

CRIM 2 FINAL EXAM NOTES

NB: all criminal liability offences you need to talk about defences

Table of contents

T1: INTRODUCTION AND REVIEW OF PRINCIPLES.....	4	FITNESS TO STAND TRIAL (s 6 CMIA)....	4
GENERAL	4	MENTAL IMPAIRMENT → S20 CMIA.....	5
ELEMENTS OF A CRIME	4	AUTOMATISM	29
JURISDICTION.....	5	DURESS	31
T2: CRIMINAL PROCEDURE	6	REASONABLE BELIEF	31
STEP (1): CATEGORISING THE OFFENCE	6	THREAT OF HARM	32
ARREST.....	6	THREAT WILL BE CARRIED OUT.....	32
ARREST WITH A WARRANT OR	6	ONLY WAY TO AVOID THE HARM	32
ARREST WITHOUT A WARRANT	8	REASONABLE RESPONSE	33
EXECUTING AN ARREST	9	VOLUNTARY ASSOCIATION	33
CONSEQUENCES OF UNLAWFUL ARREST	11	CONCLUSION.....	33
DETENTION, CUSTODY, QUESTIONING AND FORENSIC PROCEDURES	11	SUDDEN OR EXTRAORDINARY EMERGENCY	33
REQUIREMENT TO GIVE NAME AND ADDRESS	11	REASONABLE BELIEF	34
CUSTODY	11	WAS THERE A SEE?	34
QUESTIONING // once in custody //		ONLY WAY TO DEAL WITH THE SEE?	35
DUTIES AFTER ARREST	13	REASONABLE RESPONSE	35
FINGERPRINTING.....	16	CONCLUSION.....	35
FORENSIC PROCEDURES	17	INTOXICATION: ELEMENTS & DEFENCES	35
SEARCH AND SEIZURE	20	NEGATING ELEMENTS OF AN OFFENCE	35
SEARCH AND SEIZURE	20	USING INTOXICATION TO PROVE A DEFENCE ['Reasonable Person test']	37
BAILE	21	CONCLUSION.....	38
OTHER CRIMINAL PROCEDURE NOTES	21	ATTEMPTS	38
T3: CRIMINAL RESPONSIBILITY AND DEFENCES.....	4	AR S321N(1): ATTEMPT	38
		MR (s 321n(2)): INTENTION	40
		STEP 1 - INTENTION THAT PRINCIPAL OFFENCE BE COMMITTED	40
		STEP 2 - INTENTION OR BELIEF IN FACTS OR CIRCUMSTANCES	40
		VOLUNTARY DESISTANCE.....	41

