

CRIMINAL LAW SUMMARY



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Introduction

Criminal law consists of three major elements. These are the actus reus, mens rea and an absence of a valid defence.

Criminal law is **public** in nature, and contrasts with private/ civil wrongs. The ambit of criminal law is society at large: the general public is affected by criminal law. Criminal law has evolved over time, and largely reflects what is seen as morally and socially acceptable over time.

The public nature of criminal law means that the right to individual retribution is subsumed by the role of the state, and therefore by society.

New Zealand criminal law is an adversarial system. This means that the procedure differs from an inquisitive system.

The procedure is as follows:

Facts and evidence emerge by way of questions put to witnesses who have been called by the defence and prosecution.

Each party may choose their own witnesses, and can test the evidence of the other witnesses ('cross-examination').

The judge is there to preside over this procedure and to uphold rules of giving evidence.

The accused has the right to silence.

Sources of criminal law

Criminal law is sourced in legislation (particularly the Crimes Act 1963 and the Summary Offences Act 1981), case law, academic theory and the law in practice.

Judges can no longer create new offences, but judicial interpretation of statutory offences shapes our criminal law.

New Zealand criminal legislation is often ambiguous and incomplete, in order to allow some judicial discretion of interpretation. Statutes such as the Sentencing Act are guides and limits on this discretion.

New Zealand does not have a comprehensive criminal code, as many civil jurisdictions do. The Crimes Act is the closest New Zealand has to a criminal code.

New Zealand's criminal law was partially codified in the Crimes Act 1893.

The crimes are defined and the requirements are stated (known as a 'special part'), but there is no explanation of how to interpret these requirements (known as a 'general part').

Before the code was implemented, there were many criticisms of the law, including

- Uncertainty;
- Inaccessibility; crimes were spread over many sources;
- Inconsistent terminology between common law and statute;
- The law was very complex – a non-educated person would not know how to access the law and determine whether they are in breach of it or not.

The codification of the law aimed for

- Accessibility;
- Comprehensiveness (but we still have some common law crimes and crimes created by other legislation);
- Consistency;
- Certainty.

New Zealand considered implementing a general part in 1989, but it is time-consuming and difficult work for drafters. Generally practitioners and judges are opposed to a general part, as it lowers discretion.

The role of juries

A jury is made up of 12 members of the public who act as the 'fact-finder' for the case before them.

Juries are currently available where the offender is charged with an offence carrying a penalty of greater than three months imprisonment. Under the new law, this will change to 2 years.

Juries are intended to be representative of the community and a safeguard against institutional power. It is also a way for members of the public to participate in a democratic

society. There are strong arguments that juries are not necessarily representative, and that jurors bring their own personal prejudices and life experiences to their role.

Juries need not return a unanimous verdict, but must return a majority verdict (all but one are in agreement).¹

Jury directions

New Zealand judges use the 'question trail' method to establish the legal position, rather than giving a direction based on the legal position.

A jury direction has simple wording and is clearer than the previous method of enquiry.

Criminal Procedure and process

- 1) Suspect apprehended and charged
- 2) Trial
- 3) Evidence is heard
- 4) Jury direction
- 5) Jury makes factual decision
- 6) Judge makes sentencing decision

The legal burden

This refers to need to prove the case to the required standard. In criminal law, the legal burden is on the prosecution (generally) to prove the guilt of the defendant beyond reasonable doubt.

When the legal burden does shift, the standard of proof also changes.

Prosecution- beyond reasonable doubt.

Defence- balance of probabilities.

The evidential burden

This refers to the practical obligation to raise some evidence which suggests a reasonable doubt. Generally this burden is on the defence, particularly in relation to defences.

Criminalization

¹ s 29 Juries Act 1981

The major tension of thought regarding criminalisation is whether to concentrate on the **form** or the **substance** of the law.

Form

- Crime is anything contrary to criminal law.
- Criminal law responds to crime by creating rules implemented through the justice system.
- Law is rules made by humans.
- Positivism: morality has nothing to do with validity.
- We can understand the law by looking at how it operates.
- Societal context may be useful, but not essential, in understanding the legal system.

Substance

- Looks to what the law contains.
- Law is also about the community and is a social construct; who creates and enforces the rules, and what are the influences of this?
- Natural law: a just law is framed by nature and is valid everywhere.
- Some see the law as being influenced by the divine.

Interpretive approach to criminalisation

The interpretive approach looks to the past to interpret the current and the future.

Factors to consider: the scope of the criminal law, central features, commonalities and differences with other systems.

The benefits of this approach include; allowing a consideration of the law in its historical and social context and the ability to see the development of the law in response to societal changes.

The limits of this approach include; not reconciling the difference between true crimes and mere regulation, and the criminalisation of some behaviours which are not explained by this approach.



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