

CRIMINAL LAW IN NZ

a. Definition

Positivist: written law, listed as an offence in the CA 1961

Moral: 'wrong', rights based - affront to the collective morality of society

Public: state prosecutes; avoid vendetta + ensures case

Based off an individualistic approach to responsibility

b. Sources

Legislation: 1893; CA 1961 + Summary Offences Act 1981 +

regulations (provisions ambiguous/incomplete + no new offences)

Common Law: courts interpret the law as there is no comprehensive

guide (GP) – allows for social pressure to change application of law

Maori Criminal Law: historically excluded, incompatibility ICR/CCR

NZCA - system exists, problems in operating general system (**Manson**)

NZSC – Tikanga is part of the values of the common law, extinguished

for the purpose of establishing liability (not entirely- include principles

in sentencing) (**Takamore v Clarke**)

- **Sources:** collective relationships, utu (reciprocal obligations)

- **Future:** don't implore imposter legal system as first port (**Ani**)

c. History: codification

1893 codification clarified application to Maori, 1961 depart UK roots

Aims: accessibility, certainty, consistency, clarity, comprehensibility

Ability to achieve aims: retain ambiguity for flexibility for development

Crim. Procedure Act 2011: categorised crimes - s 6(1) and trial s 71-74

1 – regulatory infrng.	Fine only	Judge alone NZDC
2 – minor criminal offences	>2yrs imprisonment or community based sentence	Judge alone DC - HC can order proceeding transferred to HC
3 – serious violent offences	<2yrs or life imprisonment	Judge alone DC, D may elect jury trial, poss. judge alone HC
4 – Schedule 1 offences	(murder, manslaughter)	Jury trial HC, can be judge alone HC (length/ intimidation)

Effect: 1. **Summary/indictable offences replaced**

Less serious offending (DC) Trial without jury, possible to elect when charged with offences +3m (transferred HC) "Information" laid	More serious offending (HC jurisdiction, occasionally DC) Trial by jury, sometimes by summary "Indictment" filed
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2. **Threshold for juries increased:** for efficiency, modernisation

- previously elected for when +3m, increased to +2yrs (dividing line)

3. **Case Management Memorandum:** for efficiency (s 55,56)

- P/D take part in process to complete information on plea, charge,

defences to be argued + can get sentence indication (s 56(1)(d))

- controversial: relieves some burden on P (adversarial system), could

disadvantage defence, could impinge right to silence

Purpose of reforms: uphold minimum standards of criminal procedure

Critique: efficiency, system build around protecting rights of the D

Partial codification: included a special part (defines criminal offences,

general principles/conditions of liability) not a general part

- GP: specific requirements: actions/omissions necessary, mental

element required, how to deal with statutes silence, common law D

- not common in common law countries (UK, USA, CA)

- NZ Courts play role of GP- controversial: (1) P is elected, privy to

reports, public discussion, role (2) J are better legal experts, role as a

check/balance on P, rigid application of law incompatible with change

- Crimes Bill 1989 failed: defined intention, recklessness, heedlessness, negligence but adopted a

middle ground approach MR

- **Gillick:** contraception for underage - justification illegal: 'physical, mental, emotional wellbeing'

- **R v Murnane:** J 'extended claim [of right] beyond what was anticipated by Parliament' (belief

lawfulness even when based on ignorance) – removed via amendment to s 19 Crimes Act

d. Adversarial system

Evidence: facts/evidence emerge via witness to produce robust facts +

right to silence + **critique:** protects D rights rather than effects on V

Juries: 1. Fact finder, 2. Community conscience (temporal), 3.

Safeguard against oppressive government, 4. Provide legitimacy (role

of layperson), 5. Means of anticipation

- **Issues:** representation (women/Maori), layperson knowledge

- **Reform:** majority juries (s 29C Juries Act '81), CMM,

categorisation of offences (both Criminal Procedure '11)

Role of Courts: interpret and apply the law (extent: **Gillick**), uphold the

rules of evidence, role of the FP, common law D (apply s 20 CA '61)

NATURE AND SCOPE OF CRIMINALISATION

a. Form

Crime = construct of particular legal/social systems reflecting temporal

+ geographic interests, imperatives, arrangements

Feminist: fail to protect + media focus on pathological state of mind

(irrational) + male behaviour informs system

b. Substance

Natural law: set by nature, valid everywhere, rights pre-existing (≠NZ)

Expression of values: upholds order, fairness, justice, democracy

Normative law: law as a social construct; 'why', 'ought', 'should'?

