

# LEGAL STUDIES

## Study Notes

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## CRIME

### TOPIC ONE: THE NATURE OF CRIME

**Definition:** A crime is any act or omission of duty, which results in harm to society and which is punishable by law. In most cases, criminal law is based upon a society's morals and ethics.

#### Elements of Crime:

1. Mens rea (the guilty mind) refers to whether a person was aware that their actions would result in a crime being committed.
2. Actus reus (the guilty act) refers to the physical performance; that a person actually carried out the crime.
3. Causation refers to the link between the act and the harm caused by it.
4. Strict liability offences occur when the prosecution is not required to prove mens rea, only that an illegal act was committed (actus reus). Most traffic offences fall under this category.

#### Classifying Crime:

- There are two main categories of offences – indictable (serious) or summary (minor).
- Indictable offences require a committal hearing to determine whether a prima facie case exists; that is, whether there is enough evidence to warrant a trial. If there is, the case is then heard by a jury or judge alone.
- Summary offences are heard in the local court and are presided over by a magistrate only.

### 1. OFFENCES AGAINST PERSONS

- a. **Homicide – This is the unlawful killing of a person. Death due to self-defence is an exception.**

#### Murder

To convict a person, it must be proved that one of the following occurred...

- i. A deliberate act to kill.
- ii. A deliberate act to harm, during which death occurred.
- iii. A reckless indifference to human life, resulting in death; eg. the discharge of a firearm in a busy area.
- iv. A death that occurred during the commission of a serious crime; eg. shooting someone in an armed robbery.

## **Manslaughter**

This applies when the accused has a defence for their actions. There are two types...

- i. Involuntary manslaughter, where the accused did not have the mental intent to cause the death.
- ii. Voluntary manslaughter, where the accused did intend to cause death, but mitigating circumstances exist.

## **Infanticide**

This involves a mother causing the death of a child within its first 12 months of life.

## **Death by Reckless Driving**

The judge must determine that there was a causal relationship (a direct link) between the actions of the accused and the death. Some accused may argue that the accident was a result of poor road conditions or a third driver, and not their actions.

### **b. Assault / Aggravated Assault**

This involves inflicting physical harm, or threatening to do so, on another person. Aggravated assault is more serious. Examples include using a weapon or threatening to contaminate a person with an infectious disease.

### **c. Sexual Assault / Aggravated Sexual Assault**

This involves sexual contact with another person without their consent. Consent is irrelevant if given mistakenly or under duress, or when the act is against a minor. It becomes aggravated when there has been excessive violence, the victim is under 16 and hasn't given consent, or if the victim has a disability.

## **2. Offences Against the Sovereign**

### **a. Treason**

This involved a breach of allegiance to a country by either causing harm to its leader or working with the country's enemies to bring down the government.

### **b. Sedition**

This is the act of encouraging hatred of the government or constitution.

## **3. Economic Offences**

### **a. Crimes Against Property**

#### **Larceny or Theft**

This is defined as taking another's property without their consent. Borrowing property (even without the owner's consent) is not considered larceny.

#### **Breaking and Entering**

This occurs when a person forces entry into a building in order to commit an offence.

## **Robbery / Armed Robbery**

This involves the accused taking a person's property directly from their person or from within the vicinity of their person. Armed robbery involves the use of a weapon.

### **b. White-Collar Crime**

**Tax Evasion**

**Computer Crimes**

**Insider Trading**

This takes place when a person with special knowledge of a company uses that knowledge to buy or sell shares.

### **4. Drug Offences**

**a. Importation**

**b. Manufacture and Cultivation**

**c. Distribution, Supply and Trafficking**

**d. Possession and Use**

### **5. Traffic Offences**

### **6. Public Order Offences – These are those crimes that generally disrupt the activities of society; eg. littering and offensive language.**

### **7. Preliminary Offences**

**a. Attempt**

The Crimes Act states that attempting to commit a crime is the same as actually succeeding in committing the act. Attempted murder is an exception.

**b. Conspiracy**

This exists when a group of people agree to commit a criminal act. The agreement to act criminally is the actus reus, while the planning shows the intent (mens rea) to carry it out.

## **PARTIES TO A CRIME:**

1. Principal in the First Degree – This is the person who actually carries out the criminal act, the perpetrator.
2. Principal in the Second Degree – This is the person who assists in the commission of a crime. They are present during the crime, but is not a main participant.
3. Accessory Before the Fact – This person helps the others plan or prepare the criminal act, but is not present at the time it is conducted.
4. Accessory After the Fact – This person helps the criminals after they have committed a crime, but is neither present during the crime nor aware of it beforehand. The courts give this person a lesser punishment than the others.

5. Joint Criminal Enterprises – This is where two or more people conduct criminal activity with a common purpose. All parties are equally criminal liable.

## **FACTORS AFFECTING CRIMINAL BEHAVIOUR**

Social and Economic Factors

Genetic Theories

Political Factors

Self-Interest and Greed

Differential Association (Environment)

## **CRIME PREVENTION**

1. Situational Crime Prevention – This involves making it difficult for criminals to commit a crime by increasing the risk of being caught or decreasing the reward. It is also known as “opportunity reduction.” Examples include CCTV surveillance, which acts as a deterrent, and reducing the amount of money held on the premises, which makes the crime less worthwhile.
2. Social Crime Prevention – Programs aim to give people greater access to society and an education in order to reduce the factors that are likely to cause a person to commit a crime.

## **TYPES OF CRIME – SUMMARY**

### **1. Offences Against Persons**

#### **a. Homicide**

Murder  
Manslaughter  
Infanticide  
Death by Reckless Driving

#### **b. Assault / Aggravated Assault**

#### **c. Sexual Assault / Aggravated Sexual Assault**

### **2. Offences Against the Sovereign**

#### **a. Treason**

#### **b. Sedition**

### **3. Economic Offences**

#### **a. Crimes Against Property**

Larceny or Theft  
Breaking and Entering  
Robbery / Armed Robbery

**b. White-Collar Crime**

Tax Evasion  
Insider Trading  
Computer Crimes

**4. Drug Offences**

- a. Importation**
- b. Manufacture and Cultivation**
- c. Distribution, Supply and Trafficking**
- d. Possession and Use**

**5. Traffic Offences**

**6. Public Order Offences**

**7. Preliminary Offences**

- a. Attempt**
- b. Conspiracy**

## **TOPIC TWO: THE CRIMINAL INVESTIGATION PROCESS**

### **POLICE POWERS**

- Source of power: Law Enforcement (Powers and Responsibilities) Act 2002 (NSW).
- Police have the role to prevent and investigate crime, and to assist in the prosecution.
- They have the power to...
  - a. Arrest (only with a warrant or under reasonable suspicion).
  - b. Issue cautions or fines.
  - c. Stop, search and detain (only when there are reasonable grounds to suspect that a person is carrying something illegal).

#### **Reporting Crime:**

- The police rely on members of the community to report crime.
- They also encourage this reporting through community based-programs such as Crime Stoppers and Neighbourhood Watch.

#### **Investigating Crime:**

- Police have discretion about whether or not they should investigate an alleged crime.
- This will depend on the seriousness of the crime and the police's access to resources.
- The police are responsible for gathering evidence. It can be physical, electronic or in the form of witness statements, and it must be gathered legally.

- The police have the right to search an arrested person and their possessions; however, if the police have reasonable grounds to believe that a person is breaking the law, then an arrest is not necessary. Police must apply for authority from the courts to enter premises and engage in covert surveillance.
- Technology has also greatly assisted law enforcers during the investigation process; eg. CCTV, DNA, etc.

### **Arrest and Charge:**

- The police can only detain people if they have lawfully arrested them. A lawful arrest can occur if...
  - a. They believe a person has committed, or is about to commit, a crime.
  - b. They witness a person committing a crime.
  - c. They have an arrest warrant.
- Police are required by law to inform the accused of the reason for their arrest and that it is an offence to resist an arrest.
- They must also issue a caution (ensuring that the person understands their rights) before beginning an interview. This does not apply to strict liability cases, however.

### **Summons and Warrants:**

- A summons is a legal document that requires a person to attend court.
- A warrant is an order issued by the court authorising a law enforcement agency to do something.
- There are two types of warrants...
  - a. Arrest warrants, for when the court believes there is a prima facie case.
  - b. Search warrants, for when the police can provide substantial grounds that a search will lead to an arrest.

### **Bail:**

- This is the conditional release of a person until their case is determined by the courts.
- It depends on the type and seriousness of the offence whether or not bail is granted.
- If the officer in charge of the prison refuses- For summary offences and those that are not punishable by a prison sentence there is a presumption in favour of bail. For more serious offences, there is a presumption against bail.

### **Remand:**

Remand is a type of detention that allows for the accused to be held in custody for the period between being charged and facing trial.

## TOPIC THREE: THE CRIMINAL TRIAL PROCESS

### Court Hierarchy and Jurisdiction:

Courts are divided into levels of seriousness (lower, intermediate and higher) and areas of expertise.

The system of appeals is another important feature.

#### 1. Inferior Courts

##### a. The Local Court

- Presided over by a magistrate; no jury.
- Has two main functions in regards to criminal matters...
  - i. To hear all summary (minor) offences.
  - ii. To hear committal hearings to establish whether a prima facie case exists.

##### b. Children's Court

- Aim: To rehabilitate.
- Deals with any summary or indictable matter, when the accused is...
  - i. Less than 18 when charged.
  - ii. Less than 21 when charged for a crime committed when less than 18.

Exceptions to this jurisdiction include homicide, aggravated assault and some traffic offences. These are heard in closed sessions of the Supreme Court.

##### c. Coroner's Court

- Investigates unexplained, unnatural or violent deaths; and the cause of fires that have damaged property.
- The court can commit a defendant to trial in a higher court if the coroner rules that there is a prima facie case.

##### d. The Drug Court of NSW

This court has both local and district court jurisdiction.

#### 2. Intermediate Courts

##### a. The District Court

- Heard by a judge, with the possibility of also having a jury.
- Its jurisdiction extends to all indictable offences, apart from murder, treason, serious sexual assault and kidnapping.

### 3. Higher Courts

#### a. The Supreme Court

- Presided over by a judge and jury.
- It has jurisdiction to hear matters that involve the most serious indictable offences, as well hearing appeals from intermediate courts.
- It can also hear “stated” cases, where a magistrate in the local court has made an error in law and the ruling has been appealed.
- The Supreme Court of each state is a Court of Record – its decisions create precedent.

#### b. The Supreme Court of Criminal Appeal

- This court hears matters that were originally heard in the district court and those by a single judge in the Supreme Court.
- Under the “double jeopardy rule”, the prosecution cannot appeal once a person has been found not guilty. This is unless fresh evidence arises or the acquittal was tainted.
- The prosecution can also appeal against the perceived leniency or harshness of a sentence.

### 4. Federal Courts

#### a. The Federal Court

- Equivalent in status to the supreme courts.
- Hears serious cases of federal law, such as immigration.

#### b. The High Court

- Hears cases involving the Constitution and disputes between states or between the Commonwealth and states.
- Its role in criminal matters only extends to appeals.
- For an appeal to go to the High Court, it must be shown that the case...
  - i. is of public importance,
  - ii. is required in order for justice to be served, and
  - iii. is required due to confusion between earlier rulings of various courts.

## LEGAL PERSONNEL

- A magistrate presides over a local court. Their role is to determine guilt or otherwise and to pass a sentence.
- A judge’s role is to ensure the case is conducted according to the rules of the court, rule on and clarify points of law, advise the jury on their role, and pass sentence if the accused has been found guilty.



- Prosecutors represent the state and therefore society. They must prove that the accused is guilty.
  - a. Police prosecutors are specially trained police officers who present the prosecution's case. They are responsible for almost all summary prosecutions and many committal hearings.
  - b. The Director of Public Prosecutions, responsible for the Office of the DPP, has a team of criminal lawyers known as Crown prosecutors. All Crown prosecutors are barristers. They are required to help the court discover the truth, not to gain a conviction at any cost.

