

## Legal Studies Trial HSC 2009 Answers

### Question 16

- a. **Public law:** this covers the areas of Constitutional law (the law concerned about constitutional interpretation and constitutional challenges), administrative law (the law concerned with the running of the executive and the decisions of administrators and the executive) and criminal law. Public law therefore relates to the State and its relationship with the people. (2 marks)

whereas **private law** is the law that regulates the interaction and relationships between private 'citizens'. Such citizens may be corporate in nature and includes individuals, organisations, businesses and other institutions. (2 marks)

Examples of public law include: the *Crimes Act 1900* (NSW) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth)

- b. **Civil and political rights** are those rights that relate to government and peoples relationship with the state. Civil and political rights are articulated in the ICCPR which came into effect in 1976. The rights articulated in the ICCPR may be classed as positive in wording ('a person has a right to..") or negative in wording 'people shall have freedom from' - or those articles that restrain State power'. (2 marks)

International efforts to uphold civil and political rights are of mixed success. State sovereignty means that nation states can choose not to ratify international instruments, but even if ratified they cannot be enforced when breached. Examples of recent breaches to civil and political rights include: the question over universal suffrage in Afghanistan and Iran and the loss of autonomy of the Tibetans and the Uighar people as a result of Chinese occupation. Underpinning the question over expressing and upholding civil and political rights are notions of systems of governance and overlap or blurring between religion and the role of the state. (3 marks)

### Question 17 Crime

- a. **Summary offences** are minor offences and are heard in the Magistrates court. Matters are brought on summons, heard summarily (no jury) and generally carry a penalty of 2 years imprisonment or less; indictable offences are more serious offences brought to the court on indictment. Indictable offences carry harsher penalties and are heard by a judge and jury in higher courts. (2 marks)
- b. **The court structure with respect to summary offences, indictable offences and appeals:** Summary offences are heard in the lowest court (the only one without appellate jurisdiction) the local or magistrates court. Summary offences are summarily heard (no jury, relatively quickly decided). (1 mark) If appealed the appeal will be heard in the District Court the Supreme Court if appealed again. (1 mark) Indictable offences are heard first in the local court as committal hearings in order to establish whether there is a *prima facie* case. If so it will proceed to trial in the upper courts. (1 mark) However, it is possible for very serious matters to be heard first in the District or even Supreme court especially in the case of an *ex officio* decision by the Attorney general (often acting on advice from the Coroner). (1 mark) Matters in both the District and Supreme Courts will be heard with a jury of 11 or 12. Appeals for matters heard in the District Court will be appealed to the Supreme Court and

from there to the Court of Criminal Appeals (Supreme Court with 3 justices). On appeal there is never any jury. (1 mark)

**c. Defences**

Defences may be classified as either partial or complete. A partial defence successfully proven may reduce the charge or reduce the penalty/sentence. A successful application of a complete defence will lead to an acquittal. Partial defences include:

- Provocation (s23) and substantial impairment of responsibility s23A *Crimes Act* (NSW)

Whereas complete defences are:

- Self defence, mental illness (insanity), duress and consent

When a defence is used the burden of proof for the defence shifts to the defendant. These defences must be proven to the normal criminal standard: beyond reasonable doubt.

Defences are applied in order to characterise the events that occurred from the point of view of the accused. Thus, they will explain their conduct and/or reasoning in an effort to reduce their criminal liability or culpability.

The effect of the use of defences on sentencing is that if successfully applied sentences will be reduced as there are factors which explain and justify the defendant's actions. This combined with other factors such as a willingness to cooperate with police and a demonstration of remorse/contrition. A judge will consider numerous factors when sentencing: the effect of present, the statutory sentencing regime, the objective and subjective factors of the offence, the aggravating and mitigating factors (including any defences), the plea and any charge negotiation, the limits of their discretion and the purposes of punishment. In this way defences will be very relevant as factor influencing the sentencing decision but it will not be the only factor. (8 marks)

- d. **A current criminal justice issue:** Changes to the NSW **Bail Act** 1978 coming into effect in 2008

### **NSW Bail Laws**

#### **What is bail?**

Bail is the conditional release from remand (or custody). Generally, the **ONLY** condition is that a person agrees to appear in court for a hearing at a subsequent date. Bail can carry further conditions such as:

- Surrender of a licence
- Posting of surety (payment of a guarantee of money)
- A requirement to visit a police station daily
- An agreement to stay within a particular geographical location

#### **The presumption of bail:**

The rule of law requires that people be presumed to be deemed innocent until proven guilty. The onus is on the State to prove, in a criminal matter, that the accused is guilty beyond reasonable doubt. When the police lay charges a determination is made about whether to grant bail. This decision is made by a magistrate. The use of a magistrate upholds the principle of natural justice –

the separation of powers is invoked as the bail decision is made by the independent judiciary, rather than by the executive.

Historically, there has been a presumption of bail. That is, a person charged is presumed to be granted bail unless they present a danger to themselves or others. This means that the presumption is rebuttable (it can be rebutted or argued against).

In NSW there has been a general weakening of the presumption of bail principle. Thus, people charged with serious drug offences are routinely denied bail. Furthermore, the categories for which bail is denied have steadily increased over time. Changes to the *Bail Act* passed in late 2007 and coming into force in 2008 have made the granting of bail far more difficult as there can only be ONE application for bail made. If this application is refused by magistrate then the only alternative is to seek review through the Supreme Court.