- social relations enforces/creates standards of conduct

1. Criminal law as a **moral/retributive** system: reflects societies basic

values, criminal law is symbolic (doesn't explain why crime not wrong)

2. Criminal law as **regulatory, instrumental**, utilitarian: prohibits/deters

for public safety, health, economic (doesn't explain murder morality)

Positivist law: law as an administrative system

- law is rules/norms, validity due to origin (sovereign/procedure),

morality not a concern → legal, procedural, administrative elements

- encompass expanding, ≠ cost effective, ≠ preventative, ≠ necessary (to

examine fault), ≠ appropriate (reoffenders), ≠ effective (witnesses in fear)

c. Approaches

Interpretive: historical, original purpose; to understand how it operates

in present (contexts, traces development – what not why, regulations)

Normative: what the law ought to achieve, purpose of criminal law,

incorporates **JS Mill** liberty principle and **Gross** minimising suffering

d. Justification: harm

Purpose: informs debate about enforcement of morality through

criminal law + limits of leg which aim to protect people from harms

inflict on themselves (autonomy v state power)

Limits: although true crime is driven by the harm principle, the whole

scope of it is not (regulatory control, harder to find the harm)

JS Mill: principle of liberty – law should be justified by the greatest

good for the greatest number of people; state intervention to prevent

harm to others so to maximise freedom (utilitarian approach)

HLA Hart: punished for conduct genuinely responsible for (critique as

law also used to prohibit behaviour, not just respond to it)

H Gross: law used to minimise suffering through prevention of harmful

conduct by efficient means (violating others interests)

Fienberg: we can suffer and not be harmed, harmed when our

interests are harmed and prospects of a good life lessened

Von Hirsch/Jareborg: sanctions should be proportionate to their

severity and gravity of the offence and impact on standard of living

Subsistence → minimal wellbeing → adequate wellbeing → significant

Degrees of harm: (1) Primary harm: direct harm to others – **Gross**

categories: 1. Violation of entitlements (life), 2. Offences to sensibilities

(brothel), 3. Impairment to collective welfare (treason), 4. Violations of

government interest (tax evasion)

(2) **Secondary harm:** indirect harm to others – **JS Mill** do not fit within

his statement – otherwise justify too many interferences with liberty

Kaplan: 1°/2° harm not easy to distinguish, (1) **public ward harm:** costs

for state care, (2) **non support justification:** disrupting support structures

(3) **modelling:** good images, children, (4) **categorical imperative:** allow

behaviour will implode society (spread? if few=harm?)

Feinberg: **risk and probability** of harm: ↑gravity of poss. harm, ↓likely

required to justify prohibition, the ↑probability of harm, ↓grave harm

required to justify prohibition, the ↑valuable the dangerous conduct,

the more reasonable it is to take the risk of harmful consequences

Public interest in criminalisation: **Brown:** majority = public interest to

not condone/encourage the behaviour (morality), minority = balance

individual autonomy and societal interests, **R v S:** consent defence so

long as public policy reasons outweigh the social utility of the activity

and autonomy (rare for GBH); value autonomy, religious beliefs,

scarification ≠ punishment in intimate domestic relations. for the

purpose of maintain the relationship (power, vulnerability), **Wilson:** ≠PI

to condemn consensual activity between HW when no aggression

e. Justification: morality

Conviction is social judgment of moral blameworthiness (**Martin Luther**)

Feinberg: harm princ. limits liberty, must be balanced with moral princ.

Lord Devlin: law is good, reflects a moral code, look 'calmly and

dispassionately' if then an act is regarded as 'so abominable its mere

presence is an offence' society should not be denied the right to

eradicate it' v **HLA Hart:** law is questionable and doesn't reflect a

moral code, makes no sense to criminalise controversial act

f. Justification: reality of application

Packer criteria: criminalise where 1. **Socially threatening** behaviour,

2. Not **inconsistent** with the goals, 3. Suppressing the behaviour will

not **inhibit socially desirable** conduct, 4. Can be dealt with **even**

handedly, 5. No disproportionate **response** req. for n enforcement, 6.

No **reasonable alternatives** to criminalisation exist (education)

- Misapplied criminalisation: misuse of drugs; overreliance on crim.

Sanction, users not traffickers, underground trade, burden on low soc.

