



HSC LEGAL STUDIES

SUMMARY NOTES FOR THE HSC EXAMS



**WRITTEN BY A STUDENT WHO
OBTAINED A BAND 6 IN THE SUBJECT**

CORE ONE – CRIME

1. THE NATURE OF CRIME

The meaning of crime

“Any conduct which violates the rights of the community at large, and punishable by a recognised criminal sanction upon proof of guilt in a criminal proceeding” (The Australian Legal Dictionary)

The elements of crime

Actus reus

Voluntary doing of a “guilty act” → conduct of the offender

Mens rea

‘Guilty mind’ of the offender → must have committed crime with intention, recklessness, negligence

Strict liability offences

Liability which does not depend on actual negligence or intent to harm → only require actus reus

- Traffic infringements, such as parking in a bus stop are strict liability offences

Causation

Act committed must have caused the final outcome (‘but for’ = unbroken chain of events)

CASE: R v Thomas Sam; R v Manju Sam (No. 18) [2009] NSWSC 1003

- Mother and father charged with manslaughter → criminal negligence
- Rejected conventional treatment and relied on ineffective homeopathic treatments
- Court found that condition was treatable → denial of treatment = death
- ‘most serious case of manslaughter by criminal negligence’

Categories of crime (Crimes Act 1900 (NSW))

Type	Definition	Example
Against the person	Acts / omissions which harm others	Homicide, assault, sexual assault
Against the sovereign	Political crimes / against the nation	Treason, sedition
Economic offences (property/white collar/computer)	Offences against property	Break and enter, armed robbery, ‘white collar crime’ (embezzlement, fraud, computer crime)
Drug offences	Movement of the drugs themselves	Use, possession, trafficking, cultivation, supply, manufacturing, supply
Driving offences	Regulatory and criminal	Speeding, drink driving
Public order offences	Occur in a public place, seen as offensive or disruptive to the general population	Obstructing traffic, obscene exposure
Preliminary crimes	Attempting / planning crime = offence	Attempts, conspiracy

Summary and indictable offences

Summary offences

Smaller offences (jail sentence of 2 years or less) → dealt with by the Local Court

Indictable offences

More serious offences = two-step process

- Committal hearing in local court
- Trial in higher court

Parties to a crime

<i>Principal in the first degree</i>	Perpetrator
<i>Principal in the second degree</i>	Accomplice
<i>Accessory before the fact</i>	Person who knows about and / or helped to plan the offence but was not there when it happened
<i>Accessory after the fact</i>	Person who helped the perpetrator after the offence

Level of responsibility in a crime determines their relevant charge

Factors affecting criminal behaviour

Criminology = the scientific study of crime and criminal behavior

- Usually conditioned to follow law from a young age → parents / educational influences
 - o Psychological factors → mental illness, drug dependency
 - o Social factors → family situation, personal relationships
 - o Economic factors → disadvantaged are more likely, financial gain
 - o Political factors → protests at G8 summit, terrorism, sedition
 - o Self-interest → greed
 - o Genetic theories → discredited (no one is born a criminal)

Crime prevention: situational and social

Situational prevention

Aims to make it more difficult for crime to be carried out

1. Planning / architectural design → considers influence of physical environment on crime
2. Focused approaches → rest on rational choice theory; offenders weigh up gains, risks, costs
 - o Security systems, computer passwords, lighting dark areas, classical music, CCTV
3. Decreasing rewards of crime
 - o Ink filled security tags, security bars in stores
4. Removing opportunities for crime
 - o No alcohol zones, fluorescent lights to stop drug injecting, park lighting, police presence

Social Prevention

Aims to address the underlying social factors that may lead to criminal behavior

- Poor home environment, socioeconomic disadvantage, poor school attendance, early police contact
 - o Government funding for educational programs, school / TAFE partnerships, parenting workshops
 - o Youth programs → PCYC, Youth off the Streets

2. THE CRIMINAL INVESTIGATION PROCESSES

Police powers (*Law Enforcement (Powers and Responsibilities) Act 2000 (NSW)*)

Responsible for prevention / detection of crime / maintenance of public order → ensuring laws are observed

- o Detain and question suspects, search and seizure, reasonable force, technology use, arrest and interrogation, bail recommendations
- Challenge is to balance extent of police powers against rights of ordinary citizens
 - o Must be granted warrants to use particular powers → monitors use of power
 - o *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)*
 - o Overseen by NSW Ombudsman and Police Integrity Commission

Reporting crime

Vital role of citizens → assist police work / promote sense of community participation

- Hesitance → reluctance to become involved, perceived burden, shame, fear of consequences
 - o 85% sexual assaults = unreported, property offences = most widely reported (insurance)
- Crime Stoppers = anonymous national program encouraging people to report crimes
 - o 2014 – 2015 → 83000 calls = 1180 arrests

Investigating crime

Decision to investigate based on severity, likelihood of success, availability of resources, priorities

- Resources are usually directed to serious / high priority crimes
- Process can be long → establishing crime, finding offender, gathering sufficient evidence

Gathering evidence (*Evidence Act 1995 (NSW)*)

Strict rules of evidence ensure best chance of conviction

- Admissible = relevant, obtained lawfully / *in situ*, real, documentary, witness statements
- Inadmissible = contaminated, compromised, irrelevant / indirect, obtained unlawfully, hearsay
- Role of the police to gather evidence → may require specialist intervention (forensics etc.)

Use of technology

- Advances = useful → improved data / video / audio surveillance and processing techniques
- Rapid change = difficult to keep up → must be reliable to avoid wrongful convictions / inadmissible
- Cybercrime units can locate criminals through internet activity → hacking, scams, pornography rings
- Reliance on DNA evidence = risky
 - o 2009 = wrongful convictions in NSW and VIC caused by errors in DNA evidence
 - o 2012 = issues of backlogs → up to 12 month wait
 - o Crime prevention strategy → samples from ex-offenders to help solve cold and future cases

Search and seizure (Part 4 LEPR)

Most controversial police powers; represent intrusion into privacy

- Power to search and seize without a court warrant 'on reasonable grounds'
- Believe to be carrying
 - o Stolen goods / goods used in commission of offences, prohibited plant / drug, weapon
- Powers differ when; premises, school grounds, person in custody, strip search is required
- Procedures are in place → preserve dignity / privacy, informing of reason, asking for cooperation
 - o Help safeguard rights of citizens → reasonable suspicion is not hard to justify

Use of warrants (Part 5 LEPR)

Legal document issued by a magistrate or judge authorising a police officer to perform an act

- Certain searches / seizures can be performed without warrants → states reason / articles
- Judicial oversight preventing misuse of powers

CASE: Darby v Director of Public Prosecutions [2004] NSWCA 431

- Sniffer dogs can only search for illegal drugs at pubs, clubs, public transport, public events
- Methamphetamines discovered = inadmissible as it was an unlawful search

Arrest and charge, summons, warrants (LEPR)

- Police are not allowed to detain a person unless they can do so on 'reasonable grounds'
 - o Catching a suspect committing an offence / believing a crime has / will be committed
 - o Person has committed a serious indictable offence but not yet been tried
 - o Possessing a warrant for that person's arrest
- Arrest = last resort for furthering investigation → excessive force = charges
 - o Legal → must state that and why they are under arrest
 - o Can use 'reasonable force' → may include shooting
- Can only be held for 4 hours, must apply for extended period of extra 8 hours

Court attendance letter, bail or remand

Court attendance notice (CAN)

Personally, delivered legal document → states date / location of court, charge they must answer to

- Witnesses = subpoena
- Failure to attend = arrest / charge

Bail (Bail Act 2014 (NSW))

Temporary release of an accused person awaiting trial

- Conditions → surety, personal recognisance, electronic monitors, rehabilitation, passport surrender
- Difficult to obtain for violent offences, community risk, recidivism, flight risk
- Previous decisions cannot be reviewed on the basis of law reform → not a 'change of circumstance'
- BOSCAR 2014
 - o Prison populations rose by 2.4% (result of remand)
 - o Opposition towards heightened laws → grosser violation of justice to remand innocent person

LAW REFORM: Bail Act 1978 (NSW) → Bail Act 2014 (NSW)

- 'Presumption against bail' = addition of restrictions for drug trafficking and serious domestic violence
 - o Accused must prove why bail should not be refused
- Controversial → effect of denying bail is severe (symptoms like war veterans; PTSD, anxiety)

CASE: Jill Meagher

- Rape / murder by Andrew Bayley → on parole for 16 counts of rape (after 8 years in jail), on bail pending an appeal of a three-month sentence for 2011 king hit
- 'Highly preventable' → parole should have been revoked immediately upon breach

CASE: Lindt Café Siege

- Man Haron Monis → on bail for 40 sexual offences, falsified robbery/insurance claim, accessory before/after the fact for murder of ex-wife

Remand

A period spent in custody awaiting trial

- Against presumption of innocence → held on remand in police custody / at remand centre
- For violent crimes, dangerous criminals, repeat offenders, flight risk
- If found guilty → time spent in remand is taken off total sentence

ARTICLE: Compensation for Wrongful Conviction

- No avenue for compensation = no justice
- 'The long-term effects have been likened to that of war veterans; many wrongfully convicted people experience ongoing psychiatric dysfunction and have long-term difficulties reintegrating into society'
- Wrongfully held = often not compensated for error → system for ex gratia payments is discretionary, erratic, inconsistent
- Lack of specific legislation / guidelines = difficult to achieve justice → better to be safe than sorry??

