

**MLL214:
CRIMINAL
LAW**

Examinable Offences:

Homicide

Intentional/reckless murder
Statutory constructive murder (s 3A)
Common law (resisting arrest) constructive murder
Unlawful and dangerous act manslaughter
Criminal negligence manslaughter

Assault

Common assault
Intentionally causing serious injury (s 16)
Recklessly causing serious injury (s 17)
Intentionally or reckless causing injury (s 18)
Negligently causing serious injury (s 24)

Sexual offences

Rape (s 38)
Rape by compelling sexual penetration (s 39)
Sexual assault (s 40)

Property offences

Theft (ss 71-74)
Obtaining property by deception (s 81)
Obtaining financial advantage by deception (s 82)

Burglary/robbery

Burglary (s 76)
Aggravated Burglary (s 77)
Robbery (s 75)
Armed Robbery (s 75A)

Inchoate offences

Attempt (s 321M)

Defences

Self-defence (s 322K)
Duress (s 322O)
Sudden or extraordinary emergency (s 322R)
Intoxication (s 322T)
Mental impairment (s 20, *Crimes (Mental Impairment and Unfitness To be Tried) Act 1997* (Vic))

Part 1: The Fundamentals of Criminal Law

The definition and justification of the criminal law

The definition of crime

- Professor Glanville Williams defines a crime as ‘a legal wrong that can be followed by criminal proceedings and which may result in punishment’: G Williams, Textbook of Criminal Law (2nd edn, 1983) 27.

The Purposes of Criminal Law - The Connection between Crime and Punishment

Theories of Punishment

Punishment: The connection between wrongdoing and state imposed sanctions.

Sentencing: The system of law through which offenders are punished.

- The **lex talionis** (eye for an eye) theory of punishment states that a sanction must be selected that equates with the nature of the crime itself
- The **communicative theory** of punishment differs in that it requires sanctions be selected on their basis of their ability to best inform offenders of the wrongfulness of their crimes
- The **utilitarianism view** is that in which punishment is inherently bad due to the pain it causes the wrongdoer, but it is justified as it is outweighed by the good consequences stemming from it
- **Retributive theories** of punishment assert that offenders deserve to suffer and that the institution of punishment should inflict the suffering they deserve. Three aspects of the retributive theories include: only those who are blameworthy deserve punishment, punishment must be equal to the level of wrongdoing, and, punishing criminals is just itself.

The Goals of Sentencing

- **Deterrence:** To discourage people from committing crime. Specific deterrence refers to the attempt to discourage crime by punishing actual offenders for their transgressions. General deterrence seeks to dissuade potential offenders from engaging in unlawful conduct by demonstrating the consequences of offending. Marginal deterrence concerns whether there is a direct correlation between the severity of the sanction and the prevalence of an offence. Absolute deterrence relates to the threshold questions of whether there is any connection between criminal sanctions and criminal conduct.
- **Incapacitation:** Involves rendering an offender incapable of committing further offences. It is a means of protecting the community. To determine a sanctions efficiency, it needs to be shown that the offenders who are subject to such sanctions would have offended if they had not been restrained. If a person has previously committed a serious offence, it is not enough to assume that they will do this again in the future.
- **Rehabilitation:** Aims to discourage the commission of future offences by the offender. It seeks to alter the values of the offender so that they no longer desire to commit criminal acts. It attempts to render the individual as an honorable and productive law abiding citizen. Such programs may involve drug and alcohol problem solving, or anger management courses. However, at times, punishment and rehabilitation are inconsistent.