Economic groups (not appropriate, not achieving desired outcomes)

PRINCIPLES/POLICIES OF CRIMINALISATION

c. Introduction

Informs liability and defences; **R v Hamed:** cameras in Tuhoi- legality:

intrusive search not implicit – P responded: Video Surveillance

(Temporary Measures) Act '11- legalise footage retrospectively

d. Range

Minimum criminalisation: last resort, protect auton. (Brown-m) critique: justified wrongs	Social defence: protect people against things (Brown – M), critique: only limited financially
Liability for acts not omissions: protect auto., chain of causation, critique: less serious not unsuit.	Social responsibility: morality, require cooperation, critique: unclear expectations
Conflicting rights and necessity: rights can be infringed when an individuals own rights will be	Proportionality: absolute necessity required, inflict only the minimum harm proportion.

e. Rule of Law/Fair Procedure

Non-retroactivity: citizens autonomous and rational	Thin ice principle: do not search for fringes of legality
Maximum certainty: critique: vagueness essential to adapt	Social defence: laws adapt as new circumstances arise
Princ. of strict construction: doubt in favour of D, narrowly	Broader purposive approach: look to attitudes, J uphold rights

a. Presumption of Innocence

Procedural fairness: presumed innocent unless P proves D guilty, golden thread (**Woolmington**) **Justification**: social/legal consequences of conviction
Exception: legislative offences where the P has little to prove and D bears the burden of exculpation (strict liability) D has to prove defence

b. Principles of conditions of liability

ROL: individual respected as deliberate, choosing persons that should only be liable for consequences knowingly risked (contrary to CCR)

Principle of MR: D liable for consequences knowingly risked	Policy of objective liability: D liable for failure to fulfil standard
Principle of correspondence: fault corresponds to conduct	Constructive liability: eggshell take V as you find them
Principle of fair labelling: so you can differential behaviour	Efficiency of admin.: fewer offences broader reach
Principle of contemporaneity: conduct/fault at same time	Doctrine of prior fault: prior fault extends to conduct=liable

AIMS OF PUNISHMENT

a. Objectives: s 7 Sentencing Act 2002

Protection of society/denunciation: reduce levels of offending, trust J, statement of disapproval/condemn → s 16(1): safety of community
Retribution: just deserts, proportionate to gravity/culpability, accountability to society and individual → ss 7(1)(a),(e)
Deterrence: Threat of punishment prevents offending, recidivism (idv) and deter generally (jail not appropriate always) → s 7(1)(f)
Incapacitation: Protect society as offender sequestered (lasts only as long as sentence); ↑threat, ↑severe sentence → s 7(1)(g)
Reparation: Of put right, repay for injury/damage to \$ status prior to the offence (more V centred, conflict with prison) → ss 7(1)(d),(b), 12
Restorative justice: all affected participate: 1. Interests of V, 2. D accountable to V/community, 3. Prevent reoffending, 4. Balance, culturally appropriate, **R v Clotworthy** (idea credited CA, wider approach to criminalisation), **R v Folaumoeloa** (genuine human experience), 15% lower reoffending → ss 7(1)(b), (c), s 10, s 24A/25
Rehabilitation: resocialise individ. to prevent reoffending (need/urge) (attitude/values) + drug/alcohol courts developed, craft prog. → 7(1)(h)

b. Purposes: s 8 Sentences Act 2002

Minimum intervention: apply least severe punishment (proportional) → (a) proportionality: gravity and degree v (g) least restrictive outcome
Equality before the law: synchronicity (difficult) → (e) consistency
Equality of impact: account for circumstances, impact on experience (tailoring) → (b) seriousness (c) maximum for most serious v (g), (f)(h) circumstances of V/O, (i) personal, community, cultural background
Control public expenditure: → not direct/ but not far from thoughts
Justice: uphold humanity → (j) account for restorative justice process
Rehabilitation: resocialise → (i) personal, cultural, family background
Section 9: AGG/MIT Factors: weighed against the charge (reflected?) s 9(3) not account for alcohol/drug influence, s 9(4) any factors, weight
Section 10: account: O, A, R to make amends (genuine, fulfilment, accep.)
Section 10A: hierarchy of sentences to reflect supervision/monitoring
S 19: least restrictive combination: concurrent (different; after each other – totality of offending), cumulative (similar/connected – together; most serious offence should receive the penalty appropriate to totality of offending)
Sentencing Act 2002: originated LCR; transparency, consistency, P guidelines, costs → impact: 1. Codified principals, 2. Cultural info (s 8(1) account, s 27 report), 3. Clarified A/M factors (removed drugs/alc), 4. Max sente. in worst cases (back out- manifestly), 5. Community safety s 16(1), 6. RJ + s 10