IMPOSSIBILITY: FACTUAL + LEGAL	41
FACTUAL IMPOSSIBILITY	41
LEGAL IMPOSSIBILITY	42
PENALTY	42
PROPERTY OFFENCES	42
THEFT	43
Step 1: PROPERTY	44
STEP 2: BELONGING TO ANOTHER	45
STEP 3: APPROPRIATES	47
STEP 4: INTENTION TO PERMANENTLY DEPRIVE.....	49
STEP 5: DISHONESTY	51
STEP 6: CONTEMPORANEITY	53
STEP 7: PENALTY	53
OBTAINING PROPERTY BY DECEPTION	53
STEP 1: PROPERTY	53
STEP 2: BELONGING TO ANOTHER	54
STEP 3: OBTAINING	54
STEP 4: INTENTION TO PERMANENTLY DEPRIVE.....	54
STEP 5: DECEPTION	54
STEP 6: DISHONESTY	58
STEP 7: PENALTY	58
OBTAINING FINANCIAL ADVANTAGE BY DECEPTION	58
step 1: OBTAINING	58
STEP 2: FINANCIAL ADVANTAGE	58
STEP 3: DECEPTION	59
STEP 4: DISHONESTLY	59
STEP 5: PENALTY/CONCLUSION (not necessary unless specified)	59
ROBBERY	59
STEP 1: D STEALS	60
STEP 2: USE OF FORCE OR FEAR OF FORCE	60
STEP 3: TIMING – IMMEDIATELY BEFORE OR DURING	61
STEP 4: VICTIM	61
STEP 5: IN ORDER TO STEAL	62
STEP 6: CONCLUSION.....	62
ARMED ROBBERY – s75A	62
COMMITTED ROBBERY	62
D WAS ARMED.....	62
ITEM WAS WITH D	64
ARMED FOR THE PURPOSE OF THE ROBBERY	64
PENALTY	65
BURGLARY	5
STEP 1 ENTRY	6
STEP 2: TRESPASS.....	7
STEP 3: INTENTION TO COMMIT AN OFFENCE.....	8
STEP 4: CONCLUSION	9
AGGRAVATED BURGLARY – ARMED OR PERSON – s77	9
STEP 1 BURGLARY	10
STEP 2 AGGRAVATED	10
STEP 3 PENALTY/ CONCLUSION	72
STRICT AND ABSOLUTE LIABILITY ...	72
WHAT IS THE RELEVANT CONDUCT? .	72
IS THERE A FAULT ELEMENT (MR)?.....	72
step 1 LANGUAGE OF THE STATUTE	73
step 2 SUBJECT MATTER OF THE OFFENCE	74
step 3 POLICY CONSIDERATION	75
IS THE OFFENCE A SL OR AL OFFENCE?	76
did D do the prohibited conduct?	76
HRMF (Honest and reasonable mistake of fact) Defence	77
HONEST AND REASONABLE MISTAKE OF FACT (HRMF)	77
Did the accused make a mistake?	77
Mistake of fact not law	77
Honest and reasonable mistake.....	78
If mistake were true, would it have rendered D’s conduct innocent?	79
DRUG OFFENCES	79
IS IT A DRUG OF DEPENDENCE (DOD)	79
USE OF A DRUG OF DEPENDENCE – S75 DPCSA.....	80
DOD.....	81
USE OF A DOD	81
Intention to use.....	81
Authorised use?	82

CONCLUSION	82
POSESSION OF A DRUG OF DEPENDENCE – 73(1)	82
DOD	83
POSESSION.....	83
ATTEMPTED POSESSION	87
AR S321N(1): ATTEMPT	88
MR (s 321n(2)): INTENTION.....	89
AUTHORISED	90

CONCLUSION.....	90
TRAFFICKING	90
DRUG OF DEPENDENCE.....	91
CL TRAFFICKING.....	91
STATUTORY TRAFFICKING	93
QUANTITY OFFENCES.....	96
AUTHORISATION AND LICENSING ..	100
OVERALL CONCLUSION	100
ATTEMPTED TRAFFICKING	101

T3: CRIMINAL RESPONSIBILITY AND DEFENCES

INTRO FOR ALL: D bears the evidential burden of raising any relevant defences, and must prove a reasonable possibility that the defence is established. P bears the legal burden of disproving any defences if raised. If P fails to disprove, D is acquitted.

- Fitness to stand trial
- Mental impairment (NGMI)
- Automatism (Involuntary acts)
- Duress (pressured or threatened to act)
- Sudden or extraordinary emergency (necessity)
- Intoxication (drugs and/or alcohol)

NB: if it mentions to talk about mental state also talk about automatism!!!

FITNESS TO STAND TRIAL (*s 6 CMIA*)

(NEED THIS AND SUFFERS & CAUSED STEPS)

STATE: There is a presumption that every person is fit to stand trial (*s 7 CMIA, Eastman*). However, if there is a “real and substantial question” as to the accused’s fitness, an investigation must be held to determine whether they are unfit (*ss 8-9 CMIA; Eastman*). In order to make out s6(1) of unfitness to stand trial; the following must be proved; whether the accused suffers from at least one of the listed incapacities or will at some time during the trial, AND that the incapacity is caused by the accused’s impaired or disordered mental process.