Detention and interrogation, rights of suspects (LEPRA)

- Detention = max 4 hours → can apply for further 8 (must be informed of rights / max holding period)
 - o Rest breaks are not included (transport, waiting, refreshment, recovery from drugs etc.)
- Under 18 = right to an adult → lie about age and interrogation begins = admissible
- Interrogation recorded on video + 2 x audiotapes
- Recorded to ensure policies / guidelines are followed / for use in course

Release or charge (Terrorism (Police Powers) Act 2002 (NSW))

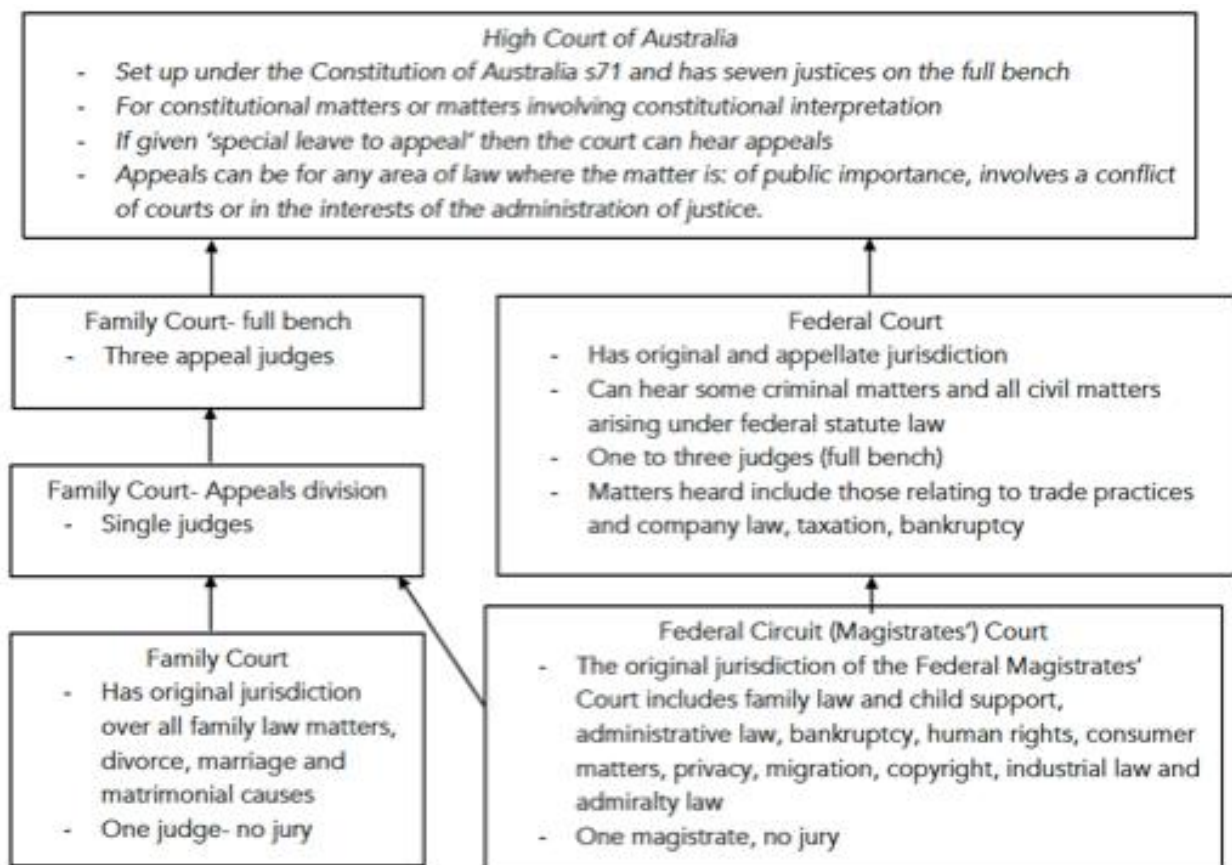
- End of max period → police must charge with specific offence or release unconditionally
 - o Charge → release or bring before magistrate / authorised officer
 - o Custody → bail hearing
- EXCEPTION = terrorism → can apply for 14-day detention period
 - o Suspected of planning a terrorist attack = preventative detention

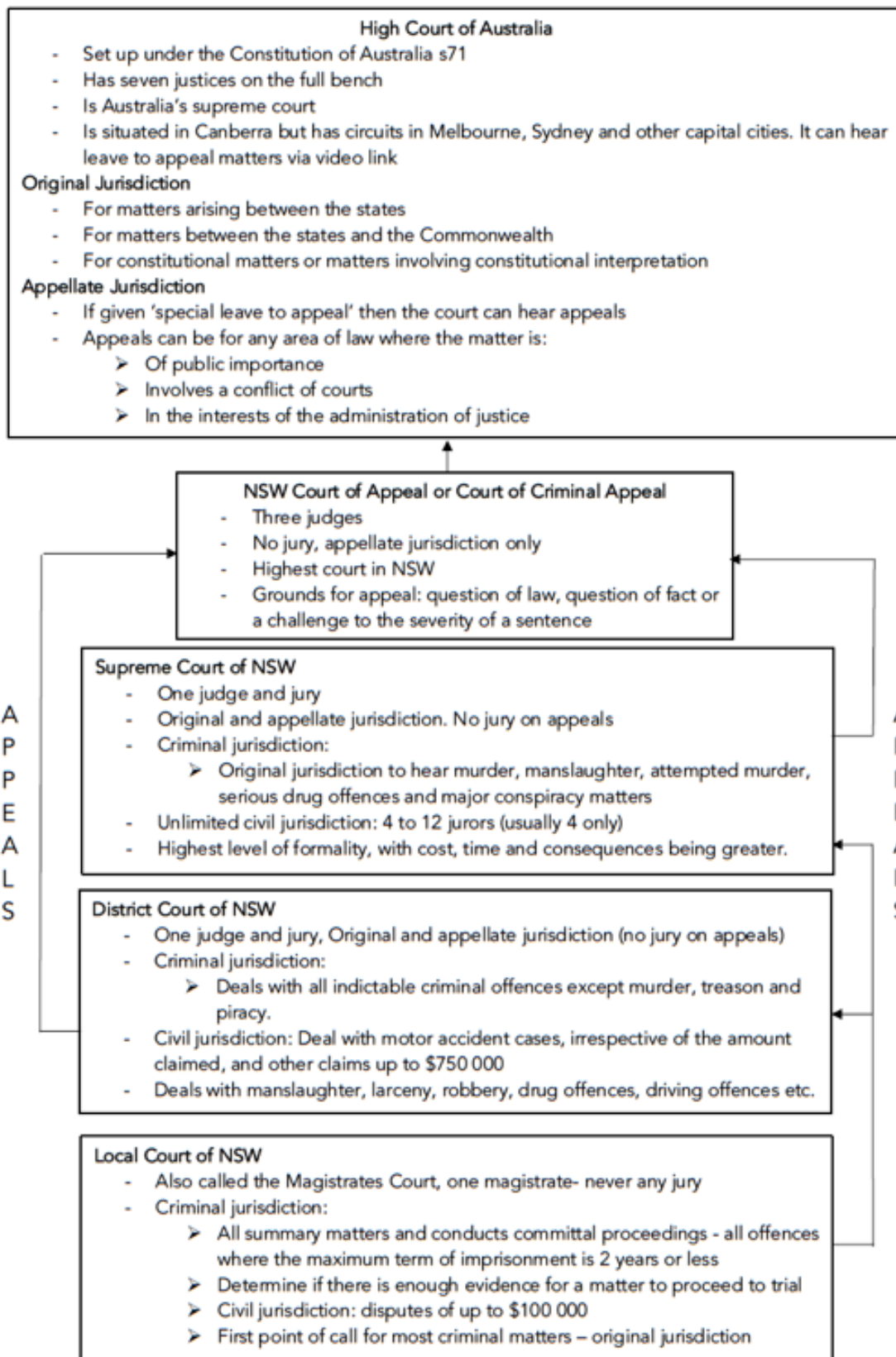
CASE: Mohamed Haneef

- Falsely accused of aiding terrorists
- Arrested and held in preventative detention on suspicion of terror-related activities

3. CRIMINAL TRIAL PROCESS

Court jurisdiction





The adversary system

A system of law where two opposing sides present their cases to an impartial judge or jury

- Alternative = the inquisitorial system → sides present their cases to a judge who directs the cases and can call for particular evidence
 - o Overseas, coronial inquests (Inquest into the Death of Azaria Chamberlain), royal commissions

For	Against
<ul style="list-style-type: none">- Fairer → allows each party an equal opportunity to present its case and is less prone to abuse or bias by the official- Cases are carefully prepared, and lawyers have an equal opportunity to present the truth- Jury is an impartial observer, uninfluenced by outside factors	<ul style="list-style-type: none">- Competing sides are not equal before the law with potential imbalances in resources, skills or knowledge- When additional evidence or testimony would assist the case, judge or jury is not in the position to request this- Complex nature of cases → may be misunderstood due to lack of general understanding of the evidence presented and because the reasons for the jury's decision are not disclosed- Pits the prosecution against the accused (usually represented by a lawyer)- Controversial in relation to criminal law

Legal personnel

Magistrate

Judicial officers → preside over Local Court and Children's Court

- Pass sentences, conduct committal proceedings, hear bail proceedings

Judge

Judicial officers → preside over intermediate and superior courts (District and Supreme)

- Oversee proceedings, maintains order, ensures procedures are followed, hands down sentences, decides points of law, guides jury (may sit without a jury)
- Can inform jury of unreliable evidence

Police prosecutor

Members of NSW Police Force with specialised legal training to conduct prosecutions

- Investigations begin with police; then required to give testimony to aid prosecution's case
- Summary offences (Local / Children's Court) = police prosecutors

Director of Public Prosecution

Independent authority that prosecuted all serious offences on behalf of NSW government
Reviews the charges against an accused person

- Employs experienced barristers / solicitors to prosecute cases using police evidence
- Do not investigate crime → only prosecutes cases (indictable, some summary)
- Operates independently of the government in deciding which matters to prosecute (merit based)
 - o Sufficient evidence, discretionary factor of public interest, resources

Public defenders

Public barrister who can appear for an accused in a serious criminal matter where legal aid has been granted

Pleas, charge negotiation (case conferencing)

Agreement between DPP and accused → guilty plea in exchange for a lesser sentence

- Cannot guarantee particular sentence → is a mitigating factor
- Accused must plead guilty or not guilty → significant impact on how charges are dealt with
 - o Guilty plea = quick → straight to sentencing, no witness testimonies required
 - o Not guilty plea → trial + bail or remand