Other relevant legislation: Victims Rights Act 2002 (victim impact statement properly recognised, for judge), Sentencing and Parole Reform Act 2010 (s 86A 3 strikes rule – third strike = max time, no parole), Sentencing Amendment Act 2014 (s 24A RJ conference)

Sentencing Process

1. Finding of guilt, 2. Pre-sentence reports, 3.V impact statement, 4. Max/Min penalties, 5. Mandatory/presumptive sentences, 6. A/M factors, 7. Guideline judgements/legislation

c. Reoffending: Maori disproportionately rep.

Prisoners 50.8% (15.4% pop), 65% youth prison (rising 56% 2006)
Reconvicted: 2: 63.2 v 49.5 (41.3 v 30.5) / 5: 80.9 v 67.7 (54 v 43)
Factors: institutional racism, not deterrent/rehab + family separation (50% children/parent) and inability to contribute to society/community

CORE INGREDIENTS

a. Proof

Legal: P has to prove the ultimate standard (**Woolmington**); different standards 1. Seriousness (autonomy v dispute settle), 2. Power imbalance (state resources), 3. Indiv.rights (due process, presumption)
- **Criminal:** beyond reasonable doubt; small possibility (**Miller**)
- **Civil:** on the balance of probabilities; less difficult proff– 51%
Evidential: practical obligation falls on D to point to evidence suggests RD (can remain silent)(**Gill**), to make D a 'live issue' the P must prove does not apply beyond RD (where sufficient evidence) (**Jaysena**)
Shifting: **Woolmington** 'no attempt to whittle it down could be entertained' except insanity (s 23(1) CA) + statutory exceptions which can shift the legal burden of proving an offence doesn't apply onto the D (regulatory/no-fault offences) only to the standard of balance of probabilities, trend towards (**Hansen:** UK broader, allowed the courts more flexibility)

b. Notions of Responsibility

Collective CR: crime suffered/responsibility communal; intent/cause minor role – Maori: *utu* (balance) and *muru* (stripping away: harm is diminished mana, legitimise affairs, social cohesion) Q: sphere?
Individual CR: fault/condemnsation; criminalisation harmful (punish, stigma) = net of liability narrow: intent + causation
Capacity: limit to cognition (understanding) and volition (choice to act differently) = certain/predictable ± fails at standards of behaviour (neg.)
Character: responsible: character– outside normal range = liability ↓ = intention, broad, practical social control ± individualised, determining

c. Responsibility and criminalisation

Clarkson/Keating: punish harmful conduct (act, omission, soa) that is committed in conditions we fairly blame the actor (MR, absence of D)
Elements not discrete – analysis can cross over (**Dadson:** wood D)

ACTUS REUS

1. ISSUE a. Justification

Distinguish evil intentions (doubt follow through) + common thoughts
Conduct requirement introduces certainty + prevent overreach of law

2. ACTUS REUS b. Elements

- i. Act (i+ii for conduct/result crimes)
- ii. Committed in legally relevant circumstances
- iii. Causing the prohibited result (result crime only)

3. CONDUCT c. Conduct

iv. Harmful: constitute or threaten (a/o/soa)
v. Status offences: harm/conduct not required
Committed when certain soa exist; liability unjust if the person had no control over their status – just if it is their fault they have no control (find original act that set the rest in motion) ± time frame open=no end

R v Larsonneur: control irrelevant: how arrived≠ difference (bad *Tifaga*), **Winzar:** (hospital) control irrelevant for purpose of Act, **Martin:** (home then highway) acquitted: appeared without volition, **Powell v Texas:** D of involuntariness (alcoholic) accepted by dissenting judge (liberty)

d. Omission liability

1. No general duty; causation/intention difficulty, autonomy, what u are
2. Ability to import: (a) language capable of AR= O? (b) D culpable: duty?
Duties: CA General Duties, categories: special relationship, assumption of responsibility, by contract/position, because the defendant created the situation producing the harm + req. to take reasonable steps to amend it (**Miller**)
Expansion: YES: social responsibility; interdep., assist vulnerable, diff: act/failure, value life>temp. freedom, feasible, ↑quality social life, NO: conventional: liability should be clear, those voluntary undertaking of respon., acts>O, autonym/liberty, paternal state, forced morality, busy bodies, impractical to cast net (unaware of obligations)

e. Continuing Act (Fagan)