**Defence lawyers represent the accused and try to create doubt about the prosecution's case.**

- a. Legal Aid assists those who cannot afford legal representation. The applicant must pass the means (ability to afford) and merit (likelihood of succeeding) tests, and the case must fall into a defined area of law. No means or merit tests apply to children or criminal matters in the Local Court.
- b. Public defenders represent those who have been charged with a serious criminal offence and who have been granted legal aid.

**Pleas and Plea Bargaining:**

- The accused can either plead guilty or not guilty. A plea of guilty means that the matter goes straight to sentencing; while, a plea of not guilty means that the case must go to a trial.
- Plea bargaining (or charge negotiation) occurs when the defence and prosecution negotiate the charges. It is used to get the accused to plead guilty in exchange for a lesser charge or the dropping of some charges.

**Burden and Standard of Proof:**

- Due to the assumption "innocent until proven guilty", the burden of proof lies with the prosecution to demonstrate the accused actually committed the crime that they were charged with. However, if a defence is used, the burden of proving that defence belongs to the accused.
- The standard of proof in criminal matters is beyond reasonable doubt.

**Evidence:**

- The Evidence Act 1995 (NSW) outlines what evidence can be used in court.
- Evidence that has been illegally obtained or is irrelevant / misleading cannot be presented.

**Witnesses:**

- Witnesses give verbal evidence attesting to what they heard or saw. They must not retell hearsay.
- Witnesses are examined and cross-examined on any statement made.

**Defences to Criminal Charges (SMAC AND SIP):**

A person who admits to a criminal offence may adopt a defence that justifies their actions. It is generally a dispute of the mens rea aspect.

## 1. Complete (Absolute) Defences

### a. Self-defence

- To use this as a defence, the accused must admit to both mens rea and actus reus.
- They must show that the accused genuinely believed that they were in danger and that the level of force used was reasonable / necessary.

### b. Mental Illness / Insanity

- Insanity refers to the fact that the defendant wasn't of sound mind and so did not understand the nature of consequence of their actions.
- Although acquittal is granted, the court may place the accused in a mental health facility.

### c. Accident

### d. Consent

This is not an absolute defence in relation to murder, but is often used in sexual assault cases.

### e. Automatism / Compulsion

This involves admitting to a crime, knowing that it was a crime, and then claiming to have been forced to carry it out.

There are two types...

- i. Necessity, where the crime committed is not as bad as what could have happened had the crime not occurred.
- ii. Duress, where a person forced the accused to commit the crime against their will. The accused had to strongly believe that the threat was genuine.

## 2. Partial (Qualified) Defences

### a. Substantial Impairment of Responsibility

This exists when a person suffers from an abnormality of mind that impairs their mental responsibility.

It is often used when the accused is not consistently insane.

### b. Intoxication

### c. Provocation

- This is when the actions of one person cause another to lose control of their own actions. It must be shown that an ordinary person would have also been provoked into the crime.
- Provocation can only be used as a defence to murder.

## **The Role of Juries:**

- A jury consists of 12 members, whose role is to determine whether the accused is guilty beyond reasonable doubt or innocent.
- The jury system relies on people who represent a cross-section of society. However, they must be over 18 years and an Australian citizen.
- There are also a number of other people who are immediately disqualified – lawyers, police, convicted criminals, the vision and audio impaired, and the mentally impaired – and those who can seek an exemption – professional people, defence force, pregnant women, parents with school aged children, the sick, and over 65 year olds.
- Each side also has the ability to challenge 3 jurors' suitability without providing a reason and unlimited challenges where they can offer a reason.

## **TOPIC FOUR: SENTENCING AND PUNISHING**

### **Judicial and Statutory Guidelines:**

- The aim of judicial guidelines is to reduce inconsistency in the judgements of trial judges; it ensures that like cases are treated similarly.
- Not only have statutes given power to courts to issue guideline judgements, but certain acts also provide general guidelines for the courts to follow during sentencing.

### **Purposes of Punishment (RRRID):**

- Retribution is based on the view that it is unfair for a person to gain from their wrongful conduct, and so the offender is given a punishment that is considered equal to the crime committed.
- Rehabilitation aims to reduce or eliminate further criminal behaviour by the convicted person.
- Re-integrative shaming/restorative justice
- Incapacitation is the principle that a convicted person may be prevented from committing further offences after being imprisoned. It is based on the view that society should be protected from particular offences.
- Deterrence can either be...
  - i. Specific, which aims to prevent convicted criminals from reoffending.
  - ii. General, to prevent people from committing particular crimes by making them aware of the penalties.

### **Factors Affecting Sentencing:**

- Aggravating circumstances are those that would generally lead to a heavier penalty; eg. the use of violence, the victim was vulnerable, the offender abused a position of trust or authority.
- Mitigating circumstances are those that would generally lead to a more lenient penalty; eg. no significant record of convictions, the harm caused was not substantial, the offender's circumstances.
- Other important factors include guideline sentences, the existence of precedent, any charge negotiation, and the discretion of the court president.

### **Role of the Victim:**

- A victim can write a Victim Impact Statement to be read at the sentencing hearing, outlining how they have been affected by the criminal's activities.
- It is considered an aggravating circumstance.

### **Appeals:**

- Both the prosecution and defence can appeal a sentence.
- Appeals may be made due to an error of law, the severity / inadequacy of the penalty or because new evidence has come to light.
- The appeal court will consider...
  - i. The court's power in imposing the sentence.
  - ii. An error of fact or law.
  - iii. Whether the sentence is generally of the range appropriate for a particular offence or offender.

### **Types of Penalties (CHIPPFANGS):**

- Community service
- Home detention, under some form of monitoring.
- Imprisonment, which is imposed only after considering all other alternatives.
- Periodic detention, usually over the weekend period.
- Probation, which involves the offender entering into a bond to be supervised by a probation officer and to comply with certain conditions.
- Fines
- Admonishment / Caution
- No conviction recorded, due to the circumstances of the offender or the trivial nature of the offence. Sometimes this is combined with an order to participate in a diversionary program for treatment or rehabilitation.
- Good behaviour bond
- Suspended sentence, in which the offender will be released on a good behaviour bond for the same length of time.

### **Alternative Methods of Sentencing:**

- The aim of restorative justice is to divert the offender away from the courts. It involves the offender explaining what happened, how they felt and what they should have done, and the victim explaining the impact that the crime has had on their life.
- Circle sentencing is mostly used for Aboriginal offenders. Its aim is to help the offender appreciate the harm caused to the victim and to introduce more relevant sentencing options.

## **Post-Sentencing Considerations:**

- Security Classifications – When a person is sent to prison, they are categorised based on the security risk that they present. This then determines what correctional facility they are sent to; minimum security, medium security, maximum security or supermax prisons.
- Protective Custody – Prisoners who feel that they are in danger from other prisoners can apply to be placed into protective custody.
- Parole – This is either automatically granted for prisoners serving less than three years or deliberated upon by the Parole Authority when it comes to more serious offenders. Parole is conditional.
- Preventative Detention – In some cases, an offender may be detained to prevent them from committing a crime if that person is deemed likely to do so.
- Continued Detention – Similarly, the Supreme Court can order to continue a detention where a prepared report assesses that an offender is likely to commit further serious crimes.
- Sexual Offenders Registration – Serious sex offenders, murderers and kidnapers are placed on a register accessible by the police. Offenders against children must also keep the state police informed of certain personal details, including their movements, for a specified period of time.
- Deportation – Non-citizens who are subject to at least 12 months of imprisonment and have resided in Australia for least than ten years automatically fail the character test and may be deported.

## **TOPIC FIVE: YOUNG OFFENDERS**

### **Age of Criminal Responsibility:**

- In Australia, a child below the age of 10 is regarded as too young to form criminal intent (*mens rea*); they are not able to fully understand the consequences of their actions. This is known as “*doli incapax*” and means that they are automatically not guilty of a crime.
- *Doli incapax* not only applies to the accused/offender, but also to witnesses, making it rare for children under 10 to be used as a witness.
- For children between the age of 10 and 14 there is a presumption that the child is not able to form criminal intent; however, this can be refuted with proof that the child did actually understand that what they were doing was legally wrong.

### **Rights of Children when Arrested / Questioned:**

- As children are vulnerable, they have special rights when dealing with the police.
- Examples include that children should not be interviewed for more than two hours, an adult must be present during the interview, children do not have to accompany a police officer unless arrested, etc.

### **The Young Offenders Act 1997 (NSW):**

- Aim: To provide alternatives to court proceedings, where it tries to minimise criminal records and maximise rehabilitation (restorative justice).
- Principles of the Act include...
  - i. To apply the least restrictive sanction.
  - ii. Children are entitled to be informed about their rights to representation.
  - iii. Alternative methods should be used if possible.
  - iv. A criminal proceeding should not be used solely as a means to help a child and their family.
  - v. Children should be dealt with in their community.
  - vi. Parents must be involved in justice processes.
  - vii. Victims must be notified of police progress.

### **Children's Court:**

- If a child admits guilt, the case goes straight to sentencing. If a child pleads not guilty, a court hearing is required.
- Bail is decided based on the seriousness of the offence, family and community ties, and the likelihood that the child will appear in court.
- The penalties given to child offenders are very similar to that of an adult.

### **Alternatives to Court:**

- On-the-spot warnings can be issued by the police for minor breaches of the law. In this case, the police will not record the name of the youth, only that they gave a warning.
- A caution is a more formal record that a young person has breached the law and requires the accused to admit to the offence. Repeated cautions will result in a court appearance.
- Youth justice conferences involve the informal gathering of the offender, victim, family members and the police. The victim is able to express how the crime has affected them, and in return the offender needs to show a willingness to compensate or try to rectify the damage caused. This is known as an "outcome plan", to which all parties must agree.
- The Department of Juvenile Justice is involved in community-based interventions with juvenile offenders. Their role is to: supervise those placed on good behaviour bonds, probation, parole orders or community service; provide programs to remedy or reduce the factors that lead youth to commit crime; provide specialised programs to modify behaviour (such as the Violent Offender Program) or to develop employment skills; etc.
- The Youth Drug and Alcohol Court Program (YDAC) aims to divert young offenders from further drug and alcohol abuse. It creates individual program plans for each referral.

## TOPIC SIX: INTERNATIONAL CRIME

### Categories of International Crime:

#### 1. Crimes Against the International Community

##### a. Piracy

- Defined under the UN Convention on the Law of the Sea (1982).
- Piracy is the violence, detention and depredation against/of another ship or aircraft, or its passengers, outside the jurisdiction of any state; that is, in international waters.

##### b. War Crimes

- The Nuremberg Charter (1945) defines a war crime as being the ill treatment of civilians or prisoners of war, the plunder of property, or the destruction of a place. They are crimes that cannot be justified by military necessity.
- The Hague Conventions (1899 and 1907) define what is lawful in waging war.
- The Geneva Conventions (1949) outline a number of international crimes that are associated with conflict. It relates to the human treatment of civilians, prisoners and wounded enemy soldiers.

##### c. Crimes Against Humanity

- Defined by the Prosecutor v. Tihomir Blaskic (2000) case.
- These crimes are particularly heinous, systematic and widespread. They involve political or military authorities.

##### d. Genocide

- Defined under the UN Convention on Genocide (1948).
- Genocide is the persecution of national, ethnic, racial and religious groups.

##### e. Aggression and Crimes Against Peace

- The UN Resolution 3314 (1974) defines acts of aggressions as armed invasions or attacks, bombardments, blockades, and armed violations of territory.
- The Nuremberg Tribunal of 1950 defined crimes against peace as the planning, preparation, initiation or waging of a war in violation of international treaties.

