

# LAWS1021 Exam Notes

Criminalization			Process	Components	Police Powers	Public Order	Drugs
What is criminal	What ought to be criminal (normative)	Over-Criminalization	*DISCRETION	Legal personhood	*Move on (s197,198,198A,199)	SOA *ss 4/4A s9 (+199 LEpra) s11 ss22-27 (Lawful assembly, procedure)	DMTA ss10 – 14 s3 s25→s29 (+4 “administer”) s40 s23 s24
Definition: social/ cultural/ historically relative	- Lord Williams of Mostyn - Ashworth - Ashworth and Horder	Indigenous people + other minorities	Process as Punishment: - *Bail - *Deaths in custody	MR/AR/SL x burdens (Attempts)	Search: *Personal and dogs (s21,21A, ss30-33)		
*Penal Populism & Law & Order “commonsense”	- *Duff - Husak - Naffine		Two-tiers of Justice	Statutory Interpretation (He Kaw Teh)	*Arrest (s99)		
Justifications - harm - morality - offensiveness - risk	- Loughnan - BROWN		* ↑Criminal Infringement Notices (CINs) ↑Technocratic Justice ↑Summary Jurisdiction ↑ Guilty Pleas ↑ Pressure	General Principles: - presumption of innocence - AR+MR= liability - AR+MR coincidence - Golden thread	*Reasonable Force (ss230,231) Detention for Questioning (ss 114-118, 122)	<i>Crimes Act</i> *93B *93C *93X 545C	Policy
					<i>Evidence Act</i> s138		

Q1. Problem question: provide legal advice in relation to a factual scenario. (substantive offences and police powers)

(30 marks)

Q2. Interpret a piece of draft legislation and discuss the policy rationales for the legislation. (statutory interpretation and themes associated with policing, criminalisation and criminal justice policy)

(30 marks)

# Criminalisation

## 1. Defining Crime (What is criminal?)

- *Mala prohibita* (wrong bc prohibited) vs *mala in se* (wrong in themselves)
- Cohen, *Against Criminology* - criminalisation, identify act deemed dangerous and designate it as criminally punishable. Crim law model applies the same yardstick in unique situations, weak social control

Law and Order “commonsense”: Hogg & Brown / Naffine – core crimes

- commonsense tests for core crimes [murder] are fallible (tho they seem obvious)
- The law is soft on criminals (few rape offenders are brought to justice)

Penal Populism: Pratt

- Punish what the electorate condemn to get their support (political opportunism). Populist influence, penalties driven by emotional forces (fear, intolerance, anger, suspicion) anger focussed on expert’s views that stand against their will
- Initial: electoral success; later: recoil from the havoc (Sorcerer’s Apprentice)

⇒ Criminalisation Theories (Justification for criminal law)

- Harm - JS Mill: Only behaviours harmful to others gives liberty to the state to intervene. Should be sovereign to your own body. (euthanasia/drug use)
- Risk (no harm, e.g. drink driving, penalise → deterrence)
  - O’Malley, *The Politics of Mass Preventive Justice* (e.g. speed cameras)
  - Gunther, Serious Crime Prevention Orders, Public Safety Orders, Consorting
- Morality (H/D debate: should crim law prohibit conduct bc they’re immoral?)
  - Devlin - common morality is bondage, price of society that we must pay. Immoral conduct undermines shared beliefs, harm social cohesion
  - Hart - Shared moral beliefs change overtime, more likely that offenders unaware of a wrongdoing until after the commit the act (e.g. rock throwing - *Loughnan*)
- Offensiveness – Hall (morally okay, public order offences, privatization)

## 2. Normative Theories (What ought to be criminal?) (rhetoric vs reality)

⇒ Lord Williams of Mostyn - sufficiently serious, existing legislation/other remedies, practically enforceable, legally sound, penalty proport<sup>n</sup> seriousness

⇒ Ashworth - purported criteria for creating new crimes aren’t practically obeyed

- crimes created as political statements: garner popular favour (penal populism)
- i. censure substantial wrongdoing (legislation realistically reduce crime?)
  - Ash&Hor: crim law shouldn’t be invoked unless other remedy are inappropriate
- ii. equal treatment and proportionality
  - Duff: If we fail to treat a person or group with the respect or concern due to them as fellow citizens, we may lose the moral standing to call them to account
  - legislation targeting specific groups of people? (Young offenders/ Aboriginals)

## iii. protections for accused persons

- Presumption of innocence, legal representation, right to fair trial, bail, defence

## iv. Max sentences proportionate to seriousness of wrongdoing (👿14yrs prison max)

⇒ Ash&Horder - Minimalist Approach (Respect for human rights, the right not to be subjected to state punishment, criminal law shouldn’t be invoked: unless other techniques are inappropriate/ if the effects of doing so would be < not doing so)

⇒ Duff - 'communicative': trial:moral communicat<sup>n</sup> between citizens; 'relational'<sup>[Ash(iii)]</sup>

⇒ Husak - internal: nontrivial harm, wrongfulness, (undeserved punishments are unjustified), criminalization (last resort); external: state has substantial/legitimate interest, statute directly advance that interest, no more extensive than necessary

- Requirement for crimes of *risk prevention*: reduce substantial risk, decrease likelihood of ultimate harm, consummate harm, culpability; (eg Terrorism offences)

⇒ Naffine - Even core wrongs require us to think how/why/whom to criminalize (rape low conviction rates, practically tolerated?) theorists insist on natural wrongness of core crimes, fail to attend these mundane/worrying realities of crim law and justice

⇒ Loughnan - features, new model offence construct<sup>n</sup> (speed [bc of ‘moral panic’?]: enough research? existing legislat<sup>n</sup>?; expans<sup>n</sup> of police powers: possible abuse, more power/better enforcement?; changes of laws of evidence and procedure; increased use of preparatory offences [*Husak risk prevention*]; ‘Particularism’: e.g. rock throwing<sub>(assault?)</sub>, a reactionary approach, rigid law less space of moral implication

- Brown - normative→look at internal logic; sociological→political,legal,cultural conditions particular instances of criminalisat<sup>n</sup>; Normative theory (standalone entity) limited purchase, criminal law integral to wider moral and cultural politics

Consorting: inconsistent w normative theories (*Crimes Act s93X; Forster v DPP [2017]*)

- Standalone offence, no AR MR, broad, easy for police to use it as an investigatory tool, no culpability [*Husak risk prevention*], targeting a group (past convicts)? [<sup>Ash(iii)</sup>] Unjust!!

## 3. Overcriminalisation - Colonialism and Indigenous People

⇒ Husak *Overcriminalisation*: too much punishment? resources spent on criminalizat<sup>n</sup>, reaction to a social problem<sup>(Cohen)</sup> offenders unaware of wrongdoing<sup>(Hart, Morality)</sup>

⇒ The role of criminal law in the processes of colonization and dispossession

- indigenous over-represented in prisons, *de facto* decriminalization, black velvet
- Deaths in Custody (Mulrunji, no reason to arrest, police fell on him when brought to station, death by forceful impact; Ward, refused bail, in cell of car, died of heatstroke; state not compiled with its duties and responsibilities)
- The stolen generation: penal welfarism (criminogenic, profound loss of personal identity and security, despair and alienation)