<i>For</i>	<i>Against</i>
<ul style="list-style-type: none">- Decreases costs and time delays- Conviction on a lesser charge is better than no conviction at all	<ul style="list-style-type: none">- Crimes may be unpunished / insufficiently punished- May plead guilty when innocent- May cause manipulation of accused to forfeit right to trial- Prosecutors may threaten more serious charges to intimidate the accused into pleading guilty
<ul style="list-style-type: none">- Increases the rate of criminal convictions (positive and negative)	

Legal representation, including legal aid (*Legal Aid Commission Act 1979 (NSW)*)

- Defendant has the right to a fair trial → trial will rarely be fair without adequate legal representation
- Quality of legal services varies and not all lawyers are experienced = injustice
- Legal Aid NSW provides legal assistance / representation to socioeconomically disadvantaged to ensure equitable access to the law
 - o Provides free brief legal advice sessions to anyone
 - o Means test and merits test for subsidised legal representation access
- Not all matters are covered (specific areas of law)
- Will provide representation or contribute towards cost of a private lawyer
 - o User must contribute (determined by means test)
- Largely funded by the Commonwealth, NSW Governments and NSW Law Society
 - o Funding is limited and often considered inadequate to meet the demand

CASE: *Dietrich v The Queen* (1992) 177 CLR 292)

- Common law precedent established a limited right to legal representation in Australia

Burden and standard of proof

Burden of proof is on the prosecution to prove the case beyond reasonable doubt

Use of evidence, including witnesses (Evidence Act 1995 (NSW))

- Admissible evidence → relevant, legally obtained
- Real evidence (tangible → weapons), documentary (statements), testimony (expert / witness)
 - o Witness → subpoenaed to appear in court and testify under oath
 - o Expert witness = studied evidence as an independent expert or assessed the defendant

CASE: *Wood v R* (2012) NSWCCA 21

- Evidence of an expert witness is usually considered valuable however it can be fallible
- Wood was convicted of the 1995 murder of girlfriend Caroline Byrne
- Expert testimony was overturned → flawed = reasonable doubt about scientific proof

Defences to criminal charges

Complete defences

Defence	Meaning	Example / notes
Mental illness / insanity	Mental incapacitation at the time of the act → no mens rea	Schizophrenia, Early onset dementia
Involuntary behaviour / automatism	Act that cannot be controlled or is not voluntary → mens rea cannot be established	Sleepwalking, epileptic fit <i>Karen Brown</i> case → security guard shot robber = acquitted
Mistake	Defendant acted under an honest and reasonable mistake and thus could not have formed the mens rea	Not generally a defence, difficult to prove Recklessness negates recklessness
Self-defence / necessity	Defendant acted in defence of self, another or property; only accepted in limited circumstances and only for reasonable force	Based on relative judgement <i>R v Zecevic</i> → reasonable grounds Complete and partial
Duress	Coercion or pressure used by one party to influence another party	Must prove crime was against their own free will <i>R v Williamson</i> → disposed of body
Consent	Accused can show the victim freely consented to the act in question	Mostly for sexual assault → must prove lack of consent Not valid for murder

Partial defences to murder

Defence	Definition	Example / notes
Provocation	Actions were a direct result of the other person's actions which caused them to lose control and commit the offence in question	Implies victim was responsible Only for reducing murder to manslaughter R v Camplin → frypan murder
Diminished responsibility	Substantial impairment of responsibility used when the accused is suffering from a mental impairment	Low IQ, mental retardation → not an excuse for being drunk / under influence of drugs Easier to prove than insanity → person may be completely normal in every other aspect of health
Self defence	Defendant acted in defence of self, another or property; only accepted in limited circumstances and only for reasonable force	Complete and partial

The role of juries, including verdicts (Jury Act 1977 (NSW) Jury Amendment (Verdicts) Act 2006 (NSW))

12 people sworn in as societal representatives, to give a verdict in case based on presented evidence

Eligibility for jury duty

- Australian citizens on the electoral roll (18+) = eligible → will be paid, employers must give leave
- Ineligible = non-English speakers, emergency service workers, disabled, criminals, legal profession
- Difficult to gain exemption → can ask if over 65, pregnant, full-time carer → not attend = fine

Jury role

To listen to the evidence presented to the court, apply the law as directed by the judge and come to an unbiased verdict as to the accused's guilt or innocence (foreperson elected to speak on behalf of jury)

- May make notes and ask for clarification from the judge → must be alert and focused (Sudoku issue)
- Not permitted to talk to anyone except fellow jurors, when they are all together, about the case

Challenging jurors

- Criminal trial → both sides have right to challenge selection of entire panel or individual jurors
 - o Peremptory challenges → disqualification without reason (difficult → no personal information)
 - o Challenges for a cause → ineligible, disqualified, suspected of bias, acquaintance, victim

Verdict

Must reach a verdict of guilty or not guilty and present that verdict to the court

Not guilty = acquitted, guilty = sentencing hearing

- 'Hung jury' = unable to reach a verdict → dismissed, retrial = financial / time burden

LAW REFORM: Jury Act 1977 (NSW) → Jury Amendment (Verdicts) Act 2006 (NSW)

Allows majority of 11:1 or 10:2 when reasonable time has passed / unanimous verdict will not be reached

- Does not apply to commonwealth offences → unanimous verdicts protected in s80 of the *Constitution*
- Does not apply to murder → 12:0

For	Against
<ul style="list-style-type: none">- Removes the power of rogue or unreasonable jurors who are unrepresentative of the community- Avoids time delays, cost and stress on the victim of retrial- Compromise the criminal standard	<ul style="list-style-type: none">- Removes the possibility of a reasonable doubt decision if only one juror is disagreeing- Disagreements are rare- Possibility of majority verdict may alter deliberations from start

4. SENTENCING AND PUNISHMENT

- Sentencing trial = after guilty verdict / plea → prosecution = severe sentence, defence tries to reduce
- Based on; severity, mens rea, need for punishment → must balance interests of all parties
- High profile cases attract public interest / become politicised
 - o 2014 murder trial of Gerard Baden-Clay = broadcasts from court / full public gallery every day

Statutory and judicial guidelines (*Crimes (Sentencing Procedure) Act 1999 (NSW), Crimes Act 1900 (NSW)*)

Laws, rules, guidelines, cases to assist in determining sentences (statutory = statutes, judicial = precedents)

- *Crimes (Sentencing Procedure) Act 1999 (NSW)* = purposes, types, impacting factors, guidelines
 - o "Court may not impose a prison sentence unless it has exhausted all other options"
 - o Attorney General can apply to court for guideline judgements
- *Crimes Act 1900 (NSW)* = maximum penalties determined by parliament → cannot be exceeded
 - o Murder = life imprisonment
 - o Sexual assault = 14 years' imprisonment

LAW REFORM: Barry O'Farrell's one-punch 8-year minimum sentence (2014)

- Controversial = replacement of discretion with mandatory (automatic) sentencing
- Further calls have been made for mandatory sentencing for child sex-offenders
- Criticism for attempts to introduce mandatory sentences for murdering a police officer
 - o Maximum non-parole period of 25 years → flaw in the rule of law
- Mandatory sentencing removes ability of judge to consider individual circumstances
 - o Ethnic, socioeconomic and minority groups may suffer more than others
 - o Little evidence that they work as a deterrent
 - o Abolished in NT due to overrepresentation of ATSI, unmanageable rise in prison populations

The purposes of punishment (*Crimes (Sentencing Procedure) Act 1999 (NSW)*)

Deterrence (specific or general)

Specific = against an individual offender aiming to deter them from committing crime in the future
General = make an example of an offender in order to send a message to the rest of the community

- Intended to discourage someone from doing something
- Passing a higher sentence → fear of punishment helps prevent future offences
 - o Little evidence in favour of specific deterrence
- 1988 → ALRC recommended deterrence not be a sentencing objective → should be proportional
 - o Education = best deterrent → privileged people are not filling up jails

CASE: NZ death penalty

- Reinstated and abolished repeatedly = no change
- Issue for achieving justice → punishing one person more severely

Retribution

Punishment considered to be morally right or deserved because of the nature of the crime

- Assumes that some good comes from inflicting hardship on the offender for their crime
- Must be proportional, make offender accountable, denounce conduct, recognise harm to society

CASE: R v AEM (Snr); R v KEM; R v MM [2002] NSWCCA 58

- 3 teenagers = 'particularly long terms of imprisonment' → horrific / long lasting impact - aggravated sexual assault in company

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Rehabilitation

Objective of sentencing designed to reform the offender so that they do not commit offences in the future

- Prevents recidivism by discouraging behavioural relapse
 - o Eliminating contributing factors, making offender accountable, promoting rehabilitation
- Rarely prime consideration for serious offences → effective for minor crimes and drug / alcohol abuse

EXAMPLE: Reading Together

- Risdon Prison → inmates recording books onto CDs for their children / community

Incapacitation

Making an offender incapable of committing further offences by restricting their freedom

- Home detention, community work, licence cancellation, imprisonment
- Hard to determine potential reoffenders → severe penalty = must consider probability of reoffending
 - o Severe penalty → probability of reoffending must be considered to avoid excess punishment

Factors affecting a sentencing decision (Crimes (Sentencing Procedure) Act 1999 (NSW))

- Must consider individual factors as well as statute and case law and considerations
 - o Aggravating / mitigating factors
 - o Objective / subjective factors affecting severity
- Young offenders = personal circumstances important for rehabilitation → severe offences outweigh

Aggravating circumstances

Circumstance that makes the offence more serious; it can lead to an increased sentence

- Offence – involved / threatened violence, cruelty or weapons, caused injury, harm or damage; motivated by hatred / prejudice; committed in company; organised crime / gratuitous violence
- Victim – vulnerable (old, young or disabled), targeted for occupation, multiple victims
- Offender – abused a position of trust / authority, reoffender, not remorseful

Mitigating circumstances

Circumstance making offence less severe by explaining cause of conduct; it can lead to a reduced sentence

