

Criminal Law & Procedure Notes

Acceptable Abbreviations

Actus Reus = AR *Mens Rea* = MR Accused = A Defendant = D Victim = V Beyond Reasonable Doubt = BRD Grievous bodily harm = GBH Substantial Impairment by Abnormality of the Mind = SIM

Class 1A - INTRODUCTION TO CRIMINAL LAW

Discussion Questions

1. What are the subject objectives and teaching/learning requirements?
2. What is crime? Crime is a public wrong. Unlike the nature of civil law, crime is public because it causes detriment to society.
3. What ought to be criminal? Actions that affect others in a negative way and negatively impacts others and society.
4. What are the aims of punishment? – Rehabilitation, learning from mistakes.
Traditionally crimes were sins. The individual exercised free will by violating the moral code and it was the role of the Church and State to punish blasphemy. More recently the Devlin-Hart debate reflected the moral divide on criminalising homosexuality. Community Welfare Approach – Crime should be defined to promote social welfare. Criticises liberal approach because community protection should prevail over individual autonomy. Supports ‘tough on crime’ policies that seek to protect the public and victims above defendants’ rights. **Group discussion** - Consider the offences reported in the *Blacktown Advocate*. Do you agree that these should be classified as crimes? Discuss your rationale. Most of the offences I would believe are criminal besides drug offences as I believe crimes are what affect others such as the baby in the car, the woman acting offensively etc. **Class 1B - CRIMINAL PROCEDURE AND ARREST**
BACKGROUND INFORMATION *Introduction to the structure of criminal law in Australia* There is no one set of criminal laws in Australia. Criminal laws at State and Commonwealth levels operate in parallel. In this subject we are only concerned with offences relevant to NSW. **Commonwealth criminal law** The Commonwealth can only make laws in relation to those powers it is given under s 51 of the Constitution. Therefore, any criminal law made by the Commonwealth has to be justified under a specific ‘power’ in the Constitution. The Federal Government does not have a

specific power in the Constitution to make criminal laws in Australia, so any federal criminal law must relate to another power in s 51, such as 'quarantine' (sub-s 51(ix)), 'copyrights, patents of inventions and designs, and trade marks' (sub-s 51(xviii)), or 'the influx of criminals' (sub-s 51(xxvii)). There is a generalist body of Commonwealth criminal law, including the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth). The *Criminal Code Act*, for example, sets out wide-ranging provisions that seek to deal with terrorism. Due to the nature and sources of the power of the Commonwealth to enact criminal legislation, Commonwealth criminal law has also been spread over a number of other pieces of legislation. For example, the Commonwealth provisions in relation to the criminal import and export of drugs are found in the *Customs Act 1901* (Cth). These provisions are based on the 'trade and commerce' power in the Constitution (sub-s 51(i)).

There is also scope under the sub-s 51(xxix) 'external affairs' power for federal intervention into State criminal law. In response to the UN Human Rights Committee's determination in *Toonen v Australia* (1994),¹ the Commonwealth was able to override Tasmanian legislation that criminalised a range of sexual activity, as the Committee found the Tasmanian legislation was in breach of Australia's obligations under an international treaty, the 1996 International Covenant on Civil and Political Rights.

Since 1991, the Standing Council on Law and Justice has been working on a Model Criminal Code. This Code is intended to codify general principles of criminal responsibility to be applied when interpreting statutes. It is a 'Model Criminal Code' because the hope is that it will be enacted in all jurisdictions across Australia to provide more consistency between the various jurisdictions. It is only a model, however, and has no legal authority. From time to time we may refer to the Code, not as a source of law but to illustrate and discuss general criminal law principles.

State criminal law

Because of the restricted power of the Commonwealth to make criminal law, the States are primarily responsible for criminal law. Where there is an inconsistency between Commonwealth and State criminal laws, the Commonwealth law prevails, and the State law is invalid to the extent of the inconsistency (pursuant to s 109 of the Constitution).

Each State enacts its own criminal legislation, resulting in different criminal laws

of different types in different States. The major point of difference between the various State criminal laws is based on the distinction between common law and codified law.

Common law States: NSW, Victoria, South Australia

The *Butterworths Legal Dictionary* defines common law as, 'The unwritten law derived from the traditional law of England as developed by judicial precedence, interpretation, expansion and modification: *Dietrich v R* (1992) 177 CLR 292.' It elaborates as follows:

The common law creates specific criminal offences, contains rules of evidence and practice and procedure, and sets out the rights and privileges of citizens. Generally, a statute will not be taken to have repealed the common law unless it explicitly or implicitly shows such an intention: *Fuller v R* (1994) 34 NSWLR 233. A law interfering with a common law right of a citizen will generally be taken to be consistent with the common law so far as possible unless there is a clear legislative intention to abolish or limit the common law right: *Coco v R* (1994) 179 CLR 427.

Common law States rely extensively on the common law for criminal law, despite the existence of State criminal legislation. NSW, Victoria and South Australia are recognised as common law jurisdictions.