Sources of Criminal Law

- In Victoria, the primary source of criminal law is the **common law**, and as a general rule, any legislation must be interpreted in the light of the common law precepts – unless Parliament has expressly or through implication, evinced a clear intention to displace the common law
- Victoria’s main criminal law statutory provision is the **Crimes Act 1958 (Vic)**
- Criminal law is primarily a matter for the states, but the National Criminal Code has been in development with the Commonwealth and the State governments. It is currently in force, applying to all Commonwealth offences from 15th December 2001

Criminal Capacity

Children

- The common law doctrine of doli incapax states that a person under the age of seven is incapable of committing a criminal offence
- In Victoria, **the minimum age is now ten** – *Children and Young Persons Act 1989 (Vic) section 127*
- If the child is between the ages of 10 and 14 at the time of the alleged crime, the prosecutor must prove that they knew that their conduct was wrong, and that the elements of the crime are present

Corporations

- Corporations do in fact have the legal status of persons and can incur criminal liability under certain circumstances
- At common law, a corporation may only act through its officers or employees
- The **doctrine of vicarious liability** states that the acts of the employee in the course of their employment are attributed to the corporate employer – *Morgan v Babcock Ltd (1929)*.
- The **doctrine of identification** states that the acts and morality of the superior officers of the company act as the acts and mentality of the company itself – *Universal Telecasters (Qld) Ltd v Guthrie (1978)*.
- A corporation itself cannot be subject to imprisonment, but can be sanctioned by fines, and/or revocation or suspension of its right to conduct business. A corporation can be convicted of fraud, theft, drug offences, offences that pervert the course of justice and contempt of court. They can also attract criminal liability as accessories to a crime as well as principals and parties to conspiracy.

Classification of Crimes

Felony: Serious indictable offence

Misdemeanor: Minor indictable offence

- In Victoria, crimes are either summary offences or indictable offences
- **Summary offences** always in statutory form, and are dealt with by a Magistrate and no jury.
- The determination of summary offences is called a hearing.
- Indictable offences are very serious offences and are triable only before a judge and jury
- **Indictable offences** triable summarily are able to be triable summarily before a magistrate without a jury
- Crimes can also be classified on the basis of offences against the person and offences against property
- The category of offences against the person can again be divided into fatal and non fatal, and further to non fatal sexual to non sexual offences against the person.

A Doctrinal Framework – General Principles of Criminal Responsibility

- It is a general principle of criminal law that criminal responsibility may not be attributed to a person unless:
 - They engaged in conduct that is forbidden by the law (actus reus)
 - They possessed a mental state prohibited by the law (mens rea)
 - The mentality must have existed at the time of the offence (temporal coincidence)
- “Actus non facit reum nisi mens sit rea” – the act itself does not constitute guilt unless done with a guilty mind.

Elements of an Offence

- Each and every element of a crime must be present in order for the crime to have been committed
- The body of the crime = corpus delicti
- The Crown must prove each and every element which comprises the offence and the defendant’s complicity therein, beyond a reasonable doubt.

Mens Rea

- The defendant must have acted (or omitted to act where s/he was under a legal duty to act) with a *particular state of mind*; the mental element of an offence.
- Don't need motive to prove offence
- In Australia, *mens rea* can consist of one (or more) of:

Intention:

- Defendant acted (or omitted to act) with the **subjective intention** of bringing about one or more outcomes forbidden by the definition of the crime as a result of the volitional act

Recklessness:

- Defendant acted (or omitted to act) with the understanding (or an awareness or foresight) that there was a **probability or possibility** that some or all of the results forbidden by the definition of the crime would result from his or her conduct.
- Different to negligence: a person *should* have known (not a mens rea as, even though the person is an idiot, they did not have a guilty mind)

Knowledge:

- Defendant acted (or omitted to act) while **holding certain facts to be true**

Actus Reus

The actual act which is prohibited by law

- In the common law doctrine, actus reus refers to the requirement that the non mens rea elements be the result of a voluntary act or omission to act where law imposes a duty to act
- For an act to be voluntary, it must consist of some willed muscular movement
- It is willed if it results from a conscious decision to move a body part
- An omission can form the actus reus of an offence only where a person is under a legal duty to act
- In essence, the actus reus of an offence consists of:
 1. The non mens rea elements of the offence as defined by its statutory or common law definition
 2. The voluntary act or omission to act which brings about those non mens rea elements.

