

Criminal Law and Procedure

Week 1: Introduction to Criminal Law + Fundamentals of Criminal Law

Questions to Frame Intro Reading

- What is a crime?
- What are the principles behind criminalising (or not) certain conduct?
- What are the purposes of criminal law?
- What is the difference between the legal and evidential burdens of proof?
- What is the difference between 'beyond reasonable doubt' and 'balance of probabilities'?
- What are the types of mens rea?
- What is the difference between strict and absolute liability?
- How do we approach a statute creating a criminal offence that is silent as to the applicable mens rea?
- Can self-induced intoxication render conduct involuntary?
- Can self-induced intoxication be taken into account in establishing mens rea?
- What is an offence of specific intent?

Readings

Criminal Law and Procedure in New South Wales 7th Edition, Chapter 1

Definition of Crime

- Lord Aitken in *Proprietary 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. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard, but one: is the act prohibited with penal consequences? Morality and criminality are far from coextensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality – unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. "
- Under this approach, we can identify what is criminal by looking at the common law and statutes prohibiting various forms of behaviour and asking whether the two essential characteristics of a crime are present:
 - Is the conduct prohibited?
 - Is the consequence of engaging in the prohibited conduct punishment?
- Bronitt and McSherry – "has been concerned with determining the legitimate conditions, in both moral and political terms, of criminal liability and punishment...As a consequence, much

theoretical debate has been concerned with exploring the conditions under which individuals should be held morally and legally responsible for their conduct.”

- Not key element addressed in this textbook
- Evans v NSW (2008) 168 FCR 576; 250 ALR 33
 - applicants intended to engage in conduct that would involve handing out material such as condoms and talking to pilgrims about the teachings of the Catholic Church on issues such as abortion and homosexuality
 - Sought a declaration that the laws were invalid, infringing rights under the Australian Constitution to engage in free political speech
- Was a situation where potentially affected citizens were able to argue that the reach of the criminal law had been impermissibly extended.
 - Court found term ‘annoyance’ too wide + struck down that part of the regulation, meaning a person could be directed to cease conduct that was a risk to safety or inconvenient or caused an obstruction, but not conduct that was merely annoying
- A crime is a crime when the legislature or the common law has determined that such conduct is prohibited and the consequence of engaging in that conduct is punishment, as opposed to another legal remedy such as an obligation to make good the damage incurred from failing to specifically perform one’s obligations.
- It is possible to try to distinguish ‘criminal’ offences from other, 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,’ whereas the former are ‘truly criminal’
- Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd
 - Shows that regardless of how a statutory provision is classified, the standard protections of the criminal law can be abrogated by parliament if it so chooses.
 - Merely describing an offence as a ‘criminal offence’ does not guarantee the protections of the criminal law if parliament chooses to abrogate those protections
- HC Considered the difference between criminal sentencing proceedings and civil proceedings involving monetary penalties in determining whether a practice that the court had laid down for sentencing in criminal matters should also apply in proceedings for determining civil penalties.
→ made comments as to the difference between the purposes of proceedings for civil penalties and sentencing for criminal offences.

Role of Criminal Law

- The Chief Justice of Australia argued that justice and liberty survives only in a community where there is respect for the principle that ‘we are ruled by laws and not by people.’
 - Identified the role of the law as being to limit power, not just of individuals but also of governments and the state.
 - 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
 - The Chief Justice also identified a criminal law purpose as being ‘to keep the peace, so that people can lead their lives, and go about their affairs, in reasonable security.’

- Does this to a limited extent by attempting to control the behaviour of individuals for the protection of all.
 - CL used to prohibit conduct, such as deliberate killing, driving in excess of the speed limit, or failing to lodge a tax return, and threatens punishment for those who fail to obey these legal commands. → means our liberty to do what we like is, to some extent at least, restrained by the CL, but this is accepted as it promotes a safer environment where most people can go about their business protected from interference from others.
- NSW Parliament passed Community Protection Act 1994, perhaps in recognition of CL's limited ability to control aberrant human behaviour. → designed to give the Supreme Court of NSW power to order Gregory Kable to be detained in prison, for what he might do. → if the court is satisfied he is 'more likely than not' to commit an act of violence, he could be detained in prison for up to 6 months.
 - When considering whether the Act was a valid law, Mahoney JA identifies problems that the Criminal Justice system has with preventing crime – *“one of the essential purposes of the criminal law, if not its fundamental purpose, is to protect men and women against violence. There is, it has been suggested, a gap in the protection which traditionally the criminal law affords...To an extent, these provisions and provisions of this kind provide safeguards against A doing violence to B in the sense that, if his violence be sufficiently apprehended, he may be arrested and held in custody to answer such charges. But it is, I think, accepted that in principle the fact that A firmly intends to murder or to do violence to B tomorrow does not provide a basis as such for the arrest and detention of A so as to prevent that violence being done.”* – **Kable v DPP (1995) 36 NSWLR 374 NSW Court of Appeal**
- Criminal law is difficult to use when restraining the behaviour of individuals → the criminal law can usually apply only after the violence or other damage has been perpetrated → ability of crim law to stop people committing crimes depends on an individual's appreciation that their conduct is criminal, the likelihood of detection and prosecution, person's fear of possible punishment, and their own socialisation into the values that the law is purporting to uphold.

