Introductory Matters

PART 1

The Structure of Criminal Law

CHAPTER 1

CHAPTER OUTLINE

This chapter provides an historical introduction to criminal law in Queensland and Western Australia. Questions answered include: Why is particular conduct criminal? Is it the responsibility of the state/s and territories or the Commonwealth to make and/or enforce criminal law? Are there major differences between jurisdictions? What of interpretation issues in criminal law? What is the import of different types of offences?

INTRODUCTION

1.1 For more than 100 years Queensland and Western Australia have shared a common heritage of criminal law and procedure based on a criminal code drafted by Sir Samuel Griffiths, Chief Justice of Queensland, later the first Chief Justice of the High Court of Australia.

The Criminal Codes of Queensland (Code (Qld)) and Western Australia (Code (WA)) — 'the Codes' — were enacted as Schedules to short covering Acts: the Criminal Code Act 1899 (Qld) and the Criminal Code Act Compilation Act 1913 (WA). Over time, differences have emerged as parliaments of the two states have responded to local issues and the need to provide particular legislative solutions to current community problems. However, the foundations of criminal responsibility and the nature of many offences remain the same.

Procedural variations have developed between the two states although there are many similarities, in part because of the common heritage and in part due to the modern involvement of the High Court of Australia in matters of criminal law and procedure. High Court judgments are binding on state courts.

Each state is part of the Commonwealth of Australia and federal criminal law applies in each state as well as state law.

THE NATURE OF CRIMINAL LAW AND CRIMINAL RESPONSIBILITY

1.2 Criminal law involves the use of penal sanctions to enforce the prohibitions which the state imposes on conduct. Conduct constitutes a criminal offence when it has been so defined

by the law. This broad definition of a criminal offence covers not only traditional crimes, such as murder and stealing, but also the modern offences found in legislation regulating fields such as road traffic, customs and taxation.

In *Proprietary Articles Trade Association v Attorney-General (Canada)* [1931] AC 310 at 324, Lord Atkin said:

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be ascertained by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? … [T]he domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be criminal and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

The purpose of the criminal law goes beyond mere regulation of behaviour. In *Munda v Western Australia* (2013) 302 ALR 207; [2013] HCA 38, the plurality said at [54]:

> It may be argued that general deterrence has little rational claim upon the sentencing discretion in relation to crimes which are not premeditated. That argument has special force where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals within those communities to be controlled by rational calculation of the consequences of misconduct. In such cases it may be said that heavy sentences are likely to be of little utility in reducing the general incidence of crimes, especially crimes of passion. That having been said, there are three points to be made in response. First, the proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community.

1.3 There is often a close correlation between the moral or ethical concerns of society and the criminal law. The traditional crimes are sometimes called *mala in se*, in order to indicate that the perceived moral or social wrongfulness of the types of conduct is the reason why they are legally prohibited and punished. In contrast, the modern regulatory offences are sometimes called *mala prohibita*, in order to indicate that the wrongfulness of these types of conduct is dependent upon their legal prohibition. *Mala prohibita* are wrong because they are legally prohibited; *mala in se* are legally prohibited because they are wrong.

The distinction can help to illuminate the scope of criminal law. However, it can sometimes be difficult to apply. While certain offences, such as murder and stealing, would be regarded as offensive to most people in society, the scope of these offences can be disputed. Moreover, a divergence of opinion often exists with respect to matters such as abortion, prostitution and euthanasia. These acts may be permitted in some jurisdictions while remaining unlawful in others. Consequently, the characterisation of particular offences on the basis of the distinction

between *mala prohibita* and *mala in se* is frequently questionable. The distinction has no direct legal significance.

1.4 The terms 'offence' and 'criminal offence' are used in this book in a generic sense, applying to all governmental prohibitions that are backed by penal sanctions. The term 'crime', in its popular sense of serious offence, is not used in this book. This is because the term 'crime' has a technical meaning, somewhat different from that of popular usage, under the Criminal Code (Qld): see **1.24**. In order to avoid confusion, the term 'crime' is used only in this technical sense.

