

### **Fair to Whom: Not Solely the Accused**

- Individual rights should not be treated as if enjoyed in a vacuum. There is an inevitable balance throughout the criminal justice process from start to finish between the competing interests in this area. As Lord Steyn pointed out in **Attorney-General's Reference (No 3 of 1999) [2001] 2 AC 91 at 118,**
- **'The purpose of the criminal law: is to permit everyone to go about their daily lives without fear of harm to person or property.** And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of

interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.'

- Over recent years, the legitimate interests and rights of victims has been increasingly recognised. Fundamental right to a fair trial for the victim as well
- Balancing conflicting interests of the accused, the victim, and the wider society.
- Think of sexual offences and domestic violence.

### 'Denny Crane'....The Rules don't Apply to Us?

Is this a valid approach to the lawyers' role in criminal or civil procedure, whether prosecuting or not? NO!!!!!!!!!!

- A lawyer is not a shark

### Rondel v Worsley: Lord Denning MR

- In the case of Rondel v Worsley [1966] 3 All ER 657 Lord Denning famously observed, at 665:
- 'All the reasons given in those cases apply as well to a suit against a barrister for negligence. As an advocate he is a minister of justice equally with the judge. He has a monopoly of audience in the higher courts. No-one save he can address the judge, unless it be a litigant in person. This carries with it a corresponding responsibility. A barrister cannot pick or choose his clients. He is bound to accept a brief for any man who comes before the courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end. Provided only that he is paid a proper fee, or, in the case of a dock brief, a nominal fee. He must accept the brief and do all he honourably can on behalf of his client. **I say 'all he honourably can', because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice.** He must not consciously misstate the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline; but he cannot be sued in a court of law. Such being his duty to the court, the barrister must be able to do it fearlessly.
- Any lawyer, prosecuting or defending, civil or criminally, in or out of court, your ultimate duty is to the court as an administrator of justice (ULTIMATE DUTY)

### Rondel v Worsley: Lord Reid

- Lord Reid expressed a similar view to Lord Denning.

'Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. **As an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.** Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. By so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him.'

**This paramount duty as officer of the court applies to all lawyers, both in and out of court.**

**1. Duty to the court**

**2. Duty to client**

The Prosecutor's Bad Wrap

- Elish Angiolini QC, the Solicitor-General of Scotland, when pondering what might prompt any young lawyer to aspire to be a prosecutor, observed:

'Worldwide, the Prosecutor has been both, historically and in fiction, portrayed as a figure of some suspicion and of doubtful merit. There is also little by way of appealing role models for any aspiring Prosecutor to turn to for inspiration from literature and fiction... generally, literature and fiction also fail to deal a kind hand to those of us who follow this career... **In short, popular culture has always loved the criminal defence lawyer or attorney. They are the underdog, the plucky defenders of innocent accused. In contrast, Prosecutors have long been depicted as over-zealous, ambitious and hell bent on framing some poor, marginalised client.'**

- **Prosecutors have an additional duty - prosecute on behalf of society**
- **Not to win at all costs**
- **Firmly but fairly**

**R v Boucher [1955] SCR 16**

- However, the prosecutor despite the common popular and historical perception does not exist as a partisan zealot. He or she rather acts as a 'Minister of Justice'. As Rand J commented in **R v Boucher [1955] SCR 16 at 23-24** of the nature of the minister of justice concept:

'It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. **The role of prosecutor excludes any notion of winning or losing;** his function is a matter of public duty than which in

civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.'

- There is 'perhaps no more often quoted statement' in the criminal law, see **Nelles v Ontario [1989] 2 SCR 170 at 191.**

In Boucher, prosecution counsel in brutal murder trial had spoken of his belief that the accused was guilty and his pleasure on a guilty verdict at asking for the death sentence.