- Usually subjective factors about the mind of the accused / their behaviour
 - o Good character / no prior convictions / youth / easily led
 - o Pleaded guilty / cooperation / remorse
 - o Provocation / duress

The role of victim in sentencing (Crimes (Sentencing Procedure) Act 1999 (NSW), Victims' Rights and Support Act 2013 (NSW))

- Some rights are guaranteed
 - o Dignity, compensation, protection from the accused, protection of identity, certain rights to information (changes in charges against accused) and assistance during the criminal process
- Wide range of opportunities for involvement
 - o Victim impact statements = only for serious offences (after verdict, before sentencing)
 - o Reporting a crime, testifying at trial as a witness
- Difficult → sexual assault – confronting or distressing questioning will often be required
- VIS = controversial → very subjective yet have a significant effect on sentencing
 - o Important opportunity for victims to express themselves in the criminal process
 - o Offender can submit mitigating factors → should also consider victim's personal circumstances

CASE: R v Kina (ABCTV Crimes of Passion)

- No defendant statement = max sentence

CASE: McCartney v R (2009)

- Offender invited victim home for drinks → repeatedly told she would not sleep with him
- Both intoxicated → victim slept, he sexually assaulted her
- Guilty = 2.5 years imprisonment → appealed severity; judge dismissed / referred to deterrence
- Aggravating → nature / seriousness, Victim Impact Statement
- Mitigating → young, no criminal history, character references, unlikely to reoffend

Appeals (Crimes Appeal and Review) Act 2001 (NSW))

Against conviction: defendant argues that they did not commit the offence of which they were found guilty
Sentence appeal: appeal against the severity or leniency of a sentence

- Only succeed to COCA if it can be proved that there was a legal error (sentence too severe / lenient)
 - o Local court → district court, district / supreme → permission to appeal to COCA
 - o Appeal directly to Supreme Court on a question of law → otherwise must seek permission
- Final court of appeal = High Court of Australia → must seek permission to appeal (rarely succeeds)

CASE: R v AEM, KEM, MM

- Sentence appeal
- Crown appealed to COCA against leniency = more than doubled original sentences

Types of penalties (*Crimes (Sentencing Procedure) Act 1999 (NSW)*)

No conviction recorded (s10 dismissal)

Court finds a person guilty but choose to dismiss the case

- Record = impact on life → minor offences, youth, first time offender

Caution

Formal warning without charge issued by police for less serious offences

- *Young Offenders Act 1997 (NSW)* → formal caution for 10 – 18s (minor offences + admission of guilt)
 - o Deterrence / rehabilitation → formal family conference

EXAMPLE: NSW Cannabis Caution Scheme

- Caution for minor cannabis offences if no prior conviction (not for supply)
- Warns of health and legal consequences AND information on counselling / support services
- BOSCAR found success → 96% for possession = successful

Fine

Monetary penalty imposed for infringement of a law

Penalty unit: specified unit of money used in legislation to describe the fine payable; currently \$180

- Minor offences = on the spot fines → can be challenged in court
- *Crimes Act 1900 (NSW)* → unlawful gambling = up to 1000 penalty units / 7 years / both
- Effectiveness depends on offence and personal circumstances → assessed by court

LAW REFORM: Work and Development Order

- Pay fines through community services, rehabilitation / treatment program → only for disadvantaged

Bond

Compulsory condition imposed on an offender for up to 5 years, which the offender undertakes to comply

- Alone / with another penalty → compliance = lenience / breach = court / imprisonment
 - o Counselling, anger management, avoiding areas, curfew, no drugs / alcohol
- Restriction on life and freedom → 'second chance'

Suspended sentence

Sentence of imprisonment, up to 2 years, imposed but suspended on condition of good behaviour (enter an equivalent good behaviour bond)

- Compliance with conditions = released into normal life
- Breach = revoke bond and reinstate original prison sentence + extra time for breach

Probation

Good behaviour bond where the offender is released on condition of good behaviour but placed under some form of supervision, such as daily reporting to a probation officer

- Must comply with bond conditions and maintain contact with probation officer
- Used when high danger of reoffending but imprisonment is too severe
- Breach = serious → court and potential more severe sentence

Criminal infringement notice

Notice issued by the police outside of court alleging a criminal infringement and requiring payment of a fine

- Not increase in police powers → can be challenged = risk of more serious sentence
- No conviction recorded if accepted → challenged and found guilty = recorded

Intensive correction order (Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010 (NSW))

Alternative to a custodial sentence where an offender has restricted movement and must attend a rehabilitation program

- Replaced periodic detention → ineffective in reducing recidivism
- Strict conditions like bail → breach = full time custodial sentence
 - o Curfew, RBT, 24/7 monitoring, 32 hrs / month community service, rehab / education
- More flexible → can keep job, connect with family, rehabilitation

Community service order

Penalty where the offender is sentenced to serve specified hours (up to 500) of work in the community

- Punishment / shaming and allowing for rehabilitation
- Cost effective / beneficial to community / good for rehabilitation

Home detention

Imprisonment sentence where the offender is confined to their home under certain conditions of monitoring

- Non-violent offences, less than 18-month sentence → assessed for suitability
- Electronic / probation officer, random visits + specific conditions
- Cost effective, allows rehabilitation, less impact on families
- Controversial for serious offences → not for murder, manslaughter, sexual assault, firearms offences
- Restricted if history of violence / live at same address as victim

Forfeiture of assets (Criminal Assets Recovery Act 1990 (NSW))

Recovery of assets gained through criminal activities

- Examination of financial affairs → restraining, seizing, forfeiting of assets / ordering payment
- Important for organised crime → sentencing does not deter if enjoying benefits
- Can proceed even if the accused has not been found guilty of a crime or has been acquitted

Imprisonment (Section 5 Crimes (Sentencing Procedure) Act 1999 (NSW))

'A court must not sentence an offender to imprisonment unless has considered all possible alternatives, that no penalty other than imprisonment is appropriate'

- Deprives of liberty and isolates → requires careful consideration of purpose for punishment
- Non-parole period = $\frac{3}{4}$ of total sentence (remand time is taken off sentence)
- Sentence imposed for each offence → served at same time

Diversionary programs

Alternative to the traditional court system that focuses on the rehabilitation of offenders

- Intensive judicial supervision program → divert offenders from traditional sentencing = rehabilitation
- Target causes of offending and future prospects

EXAMPLE: Drug Court

Aimed to rehabilitate non-violent drug-addicted offenders

- Over 150 a year → emerged from disenchantment with criminal justice system
- BOSCAR
 - o Less likely to be reconvicted than traditional penalties, more cost effective than prison
 - o 37% less likely to be reconvicted for any offence
 - o 65% less likely to be reconvicted for an offence against the person
 - o 57% less likely to be reconvicted for a drug offence

Alternative methods of sentencing

Attempt to combat some issues associated with recidivism and more traditional sentencing

Circle sentencing

Form of sentencing for some adult Indigenous offenders where sentencing is conducted in a circle made up of local community members and a magistrate

- Introduced as a trial in Nowra, February 2002 → has full sentencing powers of a court
- Based on customary law / dispute resolution → tailor the most appropriate sentence
 - o Directly involves Indigenous people → more meaningful / improves community confidence
- Objectives are being met → improvements needed in participation and support services
 - o BOSCAR → no less likely to reoffend 15 months post than traditional court setting
 - o Still expanded to more communities

EXAMPLE: Uncle John interview (SBS)

- Uncle John (SBS) unique position to "appreciate the second chance that circle sentencing provides to offenders."
 - o Son = first user "it changed the way he looked at life and didn't commit any further offences."
 - o Punishments are more likely to be respected and valued → handed down by elders
 - o "Reduces the barriers between the Aboriginal Community [and the justice system]"

Restorative justice

Form of sentencing involving a voluntary conference between the offender and the victim of the crime

- Offender can take responsibility for their actions / impact they had and gives victim a voice
 - o Can ask questions, apologise, make amends → helpful for victim recovery
- Can be confronting and difficult for both parties → voluntary, accompanied by traditional sentencing
- First model = Wagga Wagga, 1991 → now a valuable part of the rehabilitation process
 - o Safe / private conferencing / mediation services run by a facilitator
- Effectiveness is unclear → youth conferencing initiatives = possible 15–20% reduction in reoffending

EXAMPLE: Restorative justice for sexual assault in Victoria

- Victims have the opportunity to face their perpetrator / describe impact of the attack on their lives

Post sentencing considerations (Crimes (Administration of Sentences) Act 1999 (NSW))

Security classification (Corrective Services NSW)

- Maximum, medium, minimum security → seriousness of crime, rehab prospects, good behaviour
- Max (Long Bay), Medium (Tamworth Correctional Centre), Minimum (Silverwater Women's)

Protective custody

Provided to offenders who are vulnerable to attack from other prisoners (duty of care)

- Sentencing = isolate from community → not subjecting them to physical harm / inhumane conditions
- Offensive crimes, police officers, politicians, celebrities = threat of harm from other inmates

EXAMPLE: Robert Hughes

- Sexual assault / harassment
- Ineffective → attacked with boiling water, covered with faeces and urine

Parole

Conditional release after completion of minimum term of the sentence

- Incentive for rehabilitation → possibility of early release increases reform / behaviour
- Release = supervision of parole officer, additional conditions may apply

LAW REFORM: 2017 Parole Reform

- "Tougher and smarter reforms that will deliver justice more quickly to victims and communities"
 - o Active supervision and tougher conditions to prevent reoffending
 - o "Common sense reforms that will create a tougher, smarter and safer NSW justice system"

CASE: Simon Monteiro 'Playboy Rapist'

- Breached area restrictions

Preventative detention

Keeping a person in custody, even though they have not committed any offence, to prevent some future harm that they may commit

- Harshes / most controversial form of sentence → remove basic legal rights
- Purpose = incapacitation of a person considered to constitute a significant threat to the community
- Most severe type = legislation targeted at individual offenders
 - o Held as unconstitutional in the High Court case *Kable v DPP* (1996) 189 CLR 51

LAW REFORM: Part 2A Terrorism (Police Powers) Act 2002 (NSW)

- Police can apply to detain a person for 14 days → reasonably believe the suspect will otherwise engage in a terrorist act
- Victoria used the controversial anti-terror powers in April 2015 to detain five terror suspects.