- This may be raised at any stage of proceedings by prosecution, defence or judge
- The party raising the question of a person’s fitness to stand trial (*s 9 CMIA*) (prosecution/defence) bears the onus of rebutting the presumption on the balance of probabilities (*s 7(4) CMIA*).
 - o If the question is raised by the trial judge, the prosecution has carriage of the matter, but no party has the onus of proof (*s 7(5) CMIA*).
- The judge may require the accused to undergo a medical examination and require the results of that examination to be put before the court (*s.11(1)(b)(ii)-(iii)*).

1) LISTED INCAPACITIES

STATE: [D] is currently, or will be at some time during the trial, affected by one of the listed incapacities

Section 6(1) CMIA

1. A person is unfit to stand trial if, because D’s mental processes are disordered or impaired, D is (or will be at some time during the trial):
 - a. Unable to understand the nature of the charge;
 - b. Unable to enter a plea and exercise the right to challenge jurors or the jury pool;

- c. Unable to understand the nature of a trial as an inquiry into whether the accused committed the offence;
 - d. Unable to follow the course of the trial;
 - e. Unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
 - f. Unable to instruct counsel.
 - o *Given that D was instructing his solicitor and appears to understand the nature of the trial, D does not seem to be affected by a listed incapacity*
2. A person is not unfit to stand trial only because he/she is suffering from memory loss.

MENTAL IMPAIRMENT → S20 CMIA

NB: D's mental state is assessed at the time they do the acts

RED FLAG: *I thought I had to take the drugs because the voice in my head told me to.*

NB: in order to raise this argument you have to prove that (1) the accused was suffering from a mental impairment, and (2) that the impairment had at least one of the following effects (a) the accused did not know the nature and quality of the conduct OR the accused did not know that the conduct was wrong.

State: D is presumed to be sane and to have acted under their own will (**s 21(1) (CMIA)**; **Porter**), D bears the onus of rebutting this presumption and showing MI on the balance of probabilities (**s 21(3) CMIA**). D may argue that they were suffering from a “**disease of the mind**” (**M’Naghten’s Case**) and thus cannot be found guilty of [offence].

The defence may raise the question of mental impairment at any time during a trial or the prosecution may do so with the leave of the trial judge **s22(1) CMIA**.

STEP 1: WAS THE ACCUSED SUFFERING FROM MENTAL IMPAIRMENT

Step 1

State: For the defence of mental impairment to apply, D must have been suffering from a mental impairment **s20(1) CMIA**. This is undefined in the Act, so the common law tests for a “disease of the mind” applies. D will argue that they suffer from a mental impairment as they suffer from a “disease of the mind” *per M’Naghten*. It is to be noted that this is a legal term, not a medical term *per falconer*.

Step 2

State: D’s mental condition will be DOTM if it is the reaction of an unsound mind to its own delusions or external stimuli (as opposed to the reaction of a sound mind to external stimuli) *per falconer*.

BURGLARY

Red Flag: Trespass, outside of business hours,

NB for trespass; using something to allow them to enter → the premises indicates that they are doing so as a trespasser if they generally had the ability to walk in then they would enter through a regular door.

INTRO: D may be charged with burglary under **s76 CA**. A person is guilty of burglary if they enter any building or part of a building as a trespasser with intent to steal, commit an offence, assault a person in the building or damage the building of property s76 CA.

If clearly made out: On the facts, D has clearly entered a (part of a) building as a trespasser (s 76(1)). It is clear that _____ constitutes a building/part of a building ([Walkington](#)). Similarly, D does not have authority (explain – add sentence on authority?) ([Barker](#)). Moreover, it is apparent that D knew he did not have authority to enter ([Barker](#)), given that _____. Lastly, P will successfully argue that D entered the building with the intention to [offence] (s 76(1)(X); [Walkington](#)), as _____. Consequently, D will be guilty of burglary and will face a maximum of 10 years imprisonment.