### **The *Bail Act* 1978 and the amendments which came into force in 2008**

*Bail* means, "authorisation to be at liberty under this Act, instead of in custody": s. 4

Every person arrested has a right or is entitled to or eligible to be granted bail (sections 6, 8 & 13). After arrest, if police bail is not granted, a person must be brought before a Magistrate or Authorised Justice so that the question of their bail can be determined (s. 20). When the Act was introduced s. 22 said that there was no limit to the number of applications for bail. ***The recent changes removed this provision.***

Source: [http://www.lawlink.nsw.gov.au/lawlink/pdo/ll\\_pdo.nsf/pages/PDO\\_newbaillaws2008](http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_newbaillaws2008); accessed on 16.09.09

### **So, what is the effect of this change to the bail laws in NSW?**

There have been several unfortunate effects of the changes to the bail laws on different parties that may find themselves subject to bail decisions:

- Young offenders (juvenile offenders)
- Indigenous Australian offenders

According to Adele Horin (July 2, 2009) in the Sydney Morning Herald article '[Bail law means more jail for more juveniles](#)' MOST young people jailed for breaching bail conditions have not committed another crime but have broken curfews or failed to stay with parents.

The report provides strong statistical backing for those arguing for reform of NSW bail laws as they apply to children.

It shows amendments designed to toughen the *Bail Act* enacted in December 2007, combined with increased police activity, contributed to a 32 per cent rise in the number of juveniles on remand between 2007 and 2008. The time young people spent in jail before they faced a court hearing also lengthened dramatically.

"The increase in juvenile remand is a matter for concern," the report says, "not only for reasons of cost, but also because of the potential impact of being held in custody on a young person's family relationships, education and work."

Only 34 per cent of young people jailed for breaching bail committed a further offence, but 66 per cent had been locked up for breaching other bail conditions, most commonly not complying with a curfew.

The report said the cost of keeping juveniles on remand rose over the 12 months by 29 per cent to \$47.2 million but there was no evidence the increase in juveniles on remand had contributed to the fall in property crime in NSW.

### Assessing the new Bail law amendments

The effectiveness and the efficiency of the NSW criminal justice system is certainly questioned in respect of the new bail laws.

#### **For individuals:**

- **Equality:** equality is not afforded to those disadvantaged socio-economically
- **Accessibility:** The most marginalised are most affected by these laws which diminish accessibility to the legal system
- **Enforceability:** The laws are being enforced in respect of minor breaches such as curfew breaches. The laws are being oppressively applied to those least likely to be threat to society. The laws do however limit the possibility of 'magistrate shopping'.
- **Resource efficiency:** The laws are arguably resource inefficient in that resources are applied to gaols when they might be better spent on social programmes that directly help the most marginalised people to access education and make choices in society
- **Recognition of individual rights:** The laws are a direct assault on individual rights in that they reduce the power of the individual with respect to the state.

#### **For society:**

- **Resource efficiency:** the resources applied are spent on gaols and containment rather than rehabilitation. There is however a cost and time saving with respect to the courts and the legal system as only one application for bail is accepted.
- **Law as a reflection of community standards and expectations:** it is questionable whether the new bail laws are totally reflective of the society or whether they are partially reflective of very conservative elements of society.
- **Opportunities for enforcement:** the laws are enforced well as evidenced by the statistics above.
- **Appeals and review:** there is very little opportunity for appeal and review. Appeals to bail decisions go to the Supreme court which would be unaffordable for most people subject to the laws
- **Balance of individual rights and values and community rights and values:** the laws to some extent do reflect contemporary social values. In the 'law and order debate' there is generally popular support for a harsher regime of penalties for those that breach laws, however minor. However, the Council for Civil Liberties argues the laws actually are not in line with advanced social thinking.

## Optional Focus Studies

### Question 18 (a) – 25 (a)

<ul style="list-style-type: none"> <li>▪ With reference to the relevant focus study the student discusses in detail changes to the area of law</li> <li>▪ Student clearly articulates how legal processes and institutions shape the law and also the nature of conflict resolution</li> <li>▪ Student synthesises relevant examples by reference to legislation, media reports, cases, treaties or other documents (eg law reform commission reports)</li> <li>▪ Student presents a logical, sustained and well-structured response to the issues</li> <li>▪ Student integrates reference to the quote</li> </ul>	25 - 21
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<ul style="list-style-type: none"> <li>▪ Student may refer to the law</li> <li>▪ Student may refer to legislation, the media, case(s) or other documents</li> <li>▪ Student presents a response to the question</li> </ul>	5 - 1

**Question 18 (b) – 25 (b)**

<ul style="list-style-type: none"> <li>▪ With reference to the relevant focus study the student discusses in detail changes to the area of law</li> <li>▪ Student clearly articulates how culture, values and ethics shape the rights of, and protect different parties</li> <li>▪ Student synthesises relevant examples by reference to legislation, media reports, cases, treaties or other documents (eg law reform commission reports)</li> <li>▪ Student presents a logical, sustained and well-structured response to the issues</li> </ul>	25 - 21
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