##### f. Terrorism

- In international law, terrorism has no universally agreed, legally binding definition. However, in general terms, terrorism is the use of violence and intimidation in the pursuit of political aims.
- International terrorism must have an international dimension; that is, it must operate across national boundaries.

## 2. Transnational Crime

These are crimes that take place across the borders of states, involve crossing borders in some way as part of the crime, or occur in one country but have consequences in another.

### a. Money Laundering

- This refers to the process of concealing the source of illegally obtained money.
- The UN Convention against Transnational Organized Crime (2000) requires signatory countries to make money laundering a domestic offence.

### b. People Smuggling

- People smuggling is the organising of illegal entry into a state, of people who are not permanent residents or citizens of that state.
- The Convention against Transnational Organized Crime includes the Protocol to Prevent, Suppress and Punish Trafficking in Persons.

### c. Arms Trafficking

- This is the illegal smuggling of weapons, their components and ammunition. A distinction has been made between arms trafficking and legitimate trade in arms.
- The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (2001) is an important document in this area.

### d. Drug Trafficking

- Drug trafficking involves the manufacturing and trading of illicit drugs.
- The Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) is specifically directed against trafficking.

### Domestic Measures:

The Mutual Assistance in Criminal Matters Act 1987 (Cwlth) regulates assistance to foreign countries in criminal matters. It is also designed to facilitate Australia obtaining international assistance; for example, the Attorney-General can request evidence to be taken in a foreign country for use in criminal investigation or proceedings in Australia.

### Legislation...

- a. Piracy: Crimes Act 1914 (Cwlth) only applies to acts carried out on the high seas or Australian territorial waters.
- b. War Crimes: War Crimes Act 1945 (Cwlth) defines a war crime as a serious offence carried out during warlike hostilities or an occupation. Only Australian citizens can be prosecuted, but extradition may be sought by foreign governments.
- c. Crimes against Humanity: Criminal Code 1995 (Cwlth) allows Australia jurisdiction over offences that also come under the jurisdiction of the ICC.
- d. Genocide: Criminal Code 1995 (Cwlth) allows Australia jurisdiction over offences that also come under the jurisdiction of the ICC. It defines genocide as deliberately inflicting conditions (killing, harming, preventing births) likely to destroy human life.



- e. Aggression and Crimes Against Peace: There are no legislation for such crimes.
- f. Terrorism: Criminal Code 1995 (Cwlth) has jurisdiction in Australia, when caused by Australians in foreign countries, and when committed against Australian in foreign countries.
- g. Money Laundering: Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cwlth) aims to assist in tracing transfers of funds involved in criminal enterprises. Additionally, people moving physical currency are required to declare this as they pass through custom controls. Terrorist operatives with excessive amounts, however, are unlikely to do so.
- h. People smuggling: Criminal Code 1995 (Cwlth) has jurisdiction when the offence has been carried out by an Australian citizen or resident.
- i. Arms Trafficking: Criminal Code 1995 (Cwlth) states that weapons cannot enter the country except with licences.
- j. Drug Trafficking: Crimes (Traffic in Narcotic and Psychotropic Substances) Act 1990 (Cwlth).
- k. International Measures:

The International Criminal Court is a permanent court. It is able to issue warrants for arrest and prosecute war crimes, crimes against humanity, genocide, and crimes of aggression. It can try any military or political leader to the highest level. Its jurisdiction is universal; however, some countries do not recognise this jurisdiction.

There are a number of criminal tribunals that are set up to deal with war crimes, crimes against humanity, and genocide. The International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda are examples. These tribunals have jurisdiction limited to specified geography and time.

The effectiveness of tribunals has suffered, in the past, from the arrest of vast numbers of perpetrators and the impossibility of bringing about justice in a timely manner. Some alleged offenders have died before their trial; however, many high-profile individuals have been successfully tried.

## LEGAL STUDIES – STUDY NOTES

### Assessment Task #1

#### Arrest and Investigation:

- Article: “The Wronged Man”, Caroline Jones (2010).
- Andrew Mallard was questioned for eight hours and, despite his mental state, was not provided with a guardian or offered Legal Aid. He was then released.
- A few days later, he was approached by a man who posed as a potential friend. This “friend” was actually an undercover policeman.
- At later police interviews, transcripts show that the interviewing detective had been asking very leading questions to which Mallard responded with the information that had been fed to him by both policemen.
- The misconduct by police – their unlawful obtaining of evidence and mistreatment of the vulnerable accused – compromised Mallard’s rights for the sake of “solving” the murder case and helping the victim and community reach a sense of comfort.

#### Bail:

- Article: “Anger over Wood bail decision”, David Brathwaite (2006).
- Wood allegedly killed his girlfriend, was arrested, and after court deliberations was granted bail.
- The bail was conditional, but still provoked outrage from the public, especially since there is a presumption against the granting of bail for a murder offence.
- The case highlights the tension between locking up a potentially innocent man before he is heard before the law and protecting the community on the chance that he is guilty and will reoffend.

#### Trial:

- Article: “Cops in Danger before Tyler Cassidy was Fatally Shot, Inquest Finds”, Elissa Hunt (2011).
- Shani, Tyler’s mother, was dissatisfied with the coroner’s finding. She wanted to see justice in the form of the police accepting part of the responsibility for her son’s death.
- From her perspective, Articles 3 and 6 of CROC (1990) were breached. These Articles concern the right of a child to live and the responsibility of authorities to act with the best interests of the child being of primary concern.
- The police believed they acted within their training to protect both themselves and the wider community from the threat of a young, mentally unstable boy, brandishing knives; and that the life of one should not compromise the lives of many more.
- The overwhelming majority of the public agreed that the shooting was unavoidable and that, while unfortunate, justice prevailed because innocent lives were saved.

- Article: “Bowraville: Unfinished Business”, Deborah Whitmont (2011).
- The cases of R v. Thomas Hart (1994) and R v. Thomas Hart (2006), accused of the murder of three Aboriginal youth, resulted in a verdict of not guilty.
- While Hart believed he had the right to innocence under the law, the belief that he was guilty was widespread.
- It was later discovered that the trial had not been just for the victims and their families for three reasons...
  - a. The jury did not represent a cross-section of the community as there were no Aboriginal jurors in a predominantly Aboriginal region.
  - b. There was a stigma of alcoholism and poor parenting attached to the Aboriginal parents that resulted in the dismissal of their statements.
  - c. Key evidence was excluded from the trial.
- The Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 (NSW) stated that a new trial of an acquitted person can occur for the same crime if there is “fresh and compelling” evidence.
- The prosecution and members of society argued that there was, but the DPP disagreed.
- This protected Hart’s right to not have to endure a retrial, but disregarded the victim’s and community’s interest in seeking justice and finding closure.
- In R v. Ferguson (2009) the “not guilty” verdict resulted in community dissatisfaction.
- They believed that a jury should have been present, and that the law weighed too heavily in the favour of the accused.
- Ferguson and the authorities were adamant that the trial and verdict upheld the rule of law.
- In accordance to Article 10 of the UDHR, it was believed that Ferguson would not have received the fair hearing that he was entitled to if it had been before a jury, whose impartiality was thought to have been affected by the pre-trial publicity.
- The verdict was, therefore, the result of a justice-allowing judge alone trial.

### **Sentencing:**

- In the case of R v. Bilal Skaf (2002), Skaf, a sex offender, was sentenced to 55 years of imprisonment and a non-parole period of 40 years.
- This figure exceeded the maximum penalty for a sexual offence, as set out by statutory guidelines, and breached Article 11 of the UDHR; “Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”.
- Skaf considered his punishment unjust; while the physical, emotional and financial harm that was endured by the four female victims cause them to view the sentence as sufficient.
- Article: “Rape victim may not have to give evidence in Skaf retrial”, Emma Alberici (2005).
- Bilal appealed the verdict. However, as the victims did not feel they could endure a retrial, the charges were dropped.

- Subsequent legislation declared that transcripts of a victim's evidence can be used at retrials in the event that they are unfit to attend another trial.
- This ensured the women were able to seek justice, despite their lack of attendance.
- Skaf's belief that he had been treated unfairly led him to appeal against the sentence twice, and a further two appeals by the prosecution against the reduction.
- These appeals epitomise the tension that was evident in the search for an appropriate sentence.

### **Post-Sentencing:**

- Article: "Watching the Kids Swim, with Dennis Ferguson", David Penberthy (2010).
- The tension was in the act of returning Ferguson's human rights (including the right to free movement) and the community's want to protect their children.
- In response, the QLD and NSW governments introduced legislation, amongst them...
  - a. Danger Prisoners (Sexual Offenders) Act 2003 (QLD)
  - b. Child Protection (Offender Reporting) Act 2004 (QLD)
  - c. "Dennis Ferguson Act" 2009 (NSW).
- Each reduced Ferguson's right to freedom after serving his sentence and invaded his privacy.
- For the community, these pre-cautionary measures made them feel protected from a potentially dangerous man.

### **Parole:**

- Article: "Heart surgeon Victor Chang's murderer Phillip Choon Tee Lim to leave jail early" (2009).
- Phillip Choon Tee Lim, an accomplice in a murder, was granted parole after completing the minimum eighteen years of his sentence due to consistent good behaviour whilst in gaol.
- The NSW Parole Authority felt they were fostering Lim's right to parole after serving prison time and his right to be awarded for good behaviour.
- The victim's family felt it was an injustice. As they were not recorded on the victim's register, they were not informed of his release, and so could not make a submission against the proposal.
- The community, too, felt that the criminal justice system had not valued the life of the victim.
- However, as Lim was deported, the opportunity to appeal or review the situation was revoked.

## LEGAL STUDIES – STUDY NOTES

### Human Rights

#### Topic One: The Nature and Development of Human Rights

Definition: The Commission of Human Rights states that there are three features of human rights. They are...

- a. Inherent – They are our birth right and belong to us simply because we exist as human beings.
- b. Inalienable – They cannot be given or taken away.
- c. Universal – They belong to everybody, regardless of status.

#### Developing Recognition of Human Rights:

1. The abolition of slavery – Slavery was an acceptable practice from ancient times. Ideas of natural rights and political liberty came to prominence in the French and American revolutions and were in direct opposition to the concept of slavery. Christian reformers brought about the abolition of slavery in Britain, which was mirrored by other nations.
2. Trade unionism – Trade unions were initially made illegal out of fear of revolutionary activity. However, in Britain, by the 1820s, it was recognised that workers' organisations should be given some status to encourage workers to bargain rather than strike. Now, the right to form and join trade unions is entrenched in the UDHR. Generally, however, there are strict regulations about their operation.
3. Universal suffrage – Democracy has grown, particular since 1945, but there is no free vote for a significant part of the world's population. Suffrage for women was gradually achieved through the 19th and early 20th centuries as a means of preventing social unrest; yet, some countries, like Saudi Arabia, still haven't given women the right to vote. In Australia, universal suffrage was only achieved when Aboriginal men and women were entitled to vote in Commonwealth elections in 1966.
4. Universal education – By the mid-1800s, there was a growing recognition of the importance of formal education. In Australia, from the late 19th century, education (especially basic literacy and numeracy) was made free and compulsory. However, some nations continue to deny this right, in part because of its expense to implement.
5. Right to self-determination – Self-determination aims to allow minority groups the right to have some control over their land, while still being part of the broader nation. However, where traditional lands have been colonised, self-determination can mean the granting of independence to the traditional owners – as was the case in the second half of the 20th century, in which large areas of Africa, Asia and the Pacific were handed back to the indigenous people.
6. Environmental rights – Environmental rights have gained increased recognition as the result of the understanding of the limited resources of the planet and with the threat of climate change. They involve intergenerational equity: protecting the right of future generations to enjoy the same level of environmental quality as the present generation.
7. Peace rights – In ancient times, countries acted in their own interests. Theories began to emerge in the 16th century that dealt with the rights of states and peoples in war. The development of new and deadly weapons created so much destruction that by the 19th century there was a considerably incentive to find peaceful solutions to conflict. This has only grown over time, particularly with the increase in nuclear weaponry.

