

Crime and The Criminal Process
LAWS1021

Criminalisation

Week 1

Class 1- Criminalisation 1

Reading: Criminal Laws Textbook

Criminalisation and Penalty

Motivations and forces behind decisions to characterise certain forms of behaviour as criminal.

Penalty: 'The broad field of institutions, practices, discourses and social relations which surround the ideas and practices of punishment.'

Contextualising Criminal Law

Criminalisation is the process of identifying an act deemed dangerous to the dominant social order and designating it as criminally punishable. - S Cohen.

Criminalisation is a particular reaction to a defined social problem.

'Overreach' and 'Crime Tariff'

'The Honest Politician's Guide to Crime Control' - N Morris and G Hawkins (1969)

- When the criminal law invades the spheres of private morality and social welfare, it exceeds its proper limits at the cost of neglecting its primary tasks.

Narcotics, gambling and prostitution:

- The criminal law operates as a 'crime tariff' which makes the supply of such goods and services profitable for the criminal by driving up prices and at the same time discourages competition by those who might enter the market were it legal.
- This leads to the development of large-scale organised criminal groups.

'Overcriminalisation'

Law exists largely to guide behaviour, but this objective is undermined in our climate of overcriminalisation.

'Overcriminalisation: The Limits of the Criminal Law' - D Husak (2008)

- The lives of ordinary citizens are more likely to be unfairly disrupted in any jurisdiction guilty of overcriminalisation.
- The increase in criminalisation is destructive of the rule of law itself.
- The quantity of criminal law undermines the principle of legality.
- Overcriminalisation results in unjust punishments.

Class 1- Criminalisation 1

Defining Crime

Legal/formal definition:

“Activity that the state prohibits by law and punishes.” - Oxford Australian Law Dictionary

An act (or sometimes a failure to act) that is deemed by statute or by the common law to be a public wrong and is therefore punishable by the state in criminal proceedings” - Oxford English Dictionary of Law

Traditional characterisation:

Mala prohibita (wrong because prohibited)

Mala in se (wrong in themselves)

‘Commonsense’ approach

You know a crime if you see it

‘Core’ crimes

Murder, sexual assault

New crimes - How are they determined?

- The behaviour in question is sufficiently serious to warrant intervention by the criminal law;
- The mischief could be dealt with under existing legislation or by using other remedies;
- The proposed offence is enforceable in practice;
- The proposed offence is tightly drawn and legally sound; and
- The proposed penalty is commensurate with the seriousness of the offence

Nicola Lacey, ‘In Search of Criminal Responsibility’ (2016)

Criminal law should be understood as part of an ‘integrated process of criminalisation’.

A. Criminalisation as a pattern or outcome (what has been or should be criminalised)	B. Criminalisation as a social practice (who criminalises and on what basis)
Formal (legislation, treaties, judicial decisions)	Formally (‘in the books’)
Substantive (actual implementation of formal norms)	Substantively (‘in action’)

Class 2- Criminalisation 2

Reading: Criminal Laws Textbook

Normative Theories of Criminalisation

The legal conditions that ought to apply before particular forms of behaviour should be criminalised.

Ashworth on Principles

'Is the criminal law a lost cause?' - A Ashworth (2000)

The principled core of criminal law

- The criminal law is indeed a lost cause
- The Government's purported criteria for creating new crimes are not followed in practice, nor have they been in the recent past.

Seeking to identify a principled core of criminal law. The core consists of 4 interlinked principles:

- The principle that the criminal law should only be used to censure persons for substantial wrongdoing

This principle recognises that the prevention of such misconduct is a reason for criminalising it if serious wrongdoing can be identified, it is of social importance that its incidence be reduced.

Appropriately targeted social, educational and housing policies may well have a greater preventative effect than the enactment of a criminal offence.

- The principle that criminal laws should be enforced with respect for equal treatment and proportionality

Enforcement authorities and their policies ought to be reorganised so as to reflect the relative seriousness of the wrongdoing with which they are dealing.

- The principle that persons accused of substantial wrongdoing ought to be afforded the protections appropriate to those charged with criminal offences

An inherent element of criminal procedure.

- The principle that maximum sentences and effective sentence levels should be proportionate to the seriousness of wrongdoing

Ashworth has attempted to 'identify some general principles and values that ought to be considered when deciding whether or not to make conduct criminal.'

- The main determinants of criminalisation continue to be political opportunism and power.

It is still appropriate to discuss the **values and principles that ought to be relevant to criminalisation decisions**

The values are:

Intrinsic values such as personal and interpersonal good

In a secular state, an individual's life has ultimate value.

What gives real meaning and significance to individual life, is engagement in activities and relationships with other things - 'goods'.

Intrinsically valuable goods include 'personal' and 'interpersonal' goods such as bodily integrity and health, sexual identity and partnership choice, a rewarding career, property.

Life in common: the importance of public goods

Life in common is the notion of people being identified or grouped according to some feature or characteristic they possess, some activity they engage in, a place where they live...

Protecting 'fragile' public goods

The law may become involved in the case of important public goods, supporting lives in common where the goods are or may easily become fragile, threatened by 'over-use' or 'prone to injustice at point of access'.

'Criminal Law Fabric' - Horder

Horder identifies a number of principles in that they arise from 'values that the courts and legislatures ought to respect as limiting their powers where creating, interpreting, or extending the criminal law'.