The Doctrine of Temporal Coincidence

- When an offence is one of *mens rea*, there can be no such crime unless the *mens rea* and the voluntary act or omission which brings about the non mens rea elements, exists, and are executed concurrently
- It is not the casual relationship between the *actus reus* and the *mens rea*, but rather the *actus reus* and the state of mind of the accused at the time of the offence.

Principle case: *Meyers v The Crown* [1997] HCA

- Couple (V and D) got into physical dispute in their apartment
- Police were called and when arrived, V was motionless on the floor with no visible serious injuries
- V died in hospital days later (due to internal bleeding)
- D charged with murder as his act of pushing V caused her to trip and hit her head, which caused her death
- D appealed to HCA claiming that the jury's verdict was unsafe or unsatisfactory, as, although he did not hit V, the blow to V's head which caused the bleeding and subsequent death, was as a result of D pushing her away in self-defence after he attacked her and her tripping and hitting her head on a table (i.e. no temporal coincidence as he was not in a state of mind to kill her when he pushed her, resulting in the fatal injury)
- Held: due to facts of the case (neighbours hearing him scream threats) the jury's verdict was just, and the conviction stood.

Defences

- **Primary/Denial Defence:** Asserts that based on the evidence, the prosecution has failed to prove one or more of the constituent elements of an offence with which an accused is charged and/or that the accused is the person who committed the alleged crime
- **Secondary/Affirmative Defence:** The accused asserts that even if the prosecution has proven each of the constituent elements of that offence, and the accused's complicity therein, they are nonetheless entitled to an acquittal because of a defence that is recognised by law and supported by the evidence adduced at a trial.

Strict Liability

- This element states that by way of express statutory statement or judicial interpretation, do not require proof of fault (the prosecution does *not* need to prove that any kind of mens rea or ordinary negligence existed)
- Nearly all strict liability offences exist in statutory form
- Factors relevant to determining if an offence is one of strict liability:
 - **Words of the Statute:** It could be argued that the failure of the legislature to expressly incorporate a fault element leads to the conclusion that it intended the offence to be one of strict liability - *Mayer v Marchant*. It could also be argued that if the legislature intended to make the offence one of strict liability, it would have done so expressly.
 - **Maximum Penalty:** The higher the penalty, the less likely that offence does not require a mens rea element. Where an offence is punishable by term of imprisonment that is a factor that mitigates strongly in favour of presumption that proof of mens rea required.
 - **The utility in making the offence strict liability:** Offences which make one liable for the conduct of others are unlikely to be construed as ones of strict liability.
 - **The harm sought to be prevented:** It has been suggested that the greater the social harm to which the offence is directed; the less likely it is that the offence requires a mens rea. In the case of *He Kaw Tay*, the High Court took the opposite approach, whereby the greater the harm that the offence seeks to prevent, the greater the penalty attached to the offence, and hence the less likely the offence will be of strict liability.
 - **Moral Culpability:** Matters of broad public health, safety and welfare are less likely to require a mens rea – *Proudman v Dayman (1941)*. This is especially so where the gravity of the risk is significant.

Defences to strict liability

- There are two defences available to strict liability offences: The Proudman defence and the 'external intervention' defence.
- The **external intervention defence** requires that the accused show that their conduct occurred as the result of a stranger or non human act, that they had no control over their conduct, and, that they could not have been reasonably expected to guard against such external intervention – *Mayer v Marchant*.
- **The Proudman Defence – Honest & Reasonable Mistake:** Where an offence is one of strict liability, there is a presumption that the Proudman defence of honest and reasonable mistake of fact still applies.
- An accused who commits the actus reus of the offence will avoid liability where they had an honest and reasonable belief in the existence of facts, which if true, would have made their conduct entirely lawful
- It cannot be grounded on a mistake regarding the existence, application or content of a law – *Thomas v R (1937)*. The mistake made must be one of fact.
- The Proudman Defence consists of four essential elements:
 1. The mistaken belief must be genuinely and reasonably held
 2. There must be an actual mistake and not mere ignorance
 3. The mistake must be of fact and not law
 4. The mistaken belief must relate to existence of facts which if true, would have made the accused's conduct lawful