## **Formal Statements of Human Rights:**

- The development of international rights can be traced through two key areas; treaty law and international customary law.
- The Universal Declaration of Human Rights (1948) consists of 30 articles, promoting the dignity and worth of each person, and the universal respect of human rights. It covers civil, political, economic, social and cultural rights. Technically, the UDHR is not legally binding; however, the rights are so widely accepted that they have become part of the general principles of international law.
- The International Covenant on Civil and Political Rights (1966) has the main function of protecting people from the actions of oppressive governments. It includes the right to life, the freedom from torture and slavery, etc.
- The International Covenant on Economic, Social and Culture Rights (1966) is about the right to live with dignity and to pursue economic, social and cultural development. It includes the right to choose where to work, the right to education, etc. However, it also recognises that both national and global resources are finite.

## **TOPIC TWO: PROMOTING AND ENFORCING HUMAN RIGHTS**

### **State Sovereignty and International Law:**

- State sovereignty recognises that nations have the right to govern themselves without interference from other nations or organisations.
- Violations of international law can only be enforced – or often only asserted – at an international level. The concept of state sovereignty is often invoked by governments to protect themselves from international scrutiny.
- However, state officials who violate international law can be tried and prosecuted and sanctions can be imposed.

### **The Role of Key Institutions:**

#### **The United Nations...**

- a. The General Assembly – Treaty-monitoring bodies send reports on human rights to the General Assembly, who then initiates studies and makes recommendations to member states on any matter under the Charter of the UN. The recommendations carry moral force and raise the international profile of the issue.
- b. The Security Council – The Security Council's principal role is the maintenance of peace. It passes resolutions condemning violations of human rights, is involved in humanitarian actions and peacekeeping during conflicts, and imposes sanctions, typically trade and travel. An example is the "no fly zone" enforced upon Gaddafi's regime in Libya.

## **Intergovernmental Organisations...**

- a. The Human Rights Council – The Human Rights Council is a UN body, whose main purpose is to investigate and make recommendations on human rights violations. The Working Group on Situations will then reply to the states concerned and report to the Council. The Council can also send rapporteurs to mandated countries to report on issues of concern.
- b. Truth Commissions – These bodies determine facts in an open forum. Their aim is to bring about closure & reconciliation for those affected by long-running conflicts.

In Sierra Leone, they proved effective, in that legislation and reparations. In El Salvador, they were ineffective. The government's response was to issue an amnesty covering all violent events during the war.

## **Courts and Tribunals...**

- a. International Court of Justice – The ICJ hears cases between nations and delivers advisory opinions. Its role in human rights is in defining and interpreting conventions.
- b. International Criminal Court – The ICC has jurisdiction over persons alleged to have committed genocide, crimes against humanity, war crimes, and crimes against aggression. In its ten years of operation, it has made one conviction. It cost \$1 billion. Additionally, some nations refuse to send civilians to be tried.
- c. International Criminal Tribunals – These are established ad hoc to deal with serious widespread breaches of international criminal law. An example is the International Criminal Tribunal for Rwanda, which was set up when extremist members of the Hutu tribe tried to destroy members of the Tutsi tribe. The charges were of genocide and crimes against humanity.

The tribunal has been overwhelmed with huge numbers of perpetrators. A number of senior officials have been prosecuted.

## **Statutory Authorities...**

- a. UN High Commissioner for Human Rights – The High Commissioner is responsible for the promotion and protection of human rights. Their role involves coordinating human rights activities, creating awareness, and providing advisory, technical and financial services. They report directly to the General Secretary.
- b. Committees monitoring human rights conventions – Some committees receive individual complaints, whereas others only have the authority to receive interstate complaints. Once a complaint has been lodged, the subject state is asked to respond. A report is then issued, containing the opinions and conclusions of the committee. The aim is to mediate disputes and provide a remedy through law reform. They also receive periodic reports from signatories.

**Examples include the Human Rights Committee (monitoring body for the ICCPR) and Committee Against Torture (for the International Convention Against Torture).**

- Non-Governmental Organisations – NGOs can address international human rights issues regardless of where they occur, highlighting humanitarian problems and encouraging citizens to act. Notable examples are the Red Cross, Doctors Without Borders, and Amnesty International.



- The Media – The media is a vehicle for conveying information and is used by government and non-government institutions for this purpose. Governments can use the media to push their own political ideologies. NGOs can use the media to expose human rights issues and to embarrass governments into upholding international agreements and principles. In many parts of the world, however, the media is censored and journalists are violently targeted by their political enemies.

### **Incorporation of Human Rights into Domestic Law:**

- The Australian Constitution – The Constitution contains only a few references to the rights of Australians (such as the right to vote); however, the High Court has previously found that some rights are also implied. Section 51, which outlines the external affairs power, allows the Commonwealth to enact legislation that results from the signing of a treaty. Another significant feature is the division and separation of powers, both of which limit the power of individual bodies, assisting in the maintenance of human rights.
- Common Law – Not only do courts hear cases and uphold human right principles, but the court procedure aims to protect both the rights of the victim and the accused (eg. through the right to appeal). However, there have been times when common law has impeded human rights. *McInnis v. R* (1979) illustrates this, where the defendant's barrister withdrew the day before the trial and the judge ordered that the trial proceed regardless. Additionally, administrative tribunals can be formed in order to restrain unlawful actions and apply human rights standards to the actions of the government. Courts have increasingly been willing to use international law as authority in the development of common law; for example, Tasmania was forced to change its laws on homosexual relations after *Croome v. Tasmania*, so as to be consistent with the ICCPR.
- Statute Law – With the increasing volume of international law follows the increasing volume of statute law to embody the principles of the agreements. Five pieces of legislation have been passed based on international human rights legislation and further pieces have included elements. For example, the Sex Discrimination Act 1984 (Cwlth) is based on the Convention on the Elimination of all Forms of Discrimination against Women.
- A Bill of Rights? – Supporters argue that current protection is limited and has failed in the past. 64% of surveyed Australians disagree with this assertion. Opponents argue over its need and the inflexibility of an entrenched instrument, as is the case in the US.
- Non-governmental Organisations – NGOs report on states, in a way that the government may be reluctant to do so. These reports are placed before UN committees. They also aim to educate the public and gain publicity for human right issues, both international and domestic.
- The Media – The role of the media is to promote human rights and equality, as stated in UNESCO. It is also a useful tool for NGOs to promote their concerns and ideas.

In Australia, media pressure influenced the government to modify its immigration laws, particularly in regards to the protection of women and children, who are now more promptly placed into society.

However, its sensationalism of immigration issues has also contributed to a sense of irrational fear.



## LEGAL STUDIES – STUDY NOTES

### Assessment Task #2

#### Definition:

“The term ‘capital punishment’... originally referred to death by decapitation, but now applies generally to state-sanctioned executions”. Australian Institute of Criminology, 1987.

#### Nature:

- 50% of countries have completely abolished capital punishment.
- The other 50% maintains it in law or retains it for crimes committed only in exceptional circumstances.

#### Australia – Legal Measures:

- Death Penalty Abolition Act 1973 (Cwlth) abolished capital punishment for all federal offences and its use in territories. Each state and territory has similar legislation, affirming the abolition of the death penalty.
- Crimes Legislation Amendment (Torture Prohibited and Death Penalty Abolition) Act 2010 (Cwlth) prohibits the death penalty from being reintroduced by any state or territory.
- The Extradition Act 1988 (Cwlth) states that the federal Attorney-General has the power to decide who is extradited from Australia, provided that the extradition country promises that the death penalty will not be imposed upon the person.
- The case of *McCrea v. Minister for Customs and Justice* (2004) tested this law. It affirmed that it was the decision of the Attorney-General, not the courts, and that Australia cannot inquire about the sovereign state’s intent, or otherwise, on honouring their promise.
- Australia is a signatory to and has ratified most international documents against capital punishment.
- It has been involved in numerous international movements, including the UN General Assembly’s resolution calling for a global moratorium on the death penalty, in which Australia vote positively in 2007.
- The government is dedicated to the condemnation of the death penalty worldwide. Nguyen Tuong Van, an Australian man, was threatened with the death penalty in Australia for drug trafficking. The Australian government publically denounced this and engaged in diplomatic talks with Singaporean leaders.

#### Australia – Non-Legal Measures:

- Reprieve Australia works towards the abolition of the death penalty and the humane treatment of those facing it. It provides volunteer lawyers, organises and partakes in campaigns, and helps raise awareness through such mediums as theatre.
- The Australian Coalition Against Death Penalty (ACADP) develops correspondence with political leaders, human rights activists, and the media; conducts research; and campaigns.

- NSW Council for Civil Liberties' (NSWCCL) aim is to limit the abuse or excessive use of power by governments. It influences public debate and government policy, hears individual complaints, and attempts to assist these people through submissions to the government and the conduction of court cases.
- The Law Council of Australia (LCA) is focused on the remedy of all human rights issues. It lobbies the government, ensuring that it continues to abide by its international agreements, and is willing to lobby foreign governments if it deems it appropriate.

### **International – Legal Measures**

- UDHR recognises the right to life, stating that “everyone has the right to life, liberty and security of person” (3) and “no one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment” (5).
- International Covenant on Civil and Political Rights repeats the “inherent right to life” and states that “no one shall be arbitrarily deprived of his life”. It establishes regulations on who can receive the death penalty, and how, that state members are obliged to follow. However, it does emphasise its desire to rid the world of capital punishment.
- Second Optional Protocol to ICCPR requires signatories to totally abolish the death penalty, but allows them to retain it in time of war, provided they make a reservation that supports this upon either ratifying or acceding to the protocol.
- Other documents outline limitations on the use of the death penalty, attempting to protect the human rights of citizens of states that retain it.
- Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty poses a number of restrictions: can only be used on the most serious of crimes; the criminal cannot be under 18, pregnant, a new mother, or someone suffering from insanity; it must only be imposed after a fair trial; and the conduct of capital punishment must inflict the minimum amount of suffering.
- CROC states that “neither capital punishment... shall be imposed for offences committed by persons below eighteen years of age” (37).
- The International Criminal Court, under the Rome Statute (77), cannot impose the death penalty as punishment; nor can tribunals established ad hoc by the UN Security Council.

### **International – Non-Legal Measures**

- Amnesty International sends appeals to countries that have people on death row; campaigns in countries that are yet to abolish the death penalty; and monitors developments, creating reports and thus educating people.
- World Coalition Against the Death Penalty has united over 100 committed organisations so as to provide a single, united front. They meet annually to establish their strategy, before elected members make the necessary decisions to employ the strategy.
- International Committee Against the Death Penalty performs missions in order to meet political representatives, partakes in conferences and seminars, holds campaigns, distributes research, and so on.

## **Effectiveness of Domestic Response**

- Not only has capital punishment been completely outlawed, but legally enforceable commitments have been made that it will not be reintroduced.
- However, Australia has little power for crimes committed abroad.
- Besides continued confrontations with the leaders of overseas governments, there have been many examples where a citizen of Australia has lost their life.
- Australia must continue to actively oppose the use of capital punishment and to express its opposition if its current efficacy is to be maintained.
- However, political leaders must be mindful to uphold this stance regardless of the crime or criminal, and adopt the view that the human rights standard remains the same for all.
- In the past, failure to do so has resulted in a diminished opinion of the nation's integrity and equity.

## **Effectiveness of International Response**

- While it still remains a significant issue, there have been decreasing rates of its use.
- In 1977, only 16 countries had abolished the death penalty; thirty years later and the figure had increased to 90; a further four years after that and it reached 97.
- There have also been restrictions imposed on those who retain it, showing that the international community is willing to slowly reach its ultimate aim, step by step.
- However, state sovereignty continues to pose a problem.
- While China and the USA are signatories to and have ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, they still employ the death penalty on an annual basis and to significant degrees.
- The lack of enforcement agency highlights the inefficiency that international instruments pose.
- It will only be with continued and persistent political pressure, education & time that these sovereign states will reconsider their position.

