

# LAW5001 – Principles of criminal law and procedure

## Week 1 reading

### Topic: Introduction to Criminal law & Sentencing

What is a crime?

- Legal wrong that can be followed by criminal proceedings which may result in punishment (Williams, 1983)
- **Positivist definition:** focus on form of law & whether it's been correctly made, instead of function
  - Crime is a crime because it's a crime
  - Not the nature of prohibited conduct that distinguishes it, but criminal procedure that does
  - Problem: rests on assumption of clear distinction between civil & criminal law
- **Elements of punishment (HLA Hart):**
  1. Must involve pain/other consequences normally considered unpleasant
  2. Must be for offence against legal rules
  3. Must be of an actual/supposed offender for his offence
  4. Must be internationally administered by human beings other than offender
  5. Must be imposed/administered by authority constituted by legal system against which offence is committed

Aims of criminal law

- Fitzjames Stephen: to provide organised means for controlling passion of revenge
  - Unless community provides for punishment of offenders → people injured by offences would take matters into own hands to general detriment of community
- It is for lawmaker to determine within any given legal system what acts should be classified as criminal
- **Three major justifications for criminalisation:**
  1. Prevention of harm
    - **John Stuart Mill:** restrictions on individual liberty must be curtailed & are justifiable *only* in order to prevent harm to others
    - Way of balancing interests of State while protecting freedom & autonomy of individual → believed in private morality
    - Difficulty: what constitutes harm to others – psychological, emotional
  2. Public interest
    - Act only labelled criminal if it is offence to 1 or more individuals
    - Privacy protects citizens from arbitrary intrusion by State (Art 17 of International Covenant on Civil & Political Rights)
    - Toonen v Australia – overturned Tasmanian laws criminalising sexual activity of anal sex as they were in breach of ICCPR
  3. *Morality*
    - Moral wrongdoing eg. Euthanasia (illegal in Aus but not Netherlands)

## Negligent Manslaughter

- *Nydam v R*: D bought petrol & threw/lit it on hairdressing salon V was in, killing V & another  
→ said he was trying to kill himself
  - Sufficient if P shows that act which caused the death was done by A consciously & voluntarily, without any intention of causing death/GBH
  - But it was done in circumstances involving such a great falling short of the standard of care required of a reasonable person, involving such a high risk of death/GBH that it's worthy of criminal punishment
- The prosecution must show that:
  - D's acts were voluntary
  - D's acts caused V's death (same AR as murder)
  - The standard of care required of a reasonable person; and
    - Objective test
  - There has been a gross departure from the standard of care amounting to criminal negligence

### Negligent manslaughter by omission, test is (*R v Lavender*):

1. D must be under a legally recognised duty to care
  1. D breached that duty in a way that was criminally negligent
  2. D's negligence caused V's death
  3. D did not have a lawful justification/excuse for the act
- Gross criminal negligence: whether death has been caused by an act/omission, the criminal law requires a high degree of negligence before criminal sanctions are applied
    - **Objective test (*Nydam, Lavender*)**
  - General duty on everyone not to cause death by a positive act, the duty is more complex regarding allegations of gross negligence by D's omissions rather than actions
    - Need to prove legal duty to act (moral duty not sufficient)

### Legal duty to act

- Statutory duties: voluntary employment in an occupation that bears on public safety (*R v Lowe*)
- Common law duties:
  - Parent/child relationships: parent come to assistance if child is drowning (*R v Russell*)
  - Voluntary assumption of care for helpless persons (*R v Taktak, R v Stone & Dobinson*)
  - Situations where D has created a situation of danger by dealing with dangerous things or doing dangerous acts (*R v Miller* – lit a cigarette)

Breach a duty of care: must prove D breached duty of care according to standard for manslaughter by criminal negligence (*Nydam*)

## **Self-defence**

### Week 4 readings – ch 12

#### As a defence

- Aim: protection of personal autonomy against attack
- Available to crimes involving the use/threat of force to the person
- May raise defence if he acted:
  - In order to defend himself from unlawful violence
  - In order to defend another from unlawful violence
  - In order to prevent the commission of a crime; and
  - In order to exercise a power of lawful arrest
- *Entitled to full acquittal if 3 conditions are satisfied:*
  1. Accused was genuinely acting for one of these purposes
  2. Accused used no greater degree of force than he honestly believed to be necessary in the circumstances of the case
    - a. **Subjective** test → whether accused believed that force was proportionate to the necessity of the situation
  3. Accused used no greater degree of force than a reasonable person would have regarded as necessary in the circumstances
    - a. **Objective** test → not what accused believed, but what an ordinary person would regard as necessary