1.5 The commission of an offence generally requires:

1. occurrence of the act specified in the offence description (for example, killing or taking property) or, sometimes, the omission to do an act (for example, failing to provide necessaries of life to someone to whom a duty of care is owed);
2. presence of any state of mind (such as intention) required to make a person criminally responsible for that conduct; and
3. absence of any authorisation, justification or excuse which would negate criminal responsibility for the conduct.

The second and third requirements largely reflect the connection between criminal responsibility and moral blameworthiness. Generally, conduct alone is not punished.

This book focuses on the concepts, principles and rules through which criminal responsibility has been addressed in Queensland and Western Australia.

CONSTITUTIONAL AND TERRITORIAL ISSUES

1.6 In Australia, criminal law is primarily a matter of jurisdiction for the states and territories rather than the Commonwealth. Criminal law was a matter within the pre-federation competence of colonial legislatures to make laws for 'peace, welfare and good government'. The matter of criminal law was not reserved to the Commonwealth Parliament by the Commonwealth of Australia Constitution Act of 1900. Thus, only the state legislatures can prohibit and sanction conduct occurring within their boundaries on the simple basis that it is harmful or wrong. Similar powers have been delegated by the Commonwealth to the legislatures of the Australian Capital Territory and the Northern Territory.

1.7 The criminal law of a state extends to its territorial boundaries. Problems can occur in cases where the offence in question comprises a number of acts or events and only some occur within the territory of the state. However, as long as one element of the offence occurs within the territorial boundaries of the state, that state will have jurisdiction: see the Criminal Codes of Queensland (Code (Qld)) s 12(2) and Western Australia (Code (WA)) s 12(1)(b). The element may be the consequence of an act or omission occurring elsewhere: see Codes s 12(3) (Qld)/s 12(2) (WA). Therefore, a person in Queensland who perpetrates a fraud by telephone in Western Australia, even though he or she may never have set foot in Western Australia, may be liable under s 12 in that state. Similarly, provision is made for situations involving the procuring or counselling of offences either within the territorial boundaries of the state by persons outside those boundaries, or beyond the territorial boundaries of the state by persons within those boundaries: see Codes ss 13–14.

1.8 Despite the lack of an express power to enact criminal law, the Commonwealth does possess a supplementary or incidental power to create criminal offences in areas over which it has specific constitutional jurisdiction, such as external affairs, international trade and commerce, and taxation. It can use penal sanctions in order to enforce its regulatory schemes in these areas. The external affairs power makes it possible for the Commonwealth to enact criminal offences to give effect to Australia's obligations under international treaties.

The Criminal Code (Cth) covers a variety of matters of substantive criminal law, including:

- principles of criminal responsibility for Commonwealth offences;
- offences against the Commonwealth government, or Commonwealth property or personnel;
- offences committed by or against Australians overseas;
- terrorism;
- crimes against humanity and war crimes; and
- drugs offences.

Offences are also found in a variety of other Commonwealth statutes: see **9.2**.

The Crimes Act 1914 (Cth) establishes schemes of investigative, arrest and sentencing powers for all Commonwealth offences. Trials for Commonwealth offences are generally conducted in the ordinary state courts: see Judiciary Act 1903 (Cth) s 68. However, prosecutions on indictment before these courts are conducted by Commonwealth officials: see Judiciary Act 1903 (Cth) s 69(1)–(2).

1.9 Potential conflict between the Commonwealth and the states and territories over matters of territorial jurisdiction has been largely addressed by specific statutory provisions, generally to the effect that state or territory law is to apply in places subject to Commonwealth jurisdiction.

The Commonwealth Places (Application of Laws) Act 1970 (Cth) and Commonwealth Places (Administration of Laws) Act 1970 (Qld and WA) make the criminal laws of the states and territories applicable to places such as military bases and airports that would otherwise be under Commonwealth jurisdiction. See also the Crimes at Sea Act 2000 (Cth) Sch 1, which makes the criminal law of the states and territories generally applicable to areas within the outer limits of Australia's continental shelf. The law of the Jervis Bay Territory applies to Australian ships operating beyond the continental shelf: Crimes at Sea Act 2000 (Cth) s 6.

