

# LAWS1016 NOTES - CRIMINAL LAW

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## Unit Objectives

- Problems of criminal law in context
- How does law intersect with social reality?
- How do we determine the limits of criminal liability?
- Aim: develop detailed understanding of selected areas of NSW law AND critically consider within particular themes and setting
- Encouraged to think why the law is this way and the desirability of these rules: contradictions

## CLASS 1: CRIME, LAW AND MORALITY

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### *Criminal Law*

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- Defines activities which legislature and judiciary have decided we should be held criminally liable
- Has authority to take away liberty

### *Aims of Criminal Law*

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- Prevention of harm
- Community welfare
- Preserving morality
- Punishment of offender

### *Criminal Liability and its limits*

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- i) proof that A brought about event: guilty act (actus reus)
- ii) A realised what was happening: guilty mind (mens rea)
- Depends on whether A had capacity, acted voluntarily, requisite mental state, excuse or justification (defence)
- Where a defence is used, the accused has evidentiary burden to satisfy, even though ultimately prosecution must negate the defence beyond reasonable doubt.

### *Euthanasia*

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- Intentionally taking life at request of sufferer (voluntary) (ie assisted suicide; 'mercy killing')
- Illegal in Australia: 'Mercy killing still amounts to murder because the defendant intends to kill the victim, notwithstanding that it may be from the best of motives' (*Brown et al*)
  - Murder s18 of *Crimes Act 1900* (NSW)
  - Aiding suicide s31C *Crimes Act 1900* (NSW)

## CLASS 2: SCOPE AND PRINCIPLES OF CRIMINAL LAW

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**1. Is Ashworth's 'principle of welfare' different from Findlay's 'community welfare' principle?**

- Clearly related in that both point to the community as opposed to individual, concerns playing a role in shaping the content and structure of the criminal law
- But different emphasis. Ashworth's principle not necessarily in conflict with personal autonomy – rather it **enables** 'the fulfilment of certain basic interests such as maintaining one's personal safety, health and **capacity to pursue one's chosen life plan**' (Nicola Lacey). In contrast, Findlay's community welfare – it is a **group decision** that conflicts and overrides personal autonomy in the interests of **collective goals** (so no necessary facilitation of the life plan of individuals)
- Ashworth's account is normative – not just descriptive. The principle of welfare must play a role – no sustainable argument for relying solely upon individual autonomy. Principle of welfare will carry different weight in different circumstances, subject to application of rights and principle of minimalisation. Hierarchies of rights ('strong' v 'weak') enables resolution of conflicts between autonomy and welfare
- Findlay – account is descriptive – law is conflictual and demonstrates balance of power. No resolution.

**2. Ashworth and Horder's 3 conditions for criminalisation?**

- 3 principles:
  1. Existence of a 'harm' (violations of people's legitimate interests)
  2. 'Wrongfully caused' – ie. Moral wrong (= a pre-requisite – not a sufficient condition) with no strong countervailing considerations (eg the creation of unwelcome social consequences)
  3. A public element (a wrong that 'properly concerns the public')
- They don't say these are the three or the only conditions that need to be satisfied. Rather they state: 'We should abandon...attempts to derive the content of the criminal law from a single master principle'. They are conditions that 'ought' to be considered in a liberal democratic state before deciding to legislate a human behaviour as criminal.

**3. Should satisfaction of these conditions necessarily result in criminalisation?**

- No – because criminalisation is a result of democratic participation in governance. Conditions are merely supportive of arguments to sustain a case for criminalisation
- Constitutional laws and context may limit and affect application (in UK context – Euro Convention on Human Rights)

**4. What is the 'minimalist' approach?**

- Approaches to criminalisation should demonstrate:
  1. Respect for human rights
  2. A right not to be subjected to State punishment
  3. Other techniques for control not appropriate
  4. Not counter-productive (consider speed limits and drugs)
- Problematic where the State hasn't incorporated human rights into its laws (e.g. Australia) but remember this is directed at the Legislature – not judiciary

**5. What do Ashworth and Horder say about whether criminalisation is justified for behaviour regarded as morally wrong? Do you agree?**

- They say it is not a sufficient warrant in itself but must be mediated by other principles:
  - Margin of social tolerance
  - Conduct is readily avoidable (eg special designated areas for nude bathing)

- Conduct immediately offensive – not simply a risk of causing subsequent offence (cf drawing cartoons of a revered religious figure with intent to satire or cause offence? Does it matter? Anti-blasphemy laws?)
- Brown case – do we now live in an age glorifying sadomasochism (cf *Twenty Shades of Grey*)

## 6. A limited role for paternalism?

- Protection of the vulnerable and those with limited capacity to know their own best interests (e.g. the young and the elderly)
- Concern for people's welfare in the context of the great harm that may result (e.g. possession of unregistered firearms or speeding)

Rush and Yeo

## 7. Consider the argument that Indigenous criminal laws and jurisdictions continue to exist. What is the basis of this legal argument?

- Mabo rejected the doctrine of Terra Nullius. Just as Native Title, Aboriginal Criminal Law could not have been extinguished by colonial occupation. Same arguments that apply to NT apply to CL.
- English law only applicable as circumstances permitted and as applied to infant colony. Could not (and was not) applied to indigenous amongst themselves.
- Common law not fixed by adapts to circumstances and perspectives. Otherwise frozen and prone to accusations of discrimination
- Mabo accepted possibility of co-existence of another set of laws alongside state laws

## 8. Consider the rationales for restricting recognition of customary Indigenous criminal law as follows to:

- i. Circumstances where the accused rejects the jurisdiction of the common law
  - ii. Offences between those that identify as Indigenous
  - iii. Arenas where customary criminal law continues to exist
- Respects self-determination and cultural autonomy of indigenous communities
  - Respects international law
  - Feasible and practical where proof of tribal court. Not difficult to administer or comprehend where local laws are known

## Problems

- Legitimacy – Why should an accused be able to choose the law under which he is to be judged? He will choose the one which is more likely to acquit him
- How do you prove who is 'indigenous'? The Andrew Bolt question. Could you become 'indeigenous'

## 9. What dilemmas does recognition of Indigenous criminal law pose for the purposes of non-indigenous criminal law? What dilemmas does non-recognition of Indigenous criminal law pose for the purposes of non-indigenous criminal law?

- Broad issue of equality before the law
- Particular problems of denying aboriginal victims the same protections afforded under NSW law
- If cultural defences for indigenous offenders are allowed, why not for non-migrant communities?
- ALRC said situation different:
  1. migrants came to Aus knowing and accepting Aus law
  2. Adverse impact of state law on indigenous not the same as on migrants
- Non-recognition of indigenous crim law = non-recognition of indigenous and continued alienation
- Seen as racist and discriminatory by the indigenous
- Lose 'fidelity to law'