STEP 1 ENTRY

State: When D [insert action], D entered a ‘building’ or ‘part of a building’ as [insert area is a building or part of a building] **s76(1)**.

- Whether a structure is a ‘building’ is a question of fact for the jury – taking into account size, weight, permanence of position, the presence of doors and locks, and the availability of electricity.
- Inhabited vehicles and vessels are treated as ‘buildings’ (s 76(2)).
- ‘part of a building’ does not need to be separated by walls or a physical barrier. It can be designated by **signs** such as “no customers beyond this point” ([Walkington](#))
 - e.g. can have burglary if a customer steps behind the counter to the cash register
- Jury to consider the extent of any **physical demarcations** ([Walkington](#))
- [Walkington](#) – D entered a closed off counter area in a Department store and rifled through drawer. **Held:** this was ‘part of a building’.

It is for the jury to determine whether D entered the ‘building’, or simply entered a space outside the building.

- Verandas?
 - A building is from the door in, so it is for the jury to determine whether D entered the building or simply entered a space outside the building. In the end it will depend on how much the veranda is part of the building.
- Putting your hand through the window and stealing something?
 - YES: an entry is made as soon as part of D enters the building.
- Using a crowbar to pull open a door?
 - NO: Need to actually enter the building
- Using an object to enter e.g. using a hook to take something?
 - YES: Where an object is used, “effective” entry is achieved.

NB: the more narrowly you define the area i.e. if you define it as an office the harder it will be to argue for aggravated burglary if they hear someone else, rather than entering the entire building.

STEP 2: TRESPASS

D must have entered the building (or part of a building) as a **trespasser** (s 76(1)). To prove this, D must have had no authority to enter and either known or been reckless to this fact (*Barker*).

A person does not enter a building as a trespasser if his or her entry is justified by **right, authority or permission** (*Barker*). This is a question of civil law.

NB: even if they access generally i.e. to a law building or because they work there, generally this is limited to certain times, thus the idea that they had to use a card to enter, indicates that they knew that they were not allowed during those certain periods of time

No right to enter on the facts OR

Given that D [had to obtain a card for entry to mimic someone else/ had to use a sledgehammer to break the window and enter] it is clear that they did not have authorisation or a general licence/right to enter per *barker*.

Then go to known and reckless!

Example: given that X obtained a swipe card and had to use it to enter, indicates that they have no authorisation or general license to enter the building

Right to enter

RED FLAG: someone making welcoming signs to come in, even if they thought they were someone else → no trespass, got permission to come in.

Some civil law rights to enter include:

- Where D has a paramount right to possession;
- Where D is given a statutory or common law right of entry;
- Where D's entry is due to an involuntary and inevitable accident;
- Where D has the licence of the person in possession of the property (*Barker*)

Permission/consent? can be express or implied

- Trespass is an entry without lawful authority or permission (which may be express or implied).
- Permission must be given by the person in possession or someone with their authority.
- Where permission is given for a *limited* purpose, entry **outside the scope** of the permission will
- be a trespass (*Barker*)
- If consent obtained by fraud → trespass;

- general consent to enter → no trespass ie. supermarket – if take goods, is theft but not burglary belief in consent need not be reasonable, just honest (*Collins*)

Known/ recklessness

- ‘Reckless’ means being aware that it was *probable* that s/he had no right or authority to enter the building (or its relevant part) but continuing regardless (*Collins*).
- **NB:** Is different from the mental state required for the third element – treat them separately.
- **Knew:**
 - Analogise; as the building lights were off, and [they had to obtain access] it was probable that [insert D] knew that that had no right to authority to enter the building, yet did so anyway per *collins*.
 - As D has waited for after hours to enter the premises and done it through the window, this clearly indicates that he had knowledge he is doing this as someone who does not have the authority to do so.