Mere O ≠ assault, act incomplete till car removed (meets MR) as remained, ignition, maintained, words [dissent: unable to find: allowed] **Miller:** created duty– R steps to alleviate = responsibility for unintention. actions (↑awareness) = **Fagan** had duty to move car, **RE B:** DS lawful decision, death not AR, **Arthur:** nursing care + drug DS; allowing to die not AR, withholding food AR (better view O to provide food is act causing death), **Airdale NHST v Bland:** parents 3yr veg: ending (act) is AR, ≠continuing (omission) is not AR

4. LRC 5. RESPONSIBILITY f. Carried out in Legally Relevant Circumstances g. Ascribe Responsibility: Voluntariness link beh. to AR

Control: Insufficient ≠ responsible for AR; acts must be of volition, directed by mind
Hill v Baxter: (driving, stop sign) **Pearson J:** voluntary: moved car with skill, req. an extraordinary mischance (epilepsy, disease, coma-stone, bees) [**Lord Goddard:** automatism – burden on D to show evidence]

Fault: Insufficient ≠ responsible for AR; diff. doing something, it being done to you
Different to MR: spark without which AR cannot be produced, MR-intent/knowledge behind the will (K)
Kilbride v Lake: (permit/warrant) not responsible for 3rd party actions, req. exercise of will 'some other course open' (Q: produce/set stage?)
Tifaga: NZ temp permit imported contin. respon.= situation not out of his control, produced the relevant conduct, prior fault (no intervening c)
Lind v Laurenson: driver responsible for checking hubodometer
Statutes can impose liability without voluntariness (**Police v Taylor**)

h. Ascribe Responsibility: Causation

Factual causation: 'but for' D actions – V suffered? (entry point)
Wilmont: impairment (driving) not sufficiently connected to death
Legally relevant causation: 'de minimum': not insignificant cause
Sufficient causal chain: no intervening acts
1. Nature: **R v Hallet:** V unconscious, tide advanced: drowned = not intervening factor (set in motion) requires extraordinary act to sever (EO)
2. Third Party: **Roberts:** car, cannot include RF acts result of D actions
Padgett: shield, (alternative) whether intervention is voluntary (freely chosen, informed, deliberate) or induced, fettered, constrained by D
AA: doct. of alt. danger: D places person in position of dangerous to self/others any response not irrational= involuntary (police standards)
3. Medical misadventure: **Smith:** D actions operating/substantial cause or merely setting the scene? **Jordan:** antibiotic overwhelming cause, D wound set scene → s 166 CA: D still at fault where operating cause
4. Victims Conscious A: **Blaue:** eggshell skull, **Dear:** reopen wounds: RF < operating cause (± suicide RF) **Enviro. Agency v Empress:** tap, 3rd party = permits to enter waters = RF outcome (± policy real reason?, acts not RF can break chain, ≠ explain lawful storage had causal effect/set scene)

6. CONCLUSION

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Maori Criminal Law

c. History: codification

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d. Adversarial system

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III. NATURE AND SCOPE OF CRIMINALISATION

a. Form

A

b. Substance

A

c. Approaches

A

d. Justification: harm

A

e. Justification: morality

f. Justification: reality of application

IV. PRINCIPLES/POLICIES OF CRIMINALISATION

a. Introduction

b. Range

c. Rule of Law/Fair Procedure

d. Presumption of Innocence

e. Principles of conditions of liability

V. AIMS OF PUNISHMENT

a. Objectives

b. Purposes of Sentences Act 2002

c. Reoffending: Maori

VI. CORE INGREDIENTS

a. Proof

b. Notions of Responsibility

c. Responsibility and criminalisation

VII. ACTUS REUS

a. Justification

b. Elements

i. Act

ii. Committed in legally relevant circumstances

iii. Causing the prohibited result

c. Conduct

i. Harmful

ii. Status offences

d. Omission liability

e. Continuing Act

f. Carried out in Legally Relevant Circumstances

g. Ascribe Responsibility: Voluntariness

i. Control

ii. Fault

h. Ascribe Responsibility: Causation

i. Factual causation

ii. Legally relevant causation

iii. Sufficient causal chain: no intervening acts

1. Nature

2. Third Party

3. Medical misadventure

4. Victims Conscious Act