Element Analysis

Elements of a Criminal Offence

Physical
Proscribed action - always required (e.g. causing death of a human, having sexual intercourse without consent, causing harm).

Fault
Mental state - not always required (e.g. intention, recklessness, knowledge, belief, negligence)

Types of Offences

TYPE	EXAMPLE	PHYSICAL ELEMENT	FAULT ELEMENT	DEFENCE OF HONEST AND REASONABLE MISTAKE OF FACT
		Evidential Burden on Prosecution Legal Burden on Prosecution	*Evidential Burden on Prosecution Legal Burden on Prosecution*	
MENS REA / FULL FAULT	Rape Murder Assault Theft	YES	YES	NO
STRICT LIABILITY	Drive Under Disqualification	YES	NO	YES
ABSOLUTE LIABILITY	Produce Child Pornography Parking Speeding	YES	NO	NO

* Evidential burden on prosecution	have to prove why guilty
* Evidential burden on defence	have to prove why innocent

Fault Element
- **Mens Rea/Full Fault** = Prosecution has to prove beyond reasonable doubt that not only did the act occur but that it was intended to be performed (i.e. not only stole a computer, but was of the right mental state to choose to do such)
- **Strict Liability** = Prosecution does not have to prove mental state

Defence of Honest and Reasonable Mistake of Fault
Were unaware they were assisting or taking a part in the criminal act (i.e. lending a car to someone who didn't have a license, as they presumed he/she did in fact own one). Ignorance is not warranted however.

Defence to Strict Liability Offences
Defence of HRMF - *Proudman v Dayman* (1941) 67 CLR 536, 550 Dixon J:
"The burden of establishing honest and reasonable mistake is in the first place upon the defendant and he must make it appear that he had reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment."

Requires consideration of:
- Honest belief.
- Reasonable belief.
- Mistake - not ignorance or inadvertence.
- Of fact - not law.
- Would render conduct innocent.

Fault Elements

INTENTION - English Language Meaning *Zaburoni v The* Queen [2016] HCA 12	Proved by: – Words.

	– Conduct. – Inferences from words and conduct. – Forensics. – Context and history.
RECKLESSNESS - Technical Legal Meaning	• Turn mind to the consequences and act anyway. • Foresee consequences and act anyway. • Aware of risk and act anyway. *Intention; recklessness; reckless indifference; carelessness.*
KNOWLEDGE - English Language Meaning	• Rarely meaningful difference to intention. • Must be consciously aware at the relevant time. • Uncompromising definition - certainty.
BELIEF - English Language Meaning	• Less than knowledge. • More than suspicion.
NEGLIGENCE - Objective	• Reasonable person test or reasonable and sober person test (depending on offence). • Requires proof of a departure from a standard of care.

Process for Element Analysis Problem

THE LAW

Element Analysis
- Identify physical element
- Identify fault element
- Identify inherent statutory defences

THE CLIENT

Assessing Liability
- Clarify Definitions
- Voluntariness
- Apply facts to elements
- Apply facts to statutory defence

Strategy - Consider
- Seriousness of the offence (classification on the information, or penalty/Criminal Procedure Act 1921 (SA)
- Burden of proof
- Other defences
- Evidential issues affecting proof
- Alternative charges
- Whether to plead guilty, plead not guilty (explain grounds), negotiate alternative with police, other action

Element Analysis Example - Indecent Assault CLCA s56

	Physical elements	Fault elements
1a - Conduct - act	Physical contact or force	Intention
2 - Circumstance	Without Consent: s 46 Consent no defence if complainant < 17 years: s 57(2)	Knowledge Reckless indifference: s 47
	Indecent: *R v Harkin* (1989) 38 A Crim R 296 (by the standards of respectable people)	None

