

# WEEK 1: WHAT IS CRIME?

## LECTURE

### WHAT IS CRIME?

- “A crime (or offence) is a legal wrong that can be followed by criminal proceedings which may result in punishment”
- A crime is what the parliament says it is – this doesn’t mean that it is right or the best law or the fairest law
  - This definition does not take into account any historical or social context
- What constitutes a crime is always changing – things that are illegal now were once acceptable eg. slavery and vice versa eg. Homosexuality
- People were once criminalised for things which they are now commended for eg. Freedom Riders, MLK
- Criminal law throughout history has been used as a tool of the powerful, the government, to criminalise, marginalise and punish people who challenge their authority
- The criminal law is about right and wrong, but it is also about morality and is an agent for political power
- “The criminal quality of an act cannot be discerned by intuition, nor can it be discovered by any standard, but one: Is the act prohibited with penal consequences?”
  - If the parliament prohibits the act with penal consequences, it is a crime
  - There is no sense of right and wrong and there is no standard
- In society we still have some debate about what constitutes a crime eg. Is abortion and euthanasia considered murder?
- Knee jerk politics:
  - Bail Reform
  - One Punch Laws – hasn’t made any new offences, just taken the same crime (manslaughter) and given it a different name
    - Created a mandatory minimum sentence of 8 years with a more severe penalty if you kill someone with one punch while you are intoxicated
  - Anti Terrorism Laws
  - Control Orders
  - Police Powers
- Criminal law cannot be separated from law and order politics (knee jerk politics)
  - Media frenzy and gov feels great pressure to address the issue and do something about it

### HOW SHOULD THE CONTENT OF CRIMINAL LAW BE DETERMINED?

- The prevention of harm
- The enforcement of morality
- Preserving community welfare and the public interest

### UNIVERSAL DECLARATION ON HUMAN RIGHTS

- Some academics have argued that human rights give us a means to distinguish what should be a crime and what shouldn’t eg. Acts which infringe upon other people’s human rights should be a crime
- However, there is no universal consensus on what human rights are

#### Article 29

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such

limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

#### THE PREVENTION OF HARM

- *'...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'*
- The only time something should be a crime is to prevent harm to others
- What do we mean by harm? How do we measure it?
- Is being offended by something the same thing as being harmed?
- Must the harm be direct, or do we include indirect forms of harm?
- Does the principle accommodate concerns of potential harm?
- Are there really no other circumstances in which the criminal law should be invoked?

#### THE ENFORCEMENT OF MORALITY

- *'...society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence'*
- It is difficult to find laws in our criminal justice system which are based entirely on morality
- *Test for immorality:* if conduct arouses feelings of indignation or **revulsion** in **ordinary people**.
- 'Wrongness' – inherent moral values
- In systems where law and religion aligned, morality inherently has legal force – the relationship between sin and crime
- Beyond religion ideas to concept of **common social morality**
- Criminal law gauged by sense of '**public outrage**'
- Whose morality? The majority?

#### COMMUNITY WELFARE

- Criminal law as what is best for the community as a whole
- Maintenance of social order and national security
- Considerations of costs to the community – financial, social, etc.
- How far can the protection of community welfare go?
- The interdependence of autonomy and welfare

---

#### HOW DOES CRIMINAL LAW WORK?

- **Substantive:** what makes a person guilty or not guilty of a crime
- **Procedural:** what powers do police have, and what are the limits of those powers?
  - Police charge a person with an offence, you cannot be convicted/arrested without being charged
  - The Court determines the charge and if you are guilty or not
  - Bail
  - Sentencing
  - Arrest, use of force, charging, rights in custody, search, etc.

---

#### CRIMINAL PROCESS

1. An alleged crime occurs. Either it is reported to police, or police witness it themselves
2. Police decide to investigate
3. Police gather evidence
4. Police arrest a suspect
5. That suspects is charged, and is now known as the accused or the defendant
6. The accused is either given bail or remanded in custody
7. Police and/or the DPP continue to build a case. The evidence against the accused must be given to them – the accused has a right to know the evidence against them
8. The accused pleads guilty or not guilty

9. If not guilty, then the matter is set down for a hearing (Local Court in front of a magistrate alone) or a trial (District Court or Supreme Court, in front of a judge and jury).
  - a. Judge decides the law and the jury decides the factual matters in dispute
10. The magistrate or the jury hear the evidence and decide either 'guilty' or 'not guilty', to the standard of beyond reasonable doubt.
11. If guilty, then the person is referred to as the 'offender' rather than the accused and is sentenced.