## LEGAL STUDIES – STUDY NOTES

### Family Law

#### Topic One: The Nature of Family Law

Definition:

- ICCPR defines the family as the “natural and fundamental group unit of society”.
- Family Law Act 1975 (Cwth) defines the family as the “natural and fundamental group unit of society, especially in relation to the upbringing of children”.
- The definition of what constitutes a family is hard to refine due to the changing social norms. For example: size, women have delayed having children, the acceptance of same-sex and de facto relationships, increasing number of single parents and blended families, the availability of birth technology, fewer extended families, adoption numbers are falling, etc.

#### Legal Requirements of Marriage:

- The definition of a marriage first derived from the case Hyde v. Hyde and Woodmansee (1866).
- It is repeated in the Marriage Act 1961 (Cth), Family Law Act 1975 (Cth), and section 51 of the Australian constitution.
- Marriage is the union between a man and a woman (Corbett v. Corbett and re Kevin) voluntarily entered into (The Marriage of S) for life at the exclusion of others.
- Other requirements include...
  - a. Age – At eighteen you can marry. Between sixteen and eighteen you must receive both parental and judicial consent, or demonstrate to the court that there are “sufficiently exceptional” circumstances if they cannot get parental permission. This is explored in the case ex parte Willis (1997).
  - b. Consanguinity (prohibited degrees of relationship) – A person cannot marry a blood relationship (basically an ancestor, descendant or sibling). This applies also to adopted relatives.
  - c. Notice of marriage – Between one to six months’ notice must be given to the celebrant. You must also prove that you are legally free to marry. If married before, a divorce or death certificate is needed.
  - d. Wedding ceremony – It must involve a registered celebrant and two people over the age of eighteen to act as witnesses. Three copies of the marriage certificate are prepared after the ceremony, signed by the celebrant, witnesses, and the couple.

#### Types of Marriage:

1. Civil marriage, with a registered celebrant.
2. Religious marriage, in a church where the minister is the celebrant.
3. Foreign, when a marriage occurs overseas. It must be recognised in Australia.

## Void Marriages:

- A void marriage is one that is considered to have never existed.
- It occurs if any conditions of the Marriage Act 1961 (Cth) have been breached.
- A Decree of Nullity of Marriage (a court order) is issued in this case.

## Consequences of a Marriage:

- Consortium vitae – This is the mutual obligation of husband and wife to share affection and care for each other. It is a social expectation, not a legal one.
- Maintenance – Both spouses have a duty to financially support each other, including with household expenses. This also applies to child support upon divorce: Child Support (Assessment) Act 1989 (Cwlth).
- Property rights – Family law is based on the assets of a marriage being shared.
- Agency – A husband and wife are not generally responsible for the debts of the other, unless one spouse is the main income recipient, in which case they are expected to meet debts incurred by their partner for necessary household items.
- Wills and Succession – If a person dies without a will, the Succession Act 2006 (NSW) is applied. It states that the order of succession is spouse, spouse and children, parents, and brothers and sisters.

## Alternative Family Relationships:

1. De facto heterosexual relationships – A de facto relationship is one that has lived together for at least two years or has a child, and showed commitment (in sharing household duties and expenses). This is defined under the Property (Relationships) Act 1984 (NSW).

Davies v. Sparkes (1990) established what really constituted a de facto relationship, including the duration, whether there is common residence, evidence of a sexual relationship, mutual interdependence, property ownership and use, if there are children, public aspects, mutual commitment, etc.

2. De facto homosexual relationships – There has been a number of significant legislation passed...
  - c. The Personal Carer's Leave Test Case 1995 granted the leave to a person who was in a same sex relationship.
  - d. Hope and Brown v. NIB Healthfunds 1995 found that, for the purpose of health insurance, the two women were recognised as a couple.
  - c. The category of a same sex relationship was first included in the 1996 Census.
  - d. The Property (Relationships) Amendment Act 1999 (NSW) recognised that same sex couples had the same protection as heterosexual de facto couples in relation to property division, inheritance and decision making.

However, indirect discrimination still exists. They don't have the same legal status of marriage and cannot become married, there's no automatic claim on a partner's superannuation upon separation, they can be compelled to give evidence against their partners, etc.

3. Single parent – This family is defined as one parent looking after a child or children. It develops when a person has a child out of wedlock, there has been a divorce, or due to widowship. The issues for single parents include getting payments from the non-resident parent, legal protection, discrimination, etc.
4. Blended (step) families – Step relationships are defined by the absence of a blood relationship. Step parents do not have legal responsibility for step children unless the biological parent relinquishes care. Step children do not have automatic claim to the estate of a step parent.
5. ATSI customary marriage – These are not recognised under Australian law as marriage as they do not meet the legal requirements outlined. Instead, they are recognised as de facto.

## **Legal Rights and Obligations of Parents and Children:**

### **1. Parents**

- The Family Law Act 1975 (Cth) was the first time parental rights and responsibilities were stated under law. Prior, there was a reliance on common law, which is reactive (not proactive).
- The Family Law Reform Act 1995 (Cth) changed wording from “custody” and “access” (ownership) to “residence” and “contact” (responsibilities).
- The Family Law (Shared Parenting) Amendment Act 2006 (Cth) decided that parents should have equal contact with the child, unless there are circumstances that prevent this.
- Guardians have authority to make decisions that relate to a child’s religion, education, name, medical treatment, residence and citizenship.
- They are obliged to ensure that their children receive an education (Campbell v. Campbell 1988) and are responsible for discipline.

### **2. Children**

- All decisions must be made in the best interests of the child.
- CROC (1989) outlines, in depth, the rights of children.
- As a child ages, they gain more rights. For example, at 14 they can seek medical treatment without their parent (Gillick v. Health Authority 1985); at 16 they can consent to sex and get their learner’s licence; at 17 they can leave school, etc.
- The case of re Marion (1991) involved the parents of a 13 year old intellectually disabled girl, who wanted her to have a hysterectomy. They were denied as it interfered with the right to bodily inviolability and the right to reproduce.
- A child’s obligations include the idea of doli incapax (legal liability for a crime).

### **Adoption:**

- Adoption occurs when biological parents legally surrender legal rights and responsibilities permanently, which the new parents take over. A new birth certificate is issued.
- If married or in a de facto relationship at the time of the child's birth, both parents have to consent.
- If unmarried, only the mother's consent is required usually.
- The father is notified of a proposed adoption and is given 14 days in which to apply for the care of the child.
- If a child is twelve years or older, they can give their consent, or otherwise, to their own adoption.
- Adopted children have the same legal status as children born into a marriage, as stated in the Status of Children Act 1996 (NSW).
- The Adoption Information 1990 (NSW) established a contact register of relinquishing parents and adopted children. Both parties can refuse access to information and contact.

## **TOPIC TWO: RESPONSES TO PROBLEMS IN FAMILY RELATIONSHIPS**

### **Divorce:**

- Previously, divorce was dealt with under the Matrimonial Courses Act 1959 (Cth) which...
  - a. Outlined 14 grounds for divorce.
  - b. Meant that a couple had to wait five years to obtain a "no fault" divorce.
- The Family Law Act 1975 (Cth) reformed this: a reaction to society's view that people should not be trapped in an unhappy marriage. The act...
  - a. Introduced the "no fault" divorce, in which the only ground for divorce was the "irretrievable break down" of a marriage. Neither party was to be blamed.
  - b. Established that if one partner wanted a divorce, they must inform their spouse and separate for 12 months.
  - c. Allowed for couples to reconcile without having to restart the 12 month period.
  - d. Provided for living "separately and apart" under one roof, which is beneficial for those under financial restraints.
  - e. Required those within 2 years of their marriage to undergo counselling. However, these sessions are often unsuccessful, as the couple resent being forced to attend.
- 95% of divorces are settled out of court with a mediator.
- Family Relationship Centres are often called on for advice, joint dispute resolution, and will screen for cases of family violence and refer people to support services.
- The second option – the courts – rarely satisfy either party and prove to be very expensive.



## Legal Consequences of Separation:

### 1. Children

- The court acts in the “best interests of the child” (Family Law Act), which involves...
  - a. Having both parents meaningfully involved in their lives.
  - b. Protecting them from physical and psychological harm.
  - c. Receiving adequate and proper parenting.
  - d. Ensuring parents fulfil their duties and responsibilities concerning care.
- If the separated parents mutually agree on key decisions, then this can be formalised in a Parenting Plan.
- If they remain in dispute about matters of their children, the Family Court can impose a Parenting order, which direct parents about...
  - a. Living arrangements.
  - b. Time spent and communication with the child.
  - c. Parental responsibility.
  - d. Financial support.
  - e. Other aspects of care such as religion, travel, health issues, etc.
- Harris v. Harris (2009) ruled that the children were to attend the school their mother requested, as she was home more often, and spend two out of every three weekends with their father. That way, the kids would have a “quality and regular” relationship with both.

### 2. Child Abduction

- The Hague Convention on International Child Abduction (1980) aims to discourage the issue.
- It allows a family to seek the return of a child who has been abducted to another convention country and to have disagreements resolved by the courts in the child’s country of habitual residence.
- However, its jurisdiction doesn’t extend to non-convention countries.

### 3. Property

- If a couple reach an agreement on how marital property is divided, they can apply for a Consent Order.
- If not, the Family Court will consider the contributions made by each partner (financial and non-financial) and then the future needs of each.
- In the past, only the former applied for de facto couples, due to the belief that their relationship did not involve long term commitment, as occurs with marriage.
- In the Marriage of Kemp (1976) established that the domestic contribution of a wife is equal to the man’s if he goes out to work.
- Courts will assume a 50/50 split is to apply as a starting point and will then look at other factors.
- These include children, if a woman has to be retrained before she can gain employment, and so on.



- Moore and Moore (2008) dealt with a second property settlement. The husband alleged that there was an unequal overall contribution due to the wife's extravagant spending and lack of commitment. The court drew attention to the partnership basis of marriage, and ruled a 50/50 split (as opposed to the 67/33 that was in place before).
- Issues can arise when one partner hides or conveniently sells property to a friend before the divorce (such agreements are nullified), one partner is alcoholic, one partner receives a large gift from their family after marriage, etc.

### Dealing with Domestic Violence:

- Definition: Violence between family members – married or de facto couple and / or their children. It can be physical, sexual, verbal, emotional, psychological or economic abuse.
- There has been great legislative response to domestic violence...
  - a. Crimes (Domestic Violence) Amendment Act 1982 (NSW) asserts the criminal nature of domestic violence and provides protection for victims.
  - b. Periodic Detention of Prisoners (Domestic Violence) Amendment Act 1982 (NSW) provides for the weekend detention of offenders, so they can work during the week to support their family.
  - c. Firearms Amendment Act 1992 (NSW) addresses the particular problems of domestic violence.
  - d. Crimes Amendment Act 1994 (NSW) made stalking and intimidation a criminal offence.
  - e. Family Law Reform Act 1995 (Cth) requires the court to consider family violence and the impact of a child's continued contact with a violent ex-spouse on the residential parent. The "handover" must occur in a public place.
  - f. The Children and Young Persons (Care and Protection) Act 1998 (NSW) is specifically designed to assist children. Certain categories of people who have a duty of care towards children (eg. teachers, social workers) are required to notify the NSW Community Services if they consider the risk of harm to be "significant".
  - g. R v. Yusef Aytugru (2009) NSW involved a woman who was continually harassed by an ex-partner and eventually killed by him. He received a long prison sentence.
  - h. Courts are beginning to accept evidence of battered woman's syndrome as a partial or total defence for murder. This illustrates the growing recognition of the effect of domestic violence.
  - i. Apprehended Domestic Violence Orders (ADVOs) aim to stop the perpetrator from inflicting violence or causing a family member to fear violence. They may restrict the behaviour of an offender by prohibiting them to enter the victim's home or workplace, being within a certain distance of it, revoking firearm licences, etc. Legislation in 1988 extended ADVOS to include other family members, boyfriends and girlfriends, ex-partners, and persons living in the same household.
  - j. Under the Domestic Violence Intervention Education Program, a judge can order a person convicted of domestic violence to undergo an anger management course.

