

# Week 1 - Modules 1 and 2 Introduction, Principles, Criminal Responsibility and Elements

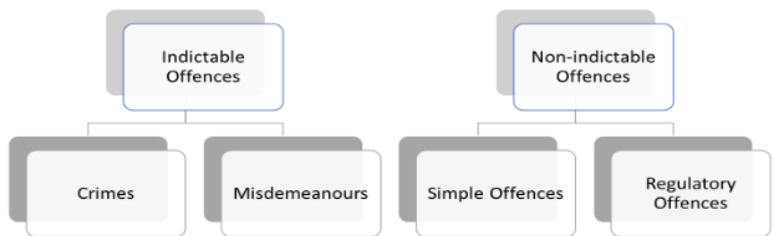
## Nature of criminal law

- ***Mala in se*** (moral wrongfulness/traditional crimes)/
- ***Mala prohibita*** (modern regulatory offences. Wrong as legally prohibited)

Differentiation has no direct legal consequence

(Colvin 1.4)

Consider: Why does society regulate criminal conduct?



## s 3(2) QCC: Criminal Offences

### Classification of Criminal Offences (II)

#### Indictable offences: Crimes and Misdemeanours

- May or sometimes must be tried in superior courts (District Court, Supreme Court). Superior courts: traditionally judge and jury but now also possibility of judge only trial.
- Sometimes magistrates can hear indictable offences summarily, see ss 552A-552BA QCC
- Indictment: Form of charge that initiates proceedings (def s 1 QCC)

#### Non-indictable offences: Simple offences and Regulatory offences

- Person may be 'summarily convicted' by a Magistrates Court. See, eg: Regulatory Offences Act 1985 (Qld) (some property offences of low value), Summary Offences Act 2005 (Qld)

### Summary vs Indictable Offences

Feature	Summary Offences	Indictable Offences
<b>Seriousness</b>	Less serious	More serious
<b>Examples</b>	Drunk & disorderly, traffic offences, minor assaults	Murder, robbery, sexual assault
<b>Court</b>	Magistrates' Court	District or Supreme Court
<b>Judge or Jury?</b>	Magistrate only (no jury)	Usually judge and jury (or judge alone in some cases)
<b>Speed of Trial</b>	Faster and simpler	Slower and more complex

#### Section 9 PSA- Sentencing guidelines

(1) The only purposes for which sentences may be imposed on an offender are—

- to punish the offender to an extent or in a way that is just in all the circumstances; or
- to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
- to deter the offender or other persons from committing the same or a similar offence; or
- to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
- to protect the Queensland community from the offender; or
- a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

Feature	Summary Offences	Indictable Offences
<b>Legal Representation</b>	Not always required	Usually recommended due to seriousness
<b>Penalties</b>	Fines or short-term imprisonment	Longer prison sentences, harsher penalties

### Nature of Sentencing (I)

- **s 9(1) PSA: Purposes of Sentencing**
- Sentencing Guidelines (Mitigating circumstances take off time, aggravating adds time)
- Just punishment in all circumstances
- Rehabilitation of offender (potentially not effective)
- Deterrence of the offender and other persons from committing same or similar offences
- Denunciation of such behaviour by society (acting through court)
- Community protection from the offender

### Nature of Sentencing (II)

- In sentencing, courts should have regard to maximum and minimum penalties, s 9(2) PSA.
- Parliament provides maximum penalties for offences and sometimes mandatory sentences. Even if maximum penalty is life, offender could be sentenced to less depending on the case (if it says 14 years, must mentally insert 'up to') Murder is the only offence with a mandatory- 'life in prison' – parole at 20, first application, every 2 years.

### Nature of Sentencing (III)

- Principle of imprisonment as a last resort. See: s9(2)(a)(i)(ii) PSA
- a sentence of imprisonment should only be imposed as a last resort; and
- a sentence that allows the offender to stay in the community is preferable

### Nature of Sentencing (IV)

- Courts should have regard to the impact of the offence including any physical, mental or emotional harm done to a victim as well as the effect of the offence on any child under 16 years who was exposed to or witnessed the offence, s 9(2)(c) PSA.
- But they should also have regard to the hardship any sentence would have on the offender, s 9(2) (fa) PSA, the offender's family members if they are the primary carer, s 9(2)(fb)(i) and the child if the offender is pregnant, s 9(2)(fb)(iii).

## Overview of relevant offences for this course

- **Homicide:** protects the right to live
- **Non-fatal offences against the person:** protects a person's physical integrity
- **Sexual offences:** protects the right to choose whether and with whom to engage in sexual intercourse
- **Property offences:** protects the right own property and to control it

## Sources of Criminal Law

- **Australia** = Criminal law mainly matter of State and Territory jurisdiction rather than Commonwealth (criminal law not reserved to CW Parliament by Commonwealth of Australia Constitution Act 1900).
- **State/Territory legislation** can sanction conduct occurring within their territorial boundaries
- **Commonwealth** has supplementary power to create criminal offences in areas of spec. const. jurisdiction (e.g. external affairs, trade, commerce etc.)
- **State and Commonwealth** sources of law operating in Qld
- **Criminal Code (Qld) Schedule 1 to Criminal Code Act 1899 (Qld) ('QCC')**
- **Criminal Code 1995 (Cth):** Commonwealth criminal law/Commonwealth offences/Commonwealth juris.