## TEXTBOOK: CHAPTER 1 – GENERAL PRINCIPLES

### DEFINITION OF CRIME

- Lord Aitken in *Propriety Articles Trade Association v AG (Canada)* said the only thing that made conduct criminal was that the state had prohibited it and had provided that a person who engaged in that conduct was to be punished
  - 'Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state'
- Much theoretical debate has been concerned with exploring the conditions under which individuals should be held morally and legally responsible for their conduct
- The reach of the criminal law is constantly increasing
- The time devoted to criminal cases by the judicial system is weighted heavily towards minor offences dealt with by the Local Court
- There is usually little value in arguing before a judge that the matter before the court should not be a crime if the legislature has said that the alleged conduct is a crime
- Lord Aitken's definition fails to take into account the growing range of conduct which looks criminal but is only 'punished' by what is classified as a **civil penalty**
  - The civil penalty process is one where a person can be ordered to pay a penalty without being classified as having been convicted of a crime
- The distinction between civil and criminal matters is unclear: punitive ends may be pursued in civil proceedings and conversely, the criminal process is frequently employed to attain remedial rather than punitive ends – J Frankfurter
- Criminal offences can be distinguished from non criminal offences because the latter are not criminal in any real sense but are acts which in the public interest are prohibited under a penalty
- Nearly all criminal offences are found in statutes
- Even decriminalising some conduct does not take the conduct outside the criminal law
- The matter of when a penalty is not a criminal penalty is to be resolved by statutory interpretation
- Where the legislature uses words such as 'offence' and provides that any penalty is to be imposed only after 'normal' criminal processes, the offence is a criminal offence
  - However, it is open to the legislature to provide for penalties that are determined by other means and these are not criminal penalties
- The standard protections of the criminal law can be abrogated by parliament – merely describing an offence as a 'criminal offence' does not guarantee the protections of the criminal law if parliament chooses to abrogate those protections
- Many crimes are well established and are accepted as examples of behaviour that should be prohibited and punished by the state where they occur
- The state can punish other conduct without relying on the criminal law eg. By imposing civil penalties
- The reach of criminal law is not subject to very real or practical restraints – parliament can choose to make merely 'inconvenient' conduct criminal eg. World Youth Day case

### ROLE OF CRIMINAL LAW

- Gleeson J identified the role of law as being to limit power, not just of individuals but also of governments and the state
- The criminal law is an example of the law operating to regulate the relationship between the state and the individual, particularly as the consequences for the individual of abuse of power by the state can be as significant as deprivation of freedom and liberty
- Gleeson also identified a purpose of the criminal law as being to keep peace so that people can lead their lives and go about their affairs in reasonable security

- The criminal law does this to a limited extent by attempting to control the behaviour of individuals for the protection of all
- The criminal law is used to prohibit conduct and threatens punishment for those who fail to obey these legal commands
- This legal prohibition and threat of punishment means that our liberty to do what we like is restrained by the criminal law, but this accepted as it promotes a safer environment where most people go about their business protected from interference from others
- *Community Protection Act 1994*: the Court can detain someone if they are satisfied that the person is more than likely to commit an act of violence
  - However the High Court found the law infringed the separation of powers
- Criminal law can usually apply only after the violence or damage has been conducted
- Therefore, the ability of the criminal law to stop people committing crimes depends on an individual's appreciation that their conduct is criminal, the likelihood of detection and prosecution, the person's fear of punishment, and their own socialisation into the values the law is purporting to uphold
  - But, most people who are in prison are there because they commit the same kind of crime over again

---

### RESTRAINING THE STATE

- The criminal law and the law of criminal procedure stand between the citizen and the state to ensure that the state does not take action against or impose a punishment on a citizen, except according to law
- The law provides a shield for individuals from arbitrary state action
- No person is to be found guilty of a crime and subject to punishment unless that guilt is based upon the law eg. Shown in Magna Carta
- It is a fundamental principle that guilt or innocence is determined by law not moral outrage
- Laws which provide for criminal sanctions should be in plain terms and the conduct for which punishment is imposed should be clearly identified and proved
  - Punishment should not depend upon assessments, value judgements, whether they are made by courts of law enforcement authorities