- The principle of 'moral' autonomy which is necessary to exercise lifestyle autonomy and comes into play when someone has 'the developmental maturity fully to understand, and evaluatively to distinguish between choices they make in life'
- The principle that 'criminalization must in most circumstances be a measure of last resort'
- The principle of respect for human rights, in international and domestic law
- The principle of strict construction, which requires that courts should resolve any doubt in the meaning of a statutory provision in favour of the defendant
- The principle of proportionality, by which the severity of punishment should be in proportion to the seriousness of the offence

'Principles, policies and politics of criminal law'

Lacey argues that a normative account of criminal law cannot in itself counter the political and social forces which have led to the expansion of pragmatic criminalisation in recent years.

Components of Criminal Offences

Week 2

Class 3- Components of Criminal Offences 1

Reading: Criminal Laws Textbook

COMPONENTS OF CRIMINAL OFFENCES

General Principles

To perform a forbidden act (**actus reus**) by itself does not make a person guilty of a crime; it also has to be shown that the person who performed that act had a guilty mind (**mens rea**).

Another 'general principle' is the '**golden thread**' - the burden of proof is on the prosecution to prove the guilt of the defendant beyond a reasonable doubt.

Constructing Individual Guilt and Innocence

The law is never fixed and frequently uncertain.

Constituting Legal Personhood

Legal Personhood - capacity to be found guilty of a criminal offence.

Not every human mind is regarded as capable of bearing criminal responsibility.

Those who can show that they were insane within the M'Naghten Rules at the time when the prohibited behaviour took place are exempted from criminal responsibility.

Children

At common law, all children under seven were treated as incapable of committing criminal offences.

This has now been raised to 10 in NSW (*Children (Criminal Proceedings) Act 1987 s 5*).

The United Nations Committee on the Rights of the Child (2007) considers that "a minimum age of criminal responsibility below the age of 12 years is ... not ... internationally acceptable"

Where a child has reached the age of 10 but is not yet 14, it is presumed that they are incapable of wrongdoing (*doli incapax*).

This presumption must be rebutted by the prosecution before criminal proceedings can be brought against them.

- Children **under 10** years of age cannot commit a crime- **irrebuttable presumption** of *doli incapax*.
- Children **between 10 and 14** years of age are presumed not criminally responsible, but the presumption of ***doli incapax* can be rebutted**.

Case:	<i>RP [2016] HCA 53</i>
Facts:	- RP was charged with having anal intercourse with a child under ten, his younger brother. - RP was aged approximately 11 and a half. - He had used a condom. - On both occasions, his brother had made it clear that he did not consent.
Issue/s:	Whether the presumption of doli incapax may be rebutted.
Arguments:	- The evidence of the appellant's use of the condom is significant. - The fact that a child of 11 years knew about anal intercourse, and to use a condom, was strongly suggestive of his exposure to inappropriate sexually explicit material or of having been himself the victim of sexual molestation.
Key takeaways:	- The presumption of doli incapax may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence. - Knowledge of the moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous. - The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. - "There is no prescribed formula for evidence sufficient to rebut the presumption; that will depend upon the circumstances in individual cases"

Actus Reus and Mens Rea

'Physical elements' and 'Fault elements'

The **actus reus** refers to the prohibited event spelt out in the definition of an offence.

The **mens rea** refers to the accompanying fault elements.

- These elements of actus reus and mens rea reflect the doctrine of Dualism developed by the philosopher Descartes in the 17th century.
- 'Human beings consist of two distinct elements: a physical body and a non-physical mind'

The first issue in a criminal trial will be whether the defendant performed the actus reus.

The Burden of Proof

The 'Golden Thread'

The burden of proof is on the prosecution to prove the guilt of the defendant beyond a reasonable doubt.

Case:	<i>Woolmington v DPP [1935] AC 462</i>
Facts:	- The defendant was charged with the murder of his wife, from whom he was separated. - He visited his wife at her mother's house while in possession of a sawn-off shotgun. - His aim was to frighten her into returning to him by threatening to commit suicide. - The gun accidentally went off. - When he was arrested and charged, he said: "I want to say nothing, except I done it, and they can do what they like with me." - He was convicted of murder and was sentenced to death.
Key takeaways:	The defendant is entitled to the benefit of the doubt. - While the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence, and it is sufficient for him to raise a doubt as to his guilt.

The moth-eaten 'golden thread'

A fundamental qualification to the "golden thread" is that it is only relevant to the extent that offence definitions specify particular elements as part of the offence definition.

Legislation will make it clear where the burden of proof is reversed:

(eg, "it is a defence if it is proved that"; "unless [the defendant] satisfies the court that")

Senate Standing Committee on Constitutional and Legal Affairs - The Burden of Proof in Criminal Proceedings

The phrase "burden of proof" has two senses to which various different names are given:

1. The Persuasive Burden
2. The Evidential Burden

The Persuasive Burden

Under the criminal law, this burden of proof usually refers to the general rule that the prosecution bears the burden of proving the accused's guilt beyond reasonable doubt.

However, there are two exceptions to this general rule:

1. When a plea of insanity is raised by the defendant
2. Statutory provisions which either expressly or by implication place the burden of proving certain matters upon the defendant.