CASE: Mohammad Haneef

- Falsely accused of aiding terrorists
- Arrested and held in preventative detention on suspicion of terror-related activities

Continued detention (Crimes (High Risk Offenders Act 2006 (NSW))

'Post-sentence preventive detention' = served their full sentence but continue to be detained

- Attorney-General can apply for continued detention if 'to a high degree of probability' of recidivism
- The allowable purposes = secure safety / protection of community, facilitate rehabilitation

CASE / LAW REFORM: Dennis Ferguson

- Dangerous Prisoners (Sexual Offenders) Act
- Charged for kidnapping, gross indecency, indecent dealing, carnal knowledge, child sexual abuse

Sexual offender's registration (Child Protection (Offenders Registration) Act 2000 (NSW))

- Convicted of specified violent or sexual offences against a child must register at local police station
 - o When the person is sentenced for the offence
 - o When the person ceases to be in government custody in relation to the offence
 - o Adults = minimum 8 years, juveniles = minimum 4 years
- Australian National Child Offenders Register (ANCOR) / NSW Child Protection Register
 - o 2014 = over 10 650 offenders registered nationally
- Justified: they protect the community, opposed: target offenders beyond sentence / deny rehab
 - o Severity of original crime + ongoing risk of reoffending → outweighs burden on offender

EXAMPLE: 2015 NSW taskforce for chemical castration

- Investigate use of anti-libido drugs for child sex offenders to 'chemically castrate' them
- Use of this treatment within the NSW correctional system / as a sentencing option for judges → hope = this reduce the likelihood of reoffending.

Deportation (*Migration Act 1958 (Cth)*)

Non-citizen migrant living in Australia may be deported if tried and convicted of a criminal offence

- Sentence of 12+ months in first 10 years of residence → Immigration Minister will decide
- Controversial → person seen as problem resolved by moving elsewhere → no follow-up / support
 - May have lived in Australia for decades → still fall under the requirements of these sections
 - Removed from family and friends to a foreign country → no support for rehabilitation
- Security threat / convicted of a serious offence → may also be prohibited from re-entering Australia

CASE: *Robert Jovicic 'The Stateless Man'*

- Over 100 criminal offences (burglary / theft to fund heroin addiction) = deportation
- Became homeless in a country where he knew no one / did not speak the language
- Social pressure = visa to re-enter Australia

5. YOUNG OFFENDERS

Area of law and policy concerned with young people and the criminal justice system

- NSW Juvenile Justice, Young People in Custody Health Survey → factors causing criminal activity
 - o Poor parental supervision, drug / alcohol abuse, neglect / abuse, homelessness, negative peer associations, poor personal / social skills, difficulty in school / employment
- Youth Justice Australia
 - o 2012 – 2013 = 12,880 young people under supervision at some point during the year
- Juvenile justice = welfare + justice
 - o Welfare → causes of crime relate to social, psychological, economic factors → must assist in rehabilitation
 - o Justice → 'tough on crime' / 'zero tolerance' approach (punishment / deterrence over rehab)

Age of criminal responsibility Children (Criminal Proceedings) Act 1987 (NSW)

- Law treats children differently to protect from exploitation / consequences of uninformed decisions,
- Children = less responsible than adults → youth / inexperience

Children (under 10 years)

'No child who is under the age of 10 years can be guilty of an offence'

- Children under 10 = presumption of doli incapax (cannot be rebutted)
- Proving that an offender under 10 had intent would be extremely problematic
 - o Limited life experience
 - o Punishment = cruel treatment
 - o Children = more likely to be rehabilitated → criminal penalties may prevent this occurring

Children (10–13 years)

- Legislation is silent → common law states rebuttable presumption of doli incapax (10 – 13 only)
 - o Turns 10 = still presumed incapable → presumption is allowed to be rebutted
- Rebuttable presumption → children might have the mental capacity
- Evidence → psychiatric evidence, parent / teacher statements, behaviour of / statements by the child

Alternatives to court (Young Offenders Act 1997 (NSW))

- Aim to encourage rehabilitation, rates of recidivism, burden of minor youth offences on court system
- Does not apply to serious offences → robbery, sexual offences, offences resulting in death

Warnings

Notice given to a young offender (usually for a first minor offence) that is recorded by police but with no conditions attached; the offender must be told of the nature, purpose and effect of the warning

Cautions

Formal, recorded alternative to prosecution where the young offender admits to the offence and consents to receiving a formal police caution; it can later be considered in the Children's Court, but not in an adult court

Youth Justice Conferences (Young Offenders Act 1997 (NSW))

- Youth justice conferences used when a young offender admits to an offence
- Removes young offenders from the court system → conference generally addresses behaviour
- Allows offender to take responsibility for actions / promote family understanding of issues
- People present provide picture of the child's life = more holistic approach to finding solutions

Effectiveness of the Criminal Justice System when dealing with young offenders

- Young Offenders Act (1997) → well received, welfare model, encourages rehab
 - o Not used for a wide enough range of offences
- BOSCAR → few juveniles receive more than 3 cautions or YJCs
- Rate of detention has decreased since 1981 by 50%
- \$150, 000 per person per year for imprisonment → rehab costs a less but isn't funded
- Changes to Bail restrict judges from granting bail = high numbers of children and adults being remanded (many don't end up serving a sentence)

6. INTERNATIONAL CRIME

Categories of international crime

Crimes against the international community

A most serious crime, of concern to the international community as a whole, and recognized by the international community as requiring punishment

- No fully agreed list of crimes → many countries disagree about specific aspects of an offence etc.
- Prosecution can be controversial → committed in military conflict, politically motivated, state-ordered
- States may be unwilling / unable to prosecute → responsible = position of power / fled jurisdiction
 - o All states condemning crime = unable to escape prosecution
 - o States condemning action have right to prosecute under universal jurisdiction
 - o Claiming right to prosecute based on the belief that the crime is beyond criminal jurisdiction

International Criminal Court (Rome Statute of the International Criminal Court 2002)

Permanent court separate from the UN dealing with individuals who have committed serious crimes against humanity

- Country must voluntarily hand over a person to the court for a trial
 - o USA will not hand anyone over → will face trial in USA instead
- Jurisdiction over genocide, crimes against humanity, war crimes, undefined crimes of aggression
 - o Accused is a national of a member state of the treaty
 - o Alleged crime occurred in the territory of a member state
 - o Situation is referred to the ICC by the UN security council
- Court of last resort → only when state courts cannot / will not prosecute
- Individual convictions → sentence of imprisonment up to life (not death) / fine / forfeiture of assets
- Requires a referral from UN security council to prosecute outside the court's normal jurisdiction

Genocide (Rome Statute, Convention on the Prevention and Punishment on the Crime of Genocide 1948)

Deliberate extermination of a national, ethnic, racial or religious group

- Difficult to prove, requires enormous documentary / forensic evidence, review, military order
- Claims of genocide are controversial and vehemently opposed by the accused
 - o Most universally recognised = 6 million Jews killed in the Holocaust
- Pre ICC → ad hoc tribunals dealt with war crimes / genocide / crimes against humanity
 - o *International Criminal Tribunal for the Former Yugoslavia (ICTY)* → crimes committed during break-up of former Yugoslavia
 - o *International Criminal Tribunal for Rwanda (ICTR)* → crimes committed during the Rwandan genocide
- ICC has not yet succeeded in convicting any person of genocide

Crimes Against Humanity (Rome Statute 2002)

Acts committed as part of a widespread or systematic attack directed against any civilian population'.

- Scope of crimes against humanity exceeds genocide = easier to prosecute
 - o Genocide requires proof of 'intention to destroy' all / part of a group
 - o Crimes against humanity = against any civilian population → must be widespread / systematic
 - o Requires multiple commissions of listed acts, which must be under state / organisational policy

War Crimes (Geneva Conventions, Rome Statute)

Activity performed during a time of war that goes against the rules of war as accepted by the international community

- Must take place during armed conflict (international or domestic)
- ICC has jurisdiction when acts are part of a plan / policy / large scale commission
- Includes war crimes as 'grave breaches' of the Geneva Conventions + lists serious violations of laws of international armed conflict
 - o Torture or inhuman treatment; including biological experiments
 - o Wilful killing or wilfully causing great suffering or serious injury
 - o Extensive and militarily unjustified destruction or appropriation of property
 - o Directing attacks at civilian populations or objects / humanitarian personnel or equipment

Transnational crimes

Crimes that take place across international borders

- Made possible by technology, global economy, migration
- Local authorities / policy-makers must confront offences / offenders outside their jurisdiction
 - o Human / goods trafficking, fraud, internet crimes, terrorism, child pornography
- Causes → socioeconomic conditions, desire for prohibited goods / services, politics / ideologies
- Prosecution is difficult → laws are based on cooperation

Dealing with international crime

Domestic measures

- Limited by jurisdiction → cannot operate in a foreign country → special circumstances
 - o Permission has been granted for presence of Australian law enforcement by host country
 - o Parliament legislates on actions of Australian residents abroad e.g. child sex tourism laws
 - o Australian court claims jurisdiction under a rule of international law e.g. universal jurisdiction

Crimes against the international community (War Crimes Act 1945 (Cth), Geneva Conventions Act 1957 (Cth))

- Most significant development = signing / ratification of Rome Statute
 - o International Criminal Court Act 2002 (Cth)
 - o International Criminal Court (Consequential Amendments) Act 2002 (Cth)
 - o Offences against Humanity and Related Offences → criminalises all offences in Rome Statute
- ICC → complement not exclude existing state criminal justice system
- Commonwealth Attorney-General reports annually on ICC operations / impact on legal system
 - o No Australian prosecutions / ICC has had 'no discernible impact' on Australia's legal system.