The airspace above the states and territories forms part of them so that local law applies to flights within the state or territory. On the other hand, offences committed on international or interstate flights are not generally subject to the criminal law of the jurisdiction over which the aircraft is travelling. The Commonwealth has given jurisdiction to the Jervis Bay Territory: see Crimes (Aviation) Act 1991 (Cth) s 15.

TWO TRADITIONS IN AUSTRALIAN CRIMINAL LAW

1.10 The historical origins of Australian criminal law lie in judge-made common law. Throughout the common law world, most criminal offences now have some form of statutory authority, which at least names the offence and prescribes the maximum penalty. In some jurisdictions, however, references are still made to the common law for the detailed elements of

offences and for many general rules of criminal responsibility. In Australia, the term 'common law jurisdictions' is used to describe those jurisdictions that have not codified their criminal law and still rely on common law as a major source of criminal law. The common law jurisdictions are New South Wales, Victoria and South Australia.

1.11 In some jurisdictions, criminal 'codes' have been enacted which are intended to provide a comprehensive statement of the criminal law and to supplant the common law. In Australia, these are called 'code jurisdictions'. The code jurisdictions are Queensland, Western Australia and Tasmania: see Criminal Code Act 1899 (Qld); Criminal Code Act Compilation Act 1913 (WA); Criminal Code Act 1924 (Tas). The respective Criminal Codes were enacted as Schedules to the Acts. Queensland and Western Australia use essentially the same code, which is known as the 'Griffith Code': see **1.14**–**1.15**. Tasmania has its own distinctive code that, although influenced by the Griffith Code, departs from it in some respects.

The Commonwealth is a code jurisdiction since its Criminal Code came into force in 2000: Criminal Code Act 1995 (Cth). The content of the Commonwealth Code, however, does not draw on the heritage of the Griffith Code. Instead, it purports to codify common law principles. Parts of the Commonwealth Code have also been adopted in the Australian Capital Territory and the Northern Territory: see Criminal Code 2002 (ACT); Criminal Code (NT).

1.12 The jurisprudential difference between the common law and the code traditions is perhaps best regarded as one of emphasis rather than of kind. In the common law jurisdictions much of the criminal law is still found in consolidating statutes, although with many gaps to be filled by the invocation of common law rules and principles: see the Crimes Act 1900 (NSW) and (ACT), Crimes Act 1958 (Vic) and Criminal Law Consolidation Act 1935 (SA). Moreover, although an attempt has been made in the code jurisdictions to provide comprehensive statutory statements of the criminal law, some gaps still remain which have to be filled by reference to the common law. In addition, the inherent vagueness of statutory language presents problems of interpretation. When resolving interpretation issues reference is often made to the common law. On the interpretation of criminal legislation and codes, see **1.19**–**1.22**.

AUTHOR - this looks very peculiar, as if something is missing. I think the best option is to say "Crimes Act 1900 (NSW) and Crimes Act 1900 (ACT)"

1.13 The two traditions in Australian criminal law embody not only these jurisprudential differences but also certain differences in the substantive law of criminal responsibility. Most notably, the contemporary common law of criminal responsibility has accepted a general principle that an offender must have been aware of what he or she was doing. It is said that the conduct must have been intentional or at least reckless: see *He Kaw Teh v R* (1985) 157 CLR 523; 60 ALR 449 and *Kural v R* (1987) 162 CLR 50; 70 ALR 658. To use a common law term, the act must be accompanied by mens rea meaning a 'guilty mind'. Inadvertent negligence may suffice for the civil law of torts but not for the criminal law. In contrast, doing an act or omitting to do an act without authority, excuse or justification is the general threshold of criminal responsibility in the codes. This means that the criminal codes of the Australian states have been largely formulated on the basis that inadvertent negligence can, for many offences, be an appropriate measure of fault for criminal liability. The Codes of Queensland and Western Australia expressly state that it is immaterial whether the accused intended to cause a particular result unless intent is expressly declared to be an element of the offence: Codes s 23(2) (Qld)/s 23(1) (WA). This elegant solution to centuries of confusion has been abandoned in the Commonwealth Code, which reflects the common law principle.