#### *Crimes Act*

#### *S322G: Application of part*

Self-defence applies to any offence

#### *S322H: Definitions*

**Evidence of family violence** has meaning in s322J

**Really serious injury** incl. serious sexual assault

#### *S322I: Onus of proof*

1. **Accused** has the **evidential** onus of raising self-defence, duress or sudden or extraordinary emergency by presenting or pointing to evidence that suggests a reasonable possibility of the existence of facts that, if they existed, would establish self-defence, duress or sudden or extraordinary emergencies
2. If the accused satisfies (1), the **prosecution** has the **legal** onus of proving BRD that the accused *did not* carry out the conduct in self-defence, under duress or in circumstances of sudden or extraordinary measures
  - Exceptions: mental impairment & some stat defences
  - If P fails to disprove defence – D is acquitted

## **Sexual Assault (no sexual penetration)**

### **Statutory provisions**

*Crimes Act 1958*

#### ***S37E: Touching***

1. Touching may be done –
  - a. With any part of the body; or
  - b. With anything else; or
  - c. Through anything, including anything worn by the person doing the touching or by the person touched
2. If a person (A) causes another person (B) to be touched by a third person or an animal, A is the person doing the touching of B
3. Touching may be sexual due to –
  - a. The area of the body that is touched or used in the touching, including (but not limited to) the genital or anal region, the buttocks or, in the case of a female, the breasts; or
  - b. The fact that the person doing the touching seeks or gets sexual gratification from touching; or
  - c. Any other aspect of the touching, including the circumstances in which it is done

#### ***S40: Sexual assault***

1. A person (A) commits an offence if –
  - a. A intentionally touches another person (B); and
  - b. The touching is sexual; and
  - c. B doesn't consent to the touching; and
  - d. A doesn't reasonably believe that B consents to the touching
2. A person who commits an offence against s1 is liable to level 5 imprisonment (10 years max)
3. It isn't a defence if that, at the time of the conduct constituting the offence, A was under a mistaken but honest and reasonable belief that the touching was not sexual
4. A person doesn't commit an offence against s1 if the touching is done in the course of a procedure carried out in good faith for medical or hygienic purposes

#### ***S41: Sexual assault by compelling sexual touching***

1. A person (A) commits an offence if –
  - a. A intentionally causes another person (B) to touch –
    - i. A; or
    - ii. Themselves; or
    - iii. A third person; or
    - iv. An animal; and
  - b. The touching is sexual; and
  - c. B doesn't consent to the touching; and
  - d. A doesn't reasonably believe that B consents to the touching
2. A person who commits an offence against s1 is liable to level 5 imprisonment (10 years max)
3. It isn't a defence if that, at the time of the conduct constituting the offence, A was under a mistaken but honest and reasonable believe that the touching was not sexual
4. A person doesn't commit an offence against s1 if –
  - a. The touching is of a person and is caused to be done by A in the course of a procedure being carried out by A in good faith for medical or hygienic purposes; or

## **Obtaining financial advantage by deception (OFAD)**

*Crimes Act*

*S82: Obtaining financial advantage by deception*

1. A person who by any deception dishonestly obtains for himself/another any financial advantage is guilty of an IO & liable to level 5 imprisonment (10 years max)
2. Deception has same meaning as s81

### **AR**

- Obtains
  - By deception
  - A financial advantage
    - Obtaining credit
    - Obtaining services without paying
    - Avoiding debt (*Ray*)
    - Defer a debt (eg. Cheque that bounces)
- *Vasic*: D wrote cheque & knew that it would bounce
- Argued he was deceptive, but no financial advantage
  - Extra time to pay debt → financial advantage
  - Obtaining opportunity for income with fake qualifications

### **MR**

- Dishonesty
  - Same as OPD → only can be negated by an honest belief in legal claim of right
  - Common law (*Salvo; Brown; Bonollo*)

Theft	OPD	OFAD
- no deception	- deception which clearly caused D to obtain property	- thing involved isn't 'property' → financial advantage

## **Robbery**

*Crimes Act*

*S75*: A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear that he or another person will be then and there subjected to force  
Level 4 imprisonment (15 years max)

No theft → no robbery

### **AR**

1. Accused steals (commits theft); and
  - S71(1)
  - *Langham* (defence)
2. Immediately before/at time of theft, accused either:
  - Appropriation is continuing act, doesn't matter if you use force after appropriation, still counts (*Hale*)
    - a. Used force on a person; or
  - No minimum physical contact constituting 'use of force' → jury decides
  - Mere act of jostling is not enough (*Dawson & James*)
    - b. Put person in fear that force was going to be used; or
    - c. Sought to put a person in fear that force was going to be used then & there