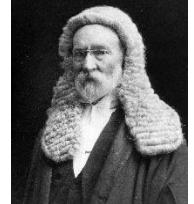
- **Other acts** can also include criminal offences for Qld: See: e.g.: Drugs Misuse Act 1986 (Qld); Crimes Act 1914 (Cth)

## Common law' and 'Code' jurisdictions

- 'Code' jurisdictions in Australia (Qld, Tas, NT, WA, ACT): Codes as comprehensive statements
- 'Common law' jurisdictions (NSW, Vic, SA): Reliance on numerous statutes and common law (judge made law)

## Criminal law in Qld

- Major work undertaken by Sir Samuel Griffith 'The Griffith Code' (was Premier of Qld, Qld Chief Justice and Chief Justice of HC of Australia). **Code came into force in Qld in 1901**
- "Griffith Code" adopted by WA in 1902
- Since then, many amendments of act, e.g. criminal procedure
- The one exception that all offences must be based on statute is Contempt of court CCA s8
- Some offences in statutes not the code Prostitution Act 1999 (Qld) Transport Operation Act 1995 (Qld) Drug Misuse Act 1986 (Qld)
- Ambiguity can be resolved in common law such as wilfully R v Lockwood (1981)



## Structure of the QCC

Part 1: Introductory (including definitions)

Part 2-6: Criminal offences

Part 7: Extension of criminal liability

Part 8: Criminal procedure

## Code interpretation (See: Colvin: 1.20-1.23)

- Generally read code on its own (code marks a break from common law). Read according to ordinary and natural meaning. Generally: do not refer to pre-existing or current common law (*Johnson v R* [1964] Qd R 1)
- Do not go outside Code for interpretation unless:

*Brennan v the King* Dixon J said the code itself works do not bring in common law principles = **literalism** (*Bank of England v Vagliano Bros*):

- **Technical meaning of code**
- **Ambiguity of wording**
- **Gap**

Where ambiguity in the penal code interpret in favour of the accused (*Beckwith v R*)

Code has evolved over time: See, eg: computer related criminal provisions: s 408E QCC; also evolved due to judicial

## Importance of case law

- Law in Qld is code based but explained, interpreted and applied in case law
- **Doctrine of precedent: Superior court decision within Qld court hierarchy are binding on lower courts.** Decision from other jurisdictions are persuasive, where laws are similar (e.g. WA has 'Griffith code' but decisions from WA only persuasive value for Qld as different jurisdictions)
  - high-supreme -district-magistrate

## The Burden of proof

## Evidential/persuasive burden and standard of proof (I)

QCC as such silent on matters of proof

Burdens of proof adopted from common law (*Woolmington v DPP*) *Viscount Sankey's best work*

Burdens of proof follow from Presumption of Innocence  
(presumed innocent until proven guilty or pleaded guilty)  
Woolmington got its first run in Qld R v Mullen (1938) 59 CLR 124

Burden can go to the accused- issue of insanity proved balance of probabilities Code s 26

## Evidential/persuasive burden and standard of proof (II)

### Burden of proof:

Who must proof a particular fact?

The person who carries the **evidential burden** must produce sufficient evidence for a particular proposition to persuade the trial judge to consider the issue.

The accused carries evidential burden in respect to mental impairment R v Menniti (1985)

The **persuasive burden** (sometimes referred to as the legal burden) means that the person deciding on the facts (jury, or in case of judge alone trial, the judge) needs to be satisfied of the existence of certain facts to the required standard.

- Where the law has been reversed and the burden shifts, the balance of probabilities, as because the abilities and resources are much lower.

## Evidential/persuasive burden and standard of proof (III)

Standard to which certain facts have to be established.

The standard of proof for the prosecution is mostly 'beyond a reasonable doubt'.

- In cases, where the burden of proof shifts onto the defendant ('reverse onus') the standard of proof for the defendant is generally the lower standard of 'on the balance of probabilities'.

- R v Dookheea (2017) not any doubt, but reasonable doubt
- Thomas v R (1960) *a comfortable satisfaction*
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Every person presumed sound mind QCC s26  
insanity QCC s27  
provocation QCC s 304  
Diminished responsibility QCC s304A  
Above 16 QCC s 215(5)

## Evidential/persuasive burden and standard of proof (IV)

### General rule:

- Prosecution carries the burden of raising on the evidence (evidential burden), and proving (persuasive burden) beyond a reasonable doubt (standard of proof) all elements of the offence (including physical and mental elements of the offence) and negating any possible excuses and defences.
- In regards to excuses and defences under the QCC the defence must raise the issue on the evidence (evidential burden) and the prosecution must generally disprove it (persuasive burden) beyond a reasonable doubt (standard of proof).