Transnational crime

Crime that occurs across international borders, either in origin or effect

Australian Federal Police (AFP) (Australian Federal Police Act 1979 (Cth))

- Uphold Commonwealth criminal law / guard Australia from crime domestically / internationally
 - o Over 25 countries, deployment for international capacity building, monitoring, peacekeeping
 - o Specialist training for international law enforcement agencies to prevent crime at its source
- International operations → child protection, counter-terrorism, stopping human / drug trafficking,

EXAMPLE: Jakarta Regional Cooperation Team

- Helped Indonesian police investigate / arrest suspects
 - o 2002 Bali bombings, bombing of Australian Embassy / Marriott Hotel in Jakarta
 - o Jakarta Centre for Law Enforcement Cooperation → increase skills of regional law enforcement
- Relations with Southeast Asia Regional Centre for Counter Terrorism (Kuala Lumpur) / International Law Enforcement Academy in Bangkok

Commonwealth Attorney-General's Department

- Reports / advises on compliance with international obligations
- Oversees operation of legislation relating to transnational crimes / advise on implementation
- Information to public and parliament on Australian efforts against transnational crime

Australian Crime Commission (ACC) (Australian Crime Commission Act 2002 (Cth))

- National statutory body to combat serious and organised crime
- Organised Crime in Australia → significant organised crime groups have international interests
 - o Southeast Asian organised crime = primary source of heroin imported to Australia
 - o Money laundering, tax fraud, identity crime, human trafficking for sexual exploitation

Australian Border Force

- National agency that looks after the security and integrity of Australia borders
- Works government / international agencies to prevent illegal transfer of goods / people

Australian High-Tech Crime Centre (AHTCC)

- Coordinates all law enforcement authorities in fighting crime involving technology
- Part of AFP's High-Tech Crime Operations → funded by all states
 - o Coordinating a national approach to serious, complex and multi-jurisdictional crimes
 - o Assisting all Australian jurisdictions in their ability to deal with high-tech crime

State and territory bodies

- Numerous state / territory bodies investigate transnational crime (cross-jurisdictional nature)
 - o Independent Commission Against Corruption, NSW Crime Commission, Police Integrity Commission, divisions within NSW Police Force
- Intelligence sharing is essential

International measures

- Government cooperation through international treaties / organisations targeted at specific crimes
- International courts / tribunals to deal with enforcement of international law
- Cooperation / intelligence sharing between sub / national agencies to tackle trans-border crime

Crimes against the international community

- Continued commitment / close cooperation is seen in development of international treaties
 - o Geneva Conventions
 - o Rome Statute of the International Criminal Court

Courts and tribunals

- Pre ICC → ad hoc tribunals dealt with war crimes / genocide / crimes against humanity
 - o International Criminal Tribunal for the Former Yugoslavia (ICTY) → crimes committed during break-up of former Yugoslavia
 - o International Criminal Tribunal for Rwanda (ICTR) → crimes committed during the Rwandan genocide
- ICC has not yet succeeded in convicting any person of genocide
- Two hybrid international courts established for the conflicts in Sierra Leone and Cambodia
 - o Established by agreement between government in question and the UN (imposed on gov')

Extradition treaties (Extradition Act 1988 (Cth))

The process by which one country surrenders a suspect or convicted criminal to another country to face criminal (relevant to all types of crimes)

- Governed by a series of bilateral agreements with other countries (Aus. has 130)
- Rome Statute, Geneva Conventions have own specific extradition arrangements
 - o Three extradition requests from the ICTY against people in Australia accused of war crimes.
- Extradition Act 1988 (Cth) sets out criteria for extradition to be granted
 - o Must have a case to answer to, must receive a fair trial, must be an offence in both countries
- Important method of combatting international crime → offender cannot escape prosecution

CASE: Dragon Vasilikjovic

- Commander of Serb Parliamentary unit
- Accused by Republic of Croatia of committing war crimes during Croatian War of Independence
- Arrest warrant by Interpol

Transnational crimes

International Criminal Police Organization (INTERPOL)

- World's largest international police organisation with 188-member nations (HQ = Lyon, France)
- 1923 → to improve international police cooperation and prevent / combat international crime
 - o Organised crime, counterfeiting / money laundering, drugs / arms trafficking, terrorism
- Advocating to develop a 'global police force' in cooperation with the UN
 - o Improve skills of police peacekeepers / sharing of communications networks / criminal data
 - o Would result in an increase ability to track movements of criminals

United Nations Convention against Transnational Organized Crime

- Main international instrument against transnational crime → 3 protocols
 - o *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*
 - o *Protocol against the Smuggling of Migrants by Land, Air and Sea*
 - o *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*
- Signatories ensure domestic law criminalises organised crime, money laundering, corruption
 - o Adopt broad changes to extradition procedure
 - o Commit to providing 'mutual' legal assistance / cooperate among law enforcement agencies
 - o Upgrade capacity of national authorities to deal with organised transnational crime networks.

Pacific Transnational Crime Network (PTCN) / Pacific Transnational Crime Coordination Centre (PTCCC)

- 2002 → AFP response to increases in regional transnational crime (HQ = PTCCC; Apia, Samoa)
- Manages, coordinates, enhances law enforcement intelligence / data, technical assistance, training
- PTCCC opened in 2008 to coordinate / analyse criminal intelligence data = 'one stop agency'

Limitations / effectiveness of measures dealing with international crime

- Due to complex / difficult nature of transnational crime; effectiveness is often not as great as hoped
- Successful → 2004 → discovered and dismantled a methamphetamine laboratory in Suva, Fiji
 - o Posed serious environmental / physical danger to local communities
 - o Drugs may have been intended for Australia, NZ, Europe, USA

Transnational crime

Complex organised criminal groups at work using sophisticated measures to avoid detection

- Identity fraud, internet crime, paedophilia rings, human / goods trafficking
- States lacking skills, training, resources = breeding grounds for transnational crime
- Main areas for efforts against transnational crime to address include:
 1. International cooperation between states; resource provisions, coordination / exchange of information
 2. The level of compliance among weaker or poorer states → weak rule of law = target
- Success → cooperation, sharing of resources, skills, funding, intelligence
- Transnational crime = unlikely to disappear → world changes = need for increased effort

Crimes against the international community

- ICC = most significant development → reactive but inefficient if persecution rate = performance
- International Criminal Tribunal for the Former Yugoslavia = more successful
 - o Indicted 260 people → victory for international justice (at a high cost)
- Permanence of ICC = symbolically powerful → criminals cannot hide behind immunity in own country
 - o Threat of prosecution = deterrent,
 - o Supports victims of crimes by bringing about justice
- Ability of the ICC to deal with these issues is questionable = criticism
 - o Courts are set up reactively not proactively
 - o Rare intervention by UN Security Council – no international force to capture offenders
 - o Charges by ICC were not laid against President al-Bashir until 5 years after → were dropped
- Enormous cost of investigations / prosecutions is borne by member states = focus on 'main players'
 - o Special Court for Sierra Leone → prosecute those responsible for crimes during Sierra Leone War; only 9 convicted
 - o Australian refugee intake from countries with war / crimes against humanity = little will to investigate potential criminals → is obliged under the Rome Statute
- Permanent court with investigative / court mechanisms / permanent staff = step to efficiency
 - o Over 110 member states → lacks some of the most influential countries (USA, China, India)
- Biggest advantage = can operate independently of state jurisdictions
 - o Jurisdiction = crimes committed after establishment, crimes committed in member states
 - o Danger of reoffending without independent oversight should outweigh national interests
- 2012 = first prosecution → Congolese warlord Thomas Lubanga Dyilo found guilty of war crimes
- Continued development of international criminal justice system = promising tool with potential
- Strengthening the rule of law / combating conditions that lead to conflict = more resource-efficient

CORE 2 – HUMAN RIGHTS

1. THE NATURE AND DEVELOPMENT OF HUMAN RIGHTS

The definition of human rights

- “Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups”
- “Human rights are basic rights and freedoms that all people are entitled to, regardless of nationality, sex, national or ethnic origin, race, religion, language or other status” (Amnesty International)

Types of rights

Civil and political rights (first generation)

- Protect the individual from arbitrary exercise of power by the state
- 1948 UNDHR and the 1966 International Covenant on Civil and Political Rights (ICCPR)

Civil rights

- Rights that are associated with being a free citizen of a nation
- Freedom of religion (Section 116 prevents commonwealth imposing religious observance)

Political rights

- Rights associated with full participation in government
- Right to vote

Economic, social and cultural rights (second generation)

- Associated with the material and cultural wellbeing of individuals
- Usually require government action
- 1948 UNDHR and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)

Economic rights

- Concerned with the production, development and management of material for the necessities of life

Cultural rights

- Rights that help in preserving and enjoying one's cultural heritage

Social rights

- Rights that give individuals security as they live and learn together

Environmental and peace rights and the right to self-determination (third generation, collective)

- Belong to “peoples” as a whole rather than individuals
- Not formally protected in international law
- Kyoto Protocol, Paris Agreement

United Nations

- 1945 = UN / UN Charter → response to the atrocities in WWII
- 1948 = UNDHR to recognise basic human rights.
- State sovereignty → UN makes recommendations, does not enforce

Enforcing Human Rights

- UNDHR = main international law → UN effectiveness is questioned – human rights abuse still occur
 - o Also enforced by governments, courts, tribunals, NGOs and the media
- Preamble to UNDHR sets out the fundamental purpose for recognising human rights
 - o “Recognition of the inherent dignity of and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”
- UNDHR = international declaration forming basis for laws, constitutions, treaties, debate
 - o Protect people from injustice
 - o Allow people to achieve their full potential in society
 - o Prevent discrimination because of physical characteristics or beliefs

Protecting human rights in Australia

- Australian Human Rights Commission (AHRC) = government body for enforcing / protecting HR
- Resolves complaints, educates public and holds inquiries into issues of national importance
- Job of protecting human rights shared by government, courts, media, NGOs and individuals
- No charter of rights → protected by statute / common law
- Best protected by common law

Contemporary human rights issues

- Free speech
- Censorship on the internet
- Rights of refugees
- Human trafficking
- Child abuse
- Capital punishment