Restraining the State

- Crim law and law of criminal procedure stand between the citizen and the state to ensure the state (police + gov) does not take action against or impose a punishment on a citizen, except according to law.
- The law, including crim law, *'provides a shield for individuals from arbitrary state action.'*
- Fundamental tenet of our system of justice that no person is to be found 'guilty' of a crime and subject to punishment unless that guilt is based upon the law. (handed down since magna carta → *“(39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land. (40) to no one will we sell, to no one deny or delay right or justice.”*

- Is a fundamental principle that guilt or innocence is determined by law, not by moral outrage, likes or dislikes. *Mahoney JA Kable v DPP (1995) 36 NSWLR 374* → *Laws which provide for criminal sanctions should be in plain terms; the conduct for which punishment is imposed should be able clearly to be identified and proved; and, as far as may be, that which is to be punished should not depend upon assessments, value judgements, or the like, whether they are made by courts or law enforcement authorities.*
- The crim law + processes of crim courts stand between state and citizen to ensure these rules are **observed**
- Role of crim law as a limit on the state powers is also reflected in the need to ensure a fair trial

Bill of Rights

- Without a bill of rights, protection offered by criminal law is limited
- Under the European Convention on Human Rights (ECHR), certain rights and protections are guaranteed to members of the European Union who face criminal charges
 - If a member state labels some penalty as something other than 'criminal' penalty and provides some process other than the normal criminal process, the rights protected by the ECHR would be meaningless
 - ECHR does not look at the mere label that is applied to a provision, but to the actual substance of what is involved (*Han v Commissioners of Customs and Excise*)
- Under Eu Law, mere classification by legislature that a provision is not criminal does not determine the matter. Rather, an Aus legislature can draw a distinction between civil and crim penalties by use of words and procedure → the protection that could be provided by the crim law, without a binding bill of rights, is reasonably weak.
- Without a BoR, NSW courts can't determine that a penalty is correctly labelled criminal, insisting that any accused person must be given the standard protections of criminal law e.g right to face his/her accusers in a trial governed by law + the case be proved beyond reasonable doubt.

Burden of Proof

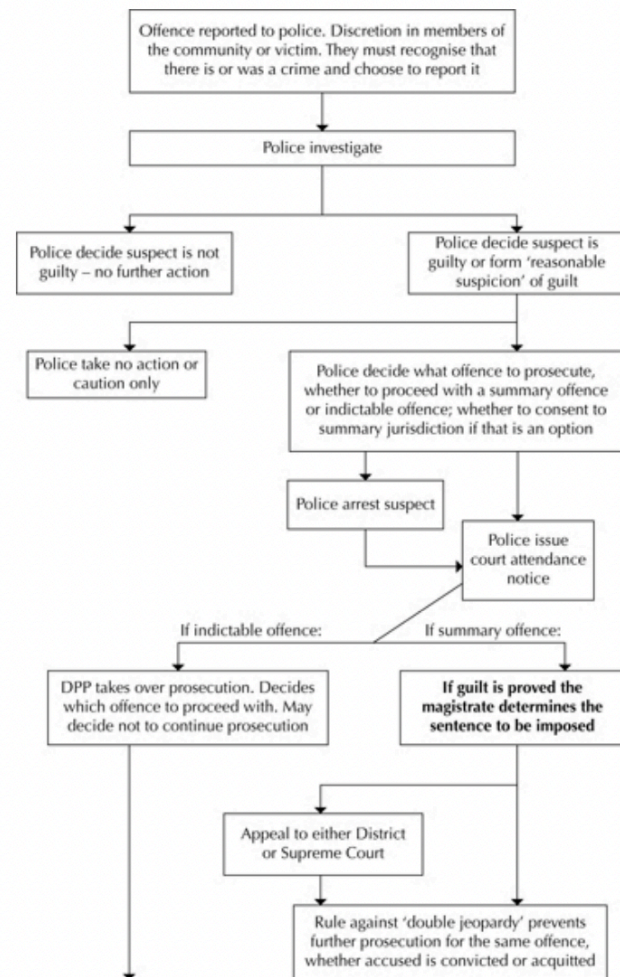
- Person should be found guilty of an offence only if the state can satisfy the jury, or the magistrate or judge if there is no jury, that the accused is guilty 'beyond reasonable doubt.'
- HC has further considered directions on 'beyond reasonable doubt' and what it is permissible to say in explanation of the concept
 - *Darkan v R (2006)* → the court referred to its stand against any explanation of the concept as an 'extreme and exceptional' one that proceeds from a perception that any explanations are 'most likely to exacerbate a jury's uncertainties than alleviate their concerns'.
 - *R v Dookheea (2017)* → court held there was no error for a trial judge to contrast 'reasonable doubt' with 'any doubt,' although there is a risk of obfuscating the jury's understanding of the task.
- Crown must prove the elements of an offence, and defendant does not have to offer any rebuttal
- The accused has to raise a doubt about the prosecution case, and is then entitled to the benefit of that doubt;