- k. Operation Paradox is a campaign run by the NSW Police and NSWCS once a year to enable people to report child sexual abuse confidentially. This is a positive step as false charges of sexual assault can do untold damage to a family, while failure to act in time can leave a child in an intolerable situation.
- Finally, the NSW Police have adopted a pro-arrest policy for domestic violence cases. They are also legally obliged to seek an ADVO if they suspect domestic assault and must take photographs of victim's injuries. This increased accountability and the community's faith in the police to deal with the issue.

## **Dealing with Problems in Families:**

### **1. Courts**

- The Family Court deals with matters relating to marriage, divorce, and children – and all the issues that may arise in the process. However, it has no jurisdiction over de facto relationships.
- Family Relationship Centres (established in 2006) and the Federal Magistrates Court has increased the availability of mediation services. The Federal Magistrates Court also handles divorce where there are no allegations of abuse. This allows the Family Court to concentrate on the most complex disputes.

### **2. Counselling**

- The Family Law Reform Act 1995 moved the focus of resolving marital disputes from court litigation towards mediation and arbitration.
- Couples seeking divorce are required by law to attend a compulsory information session, which encourages the use of the court's conciliatory facilities, and attempt some form of dispute resolution.
- The benefits of counselling include the small expense, small stress, and increased satisfactory results.
- The disadvantages are that many unhappy couples are unwilling to face each other to discuss issues and it is not an appropriate method if there has been violence in the marriage.

### **3. Mediation**

- Often the Family Court is criticised for the adversarial nature of legal proceedings which often intensify the conflict between the parties. Thus, mediation has been introduced.
- Family and child mediation may be court-associated, community-based, or delivered privately.
- It is designed to help couples discuss issues, look at options, and work out how best to reach an agreement.
- If it is successful, it means that couples can avoid costly and time-consuming court cases.
- The NSW Legal Aid Commission is the most commonly used service provider for low-income families trying to resolve disputes. Mediations can be arranged with input from family lawyers so that the couples are informed about the law.

#### 4. Non-government Organisations

- There are many community-based practitioners available to assist families with conflict, children with special needs, financial hardship, separation, and so on.
- They include refuges, and support groups like Dads in Distress, The Women's Legal Centre, and Wesley Mission Community Services.

#### 5. The Media

- The media can draw attention to perceived injustices in the system, like domestic violence and the alleged disadvantaged suffered by men. This has led to changes in social attitudes, legislation, and the more rigorous enforcement of laws and court orders.
- For example, The Case of Jean Majdalawi (1996) was used to highlight the plight of women with violent ex-partners. Public outcry led the NSW Government to implement reforms that improved the security for women who take out court orders against violent individuals.

### **TOPIC THREE: CONTEMPORARY ISSUES CONCERNING FAMILY LAW**

#### **Recognition of Same-Sex Relationships:**

1. Corbett v. Corbett (1970) ruled that a person remained the sex stated on their birth certificate, regardless of any sex change. The couple was not permitted to marry.
2. Family Leave Test Case (1994) found that homosexuals were entitled leave to care for a sick partner.
3. Hope and Brown v. NIB Health Fund (1995) allowed a same-sex couple to get a family rate for health insurance. The case changed the definition of what constitutes a family.
4. The 1996 Census recognised same sex couples as a family. This federal acknowledgement reinforced the idea in Hope and Brown.
5. Property (Relationships) Amendment Act 1999 (NSW) gave same sex de facto couples the same property rights as heterosexual de facto couples. This included the right to divide property or claim financial maintenance, to inheritance, and to make the necessary decisions upon the death of a partner. However, there have been some issues in establishing that a couple were in a same-sex relationship prior to the death of one partner.
6. re Kevin (2001) decided that a person is the sex they are on their wedding day.
7. Marriage Amendment Act 2004 (Cth) confirmed that marriage is only between a man and woman.
8. Same Sex Relationships Act 2008 (NSW) gave lesbian women legal recognition relating to adoption.
9. The Same-Sex: Same Entitlements Report (released by the AHRC) has found that there are over 50 federal laws which discriminate against same-sex couples and their children, including in employment, worker's compensation, social security benefits, tax benefits, health care subsidies, travel, and so on.

10. Currently, there has been lobbying to change the Marriage Act for same-sex marriage. Marriage equality is the only alternative that offers full legal and social acceptance, as well as practical benefits.
11. However, there is doubt of success. As a sort of compromise, there have been moves to introduce civil unions.

### **The Changing Nature of Parental Responsibility:**

1. Family Law Act 1995 states that both parents are equally responsible for the short and long term care of their children.
2. Crimes Amendment (Child Protection) Act 2002 (NSW) restricts the ability of parents to use corporal punishment by prohibiting physical force above the neck, with a fist, and that which causes more than fleeting pain.
3. Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)...
  - a. Places emphasis on the best interests of the child as the paramount consideration.
  - b. States the rights of children to know both parents.
  - c. Requires the Family Court to consider whether a child spending equal time with both parents is reasonably practical and in the best interest. If not, the court must consider substantial and significant time.
  - d. Declares the rights of children to be protected from harm.
  - e. Requires parents to attend family dispute resolution before taking their matter to court.
  - f. Changed the definition of family violence, requiring that a fear of harm must be "reasonable."
  - g. Provides for greater recognition for the role of grandparents and other relatives.
  - h. Strengthened the existing enforcement procedures for people who breach parenting orders.

### **Surrogacy and Birth Technologies:**

#### **1. Surrogacy [Surrogacy Act 2010 (NSW)]**

- Surrogacy occurs when a woman agrees to fall pregnant and bear a child for a couple.
- The biological parents are the ones to provide sperm or ova.
- They do not become the legal parents until the surrogate mother relinquishes the child for adoption.
- There are two types of surrogacy: altruistic and commercial.
- Altruistic is when someone agrees to carry a child, but there is no exchanging of payment, except for medical costs.
- Commercial surrogacy involves the provision of a financial or material benefit to a person who enters into a surrogacy agreement. It is illegal.

- It is also illegal to advertise surrogacy.
- Issues that can arise include: contracts may not be recognised in courts (re Evelyn 1998) and the legal status and nationality of a child born overseas is uncertain.

## 2. Artificial Conception

- There are two types: artificial insemination and in vitro fertilisation (IVF).
- Artificial insemination involves medically implanting semen into a woman's reproductive system.
- IVF requires the ovum and sperm to be fertilised externally in a test tube and then implanted.
- If a couple use their own sperm and ova, resulting children have the same legal status as a child conceived naturally.
- However, in both instances, the sperm may come from the woman's husband or partner, or from a donor. This raises the question of the legal paternity of the child. The Status of Children Act 1996 (NSW) deals with this issue. It states that if a husband or partner consents to the use of donor sperm, then he is the legal father.
- Artificial conception raises a number of issues. For example, what happens to frozen embryos if one partner dies? If both do? If they decide to divorce? And so on.

## Care and Protection of Children:

### 1. International Documents

- CROC (1989) recognised that children need special care and protection due to their vulnerability.
- The Hague Protection Convention (2003) aims to improve communication between countries in child protection matters and to gain greater consistency in how courts in different countries determine parenting orders.

### 2. Legislation

- Family Law Act 1975 (Cth) provides that both parents have equal parental responsibility (financially), unless there has been a court order to the contrary. It also changed phrasing to "residence" and "contact", as opposed to "custody" and "access".
- Children (Equality of Status) Act 1976 (NSW) reduced discriminated against ex-nuptial children and made them equal in status to children born in wedlock. It also gave the father guardianship of the child and greater custody and access rights.
- Children (Protection and Parental Responsibility) Act 1997 (NSW) has increased parents' responsibility and accountability for the behaviour of their children. It ensures parents care for and control children.

- Children and Young Persons (Care and Protection) Act 1998 (NSW) allows the children's court to make an order for an abused or neglected child to be cared for someone else. A report must be submitted if there is reasonable belief that a child is at risk of "significant harm". This terminology limits efficacy as it is a subjective phrase and some authority figures may know the parents and thus be reluctant to report.
- Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) encourages both parents to participate in caring for and developing a child, both financially and non-financially, unless there are reasonable grounds to suspect a parent is violent.
- Amendments in 2010 to the Education Act (NSW) state that parents must ensure their children attend school between the ages of 6 and 17. Parents can also be taken to court if they want their child to leave school when the child wants to continue. The court can order the parent to pay maintenance.

### 3. Common Law (Children's Court)

- Paul Hogan v. Catholic Church (2001) NSW involved Paul being given a strapping in 1984. He claimed it was excessive punishment and caused him to develop a chronic pain syndrome in his hand. He was compensated for the fact that he had a permanent hand injury that restricted his ability to perform the full range of task expected in his professional life.
- Wood Special Inquiry (2009) investigated areas of child protection and the role of government bodies. It found that non-government agencies provide a higher quality of foster care. As a result, foster care services are being transferred from DoCS to non-government agencies.

### 4. Government Organisations

- NSW Community Services is the main government department that puts into practice the law on keeping children safe.
- NSW Department of Community Services (DoCS) spends the majority of its funding on foster care.

### 5. Non-Legal Responses

- These include organisations such as Headspace, Kids Helpline, the PCYC, and youth refuges, which are designed to assist children in their respective areas.

## LEGAL STUDIES – STUDY NOTES

### Consumer Law

#### Topic One: The Nature of Consumer Law

##### Definition:

- Generally, a consumer is a person buying goods and services for everyday use.
- The Trade Practices Act 1974 (Cth) defines a consumer as a person for buys goods and services for personal, domestic or household use up to a value of \$40 000. The provision of credit is also covered.

- The Fair Trading Act 1987 (NSW) defines a consumer as a person who acquires goods or services from a supplier.

### **The Developing Need for Consumer Protection:**

- In the 18th and 19th centuries, individuals were expected to protect their own interests when buying or selling goods. There was no government intervention. The approach had merit, as most transactions occurred in the town market where buyers could examine the goods and negotiate a price.
- With industrialisation, the rights of consumers became restricted: they were less likely to be able to inspect goods before purchase, the dominance of large companies meant an inability to complain, and the less educated became targets for unscrupulous business people.
- In response, the body of consumer law grew significantly in the late 20th century.
- Statutory law is the most significant means of protection. It empowers consumers, stating their rights and outlining how to access dispute resolution mechanisms and seek remedies.
- Unfortunately, however, federal legislation does not cover small businesses. This has resulted in a certain degree of duplication as state governments have had to introduce their own laws.
- Advances in technology have guaranteed that consumer law keeps adapting to meet change.
- The internet has meant that commercial transactions can now easily occur across national borders. This has limited the application of domestic law and must result in international agreements if the rights of the consumer are to be maintained.
- Regulation is the most effective way to protect consumer rights and provide remedies where required.

### **Objectives of Consumer Laws:**

1. To establish guidelines of acceptable and unacceptable conduct.
2. To imply terms into contracts to safeguard consumers (as the weaker party in most transactions).
3. To provide information that will benefit all parties.
4. To encourage alternative dispute resolution of consumer complaints.
5. To provide remedies if one party does not meet their legal obligations.



## TOPIC ONE AND A HALF: CONTRACTS

**Definition:** A contract is an agreement involving two or more parties in which legal rights and obligations are created.