Developing recognition of human rights

The Abolition of Slavery

- British = actively involved in transatlantic slave trade → Caribbean / North American for 200 years
 - o Transported over 3 million Africans across the Atlantic to the Americas
- 1807 = *Abolition of the Slave Trade Act*
- 1834 = slavery abolished in colonies → only children under 6 freed under *Emancipation Act 1833*
- 1838 → laws passed in Bahamas / Antigua to abolish apprenticeship clause = pressure to follow Laws
- 1865 → all USA slaves freed

CASE: *The Queen v Wei Tang* (2008)

- Found guilty of possessing / using a slave = ten years' imprisonment
- Slavery and sexual servitude provisions of the *Criminal Code 1995 (Cth)*

Trade unionism and labour rights

- 1948 = UNDHR → recognising the importance of work to people's lives
- Trade Union members today = less than 20%, down from 40% in 1992 (reflects changing economy)

Some basic history

- 1791: Convicts strike demanding daily issue of rations, not weekly issue
- 1828: Masters and Servants Act of NSW provided that... "servants could be imprisoned and have their wages forfeited for refusal to work or for the destruction of property"
- 1856: The 8 Hour Day Movement is formed by the Stonemasons in Melbourne and Sydney
- 1907: The Minimum Basic Wage is established in the Harvester Award
- 1950: The woman's wage rate is lifted to 75% of the man's wage rate
- 1959: Teaching = first to offer equal pay for equal work (approx. 15 years before others)
- 1973: Four weeks annual leave = standard
- 1979: The right of women workers to 12 months unpaid maternity leave is achieved
- 1986: Introduction of superannuation for Australian workers
- 2010: Fair Work Laws provides collective bargaining rights, protection from unfair dismissal, safety net
- 2011: An 18-week universal paid maternity leave scheme comes into force

Universal suffrage

The right to vote

- Not in China and North Korea → no elections
- Emmeline Pankhurst led the Suffragettes → campaigned in England for women to vote
- Important → gives opportunity to have a say in who should govern them = self-determination
- New Zealand = first country to allow women the right to vote, Australian followed after 7 years

EXAMPLE: Apartheid Policy of South Africa

- Until 1994 → right to vote was based on race
- Abolished after strong international protests and sporting sanctions were imposed on South Africa

Universal education

- UNDHR → everyone has a right to education → empowers people by freeing them from ignorance
- Can break poverty cycle helps increase earnings / living standards
 - o 1/4 adults in the world = illiterate (Oxfam UK)
 - o Over 100 million children remain out of school (UN)
- Many young people must work so that their families can survive
- Traditional customs also discourage girls from going to school or getting a job
- Informed / educated citizens → better able to run a country / elect an appropriate government
- Economic development is almost impossible without literacy and education
- NSW → schooling was made compulsory for children under 14 in 1880

Self-determination

- Right to elect your own government
- Many countries = “collection of nationalities” → historical differences in language, culture etc.
 - o Internal forces wish to secede → Chechnya / Russia, Catalonia / Spain, Quebec / Canada
- Some groups identify themselves as a nationality but do not have an official homeland
 - o Palestinian people
 - o Tamil population in Sri Lanka
 - o Kurdish populations (Iraq, Turkey, Syria)
- Often experience hardships in trying to establish an independent homeland → civil wars

Environmental rights

- Human health and survival are threatened by ecological problems → pollution, deforestation, water shortage and climate change
- A clean and healthy environment is essential for the effective protection of human rights
- International community has made connection between human and environmental rights
- Economic growth is not desirable unless sustainable → economy exists in / depends on environment
- Economic growth, rising affluence and a growing world population = environmental degradation
- Paris Agreement, Kyoto Protocol

Peace rights

- Right for every state / individual to live in peace
- 1984 Declaration on the Right of Peoples to Peace → obligation to implement peace is non-binding
- “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” *UN Declaration of Human Rights*

Formal statements of human rights

Universal Declaration of Human Rights

- WW1 = direct catalyst for UNDHR → 1941 = call for 4 freedoms (speech, conscience, fear, want)
- Charter 2nd purpose (after peace) = 'reaffirm faith in fundamental human rights, dignity and worth'
 - o Must promote 'universal respect / observance of human rights and fundamental freedoms'
 - o Did not specify what rights / freedoms = need for formal statement
- UN Commission on Human Rights → chaired by Eleanor Roosevelt, drafted the document
 - o Referred to historical rights documents, political / philosophical / religious movements
 - o Members = Australia, Chile, Egypt, France, India, Iran, Soviet Union, Uruguay, USA and UK
- Adopted on December 10, 1948 → signed by 48/58 states
- 30 articles → right to life, liberty, security, thought, religion, education, work, movement, asylum etc.
- Not fully binding → UN charter defines 'fundamental freedoms' / 'human rights' = binds members
- Enduring statement → inspired over 200 treaties, conventions, declarations and bills of rights
 - o Most important human rights document → part of international customary law
 - o Stood the test of time, gained international acceptance
 - o Foundation for eight human rights treaties / treaty bodies → monitor / report on HR status
 - o First formal document to grant rights to all human beings
- Despite good intentions → many human rights issues remain → Australian detention centres

International Covenant on Civil and Political Rights

- Drafted / approved in 1966 → into force in 1976 (ratified by the required 35 countries)
 - o Didn't receive support from USA / USSR
- Creates an obligation to respect the civil and political rights of individuals
 - o Gender equality, right to life, freedom of movement, fair trial, innocent until proven guilty, freedom of thought, conscious, speech, religion, assembly, marriage / family, children have special protection, outlawing torture / slavery, prisoners to be treated with respect, equal legal protection, culture
- Overseen by the Human Rights Committee (Toonen Case)
- 2016 = ratified by 168 countries
 - o China and Cuba → signed not ratified, USA → ratified added many reservations
 - o Burma, Malaysia, Saudi Arabia and Singapore have not signed or ratified

International covenant on economic, social and cultural rights

- Drafted / approved in 1966 → into force in 1976 (ratified by the required 35 countries)
- Created an obligation to work towards granting economic, social and cultural rights to individuals
 - o Labour rights, just conditions, fair wages, trade unions, adequate living standard, food, clothing, housing, health care, education

The International Bill of Rights

- UDHR has 3 components → declaration, international treaty, measures of implementation
- Years after approval until binding covenants → would oblige states to domestically protect HR
 - o UN Commission of Human Rights was given the task of drafting this document
- Cold War tensions = disputes → West = civil / political, East = economic, social
 - o Covenant split in two → ICCPR, ICESCR → with UDHR = International Bill of Rights

2. PROMOTING AND ENFORCING HUMAN RIGHTS

- Implemented internationally and domestically → UN, governments, courts, NGOs, media
- The main issues for Australia = asylum seekers / refugees, international people

In the international community

State sovereignty

Authority of an independent state to govern itself (for example, to make and apply laws; impose and collect taxes; make war and peace; and form treaties with foreign states)

- Agreement to not interfere with other nation's sovereignty → what happens if HR are breached
- Not always → 2003 USA invasion during Iraq war, 2017 North Korea launching missiles in Japan
 - o Actions require resolution from UN Security Council → should not act unilaterally
- International pressure to conform / become better international citizens = effective
 - o Nations want to trade → incentive to balance HR with economic benefits

The roles of

United nations

- HR = major focus UN branches → ICJ, ICC
- Human Rights Council = intergovernmental body within UN → strengthens HR promotion / protection
 - o Address HR violations / make recommendations on solutions
- UN spoke out against Australia's offshore detention system in June 2017
- Issue = state sovereignty → can make recommendations but not enforce

Intergovernmental organisations

- IGO = general term → UN, Commonwealth of Nations, African Union, Organisation of America
- Function by agreements between states → agree to cooperate for the common good

Courts, tribunals and independent

ICJ

Primary judicial organ of the UN; has jurisdiction to hear disputes submitted by member states and issue advisory opinions

- Effectiveness depends on cooperation → cannot enforce decisions
- By voluntarily coming to court, nation-states are making a commitment to comply with judgements

EXAMPLES: ICJ Rulings

- French Nuclear testing in Pacific Ocean → didn't attend court when taken by Australia and NZ
 - o Japan largely ignored ICJ rulings on whale hunting in the southern oceans
- Republic of Guinea v. Democratic Republic of the Congo
 - o Guinea accused Congo of "serious violations of international law" = compensation

International Criminal Court

Independent international court established by the Rome Statute in July 2002 to prosecute and try international crimes of the most serious nature → established by a treaty

- A country must voluntarily hand over a person to the court for a trial → USA will not

EXAMPLES: ICC Convictions

- 1st prosecution = Thomas Lubanga Dyilo (DRC war criminal)
- Joseph Kony - arrest warrant = July 8, 2005 (prompted initiation of Invisible Children)
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Statutory authorities

Australian Human Rights Commission (AHRC)

- Independent statutory organisation → report to Federal Parliament through Attorney General
- Leads promotion / protection of HR → empowering people to understand / exercise rights, holding government accountable for national / international standards
- Resolves complaints of discrimination / HR breaches, hold public inquiries, provides advice / recommendations to parliament to develop policies / programs
- Works with other human rights institutions (Asia Pacific Forum of Human Rights) to address issues

Non-government organisations

Independent, non-profit group that often plays an important role in advocating, analyzing and reporting on human rights worldwide

- Red Cross, Amnesty International, Human Rights Watch, Caritas, Medecins Sans Frontieres
- Work on basis of cooperation, staffed by volunteers → pressure governments to change laws

The media ('Fourth Estate')

- Media attention = pressure on governments to review a decision or a law
- Place of last resort → issue cannot be progressed through other channels (government)

EXAMPLE: Crimes Against Humanity; The Struggle for Global Justice (Geoffrey Robertson)

- Explains why society must hold political / military leaders accountable for genocide, torture and mass murder
- Shows how human rights standards can be enforced against cruel governments, armies and multi-national corporations

In Australia

The incorporation of human rights into domestic law

- Any treaty signed must be ratified / passed by parliament to have any impact in Australian law
- Federal Parliament has passed a number of laws aiming to protect from discrimination / HR breaches
 - o Racial Discrimination Act 1975, Sex Discrimination Act 1984, Australian Human Rights Commission Act 1986, Disability Discrimination Act 1992, Age Discrimination Act 2004