- In some cases, burden to prove a defence does fall upon the accused, where the accused relies on the defence of mental illness or substantial impairment due to abnormality of mind, or where a particular statute places the burden of proof on the accused (*Crimes Acts 527C(2)*).
 - Accused need only prove the defence ‘*on the balance of probabilities.*’ → (*Evidence Act 1995 (NSW) s 141 (2)*) **141 Criminal Proceedings: standard of proof (2) in a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities**

Discretion

- Helps shape the outcomes of criminal law by deciding who will be charged with criminal offences, and what charges will be laid. → crim law is influenced by many players (public, police, lawyers, judiciary, jury, populist media), bringing to bear a variety of often conflicting perspectives.

FLOW CHART 1-1: DISCRETION



- Court has the power to refuse to hear a prosecution if to hear it would breach the rule against double jeopardy (*R v Carroll (2002) 213 CLR 635; 194 ALR 1*) or amount to an abuse of process of the court’s jurisdiction, e.g because the prosecution is bound to fail (*Ridgeway v R (1995) 184 CLR 19; 129 ALR 41*), or it is oppressive, or the trial has been rendered unfair by delay or other prosecution conduct
 - DISCRETION FLOW-CHART → **Bold:** Decisions made by judicial officers (magistrates/judges) in open court where parties are entitled to address the court + officers are required to give reasons for their decisions.

- Discretions occur at all levels of the process:
 - Person may witness a crime and choose not to report it, or give evidence about it
 - Police officer decides who to charge, and with what offence
 - If it is a serious offence, the prosecuting authority, DPP, may decide to charge the person with some other offence, or to drop the prosecution altogether – a ‘no bill.’
 - Magistrate may decide there is insufficient evidence to go before a jury, and discharge the defendant
 - The DPP may decide to prosecute a person, even though a magistrate has dismissed the charge.
 - Jury may decide to acquit a clearly guilty person
 - Judge or magistrate decides what punishment to apply
 - The Court of Criminal Appeal, in quashing a conviction, may acquit the appellant or order a new trial.

Role of Lawyers

- It is imperative both sides are represented by competent and ethical lawyers
- Primary Duty of lawyers for prosecution and accused, is to the court and the process, and not to their respective clients. → both sides have similar obligations, although coming to their tasks from differing perspectives.

Prosecutors

- Reps the state, not the victim (if there is one)
- Their duty is to ensure all evidence is fairly and accurately put before the court.
 - In Local Court summary proceedings, prosecutor is generally a police prosecutor who represents the police informant
 - Prosecutors can also be appearing on behalf of a government agency in offences falling under specific categories, such as environmental offences
 - In higher courts, prosecutors is DPP who prosecutes on behalf of the Crown (i.e the state)
- **Prosecutor obligations (enforced by court)**
 - Full disclosure to defence of any material that might be relevant to the conduct of the defence case, incl. Material relevant to the credibility of a crown witness or the cross-examination of a crown witness (*Grey v R (2001) 184 ALR 593; [2001] HCA 65*)
 - Calling all relevant witnesses in the prosecution case whether the witness assists the prosecution case or not, so there should be a good reason for failing to call a witness who appears to be relevant: *Apostolides v R (1984)*
 - When addressing the jury, avoidance of inflammatory language or prejudicial statements; comments belittling or ridiculing defence case; making a submission that does not accord with the evidence or conveying to the jury the prosecutor’s personal opinion on the evidence: *Livermore v R*, nor should the prosecutor make submissions that in effect reverse the onus of proof: *R v Rugari (2001) 122 A Crim R 1; Wood v R (2012) 84 NSWLR 581*