### Types of Contracts:

1. Simple contracts – Most consumers enter into simple contracts every day.
2. Contracts under seal – They must be in writing and signed, sealed and delivered. They do not require consideration.
3. Bilateral contracts – These involve “a promise for a promise”; eg. a seller promises to deliver an oven to a buyer by the end of the week and the buyer promises to pay for it on that day.
4. Unilateral contracts – An offer is made inviting acceptance by actual performance rather than a promise; eg. if an owner offers a reward for the return of a lost dog, the acceptance occurs when someone returns the dog.

### Elements of a Contract:

1. An intention to create legal relations – The parties must intend to be legally bound by the agreement they have reached. However, if there is confusion about the transaction, then no real agreement was reached. This is called “meeting of the minds”. The Contracts Review Act 1980 (NSW) provides an avenue for persons wishing to challenge the nature of a particular contract.
2. An offer and an acceptance.
3. Consideration – Both parties must benefit in some way from the contract.
4. Parties must have the legal capacity to enter a contract – Generally, this means being at least eighteen years and understanding the nature of the agreement. Those who may not understand include persons with an intellectual disability, intoxicated persons, and so on.
5. Genuine consent – This may be breached when consent is not freely given or there have been misunderstandings during negotiation.
6. Legality of objects – Courts will not enforce agreements over illegal objects or activities.

### Implied and Expressed Terms:

- Expressed terms are those directly written or clearly stated in a contract.
- Implied terms are not expressly stated, but there is an expectation that they automatically apply. They were first codified in the Sales of Goods Act 1923 (NSW) and include...
  - Duty of care (established by *Donoghue v. Stevenson* (1932)).
  - Merchantable quality (the goods supplied should meet the reasonable objective expectations of a consumer).
  - Fit for purpose (the goods sold must do what they are designed to).
  - Must not be unconscionable (the contract should not be grossly unfair to one party).



- Sellers must give buyers the opportunity to compare goods prior to purchasing.
- Goods offered must match samples or advertised descriptions.
- Advertising of a good must not be deceptive or misleading.

### **Conditions and Warranties:**

- Conditions are the fundamental or essential terms of the contract.
- The breach of a condition allows the aggrieved party the right to rescind the contract and sue for damages.
- Warranties are less important terms, but may still cause considerable inconvenience if breached.
- A person can claim damages as compensation for their loss.

### **Exclusion Clauses:**

- These are commonly used by sellers to limit their liability.
- However, if damage is a result of negligence or a product is faulty, then the store can be found liable.
- It is also important that the exclusion clause is brought to the attention of the customer.

### **Unjust Contracts (Common Law Protection):**

- The courts are generally not concerned that a contract may be unfavourable to one party as they usually provide benefits for both the buyer and the seller. However, they will intervene if the contract is clearly unfair (where misrepresentation, duress, undue influence or unconscionable conduct is involved).
- A misrepresentation occurs when one party is induced into entering a contract based on a false statement made by the other party. It can be fraudulent, negligent, or innocent...
  - Fraudulent misrepresentation occurs when a person makes an untrue statement knowing it is untrue or not caring whether it is true or not.
  - Negligent misrepresentation occurs when a person enters a contract based on false information given to them by a third person.
  - Innocent misrepresentation doesn't involve intention to mislead or deceive.
- The court will allow the innocent party to rescind the contract and claim damages (for the first two).
- A contract entered into because of duress, a threat, or undue influence is made void. This is shown by *Barton v. Armstrong (1975)*.
- Unconscionable conduct is where one party takes advantage of another, as defined by *Commercial Bank of Australia v. Amadio (1983)*. The contract will be made void.

### **Unjust Contracts (Statutory Protection):**

- The amount of statutory protection has increased considerably in recent years.
- “Cooling-off periods” allow consumers to change their minds and withdraw from a contract. There is specific legislation relating to specific areas; for example, the Fair Trading Act 1987 (NSW) provides a cooling-off period in relation to door-to-door sales.
- There are three references to unconscionable conduct in the Trade Practices Act 1974 (Cth) in regards to making the contract and operating the contract.

## **TOPIC ONE AND THREE QUARTERS: BACK TO THE NATURE OF...**

### **Tort of Negligence:**

- A tort is a civil wrong. Negligence is the failure to foresee what any reasonable person would predict.
- The law provides legal remedies, often in the form of compensation, for injuries caused by negligence by a manufacturer, supplier or seller of goods.
- To establish negligence in a court action, a consumer complainant must establish...
  - a. A duty of care (which is automatically accepted when there is a commercial transaction).
  - b. That the duty of care was breached as the standard shown by the seller was deficient.
  - c. Actual damage resulted to the person to whom a duty of care was owed.

### **Regulation of Marketing and Advertising:**

- Advertising and marketing often confuses, misleads or deceives.
- There is both statutory protection and non-statutory controls on advertising.
- Examples of statutes are...
  - a. Sales of Goods Act 1923 (NSW), which codified implied terms in contracts.
  - b. Trade Practices Act 1974 (Cth), which regulates suppliers and sellers.
- Courts will often enforce these statutes. This was seen in the case ACCC v. Arnott’s Biscuits Ltd (2008), in which Arnott’s Biscuits were found to have used deceptive packaging and told to fix it immediately.
- An example of a non-government body is the Advertising Standards Board. The ASB monitors advertising and hears complaints.

### **Occupational Licensing:**

- Occupational licensing allows a person to carry out a particular occupation with the approval of the relevant authorities.

- It means that the provider of the service has met educational and competency standards, and implies that they should conduct their business with honesty and integrity. It protects consumers!
- Denial or revoking of a licence must be in accordance with the rules of natural justice; that is, the reason must be known and the provider has the right to appeal.
- There are two types of regulation: self-regulation and state regulation.
- Self-regulation has advantages because they understand the practices in the industry and can respond quickly.
- However, it is not always effective. Consumers may lose confidence in an industry if they feel their complaints are not being handled well. This usually leads to calls for greater levels of state regulation.
- State regulation is where government bodies impose standards of conduct. It provides a transparent and unbiased way of monitoring the conduct and involves a clearly defined process for reviewing complaints.
- However, it, too, can have disadvantages, in that the government tends to side with consumers in order to gain popularity.
- An example of occupational licencing is in regards to motor car dealers.
- The Motor Dealers Act 1974 (NSW) states that dealers must have a licence to buy and sell cars, they must be honest, and they must honour guarantees and warranties.
- Holden v. Eagleston (2004) resulted in a verdict in favour of the consumer, who had to get twelve repairs in the first two years. They received a refund.

## **Topic Two: Consumer Redress and Remedies**

### **Awareness and Self-Help:**

- Consumers are often able to resolve issues associated with purchases for themselves.
- Self-help involves consumers taking complaints over products or poor service directly to the retailer or supplier.
- The benefits of self-help include...
  - The company is generally appreciative of the non-confrontational approach and will be prepared to respond to the issues raised.
  - Companies become aware of any problems and are able to rectify them quickly.
  - If ignored, government agencies are more likely to investigate the consumer's complaints.

However, self-help is reliant on the consumer having access to information about their rights and remaining well informed.

### **State Organisations:**

- The NSW Office of Fair Trading.
- This organisation helps consumers through education on consumer rights under law; providing information on common illegal sales practices; naming dishonest companies; advising consumers on self-help strategies; assisting in negotiations with retailers, service providers and manufacturers; investigating serious complaints; and referring serious breaches of the law to tribunals and courts.
- For example, investigations led to the Fair Trading (Treadmills) Regulation Act 2008 (NSW), which required all new treadmills to carry prominent warning stickers. It was in response to the alarming rate of children who had suffered injuries due to this equipment.
- The Office is very accessible – it can be reached by internet, phone or centrally located offices.

### **Federal Organisations:**

- The Australian Competition and Consumer Commission (ACCC).
- This body ensures that the provisions of the Consumer and Competition Act 2010 (Cwlth) are enforced.
- The ACCC is able to gather complaints from consumers across the nation. When they find that a large number of consumers have complained about the same product, they can investigate the company.
- The matter can then be referred to the Federal Court. The ACCC, in this case, is taking action on behalf of all consumers who have bought, or might buy that product.
- The Federal Court may impose fines up to \$10 million for a corporation and \$500 000 for individuals.
- For example, ACCC v. Proud Jewellers Pty Ltd (2008) concerned “was/now” pricing or “dual ticket” pricing. Prouds had advertised products, declaring discounts. However, many of the items had never been on sale for the “was” price. The court found this to be misleading and deceptive conduct.

### **Industry Organisations:**

- Industries often develop their own codes of conduct to guide their members.
- They will also lobby federal and state governments to influence the composition of new legislation.
- For example, the Australian National Retailers Association represents the nation’s major retail companies. It imposes standards of conduct on its members and addresses issues of major concern in the retail industry.

### **Role of Tribunals and Courts:**

- The NSW Consumer, Trader and Tenancy Tribunal (CTTT) was established in 2002. It is a specialist dispute resolution mechanism for consumers, traders and tenancy issues. It allows consumers to bring an action against suppliers or sellers of goods and services.

- The main advantages of this avenue include...
  - Relative informality – The Tribunal must encourage conciliation and mediation, meeting with the parties to try to resolve disputes before the issue is taken further. If an agreement is reached, the terms are made into a CTTT order. If not, a hearing will be arranged before the Tribunal.
  - It is up to the parties themselves to discuss grievances. However, if the amount in dispute is in excess of \$10 000 or if one of the parties is incapable of adequately representing themselves, then legal representation is allowed.
  - Modest cost.
  - Quick resolution.
  - Easily accessible – Applications for tribunal hearings can be lodged online and an automatic hearing notice will be issued.
- Under the Courts and Crimes Amendment Act 2008 (NSW), appeals are now heard in the District Court (not the Supreme Court). This was designed to speed up the hearing process and reduce the cost.
- Alderman v. Everything Totally Cool (2005) involved a man who bought a miniature motorbike from the shop and was told that he could legally ride the bike on the road without needing to have it registered. Soon after the purchase was made, the law changed. The CTTT held that the salesperson's representations led Alderman to buy the bike and he was entitled to a full refund.
- Arbitration occurs when an independent third party listens to submissions from the two parties and makes a legally binding decision on them. It is adversarial in nature.
- Some contracts will have a clause dealing with grievance procedures, and it may indicate that any disputes must be referred to arbitration.
- Local Courts have a Small Claims Divisions that will make orders for amounts up to \$3000. Generally, however, their jurisdiction reaches \$40 000. Claims for amounts up to \$75 000 are heard in the District Court. If the claim is more than \$750 000 the matter will be heard in the Supreme Court (unless both parties agree to have it heard in the District Court to limit cost).
- Court procedures are time consuming and costly.
- Thus, there is often merit in consumers joining to mount a class action against a supplier. In such a case, both the cost and damages are shared evenly amongst them.
- For example, the Dow Corning case dealt with international claims from women concerning silicone breast implants that were found to leak internally, causing disfigurement and organ damage. It was held in the US, but payments extended to other countries, including Australia. It took ten years before the women were finally compensated for their loss.
- In a court case, there is also a need for persons claiming damages to have tried to mitigate their losses; that is, finding an alternative for the product that is unable to do as intended. Failure to do so may lead to a reduced amount of damages awarded.

### **Role of Non-Government Organisations:**

- These organisations provide information and advice to consumers, and make representations to suppliers, other organisations, and the government.
- Examples include...
  - The Consumers' Federation of Australia; the umbrella organisation.
  - Choice is able to independently assess the merits of a range of products. It then publishes its findings to inform about the quality, value for money, energy efficiency, safety issues, availability of after-sales service, and so on, of the goods received.
  - Standards Australia advises the government on minimum standards.
  - National Roads and Motorists Association (NRMA) advises consumers on consumer issues, tests motor vehicles, and produces information on the performance of the cars and related products.

### **Role of the Media:**

- Products can be advertised in the media to inform consumers and entice them to buy products.
- Companies are aware of the value of a good corporate image and make efforts to maintain a good reputation.
- The media can also heighten consumer awareness of unsafe products or dishonest sales techniques.
- This can be beneficial if it results in inferior products being removed from the market.
- An example of one such advertising campaign is the health consequences of smoking cigarettes.