The roles of

The constitution, including division of powers and separation of powers

- Constitution gives power to parliament → can only be changed by a referendum of the people
 - o Indirectly gives people rights → no actual list of human rights in the Constitution
 - o S41 = right to vote
 - o S51 = protection against the acquisition of property on unjust terms
 - o S80 = right to trial by jury
 - o S116 = freedom of religion
- High Court has found that additional rights may be implied by its language / structure
 - o 1992 → decided that Australia's democracy requires freedom for discussion / debate

Separation of powers

Preventing one person or group from gaining total power by dividing power between the executive, the legislature and the judiciary

- Constitution protects HR → everyone must follow the rule of law (nobody is above the law)

Division of powers (Constitution section 51)

How powers are divided between the federal and state governments

- Section 51 lists the specific / exclusive powers of federal government
 - o Federal parliament cannot go beyond / abuse these powers
- Powers not listed in section 51 = residual powers → fall to state governments
- Restricting powers of parliament = indirectly protecting rights from an abuse of power

Statute law

- Many laws have been adopted in response to international law → also independent ones
- Statutes = not fixed → can be removed by an Act of Parliament
- Must be within Constitutional boundaries / be made by a democratically elected parliament
 - o Racial Discrimination Act 1975 (Cth)
 - o Anti-Discrimination At 1977 (NSW)
 - o Sex Discrimination Act 1984 (Cth)
 - o Australian Human Rights Commission Act 1986 (Cth)
 - o Disability Discrimination Act 1992 (Cth)
 - o Age Discrimination Act 2004 (Cth)

LAW REFORM: Border Force Act (section 42)

- Makes it an offence for an entrusted person working in Australia's immigration detention centres at Nauru, Manus Island and Villawood (Sydney) to disclose any information they come across in the course of their work
- Extends to harm which could include sexual violence, drug abuse etc.
- Doctors have been required to report to authorities' cases of abuse since 1977
 - o 1987 = broadened to include teachers / nurses
- Speaking out about abuse = potential 2-year jail sentence
- 2015 → doctors at Royal Children's Hospital refused to discharge children back into detention centres
 - o Concerned about patient welfare → unethical to discharge them into unsafe conditions

Common law

Body of law made by the judgements of the courts

- Independent of government → carries power to protect human rights where statute law is silent
 - o *Dietrich v the Queen* → right to a fair trial
- Not fixed = not complete protection → can be removed by any act of Parliament (overrides)
 - o Anti-terrorism laws passed by Commonwealth after 9/11 → criticised as removing long-standing criminal rights for certain people
- Cannot develop new rights → define on a case by case basis

EXAMPLES

- *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63 (High Court suggested the possibility of a tort for invasion of privacy)
- *Australian Crime Commission v Louise Stoddart and Anor* [2011] HCA 47 (High Court found that spouses had no right to silence overturned a presumption that has existed for hundreds of years and that protected the privacy of communication within a marriage)
- *Toonen Case* → gay man in Tasmania, discrimination, referred to Human Rights Committee = law reform to decriminalise homosexuality

Courts and tribunals

- All courts and tribunals in Australia must respect and follow human rights laws
- Australian Human Rights Commission = national independent government body (see previous notes)

Australian Human Rights Commission (previously HREOC)

- Established under *Australian Human Rights Commission Act 1986* → deals with violations of *Racial Discrimination Act 1975 (Cth)* and *Sex Discrimination Act 1984 (Cth)*
- Independent statutory organisation → report to Federal Parliament through Attorney General
- Works with other human rights institutions (Asia Pacific Forum of Human Rights) to address issues
- Functions have expanded and has a responsibility to →
 - o Receive and investigate complaints into discrimination and breaches of human rights
 - o Promote public awareness about human rights and provide legal advice
 - o Conduct public inquiries into human rights issue and produce recommendations
 - o Give advice / make submissions to parliament on development of laws, policies, programs

- Had important influence on Australia's laws
 - o 1977 *Bringing Them Home* → recommended an apology to victims → ignored until 2008
- 2010 → recommended having an Australian Charter of Human Rights
- 2015 → *Forgotten Children* report = attack on Gillian Triggs by Tony Abbot (claimed to be biased)
- Has two complaints functions
- Can investigate many discriminations → race, ethnic origin, age, disability, gender
 - o Workplace discrimination relating to sexual preference, trade union activity or political opinion
 - o Will investigate / try to → unresolved = Federal Court of Australia
- Can hear complaints on other Australian / International HR breaches
 - o Complaint = unable to take matter to Federal Court → commission can report to Attorney general (required to table report in parliament)
 - o Findings are not enforceable → no right to have wrong rectified = calls for matters to be made actionable in courts

The High Court

- Interprets Constitution → rules on the validity of a law (can overturn unconstitutional laws)
- Has power to set binding precedents / overturn legislation conflicting with constitution
- Power of judiciary = critical → judges are influenced by / apply international standards
- Most important protector of HR → power to declare legislation inconsistent / invalid, uphold rights provided in constitution, develop common law

CASE: *Mabo case, Native Title Act 1993 (Cth)*

- High Court set a precedent involving the rights of people
- International law = major influence → 'common law doctrine was founded on unjust discrimination'
- 1992 = recognition that Terra Nullius was an inappropriate legal description of Australia in 1788
- 1993 = *Native Title Act* → granted Aboriginals conditional title of land
- Displacement = unable to prove ownership until High Court decided in favour of Mabo

EXAMPLES: Human rights cases in the High Court

- *Croome v Tasmania* (decriminalisation of homosexuality)
- *Lange v Australian Broadcasting Corporation* (right to freedom of political communication)
- *Roach v Electoral Commissioner* (upholding of right of all people, including prisoners to vote)

Non-government organisations (domestic and international)

- Research / report on HR, make submissions to parliaments / law reform bodies, working with victims
- Australian NGOs = protect rights, shaping public / political opinion, exposing HR violations
- Amnesty International / Caritas = international and domestic NGOs
- ACOSS = Australian Council of Social Services (1956) → Australian NGO
 - o Leading and supporting initiatives within the community services and welfare sector
 - o Acting as an independent, non-party political voice
 - o Developing and promoting socially and economically responsible public policy and action

The media

- Large role in our lives → highlights human rights abuses = significant influence on public opinion
- Australia → media freedom is protected by law → no general right of freedom to speech
- NGOs and media = crucial role in bringing attention to human trafficking / other issues
 - o Can exhibit bias → Fox New in USA is known to support the Republicans
- Has a persuasive and informative role → must balance
 - o Unbiased does not blur the lines between information and persuasion
- Rights of reporters to disseminate information / right of public to receive information = not in law
- Australian reporters = important role in investigating / reporting on human rights

A charter of rights (arguments for and against)

For	Against
<ul style="list-style-type: none"> - High community support - Redresses any inadequacy of existing human rights protections - Protects the marginalised and disadvantages - Contributes to a culture of respect for human rights - Improves Australia's international standing in relation to human rights 	<ul style="list-style-type: none"> - The adequacy of current human rights protections in Australia - Undermines a tradition of parliamentary sovereignty, including transferring legislative power to unelected judges - Democratic processes and institutions offer better protection of rights (common law) - Must be easily amendable

- National Human Rights Consultation 2009 = one of the biggest public consultations (81% in favour)
- Many have adopted a Bill / Charter of Rights → restricts power of to reduce or infringe certain rights
 - o US Bill of Rights 1791 → rights given constitutional force = ensuring fundamental status in US law and their future survival
 - o English Bill of Rights 1689
 - o Canadian Bill of Rights 1960
- ACT (2004) and VIC (2006) → enacted HR charters to protect HR in relation to legislation / decisions
- Commonwealth= various attempts to introduce greater human rights protection → failed
 - o 1944 → Labor government tried to introduce constitutional amendments to guarantee freedom of expression and freedom from want and fear
 - o 1983 Australian Human Rights Bill
- 2008 → *National Human Rights Consultation* → inquiry into whether Australian should adopt a charter of rights = debate on status of rights protection, the merits of adopting a charter, future of rights
 - o 95% submissions discussed enacting a charter of rights / human rights Act
 - o 87.4% = in favour, 12.6% opposed
- 2010 → Government rejected key recommendations of the report → decided to adopt a human rights framework (education initiatives, enhanced parliamentary processes)

Themes and challenges

The changing understanding of the relationship between state sovereignty and human rights

- State sovereignty can be used both to promote and undermine human rights
 - o North Korea as a sovereign state does not have a good human rights record
- International community can exert pressure but cannot force compliance

Responsibility to Protect

- UNDHR makes it every government's responsibility to protect the human rights of their citizens
- Government is unable to do this = international community's responsibility to assist them

Issues of compliance and non-compliance in relation to human rights

- State sovereignty → ICJ requires compliance to initiate proceedings
- Monitoring / enforcement mechanisms aim to hold people accountable for violations of human rights
- Democratic, open societies = better HR record than closed, non-democratic / dictatorial nation states

The development of human rights as a reflection of changing values and ethical standards

- World wars / atrocities = change to value human rights / develop new world order
- Universal Declaration of Human Rights, UN Charter, Genocide Convention, Geneva Conventions

The role of law reform in protecting human rights

- Human rights treaties give individuals a lot of protection → enforcement is not always guaranteed
- Rule of law = best chance to protect human rights
- International community must help struggling nations build economic / governmental development
- Social attitudes, international pressure and the work of NGOs = advance cause of HR

The effectiveness of legal and non-legal responses in protecting human rights

- Depends on political will of world powers to take action to strengthen HR protection mechanisms

Legal	Non-legal
<ul style="list-style-type: none">- The Constitution (separation and division of powers)- Statute law- Common law- Courts and tribunals- The UN, including International Treaties (international law)	<ul style="list-style-type: none">- A public that is informed and made aware of human rights issues can pressure their leaders to promote human rights- NGOs, IGOs and the media play a critical role in the areas of research, education and lobbying- Little would be achieved without NGO / IGO