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## COMMON ABBREVIATIONS

Throughout these materials, and in class, you will encounter the following commonly used abbreviations. It is acceptable to use these abbreviations in any work that you submit for assessment.

A = Accused

AOABH = Assault Occasioning Actual Bodily Harm

AR = Actus Reus

BRD = Beyond Reasonable Doubt

C = Complainant

CPA = *Criminal Procedure Act 1986 (NSW)*

D = Defendant

GBH = Grievous Bodily Harm

JCE = Joint Criminal Enterprise

LEPRA = *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*

MR = Mens Rea

SIM = Substantial Impairment by Abnormality of the Mind

UDA = Unlawful and Dangerous Act

V = Victim

# CLASS 2A – CRIME, PUNISHMENT AND PROSECUTION

## BACKGROUND INFORMATION

### *Introduction to the structure and sources 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' (s 51(ix)), 'copyrights, patents of inventions and designs, and trade marks' (s 51(xviii)), or 'the influx of criminals' (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 (s 51(i)).

There is also scope under 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 \(1994\)](#), 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 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.

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.

### ***Classification of criminal offences***

For fairly arbitrary historical reasons, some distinctions between various types of criminal offences have evolved. There is a wide range of offence classifications existing in each State, often reflecting perceived criminal justice needs at the time of introduction. To this extent, the law is procedural and determines how offences are charged and the court in which the matter is tried.

### *Summary and Indictable Offences*

The distinction between summary and indictable offences is the most significant classification of offences and relates primarily to the mode of trial or hearing (Local, District or Supreme Court).

Summary offences are:

- Less serious offences;
- Determined finally in the Local Court ([Criminal Procedure Act 1986 \(NSW\)](#) ('CPA'), [s 7](#));
- Tried before a Magistrate, who is also a trier of fact;

- To be proved by the prosecution, beyond reasonable doubt;
- Only created by Parliament (they do not exist at common law).

In general, where a person is charged with an indictable offence:

- The accused faces a preliminary hearing or committal proceedings;
- The case is tried by a judge and jury, with the judge ruling on questions of law and the jury ruling on questions of fact; and
- The guilt of the person charged must be established beyond reasonable doubt.

[Section 5](#) of the [CPA](#) provides that an offence must be dealt with on indictment unless it is an offence that under any Act is permitted or required to be dealt with summarily. [Schedule 1](#) of the CPA provides a list of offences that can be dealt with summarily under Table 1 and Table 2. Table 1 offences are said to be more serious than those in Table 2, and are dealt with summarily unless the prosecution of the accused elects to have the charges dealt with on indictment. Table 2 offences are to be dealt with summarily unless the prosecution elects to have them dealt with on indictment.

Some matters are strictly indictable (such as large drug offences) and must be finalised in the NSW District Court. Murder and treason are heard exclusively in the NSW Supreme Court in its original jurisdiction.

Summary offences will be dealt with in the Local Court. You can see from the flowchart the different procedures that apply to offences that are dealt with summarily or on indictment. The maximum penalty for an offence is either in the legislation such as the Crimes Act which shows the penalty on indictment or in ss 267 and 268 of the CPA which shows the penalty for indictable offences dealt with summarily.

### ***Jurisdiction***

Jurisdiction is the power to legislate, to enforce the law, and to hear and decide cases. Jurisdiction to try criminal cases is generally territorially-based. That is, the reach of the criminal law is based on the offence having taken place within the territory of NSW. The NSW criminal law also has a limited extraterritorial application, in the case of offences that are 'sufficiently connected' with the State of NSW.

Sometimes, more than one State or Territory will have territorial jurisdiction over an offence, or there may be a factual dispute as to where the crime took place. For instance, in the case of murder, an issue of jurisdiction may arise if it is unclear in which State or Territory a victim died, or if elements of the killing took place in more than one State or Territory.

In NSW, there is geographical jurisdiction if an offence is committed wholly or partially within the State or, if committed outside the State, the offence threatens the peace, order or good government of the State (*Crimes Act*, [s 10D](#)). There is a presumption as to the existence of the necessary geographical nexus ([sub-s 10E\(1\)](#)). This presumption is conclusive unless the person charged shows on the balance of probabilities that the nexus does not exist ([sub-s 10E\(2\)](#)).

For the purpose of this subject, you will not be assessed on questions of jurisdiction. All problem questions will pertain to crimes occurring within the territory of NSW.

### ***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