### **Consumer Remedies for the Individual:**

- If approaching the company does not wear the appropriate results, then other avenues can be explored to deal with consumer complaints.
- Typical remedies include...
  - Rescission of a contract – If a contract is overwhelmingly unfair to one of the parties, the courts may rescind the contract. This means that the innocent party no longer has to meet their obligations. The court may also choose to modify the original contract or make a new one.
  - Payment of damages – The award of damages is to put the innocent party back in the financial position they would have been in, had the breach not occurred.
  - Court orders – These may include injunctions to stop unscrupulous persons from engaging in some unfair business practice or an order for specific performance, which compels a party to complete their obligations under the contract.

## **Actions in Tort**

- Torts are civil wrongs and the most common is the tort of negligence.
- There are many instances where consumers are better placed to bring a claim of negligence to the courts.
- *Shoey v. Allan* (1991) – A elderly woman was injured when she slipped and fell on vegetable matter in the store. It was found to be negligent. Upon appeal, the Court held that a store is required to adopt a system of routine inspections and cleaning of high-risk areas. Failure to do so means it has breached the duty of care that it owes to its customers.

## **Mediation and Conciliation**

- Mediation involves an independent third party who helps to identify the issues of concern and facilitate a remedy. Conciliation involves an independent third party, who helps direct a meeting between the two disputing parties. Proceedings tend to be more formal.
- The Community Justice Centres Act 1983 (NSW) allows small consumer claims to be resolved through mediation.

## **Consumer Remedies for Society:**

- There are many instances where a consumer sees little benefit in pursuing a complaint.
- However, the experience may be shared by countless consumers who bought the same faulty product.
- In this situation, the ACCC or Department of Fair Trading may institute proceedings on behalf of all those consumers who were or may be adversely affected by the dishonest practices of a supplier.
- Alternatively, consumers who have suffered a significant loss may join together to lodge a class action.
- The court may, if the law has been breached, make orders including...
  - Fines or penalties
  - Injunctions
  - Refunds
  - Damages
  - Specific performance
  - Apologies
  - Corrective advertising
  - Banning products
- “Naming and shaming” of companies who have breached provisions can also benefit society.
- Product recalls protect the safety of the public. A few years ago, after claims of unsafe products being sold by supermarkets, legal action resulted in manufacturers being required to use tampering-evident packaging, so that consumers could tell immediately if the product had been interfered with.

- Australia is a member of the International Consumer Protection and Enforcement Network (ICPEN). They share information about cross-border commercial activities, such as scams committed on an international basis and Internet fraud. International cooperation amongst law enforcement agencies is encouraged to deal with these crimes.

### **TOPIC THREE: CONTEMPORARY ISSUES CONCERNING CONSUMERS:**

#### **1. Credit:**

- The use of credit allows a person to borrow money or to acquire goods without payment in return for a promise of future settlement of the debt and the payment of a stated rate of interest.
- Credit does offer certain advantages, including...
  - Immediate use of a good that the consumer is unable to currently afford.
  - Regular and hopefully affordable monthly repayments.
  - Establishment of a good credit rating.
  - Opportunistic purchases of items that have become available at an especially low price. This can encourage consumers to buy on credit, thinking the low price will offset any interest charges.
- However, there are also many issues...
  - Living beyond one's mean, resulting in debt.
  - High interest rates.
  - Inducements, such as 12 months interest free on a consumer loan, can often sound appealing, but result in large payments required. Customers need to be really well informed of the conditions that apply with such offers.
  - The range of credit products available has increased dramatically. It is difficult for a consumer to understand the conditions associated with each one.
  - Cybercrime and credit card fraud.
- Thus, there is need for consumer education and increased awareness of potential problems.
- Credit providers need to ensure the persons applying for credit have the capacity to repay loans without financial hardship. The law places restrictions on the rate of interest that can be charged.
- In turn, consumers have a legal responsibility, when applying for a loan, to disclose the amount of credit debt they may already have acquired from other providers.



## **a. Legal Responses**

The Competition and Consumer Act 2010 (Cth) relates in two ways...

- Licencing regulation equates to credit market integrity, which lifts consumer confidence.
- Creates rigorous entry conditions, meaning that credit providers must meet lending standards.
  - Following a period of continued criticism of the finance industry, the Council of Australian Governments agreed to increase regulation of financial institutions. The result was the Consumer Credit Code.
  - The Consumer Credit Code applies to all credit providers in Australia. It protects consumers in a number of ways...
- Requires all finance brokers, advisors and credit providers to be licenced.
- All relevant information must be disclosed and consumers must be informed of their rights and obligations.
- Lenders must not enter contracts with consumers if financial hardship is created.
- Gives power to courts to change or rescind unconscionable contracts. There are civil and criminal penalties for non-compliance.
- Ensures that standardised and easy-to-understand contracts are used.
  - NSW Office of Fair Trading gives advice to consumers.
  - Community Justice Centres provide mediation.
  - NSW Financial Ombudsman provides dispute resolution.

## **b. Non-Legal Responses**

- Consumer Credit Legal Centre provides financial counselling.
- Redfern Legal Centre gives advice.

## **c. Effectiveness**

- Uniform laws (CCA and CCC) are effective as they are transparent and standardised. This makes them beneficial for those who move interstate and ensure understanding and therefore, a level of fairness.
- Consequences for breach of contract (especially in the dual criminal and civil legal systems) result in improved justice. Non-effectiveness derives from their costly and time-consuming nature.
- Remedies and compensation are accessible to those who believe they have been treated unfairly.

## 2. Product Certification:

- Product certification is the process of acknowledging that a particular good has passed performance and quality assurance tests or qualification requirements.
- In Australia, the standards are developed and aligned with international standards by Standards Australia.
- Checks will be made over time to ensure that the standard is maintained.
- An area currently under review, because currently there is not product adequate certification, is the use of plastic bags. Australians aren't informed about how effectively plastic bags will degrade.
- This example shows that to reach complete effectiveness, product certification must apply to a wider range of products. The industry must be constantly re-examining current items and those new to the market.
- Additionally, there are standard boards specifically in one area.
- For example, the Australian Organic Standard outlines the requirements for marketing produce as certified organic. This benefits consumers as they can be assured that they are buying produce that has not been treated with chemicals. Organic food often attracts higher prices. Thus, one unfortunate result is that unscrupulous producers sometimes try to offer alleged organic goods, when this is not the case.
- There are also moves among some countries to adopt uniform certification schemes. This would benefit consumers on a global basis.

### a. Legal Responses

- The Competition and Consumer Act 2010 (Cth) and Fair Trading Act 1987 (NSW) relate to mandatory product certification.
- They require product safety (including clear instructions for use and warnings for misuse, product recall plans, quality insurance program); product certification (including a system of “certification listing”, which sets out conditions, and “delisting” in the case of non-compliance); and product labelling.
- The Director-General, Commissioner for Fair Trading, and the federal Minister have the power to recall dangerous goods.

### b. Non-Legal Responses

- Consumers, themselves, are encouraged to report unsatisfactory and unsafe products.
- The lobbying of parliament attempts to influence legislation.
- Independent consumer groups protect the rights of Australians; eg. Australian Consumer Association.
- The media is able to highlight consumer safety issues.

### 3. Marketing Innovations:

- Marketing is the use of sales techniques to promote a product or service.
- Testimonials and endorsements are popular market tools to add credibility to claims about the quality or desirability of products or services. However, claims must be accurate and truthful.
- Cadbury v. Darrell Lea Chocolate Shops (2006) involved Cadbury trying to sue Darrell Lea for using various shades of purple. While marketing ideas do need legal protection, some companies can be overly protective of their image. The Federal Court ruled that Cadbury did not own the colour.
- Gifts and prizes provide the consumer with a chance of winning a prize when making a purchase.
- Hurley v. McDonald's Australia (2001) ran the same competition twice. As such, some customers had kept tokens from the previous competition. They claimed their "matched prizes", but McDonald's refused to award them. Mr Hurley argued that the company had acted unconscionably. However, the court ruled that Hurley had to show that they were liable for "serious misconduct or something clearly unfair", which he was unable to do.
- Cash-back offers are now being offered on everyday products. However, there are a number of time consuming, fiddly conditions that consumers must meet to qualify for what is only a small amount.
- The ACCC wants consumers to be fully informed of terms and conditions associated with cash-back offers before a purchase and for all cash-back and free offers to be as transparent as possible.
- Shopper dockets are those special offers printed on the back of receipts.
- There has been an increasing amount of issues since the development of e-commerce; including, spamming, phishing attacks (stealing information), and so on. Many occur over national borders, and so are difficult to enforce.

#### a. Legal Responses

- Spam Act 2003 (Cth) makes it a civil offence to use dress software.
- Competition and Consumer Act 2010 (Cth) prohibits deceptive advertising and marketing, bait advertising, referral selling, aggressive marketing, pyramid selling, the sending of unsolicited credit cards, the sending of unsolicited goods and demanding payments, not delivering on the offer of gifts and prizes, and so on.
- Australian Communications and Media Authority regulates broadcasting and telecommunications.
- Australian Competition and Consumer Commission regularly scans for illegal offers and runs a program called SCAMwatch to give advice on how to recognise, avoid and report scams.
- NSW Office of Fair Trading regularly scans the internet, radio and TV for illegal offers.

## **b. Non Legal Responses**

- Choice reports on deceptive marketing.
- The media (see emails) highlights issues.

## **c. Effectiveness**

- The law has responded very well to domestic marketing issues, making Australian consumers who buy products in Australia sufficiently protected.
- However, difficulties arise in regards to marketing that originates in foreign countries.
- Countries cannot shut down their borders to keep out cyber threats.
- Electronic transfer makes it easier to transfer funds across borders.
- It is difficult for Australian authorities to catch perpetrators. This issue derives from jurisdiction and foreign law.
- Even if they do, there is also tension in prosecuting criminals. It is only possible if the countries involved have an extradition agreement.
- Solutions at national and regional levels are not sufficient. There needs to be an extensive body of international law and countries must cooperate to target and remedy issues that arise.

## **4. Technology:**

- The Electronic Transactions Act 1999 (Cth) has addressed many of the issues associated with consumer contracts negotiated over the Internet. Under this act, a contract that has been arranged through electronic means is to be treated in the same way as an equivalent contract in written or oral form. It must meet all requirements.
- The internet also provides businesses with ample opportunity to expose consumers to their products.
- The Spam Act 2003 (Cth) deters unrequested bulk emailing – an example of an initiative trying to keep up with the constantly evolving nature of the internet, and its use.
- The relatively new phenomenon of social networking sites has led to issues. There is a suggestion that they infringe privacy laws, though this has not yet been adequately addressed in statute law.
- Smythe v. Thomas (2007) involved Thomas advertising items on Ebay, asking for at least \$150 000. Smythe bid the required amount, believing he had created a legally enforceable agreement. However, Thomas refused to proceed with the transaction, stating that the advertisement on Ebay was an invitation to treat and not an offer. The Supreme Court ruled that a binding contract did, in fact, exist.
- A number of issues have arisen from the changing nature of technology.

- For example, supermarkets have now removed incandescent light bulbs from their stores, replacing them with compact fluorescent lamps that are more energy efficient. Consumers must be careful that they buy the right light bulbs for their purpose.

## 5. **ADDITIONAL NOTES on the Effectiveness of Legal Responses to Contemporary Issues**

- Consumer law benefits from having far-reaching provisions in its legislation – that is, in the existence of both state and federal legislation AND broad expressions that can cover a multitude of situations.

### **Hidden Fees and Charges**

- Advertised prices often do not include additional fees or taxes.
- To remedy this, the federal government introduced the Trade Practices Amendment Act 2008 (Cth).
- It is designed to increase pricing transparency.