THE GRIFFITH CODE

1.14 A criminal code for Queensland was prepared by Sir Samuel Griffith (1845–1920). Griffith was successively Premier of Queensland, Chief Justice of Queensland and the first Chief Justice of the High Court of Australia. He drafted the Code while Chief Justice of Queensland, and submitted it to the state government in 1897. Enacted as a schedule to the Criminal Code Act 1899, it came into force in 1901. Sir Samuel Griffith drew upon a draft code prepared for England in the late 1870s, known as the 'Stephen Code' after its principal drafter, Sir James Stephen. The Stephen Code was never enacted in England but became the basis for the Canadian Criminal Code 1892 and the New Zealand Crimes Act 1893. Sir Samuel Griffith also drew upon the Criminal Codes of New York and Italy. He added original features which mark his as the 'Griffith Code'.

The Griffith Code was adopted in Western Australia in 1902. It was then exported by Australia to its overseas dependencies — Papua in 1902, New Guinea in 1921 and Nauru in 1922. It was also adopted as a model by the British Colonial Office, which exported it to many parts of the globe — Nigeria and some other parts of British imperial Africa, Palestine, Fiji, the Solomon Islands, Kiribati and Tuvalu. The Griffith Code had some influence in the drafting of the Tasmanian Criminal Code. This Code, however, departs from the Griffith model in some respects.

1.15 Amendments have been made to the Queensland and Western Australia Codes since their enactment, including Western Australia's removal of criminal procedure to separate statutes, particularly the Criminal Procedure Act 2004 and the Criminal Investigation Act 2006. The two states still share the basic concepts, principles and structure of the Griffith Code in relation to substantive criminal law, but the effect of amendments has been to make the two Codes differ in some particular respects. As a result, many section numbers now differ between the states.

CODES, OTHER CRIMINAL LEGISLATION AND COMMON LAW

1.16 With one exception all criminal offences in Queensland and Western Australia must have statutory origin or recognition:

- The Criminal Code Act (Qld) s 5 provides that henceforth 'no person shall be liable to be tried or punished in Queensland as for an indictable offence except under the express provisions of the Code' or some other state or imperial statute. Indictable offences are serious offences which were historically created through the common law and which are triable in superior courts, generally by judge and jury: see **1.23–1.25** on the meaning of 'indictable'.
- The Criminal Code Act Compilation Act 1913 (WA) s 4 provides that henceforth 'no person shall be liable to be tried or punished in Western Australia as for an offence, except under the express provisions of the Code' or some other state or imperial statute. This covers both indictable and summary offences.
- The general principle that there must be statutory authority for an offence is also expressed in the Criminal Code (Cth) s 1.1: 'The only offences against laws of the Commonwealth are those offences created by, or under the authority of, this Code or any other Act.'

Minor offences triable 'summarily', that is, by a magistrate without a jury, have almost always been created by statute in all jurisdictions.

The one exception to the rule that all offences must be based in statute is contempt of court. Under the Criminal Code Act (Qld) s 8 and the Criminal Code Act Compilation Act (WA) s 7, contempt of court is preserved as a common law offence triable summarily. The scope of the offence (and the procedure by which it is tried) is still governed by the common law. Nevertheless, the continued existence of the offence depends upon its statutory recognition in the Acts just outlined.

1.17 In Queensland and Western Australia, the Code is a near-comprehensive statement of the law in respect of liability for major offences. In neither state, however, is it a complete statement of the criminal law.

A few matters were deliberately left to the common law. For example, the Griffith Code contains no general provisions relating to the location of the burden of proof or the standard of proof. The only references to the burden of proof involve specific offences or defences. The general requirements must be derived from the common law: see **Chapter 2**. In addition, the vagueness of the language of the Griffith Code has sometimes led to the use of the common law as an interpretative aid: see **1.19–1.22**.

Some offences are found in statutes other than the Codes. These include many minor offences that can only be tried summarily by magistrates. For example, the Prostitution Act 1999 (Qld) and the Prostitution Act 2000 (WA) cover prostitution-related offences, and the Transport Operations (Road Use Management) Act 1995 (Qld) and the Road Traffic Act 1974 (WA) cover drink driving, careless driving and a host of minor traffic offences. There are even some indictable offences which appear in statutes other than the Codes. For example, offences relating to illicit substances are found in the Drugs Misuse Act 1986 (Qld) and the Misuse of Drugs Act 1981 (WA).