While these States are not pure common law States, they are referred to as such because:

- They still use the common law as the source of their criminal law;
 - Many of the criminal laws legislated reflect the common law;
 - Many defences are still established by the common law; and
 - Fundamental elements of criminal responsibility are drawn from the common law. In NSW the serious offences have been collected under a single statute, the *Crimes Act 1900* (NSW) ('*Crimes Act*').
- Code States: Queensland, Western Australia, Tasmania, Northern Territory, Australian Capital Territory* A Code is legislation purporting to cover exhaustively a complete system of law (for example, the Code of Justinian) or a particular area of law as it existed at the time the Code was enacted (such as the Queensland Criminal Code). Code States have enacted criminal codes which operate to replace the common law. In these States, common law

offences may no longer be used; for an offence to be established, it must be in the Code. These Codes can also alter basic common law principles (such as the concept of *mens rea*). All criminal offences for Queensland, Western Australia, Tasmania, Northern Territory and Australian Capital Territory are collected under their respective Codes. ¹ *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994) (UN Human Rights Committee).

The Codes do not completely displace or overturn the common law. For historical and practical reasons, the Codes reflect parts of the common law inherited from England. However, the Codes are interpreted on the understanding they are intended to replace the common law. Their language is construed according to its natural meaning and without any presumption that provisions were intended to do no more than restate the existing law.

Overview of criminal procedure

In criminal cases, the questions of what happens before a matter gets to Court, the selection of Court, and when and what happens as a result of the Court's decision are all governed by the rules of criminal procedure. Many of these procedural rules are contained in legislation such as the *Criminal Procedure Act 1986* (NSW) ('CPA') and the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ('LEPRA').

Criminal procedure governs the initial contact with the police, arrest, charge, questioning, the requirement for bail and how, when and where the matter will be commenced and finalised, such as in the Local, District or Supreme Court. Rules about criminal procedure also apply to sentencing and to the availability of appeal processes.

As soon as police are aware of an alleged crime, if they consider the matter warrants further action, an investigation commences. The nature of the crime, the nature of the police information, and, at times, the personal qualities of the police officers involved, will determine how that investigation unfolds, and the criminal procedure that follows.

In criminal procedure, there are two main perspectives to consider. First, there is the perspective of those tasked with enforcement of the criminal law: the police, who have the important job of preventing and investigating crimes, and the prosecutors to whom the police pass on their evidence. Prosecutors use that evidence to prosecute accused persons with the aim of obtaining a conviction.

Secondly, there is the accused, who is in the position of needing to respond to the charges against him or her. Generally, the accused will be represented by defence counsel, and that person has the important job of ensuring the accused is given adequate representation when responding to charges laid by the police.

Police and prosecutorial guidelines

Guidelines and codes of practice have been developed for police and prosecutors to follow. The NSW Police Force Code of Practice for CRIME covers custody, rights, investigation, management and evidence. The Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales cover important ethical and practical issues such as the decision to prosecute and to settle charges, as well as how and when to discontinue a prosecution.

Prosecutors have special professional duties pursuant to rule 29 of the NSW Solicitors' Rules and rules 82–94 of the NSW Barristers' Rules. These include a duty of full disclosure of evidence to the defence, and fairness and impartial conduct in court.

An imbalance of power often exists between police (not just individual police officers, but the institution of policing) and the individuals who are being policed. Much of criminal law and procedure is aimed at protecting citizens against the arbitrary exercise of power. Accordingly, the rules of criminal procedure are supposed to ensure that police use their power responsibly. Accused persons are protected by certain fundamental rights and presumptions, such as the right to silence (recently amended in s 89A of the *Evidence Act 1995* (NSW)) and the presumption of innocence. The burden and standard of proof (considered in the next class) also proffer protection against the arbitrary exercise of power by the state.

Although it is beyond the scope of this subject, there is a need to assess how the long-standing checks on police power protect against abuses of power where recent legislation related to terror offences, bikie gangs and public order offences increases police power, removes the rights of the accused and eliminates transparency from the process. These checks should also be considered in light of developments in surveillance technologies and police weaponry, such as capsicum spray and Tasers. You should reflect on what you are learning to see how the rules and principles we study can be critically examined when tested by new situations.

Arrest: police powers and responsibilities

In 2002, the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)

('LEPRA') was enacted. It was in large part the result of the 1997 Wood Royal Commission into Police Corruption in NSW, where the Commission recommended that police powers be consolidated into a single piece of legislation. It is in LEPRA that you will find information about police powers and procedures. You should read the index to the Act and the sections listed as required reading, particularly Part 8 (ss 99–108) in regard to police powers relating to arrest.

There is substantial case law in this area, both pre- and post-LEPRA (see, for instance, *DPP v Carr* (2002) 127 A Crim R 151 and *R v McClean* [2008] NSWLC 11 (Unreported, Magistrate D Heilpern, 29 May 2008)). It is important to note that police have alternatives to arresting an alleged offender. The *Criminal Procedure Act 1986* (NSW) and *Local Court Rules 2009* (NSW) provide for preparation and service of a Court Attendance Notice ('CAN'). A CAN is a document setting out the charge. It can be issued and served on the spot or later, and it may dispense with bail proceedings.