Absolute Liability

- Legislature can choose to abrogate the Proudman defence expressly or through implication
- The offence is then referred to as one of absolute liability
- Therefore the Proudman defence is not available
- There is a rebuttable presumption that an offence is not one of absolute liability. In considering whether such an offence has been created, the court is guided by the same considerations that are relevant to determining whether the presumption of a mens rea has been rebutted.

Inchoate Crimes

- Such crimes include attempt, incitement and conspiracy
- In such crimes, the mental element of the crime, although formed, is not fully expressed in the conduct of the accused
- In these crimes, criminal law comes closest to holding people criminally responsible for their thoughts alone
- **Incitement:** Encouraging or attempting to induce or persuade another person to commit a crime
- **Conspiracy:** In agreement between or among two or more persons to commit an illegal act.

Participation

- This is the law of participatory liability (also called complicity)
- At common law, the basic distinction of participatory liability is between principal parties and accessories.
- **Principal in the First Degree:** A party who personally performs part of or all of the actus reus of the crime. If two or more parties each perform part of the actus reus of the crime, then each is considered to be a joint principal in the first degree. It also includes parties that are present at the scene and acting in concert as a part of a pre-conceived agreement to commit a crime
- **Principal in the Second Degree:** A party that is present at the scene of the crime, and although provides assistance and/or encouragement to the principal/s in the first degree, does not significantly contribute to or actually perform any of the actus reus of the crime.
- **Accessory before the fact:** A party who provides the same type of assistance/encouragement as a principal in the second degree, except that they are not at the scene where the crime takes place.
- **Accessory after the fact:** This party does not provide assistance or encouragement in the actual commission of the crime, but takes affirmative action after its commission to secrete one or more of the participants to avoid apprehension or prosecution, while knowing or believing that they have committed the offence/s in question.
- The **common purpose doctrine** states that secondary parties (those other than the principals in the first degree), are not only liable to the same extent as a principal in the first degree for the offence that was actually contemplated by the secondary parties and committed by the principals in the first degree, but also for any other crimes committed by them which the secondary parties contemplated might be committed as incidental to the offences actually contemplated.

Transferred Malice

- Under the doctrine of transferred malice, when an accused acts with the requisite mens rea to commit an offence against a particular person or property and instead succeeds in causing the same type of harm to another person or property, the law treats the accused in the same manner as if they had carried the crime as intended
- Therefore the mens rea is transferred – *R v Newman [1948]*
- The actus reus of the intended offence needs to be identical to that of the resulting offence for this doctrine to operate.

Burdens of Proof

- The **legal burden of proof** refers to the burden of ultimately persuading the fact finder of the existence or non existence of a disputed fact by whatever standard of proof is required by law
- In criminal trials, the Crown carries the legal burden for every element of the offence charged. The standard of proof is beyond all reasonable doubt
- The **evidential burden of proof** refers to the burden of persuading the court that there is ample evidence in support of a claim or defence to warrant a determination by the fact finder as to whether the legal burden has been discharged. In criminal trials, the Crown bears the evidential burden with respect to every element of the offence charged
- To test if the Crown has satisfied this burden, is to ask if a jury or judge could reasonably find that these facts have been proven beyond a reasonable doubt
- When the accused asserts a secondary defence, they then bear the evidentiary burden with respect to each element of the defence
- When **insanity and diminished responsibility defences** are used, the accused bears both the evidential and legal burdens of proof. The standard of proof then for the evidential burden is on the balance of probabilities.