Much of the law of criminal procedure is found in statutes other than the Codes:

- In Queensland, the Justices Act 1886 prescribes much of the law governing the initiation of criminal proceedings, and the Police Powers and Responsibilities Act 2000 has codified police powers.
- In Western Australia, court proceedings are now largely governed by the Criminal Procedure Act 2004 and the Criminal Appeals Act 2004. A codification of police powers has been enacted in the Criminal Investigation Act 2006.

1.18 The Codes s 36 makes the general provisions relating to criminal responsibility applicable to offences against any statute. In Queensland an exception is the Regulatory Offences Act 1985, dealing with offences involving property of low value, which contains its own scheme of criminal responsibility. Generally, though, other statutes rely on the Codes to supplement what is enacted. In some instances this process is expressly stated by provisions such as the Drugs Misuse Act 1986 (Qld) s 116 which provides: 'The Criminal Code shall, with all necessary adaptations, be read and construed with this Act.'

INTERPRETATION OF CRIMINAL LEGISLATION AND CODES

1.19 Principles of interpretation for criminal legislation differ markedly between code jurisdictions and common law jurisdictions. In common law jurisdictions, legislation is interpreted in light of the general principles of the common law respecting criminal responsibility. In code jurisdictions, courts have insisted that codification marks a break from the past and the common law should not unduly influence the interpretation of statutory provisions. It has often been said that the language of the Codes should be interpreted in accordance with ordinary meanings and without any presumption that the previous common law was intended to be maintained. The classic statement is a passage by Dixon and Evatt JJ from *Brennan v The King* (1936) 55 CLR 253 at 263; [1936] ALR 318, quoted in *Stuart v R* (1974) 134 CLR 426 at 437; 4 ALR 545:

> … it forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered.

The general principles were reaffirmed by the Western Australia Court of Appeal in *Roberts v State of Western Australia* (2007) 34 WAR 1; [2007] WASCA 48 at [88]–[118]. With respect to the elements of manslaughter, Roberts-Smith JA concluded at [118]: 'There is simply no need to look outside the Code to extend or limit the offence of manslaughter beyond the scope of the offence which the Code sets out.'

1.20 There are instances where the courts have invoked common law as an aid to the interpretation of the Codes. The current orthodox view is that resort to the common law is appropriate only where the language of the Codes is ambiguous or has a technical meaning, such as a special meaning acquired at common law: see *Stuart v R* at 437. An example of an ambiguity resolved by reference to the common law is the word 'wilfully', discussed in *R v Lockwood; Ex parte Attorney-General* [1981] Qd R 209 at **7.53C**. An example of 'technical' interpretation is the analysis of the meaning of the word 'provocation' by the Queensland Court of Criminal Appeal in *R v Johnson* [1964] Qd R 1: see **Chapter 15**. In *Johnson*, it was made clear that, when the courts refer to the common law in this way, it is to the contemporary common law and not the common law as it stood at the time of codification.

1.21 There are some instances where the courts have made freer use of common law ideas, dispensing with the narrow justifications of ambiguity or technical meaning. The most notable example is the introduction of the common law concept of 'criminal negligence' into the Codes: see *Callaghan v R* (1952) 87 CLR 115; [1952] ALR 941; *R v Scarth* [1945] St R Qd 38.

1.22 Both code jurisdictions and common law jurisdictions recognise the general principle for the interpretation of penal statutes that ambiguities are to be resolved in favour of the accused. This is the principle of strict construction. It means that when a provision can reasonably be interpreted in more than one way, the preferred interpretation is the one which will give the narrowest ambit to criminal liability. The principle is one of last resort, invoked when interpretational difficulties cannot be resolved by other means.