Section 99 of LEPRA provides a two-step process for arrest without a warrant. First, arrest without a warrant is only permitted where a police officer 'suspects on reasonable grounds that the person is committing or has committed an offence' (sub-s 99(1)(a)). Second, the police officer must be satisfied that arrest is 'reasonably necessary' to achieve one or more of the purposes set out in sub-s 99(1)(b), such as to stop the person fleeing the scene (ss 99(1)(b)(ii)), to preserve evidence of the offence (ss 99(1)(b)(vi)) or to protect the safety or welfare of any person (ss 99(1)(b)(viii)). Section 99 was amended in 2013 to significantly increase the police powers to arrest without a warrant.

The case of *R v Rondo* (2001) 126 A Crim R 562 is a leading authority on arrest and reasonable suspicion. This case involved the successful appeal against a conviction for drug offences following a search and seizure of marijuana found in the car Rondo was driving when stopped by police on Epping Road, Lane Cove in 2001. In considering whether police reasonably suspected that a crime was occurring or had occurred at the time of arrest, Smart AJ stated (at [53]):

- . (a) A reasonable suspicion involves less than a belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s 357E.
- . (b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown.

- . (c) What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question, regard must be had to the source of that information and its content, seen in the light of the whole of the surrounding circumstances. Sources of Law;
 - Primarily statute (but statutes are not all encompassing).
 - Supplemented with common law
 - NSW is known as a common law jurisdiction; cf Code States such as Qld and WA.
 - Note: (unenforceable) guidelines and unstructured discretion play a significant role in the operation of criminal procedure and law. Police (pre-trial) discretion;
 - Whether to police certain areas
 - Whether to investigate 'suspicious' activity or follow-up reported crimes
 - Whether to provide a caution or to charge and what charges to lay (also plea bargaining)
 - Whether to provide a summons or to arrest
 - Whether to provide bail
 - What evidence to collect Judicial Discretion;
 - Whether to grant bail
 - Whether to hear case (committal)
 - Whether to admit evidence
 - Directions to the jury
 - Determinations of culpability

- Sentencing (fines, bond, incarceration etc.)
- Whether to grant leave to appeal To charge or divert?
- The decision may be based on weight of evidence or public policy
- E.g. the Young Offenders' Act provides for: Warning or cautioning, rather than charging (Pt 3-4), Conferencing as opposed to prosecuting (Pt 5).
- Prosecutors may suspend prosecution in the public interest. Arrest as a last resort;
- Smart AJ in *DPP v Carr [2002] NSWSC 194* at 35: Arrest is an added punishment involving deprivation of freedom and frequently ignominy and fear.
- Justice Deane pointed out in *Donaldson v Broomby [1982] FCA 58; (1982) 60 FLR 124* at 126 that: It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined. NSW local court (expanding) criminal jurisdiction;
- Original jurisdiction for summary offences (up to 2 years prison): Criminal Procedure Act 1986 NSW s7
- Hearing of 'hybrid' indictable offences: CPA s260
- Committal hearings for indictable offences: CPA s64.
Committals; Magistrate/Local Court judge must determine: 1. Whether prosecution evidence is capable of satisfying a reasonable jury beyond reasonable doubt that the accused person has committed an indictable offence. 2. Is there a reasonable prospect of conviction? (CPA s65-66) The purpose of the committal hearing is to: 1. Eliminate NSW higher courts;
- District and Supreme courts have original jurisdiction for NSW indictable offences (2 yrs. + prison): Criminal Procedure Act s46.
- District Court hears all indictable offences in original jurisdiction except murders Two tiers of justice;
- Congestion of summary courts: 97% + cases - largely based on fact, fast

processes, limited representation, no jury

- Perceived justice of higher courts – showcase ideology of justice: formal and ritualistic, largely based on law (especially appeal courts), long wait for accused, representation is common, right to jury. The role of jury
- To determine defendant's guilt or innocence
- To determine matters of fact – judge directs jury on matters of law
- To provide public legitimacy to the trial process Investigation & Questioning; LEPR ss 114 – 121 What is reasonable time? Section 116 states: physical and mental state of person, seriousness and difficulty of case, time for other police to arrive, time for searches etc. The Investigation Period;
- Time-Outs from investigation period?
- S117 – matters include time: to take person to proper facilities for investigation; communication with (and arrival of) 3rd parties; medical attention etc.
- Investigation period likely be longer than 4 hours.
- S118: Investigation period may be extended by up to 8 hours by securing 'detention warrant' from authorised officer. Custody Manager's Obligations;
- 'Custody manager' (police officer) is responsible for care, control and safety of detainee.
- S122: custody manager must give detained person (orally and in writing) information: caution that person need not say or do anything, but if does, may be used in evidence: 'right to silence', summary of provisions of Pt 9 LEPR, including D's rights, details of investigation period, etc.
- S123: CM to inform person of their right to communicate with friend, relative, guardian, or other, or lawyer (of person's choice). Implications of non-compliance