

CHAPTER 1 – INTRODUCTION TO CRIMINAL LAW

When do we criminalize conduct?

Criminalization usually involves:

- Public conduct
 - i.e. the conduct is an offence against one or more individuals
- Moral wrongdoing
 - Public condemnation of the behaviour
 - Includes the controversial crimes without victims

Defining crime

- Glanville Williams: 'a legal wrong that can be followed by criminal proceedings and which may result in punishment'
- Louis Waller and CR Williams:
 - Conduct is injurious to the public at large AND
 - Conduct involves moral blameworthiness

The same conduct can result in criminal and/or civil actions

Example

- *Criminal*: OJ Simpson was charged with the murders of his ex-wife Nicole Brown and her friend Ron Goldman. Found not guilty at trial in 1995
- *Civil*: In 1997 OJ Simpson was sued by the families of Goldman and Brown for the wrongful deaths of the deceased. He was found liable for the wrongful death of Goldman and the battery of Brown and was ordered to pay \$33 million in damages.

Procedural:

- Prosecuted by the State (police or OPP)
- May result in punishment
- Punishment and Sentencing in Victoria:
 - Retributivism
 - Deterrence
 - Specific
 - General
 - Incapacitation (post-custody detention orders)
 - Rehabilitation (Assessment and referral list, MMC)

Sources of criminal law

- Australia, upon colonization by the British, inherited English common law.
- However, subsequently two different pathways adopted in the various jurisdictions:
 - Code jurisdictions: adopted comprehensive criminal codes. Interpreted with minimal reference to the common law: QLD, WA, Tasmania (Griffith Code); Commonwealth and NT
 - Common law jurisdictions – VIC, NSW, SA. Criminal law developed from the common law and is interpreted with reference to that law. BUT now increasing statutory reform (eg rape)

The Australian constitution and Criminal Law

- Most criminal law in Australia is passed by the various states and territories e.g. Crimes Act 1958 (Vic)

- The power of the Commonwealth government to enact criminal law is limited by the Australian Constitution, which does *not* include an express power for the Commonwealth to legislate in the field of criminal law. Consequently, for federal criminal laws to be constitutionally valid they must be created as 'incidental' to an existing head of power. The two most important powers relied on by the federal government in relation to the enacting of criminal law are:
 - Key Commonwealth legislation in relation to criminal law includes the Crimes Act 1914 and the Criminal Code Act 1995
- Although the power of the Commonwealth to legislate in relation to crime is limited, the reach of the Commonwealth is increasing. In 2005 the Australian Law Reform Commission estimated that federal crimes accounted for about 10% of all criminal activity in Australia.
- Note that it is possible for the States and Territories to refer their constitutional power to the Commonwealth on a particular issue. This has occurred on a few occasions when the States have considered that a national law is preferable to a set of State laws E.g. anti-terrorism legislation (2002)

Important initiative: MCCOC

- The Model Criminal Code Officers Committee was established in 1990 by the Standing Committee of Attorneys-General to advise of criminal law issues.
- The Committee developed a Model Criminal Code that was intended to be adopted in every jurisdiction in Australia (voluntary)
- The recommendations of the MCCOC form the basis of the *Criminal Code Act 1995* (Cth).

Charter of Human Rights and Responsibilities 2006 (Vic)

- Came into effect in Victoria on 1 January 2008
- Makes it unlawful for a public authority to act in a way that is incompatible with the human rights listed in the Charter, or in making a decision, to fail to give proper consideration to a relevant human right (section 38 (1)).
- Relevant rights re criminal law and procedure include:
 - S21: right to liberty & security of person;
 - S24: right to a fair hearing;
 - S25: rights in criminal proceedings;
 - S26: right not to be tried and punished more than once

Victoria – interaction of common law & Statute

Murder

- Crimes Act 1958 s3 – establishes the punishment for murder. But – definition of offence? → Common law
- 'Felony murder' – now governed by S3A Crimes Act 1958

Rape

- Originally a common law offence. Now extensively defined in Crimes Act 1958 (provisions re consent, rape of males, defn of act of rape (penetration) et.c)'

Criminal responsibility

Who should be criminally liable for their acts?

Changing historical views:

- In medieval European law, responsibility was sometimes attributed to animals. If a domestic animal (pig, dog, cow, horse) killed a human being it could be tried in a secular tribunal with capital punishment the usual result (Evans 1906)

- England: historical trend from 13th century through to contemporary period moving away from exclusive focus on behaviour to more detailed analysis of mental state of D at the time of the alleged offence
- Contemporary focus: what mental states required as fault element of crime? What disorders/conditions will excuse people from criminal responsibility?

General principles of Criminal responsibility

1. No liability for conduct that is not voluntary
2. No liability for conduct where person lacks capacity
 - Minors?
 - Mentally ill? (Presumption of sanity)
 - – presumption that persons are sane: previously common law, now *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s21(1).

1. Voluntariness

- Goes to the *actus reus*
- Traditional approach is that the conduct is not voluntary if it is not the product of the person's will.
- *Ryan v The Queen* (1967 121 CLR 205, 213 Barwick CJ)

'That a crime cannot be committed except by an act or omission is axiomatic. It is basic, in my opinion, that the 'act' of an accused... must be a 'willed', a voluntary act which has caused the death charged. It is the act which must be willed, though its consequences may not be intended.'
- Usual examples of *involuntary* conduct:
 - Reflex action
 - Sleepwalking
- Controversial development:
 - 'psychological blow' (shock) leading to involuntary conduct
- Somnambulism 1: *R v Tolson* (1889)
 - Can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. – Stephen J
 - Also: *R v Cogdon* (1950) unreported
- **Voluntariness and intoxication**
 - X is a rugby player. After a successful game in which his team trounced the opposition, the players went back to the clubrooms to celebrate. Much drinking of alcohol took place. After a few hours some of the players, including X, decided to move on to a nightclub. X continued drinking. After 8 hours of celebrations and while he was grossly intoxicated, X left the nightclub. Upon leaving a young woman accidentally bumped into X; he punched her in the face, causing considerable swelling and bruising. X is charged with assault.
 - Can X argue that he is not criminally responsible because his act was not voluntary? I.e. it was not a conscious, willed act?
- **Voluntariness: S4.2 Model Criminal Code**
 1. Conduct can only be a physical element if it is voluntary.
 2. Conduct is only voluntary if it is a product of the will of the person whose conduct it is.
 3. The following are examples of conduct that is not voluntary