CLASSIFICATION OF OFFENCES

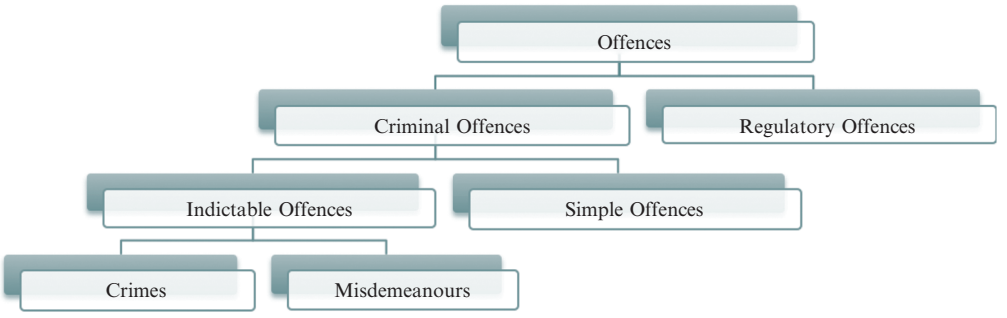
1.23 In classifying offences, the crucial distinction in both Queensland and Western Australia is between indictable and simple offences. The law of procedure for the two categories of offence is quite different.

Importantly, indictable offences may and sometimes must be tried in superior courts (that is, the Supreme Court or a District Court). Trial in superior courts has traditionally been by a judge and jury, although options for 'judge alone' trials now exist in both Queensland and Western Australia: see **28.4**. An 'indictment' is the name of the form of charge which initiates proceedings before a superior court: see **27.7**.

Simple offences are generally tried in Magistrates Courts. A Magistrates Court operates without a jury. It will try offences 'summarily'. Proceedings in a Magistrates Court are commenced by a document called a complaint in Queensland and a prosecution notice in Western Australia.

Thus, Magistrates Courts have exclusive jurisdiction over summary offences except where, in limited circumstances, a statute expressly extends the jurisdiction of superior courts to summary offences. Superior courts have exclusive jurisdiction over indictable offences, except where a statute expressly provides otherwise.

1.24 In Queensland, the Code (Qld) s 3 divides offences into four categories. In descending order of seriousness, they are crimes, misdemeanours, simple offences (these three are broadly grouped as criminal offences) and regulatory offences. Crimes and misdemeanours are both designated 'indictable offences', triable only on indictment unless otherwise expressly stated: s 3(3). On indictable offences which may be tried summarily, see, especially, the Code (Qld) ss 552A–552BB, discussed in **28.9**. An offence not otherwise designated is deemed a simple offence: s 3(5). Simple and regulatory offences are offences for which a person may be 'summarily convicted' by a Magistrates Court. The distinction between simple offences and regulatory offences merely reflects the separate existence of the Regulatory Offences Act 1985 (Qld), dealing with some property offences of low value; for example, shoplifting or non-payment of restaurant or hotel bills, where the value of the property is $150 or less. These regulatory offences are generally subject to the same procedure as simple offences.



The distinction between crimes and misdemeanours is relatively unimportant. It reflects an old common law distinction between felonies and misdemeanours which no longer has much significance. The distinction still matters in Queensland for determining the extent of the powers of ordinary persons to arrest without warrant; a power to make a citizen's arrest

generally existing only for crimes: see the Code (Qld) ss 5, 546 and 25.18. The distinction is, however, immaterial to police powers of arrest under the Police Powers and Responsibilities Act 2000 (Qld).

1.25 In Western Australia, the Interpretation Act 1984 s 67(1) provides that offences are of two kinds: indictable offences and simple offences. Crimes and misdemeanours are indictable offences: see s 67(1a). An offence not otherwise designated is a simple offence: see s 67(2). The Code (WA) s 3(2) provides that an indictable offence is triable only on indictment unless a written law expressly provides otherwise. Simple offences are triable 'summarily' by a Magistrates Court. The Code (WA) s 5 provides for circumstances when indictable offences may also be tried summarily. When a person is charged with an indictable offence before a Magistrates Court and the offence has a 'summary conviction penalty', it is to be tried by the magistrate unless, under certain conditions, including the seriousness and the interests of justice, the magistrate considers that the charge should be dealt with on indictment.