Collins – D climbed ladder to bedroom of V and saw her naked and asleep. Got undressed and climbed back to the windowsill. V woke up, thought it was her boyfriend & invited him in. They had sex but when V realised it wasn’t her bf, she slapped him & D left. D said he believed she was consenting. **Held:** Not a burglary. D thought he had consent bc V had said “come in”.

Barker – D’s neighbour told him where he kept a spare key and asked him to keep an eye on his house. D used key to remove property from house. D argued removed goods for protection. Neighbour said he had authority to enter but not remove goods. **Held:** was trespass. Entered for a purpose other than that for which he was granted permission.

- Shoplifting (obiter): will be impossible to prove in many instances that the D *entered* as a trespasser. Intention to steal may have arisen after entry or may have been accompanied by another intention/purpose which brought D within ambit of shopkeeper’s implied invitation.

STEP 3: INTENTION TO COMMIT AN OFFENCE

D must have entered the property **intending** to steal (*s76(1)(a)*) or commit one of the offences prescribed in *s 76(1)(b) CA*.

- *To steal, commit an offence involving assault to a person in the building or part of it, or involving damage to the building or to property in it.*
- *****having a look is not intention!***

D must have had the relevant intention at the **time of entry**, and formulated beforehand, not after (*Walkington*).

Intention to steal

Per *s 76(1)(a) CA*:

- The prosecution need not prove:
 - That D intended to steal a specific item OR
 - That D actually stole something OR
 - There was anything on the premises worth stealing (*Walkington*).

- All that needs to be proven is that D intended to steal “anything in the building”.
 - To do this, the MR elements of theft (IPD and dishonesty) need to be made out (see above).
 - However, if D believes they have a legal claim of right, then there will be no intention to steal.
- Conditional Intention: If D intends to steal anything of value, not knowing what is there, this is sufficient (**Walkington; AG’s Reference Nos 1 and 2 of 1979**).

Although D may argue that their intention was only to get the exam and get out, the prosecution would likely argue, that their intention was to take something from the building as how else were you intending on getting the exam?

OR

Intention to assault

The prosecution must prove that D entered the building with the intention of committing an offence punishable by imprisonment for a term of five years or more that involves an assault to a person in the building or unauthorised part of the building.

- Whether a particular offence is an offence ‘punishable by imprisonment’ for any particular term is a question of law for the judge (not a jury question).

Common law assault the person

- Common law assault is punishable by imprisonment for a term of five years
- If intention to commit common law assault is alleged, the prosecution must prove:
 - D intended to apply force to body of a person in (part of) building; or (**Fagan**)
 - D intended to cause a person in the (part of the) building to apprehend the immediate (**Fagan**) application of force to his or her body.
- Consider possible defences to the assault (e.g. consent).

Intention to damage property

The prosecution must prove BRD that D entered the building with the intention of committing an offence punishable for a term of five years or more that involves damage to the building or to property in the location (**s 76(1)(b)(ii) CA**).

- D intended to damage building or property (arson or criminal damage).
- Doesn’t matter if they actually do it – it is about what their intention is when they enter

STEP 4: CONCLUSION

CONCLUDE: D is likely not/guilty of burglary which is an indictable offence.

- punishable to level 5 imprisonment (10 years max) (**s76(3) CA**).

AGGRAVATED BURGLARY – ARMED OR PERSON – s77

D may be charged with aggravated burglary while armed (**s 77(1) CA**).

NOTE: Only need to show that EITHER D was armed OR a person was present to make out aggravated burglary (s 77(1) CA). *Only need to establish 1 of these!!*

STEP 1 BURGLARY

P must prove all the elements of burglary BRD (see above).

STEP 2 AGGRAVATED

ARMED OR PERSON PRESENT

ARMED OR

P must prove that when D committed burglary, they were armed (s 77(1)(a) CA).