### **Nature and Demands of the Legal Role in Criminal Law**

- **The task of the modern prosecutor with the intense (and often misdirected) press, public and political focus and the demanding nature of the work is far from easy.**
- Look at this perceptive observation by Stephen Pallaras QC, the former South Australian DPP in a 2005 address at the Press Club.
- 'The Office of the Director of Public Prosecutions (DPP) was established in 1992 to provide an effective, fair and independent criminal prosecution service for the people of South Australia. So our charter is to provide an effective, fair and independent prosecution service ...Our Office is made up of some key functional areas. They are our solicitors, prosecutors, witness assistance officers and administrative support staff. **They work in an environment which is stressful not only because of the amount of work that comes to us but also because the very nature of the work itself, in which we see on a daily basis statements, photographs, files that involve people who have been the victims of sometimes horrendous and always disturbing, crimes. We see the carnage that we as a society wreak upon each other in the black and white of the statements of witnesses, in the colour of the photographs of the injuries of the victims and in the faces of the families that we deal with every day. That's the nature of the working environment that my staff come to every day, day after day. It's the legal equivalent of the Accident and Emergency units at our hospitals.**
- But the risk of stress applies to all 'sides' in the practice of criminal law. It is a vital area to be aware of. It is not confined to criminal law and start thinking about it at Law School.

### **Not Lawyer for the Police or the Victim**

- The prosecutor as a minister of justice must not lose sight of the fact that he or acts on behalf of the public at large. The Crown Attorney is not simply the lawyer for the police, see **Dix v Attorney-General [2002] AJ No 784** and/or the victim of crime. The prosecuting lawyer must be astute to avoid been cast as 'the creature of a private interest' in the exercise of his or her powers. **R v Milton Keynes Magistrates' Court; ex parte Roberts [1995] Crim LR 225.**
- The modern prosecutorial role must be 'scrupulous in attention to the welfare and safety of witnesses,' **R v Logiacco (1984) 11 CCC (3d) 374 at 379** per Cory J. But Prosecution counsel has wider interests to consider than just the interests of the victim.' The modern need for the prosecutor to be responsive to the views and welfare of victims poses real issues as to prosecutor's status as a minister of justice acting on behalf of the public at large.

## Week 2: Criminal Responsibility

### CLCA 269D—Presumption of mental competence

A person's mental competence to commit an offence is to be presumed unless the person is found, on an investigation under this Division, to have been mentally incompetent to commit the offence.

**When charged, presumed as legal functioning members of society we are rational people and are making decisions reasonable and freely.**

- Criminal law so based on a rational adult whose mental capacity is undiminished by mental impairment or intoxication, not subject to force or duress and so has 'the opportunity to exercise true choice' and so is legitimate to hold them criminally responsible. - Mgaire Naffine, in Caruso et al, *South Australian Criminal Law and Procedure* (Lexis Nexis, 2016) pp 20-21
- Liberal individualistic Approach: What about social and neurological factors?
- Basis on human choice and morals
- Motive is important - however law doesn't particularly take this into account

**Who do we not hold responsible?**

### 1. Children

< 10:	<b>Young Offenders Act 1993 (SA) (YOA) s 5 - Age of criminal responsibility</b> <b>A person under the age of 10 years cannot commit an offence</b>
10-14:	common law presumption of doli incapax – presumed the child does not have capacity to know the difference between right and wrong and cannot form the mental element Can be rebutted - <b>R v M (1977) 16 SASR 589</b> 12 year old boy charged with murder and evidence was admitted showing that he had an appreciation of right and wrong
14-18	criminally responsible – but subject to special principles and procedures under <b>Young Offenders Act 1993 (SA) and Youth Justice Administration Act 2016 (SA)</b>

- Can be highly controversial – James Bulger killed by 2 ten year olds in England in 1993
- Human development and reasoning
- May be held responsible but **processed differently**
- Under the age of 10 not found criminally liable
- **Presumption:** Between 10-14 no capacity to know difference between right and wrong and cant form the mental capacity - can be rebutted to say they do have mental capacity, using evidence
- Eg. Intention and motive- surrounding circumstances, intellectual functioning