## Evidential/persuasive burden and standard of proof (V)

- Prosecution ordinarily has **evidential and persuasive** burden of proof (regarding all of the elements of the offence and for negating possible defences and excuses)
- If prosecution is unable to meet the burdens of proof then **presumption of innocence** remains.

- Burden of proof can be reversed and placed on the accused ('reversed onus').
- In this case the defence carries the burden of raising the issue on the evidence (evidential onus) and proving (persuasive burden) it generally on a balance of probabilities (standard of proof), e.g. killing on provocation, s 304(9) QCC: and insanity
- 'On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only'

## Evidential/persuasive burden and standard of proof (VI)

- Burden of proof can be reversed and placed on the accused ('reversed onus').
- In this case the defence carries the burden of raising the issue on the evidence (evidential onus) and proving (persuasive burden) it generally on a balance of probabilities (standard of proof), e.g. killing on provocation, s 304(9) QCC:
- 'On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only'
- Braysich v R (2011) evidential burden suggest a reasonable possibility something does or does not exist.
  - Brennan vs King – **Follow the code**, it replaced common law

R vs Hutchinson (2003) s 49 displaced the ordinary common law evidential rules

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For other examples of reverse-onus provisions, see Code (Qld) ss 210(5), 215(5) (reasonable belief that a sexual partner is 16 years or above); Code (Qld) s 304(9) (defence of provocation to murder); Drugs Misuse Act 1986 (Qld) s 129(c); Misuse of Drugs Act 1981 (WA) ss 6(3), 7(3) (lawfully prescribed drug).

## Others

*Provocation in assault cases QCCss268 and 269; Self-defence QCC ss271 and 272; Killing for preservation in DV QCA s 304B; accident QCC s 23(1)(b)Mistake of fact QCCs24 and sane automatism QCCs23 (1) (a)*

R v **Falconer** (1990) 171 CLR 30 The court's decision also addressed the burden of proof in automatism cases. It established that the prosecution must prove beyond reasonable doubt that the accused's actions were voluntary, not that the accused must prove their automatism

**Diagram 1.1: Proof rules**

	Legal burden of proof (persuasive onus of proof)	Evidential burden (evidential onus)
<b>Elements</b>	Prosecution	Prosecution
<b>Defences</b>	Prosecution	Accused
<b>Insanity and statutory exceptions</b>	Accused	Accused

## Module 1: Tutorial Question Introduction LAW1121/5121 Criminal Law and Procedure/Advanced Criminal Law and Procedure

1. To punish or not to punish- *Clara Weston can not be punished nor can her adultery be used in divorce we have a no-fault divorce under the Family Law Act (1975)*
2. The bad sentence *The judge can not use his personal knowledge; the sentence must be applicable to all as set out in 9 1 (a) to punish the offender to an extent or in a way that is just in all the circumstances; or*
3. The law Australia is a **common law country**, meaning that **court decisions (case law)** play a key role in shaping the law. However, in **Queensland**, the **Criminal Code Act 1899 (QCC)** is the **primary source of criminal law**, and it **overrides the common law** in most criminal matters. Western Australia law is similar as per Samuel Griffith but can be persuasive not binding. /unless it's the High Court. Burden of proof is a burden to prove by the prosecution beyond all reasonable doubt. It has been said it must be a "comfortable satisfaction"- **Dixon J** in **Briginshaw v Briginshaw** (1938)

## Module 2: Criminal Responsibility (including Criminal Liability of Youth, Act Independent of Will and 'Accident') and Elements of Crime

- the elements of an offence.
- the interplay between elements, excuses and defences.
- concepts relating to criminal responsibility including criminal responsibility of young people.
- concepts relating to act independent of will and unintentional and unforeseeable act 'accident', s 23(1), (1A) QCC.

### Suggested structure for assessing criminal responsibility

- I. Physical elements; Can the physical elements of the offence be established?
- II. Mental elements Are certain mental elements required for the offence according to the QCC? If so, can the mental elements of the offence be established?
- III. Defences and excuses Do defences or excuses or justifications exist that could affect the criminal liability of the accused?

### I. Elements of Criminal Responsibility

- s 2 QCC 'an act or omission which renders the person doing the act or making the omission liable to punishment is called an offence'
- Prosecution generally **has the burden of proof to establish** the elements of an offence beyond a reasonable doubt.

#### I. Physical elements

Can the physical elements of the offence be established?

#### II. Mental elements

Are certain mental elements required for the offence according to the QCC? If so can the mental elements of the offence be established?

#### III. Defences and excuses

Do defences or excuses or justifications exist that could affect the criminal liability of the accused?

#### IV. Conclusion