	PHYSICAL ELEMENTS	FAULT ELEMENTS
1a - Conduct - act	Engage in filming: S 26(1) interpretation film means take images by any means; image means a moving or still image,	Not specified - Intention implied

	and incudes an image that has been altered by digital or other means; Is the fault for the CONDUCT element implied? - consider the wording of the statute 1. English language meaning of 'engage' - sounds active and involved, conduct should have just been 'film' - suggest intention to film required. 2. Analogy - filming is lawful conduct that needs a particular circumstance to make it unlawful. In rape sexual intercourse must be intended; in indecent assault physical contact or force must be intended - suggests intention to film required. 3. Filing could be accidental - not requiring intention could conflict with principle of voluntariness - suggests intention to film required If implication of need to prove fault (only intention seems to fit in this case) is strong enough - no need for HKT analysis. STATE whether or not you need to use HKT analysis (don't just ignore it if you don't need it - state you don't need it).	
2 - Circumstance	Filming is humiliating or degrading: S 26(1) interpretation **Humilitating or degrading act**, in relation to a person, means - (a) an assault or other act of violence against the person; or (b) an act that reasonable adult members of the community would consider to be humiliating or degrading to such a person (but does not include an act that reasonable adult members of the community would consider to cause only minor or moderate embarrassment); **Humiliating or degrading filming** means filming images of another person while the other person is being subjected to, or compelled to engage in, a humiliating or degrading act, but does not include filming images of a person who consents to being subjected to, or engaging in, a humiliating or degrading act and consents to the filming of the act. Relating to 26D(1) indecent filming - circumstance: 1. All the definitions of 'indecent' relate to the victim not the defendant - may suggest fault is not required 2. Statutory defence included for 'consent' but not for 'indecency' - may suggest fault is not required 3. The element of indecency has no fault element in indecent assault - may suggest fault is not required If implication of need to prove fault is strong enough - no need for HKT analysis	Not specified - requires HKT
Result	N/A - person does not have to be humiliated or degraded	N/A
Statutory Defence	26D(2) It is a defence to a charge of an offence against subsection (1) to prove -	N/A

He Kaw Teh Analysis (HKT)

Purpose of He Kaw Teh Analysis

Caruso et al, South Australian Criminal Law and Procedure - Page 65: 'provides an authoritative statement of the principles that guide common law courts… as to whether prosecution prove fault with respect to one of more physical elements of the offence'.

HKT only determines what liability attaches to a particular offence – nothing about a particular defendant or a particular case.

HKT analysis requires consideration of the wording and purpose of the legislation, issues with its enforcement, and principles of criminal responsibility.

- There will be a box with new legislation in the problem question, or if not, there will be a He Kaw The.
- Doesn't matter when you do a He Kaw Teh, however need to do it before considering liability for the act.
- If unsure whether to do HKT, just do it

* Prosecution want full fault --> makes it on the defendant to prove fault was invalid
* Possession involves a mental element (only when you have the knowledge that you are in possession of something)

HKT Analysis is ONLY Needed Where:
- Fault is not expressed or implied
- New statute is involved, and doesn't specifically relate to scenario alone or old statute (i.e. rape).
- An offence does not specify whether or not a fault element is required.
- A statutory offence does not specify or imply whether a fault element is required (i.e. the words of the statute are inconclusive as to the requirement of proof of fault).

HKT Analysis is NOT Needed Where:
- Fault is expressed or implied
- The fault element is specified or implied in a statute e.g. rape
- The fault element has been established by case law e.g. murder
- To answer a problem question
- As soon as prosecution need to prove fault, HKT is no longer relevant.

Legislation
Customs Act 1901 (Cth) s 233B(1)

The Importation Offence
　　Any person who -
　　(b) imports, or attempts to import, into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies; or

The Possession Offence
　　(c) without reasonable excuse (proof whereof shall lie upon him) has in his possession, or attempts to obtain possession of, any prohibited imports to which this section applies which have been imported contravention of this Act;

　　shall be guilty of an offence.

The Why
He Kaw Teh v R (1985) 157 CLR 523

LOWER COURT: Wilson J 'the trial judge directed the jury that it was for the applicant to satisfy the jury on the balance of probabilities that he honestly and reasonably believed in the existence of a state of facts which if they had really existed would make his act innocent. That direction was upheld by the Court of Criminal Appeal'.

HIGH COURT: HKT appealed – arguing mens rea was required Why would D do that? HCA considered whether it was an offence of strict liability or full fault. Brennan J established a process that is still used when a statutory offence does not specify or imply whether or not a fault element needs to be proved. The process starts from the presumption of mens rea and then works through various issues to see if the presumption is rebutted and the offence is actually one of SL or AL. This process is the HKT analysis or method, based on presumptions that apply when the words of the statute are inconclusive as to the requirement of proof of fault.