- same as under armed robbery - see above if discussed

Choose from below list and go to relevant section

- A firearm;
- An imitation firearm;
- An offensive weapon;
- An explosive; or
- An imitation explosive.

Firearm

‘Firearm’ is defined to have the same meaning as given in s 3 of the Firearms Act 1996 (s77(1A) CA).

Broadly includes devices that are:

- Designed or adapted to discharge shot, bullets or other missiles.
- By the expansion of gases or by compressed gas.
- Some items are excluded by definition.
 - E.g. Underwater spear guns; flare devices

Imitation Firearm

An ‘imitation firearm’ is anything which has the appearance of being a firearm, whether or not it is capable of being discharged (s 77(1A) CA).

- A water pistol that looks like a gun will make an armed robbery. A bright yellow and pink, obviously plastic super soaker will not.

Explosives or Imitation Explosives

An ‘explosive’ is any article that is:

- Manufactured for the purpose of producing a practical effect by explosion; or
- Which the accused intends to have that purpose (s 77(1A) CA).

An ‘imitation explosive’ is any article which might reasonably be taken to be, or to contain, an explosive (s 77(1A) CA).

Offensive Weapon

CA s 77(1A): Offensive Weapon means any article made or adapted for use for causing injury to or incapacitating a person, or which the person having it with him or her intends or threatens to use for such a purpose.

NB: using a weapon for entry and not intention to hit someone if they came is unlikely to satisfy this!

An 'offensive weapon' is any article which:

- Per **s 77(1A) CA** is made for causing injury or incapacitation to a person; or
 - Knuckle Dusters
 - Swords
 - Nun-chuks
 - Not a pocket knife (**Woodward**)
- Per **s 77(1A) CA** is adapted for the use of causing injury or incapacitation to a person; or
 - E.g. an intentionally broken bottle (**Nguyen**)
 - Must be “the making of some physical change in the article”(per Charles JA in **Nguyen**)
- Per **s 77(1A) CA** the accused threatens or intends to use for the purpose of causing injury or incapacitation to a person; or
 - E.g. a walking stick
 - If only carrying it for defence is not ‘offensive’ (**Wilson**)
 - Offensive weapon requires an “aggressive purpose” for having it (per McGarvie J in **Wilson v Kuhl**), such as using it in “attack or combat” (per Cavanough J in **Woodward**).
- Phrase “intends to use” requires that “the person has formed the necessary intent and occasion to use violence arises” (Per Lord Widgery in **Ohlson**)
 - Kitchen knives commonly used for this, hammer, axe, shovel, baseball bat, walking stick and cricket bat

NB:

- *Self defence for a machete – unlikely as they were entering the premise knowing someone was there - choice of weapon may diminish your argument*
 - *Second category – simply something that is falling outside of that - focus is on what purpose did you carry that.*
- D must have had the weapon with them for the purpose of the burglary (i.e. to steal/assault/damage property).
 - Offensive weapon if not carried for defensive purposes (**cf Woodward**).

NB;

- The sledge hammer was used to facilitate the entrance, s77 lists a number of features pointing to whether someone was armed, one of those is an offensive weapon. Here a sledgehammer could arguable be adapted for the purposes of the application of force, but we know from the decisions that there has to be intentionality behind the use of it in order to suggest it is an offensive weapon. Thus in this instance the sledgehammer is being used to open the window, and when he is accosted by the security guards he

is startled and this is not the same as what would be needed to be satisfied for armed burglary.

Section 77 of the *Crimes Act 1958* (Vic)

Aggravated burglary

(1) A person is guilty of aggravated burglary if he or she commits a burglary and—

(a) at the time has with him or her any firearm or imitation firearm, any offensive weapon or any explosive or imitation explosive; or

(b) at the time of entering the building or the part of the building a person was then present in the building or part of the building and he or she knew that a person was then so present or was reckless as to whether or not a person was then so present.