Defence

- Defence lawyers act for their clients who are entitled to be acquitted if the crown case is not established beyond a reasonable doubt.
- Lawyer is required to act in accordance w/ the client's instructions, provided they do not mislead the court
- No prohibition on a lawyer acting to defend a client even if they've admitted guilt to the offence

Right to a defence lawyer

- Any accused person is entitled to forego legal representation + appear for themselves in any trial, sentencing proceedings, or appeal before any court.
- Importance of legal rep in achieving a fair trial is such that the HC has held that a trial should not proceed if the accused cannot obtain a lawyer
- Accused is entitled to a fair trial, which may require the trial of an indigent person for a serious offence be adjourned until legal rep is obtained.

Incompetence of the defence lawyer

- Can result in a miscarriage of justice leading to the quashing of the conviction (*R v Birks (1990) 19 NSWLR 677*)

Elements of a Crime

- Can be divided into physical elements and the mental elements
- **Physical Elements:** Those actions or omissions that are prohibited (e.g murder, any act or culpable omission of the accused that caused the death of the deceased).
 - Three Categories
 1. Where some action is prohibited, such as driving in excess of speed limit
 2. Where there is some prohibited effect e.g causing death → the consequence caused is the issue
 3. Where the circumstances of an action are part of the required physical element of the crime → external circumstances change an otherwise lawful act into an unlawful one
- **Mental Elements:** State of mind that must have existed at the time of the physical element (e.g murder, an intention to kill or inflict grievous bodily harm or recklessness as to death).

Fault Elements

- The state of mind of the accused that must coexist w/ the physical elements of the crime for the crime to be complete.
- Without necessary fault elements, a person is not guilty of the crime, no matter how reprehensible or stupid they may have been.
- Established by proving one or other of the following
 - **Intention:** accused foresaw the consequences of his/her actions or culpable omissions + actively desire that the consequences should occur
 - **Recklessness:** Accused foresaw the consequences of his/her actions or culpable omissions, but proceeding in the case of that foresight.
 - **Knowledge:** accused was aware of the existence of the physical element required for offence

- **Negligence:** Although the accused did not foresee the consequence of their actions, a reasonable person would have had that foresight.

Motive: ‘A circumstance or thing which induces a person to act...[T]he motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility’

- While proof of motive might aid in proving the accused’s intention it cannot substitute for intention or purpose

Coincidence of Physical and Fault Elements

- Both elements must be present at the same time to constitute the offence.
 - *Meyers v R* (1997) 147 ALR 440
 - Accused conceded he had killed the deceased (physical element) but argued the Crown could not prove that at the time of the killing he intended to kill
 - Members of High Court said in joint judgement
 - *“An accused person who unlawfully kills another is not guilty of murder unless he does the particular act which causes the death with one of the specific intents that is an essential element of the crime of murder. The particular act and the intent with which it is done must be proved by the prosecution beyond reasonable doubt...If the circumstances of a fatal altercation are such that the prosecution can prove that some acts were done with the necessary intent but cannot prove that other acts were done with that intent, no conviction for murder can be returned unless there is evidence on which the jury can reasonably find that the act which caused the death was one of those done with the necessary intent”*
 - The requirement that ‘act and intent must coincide’ is applicable to all crimes where proof of intent or some other fault element is necessary.

Special Defendants

- Children
 - A child under the age of 10 cannot be convicted of a crime
 - Between the ages of 10-14, there is a rebuttable presumption of *doli incapax*; the child does not sufficiently understand the difference between right and wrong → this presumption may be rebutted by evidence from the prosecution to show the child realised his/her actions were ‘seriously wrong’.
 - **Division 7 of pt 2.3 of the Criminal Code**

Lecture

What does Australian Criminal Law (ACL) look like

- **Substantive Criminal Law:** Body of rules that determine whether a person has committed a crime