

# **LLB 130 CRIMINAL LAW AND PROCESS A**

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# CONSTRUCTING AND DEFINING CRIME

## *What is a crime?*

A crime is a legal wrong that can be followed by criminal proceedings which may result in punishment (G Williams, CB 59)

## *Crime as a “social” construct*

Crime is not some given “object”. It is produced in and through the knowledge and power relations of society.

Examples of crime as a social construct include:

- changes to the law of provocation
- removal of rape in marriage
- decriminalisation of homosexual sexual activity
- removal of public drunkenness

There is nothing ‘natural’ or necessary’ as to why certain acts are crimes at particular points in time, or why they cease to be at others. Rather, to understand why they are crimes, we must locate them in particular discourses and knowledge regimes.

## *Commonsense*

The commonsense response to the question “what is a crime?” is that everyone knows a crime if they see one.

The enduring themes within law and order commonsense can be reduced to the following:

- soaring crime rates
- “it is worse than ever”: law and order nostalgia
- the future is New York or LA
- the criminal justice system is “soft on crime” and does not protect citizens
- the “solution” is more police with more powers
- we need “tougher penalties”
- victims should be able to get revenge through the courts

## *Criminalisation*

“The constellation of social practices which form the subject matter of criminal law ... criminal justice and criminological studies ... Escaping the notion of crime as ‘given’, the idea of criminalisation captures the dynamic nature of the field as a set of interlocking practices in which the moments of ‘defining’ and ‘responding to’ crime can rarely be completely distinguished and in which legal and social constructions of crime constantly interact”. (N Lacey, CB 47)

## *Why is an act defined as a crime?*

- Public interest is harmed
- Conduct occurs in public
- State may interfere with liberty of others where actions would harm others
- Morality

- Offensiveness
- Conduct causing moral panics

Note: None of these explanations can totally explain why we understand a certain act as a crime.

### *Effects of over criminalisation*

Over criminalisation may lead to poor resource allocation. For example, the combined federal and state expenditure on illicit drugs (2009-10) was \$1.7 billion, with 66% on law enforcement, 21.3% on treatment, 9.2% on prevention and only 2.1% on harm reduction. Another example of poor resource allocation is in arrest and conviction/imprisonment rates: 1000 “crimes” committed → 400 reported to police → 320 recorded by police as offences → 64 cleared up → 43 persons convicted → 1 person imprisoned.

### *Normative theories of criminalisation*

“A theory or set of criteria which ought to determine the appropriate limits to the criminal law, enabling the specification of what sorts of behaviour are appropriately criminalised” (CB 47)

Normative theories suggest when and how the criminal law should be used, for example:

- Should only be used for substantial wrongdoing;
- Should be enforced with respect to equal treatment and proportionality;
- The principle that persons accused of substantial wrongdoing ought to be afforded the protections appropriate to those charged with criminal offences;
- The principle that maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrongdoing;
- Serious offences should require MR.

“In considering whether new offences should be created, factors taken into account include whether:

- The behaviour in question is sufficiently serious to warrant intervention by the criminal law;
- The mischief could be dealt with under existing legislation or by using other remedies;
- The proposed offence is enforceable in practice;
- The proposed offence is tightly drawn and legally sound; and
- The proposed penalty is commensurate with the seriousness of the offence.”

(Lord Willians, CB 61)

## **COMPONENTS OF CRIMINAL LAW**

### *Criminal liability*

Criminal liability depends on the Prosecution proving four things:

1. That the defendant has the legal capacity to commit the offence;
2. That the defendant commits the relevant actus reus;

3. That the defendant has the relevant mens rea at the time of committing the actus reus;  
and
4. That the defendant has no defence or excuse available to them.

### *Doli incapax*

The status of children under the law is contained in the *Children (Criminal Proceedings) Act 1987* (NSW). It states that, for children under 10, the law presumes that they are incapable of committing a criminal offence. Between the ages of 10 and 14, they are presumed to be incapable but this can be rebutted. The Prosecution must prove that the child knew the offence was seriously wrong (rather than just being naughty or mischievous). Once a child reaches 14, they are deemed capable of criminal behaviour.

Rebutting the presumption requires the application of a subjective test. This means that the Prosecution must prove that the child actually knew it was wrong, not that the child should have known. (*RH v DPP* [2014] NSWCCA 305 CB 152).

This is not always easy to meet. “The application of the objective test no doubt followed from the stark absence of evidence relating specifically to the knowledge and state of mind of the applicant. The fact, however, merely demonstrated there was only sparse material from which a finding could be made beyond reasonable doubt as to the particular knowledge and state of mind of the applicant. It did not justify substituting an objective test for that required by law”.

### *The “golden thread” of English criminal law*

This golden thread alleged to run through the criminal law accords that the burden of proof is on the prosecution to prove the guilt of the accused beyond reasonable doubt.

“Throughout the web of the English criminal law one golden thread is always to be seen – that it is the duty of the prosecution to prove the prisoner’s guilt ... if at the end of and on the whole of the case, there is reasonable doubt, created by evidence given by either the prosecution or the prisoner, the prosecution has not made out the case and the prisoner is entitled to an acquittal” (*Woolmington v DPP* [1935] CB 235)

### *Why beyond reasonable doubt?*

Beyond reasonable doubt is a very high standard of proof.

“I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent man to be condemned unjustly” (John Fortescue, *De Laudibus Legum Anglia*).

### *Actus reus*

This is the physical, external or observable element of the crime.

It can be broken down into:

1. Conduct
2. Circumstance
3. Consequence

Most offences are committed by a positive act of the accused, while some may be committed by omission (*Fagan*).

### *Voluntariness*

Voluntariness is an element required for every criminal offence.

This is described as the minimum degree of mental control over bodily movements (*Ryan*). There is an evidentiary presumption that a conscious person acts voluntarily. The defendant must therefore raise the issue that the act was involuntary.

Some law define categories of involuntary conduct include: acting under duress, sane automatism (this incorporates acts such as those done while asleep, in an epileptic seizure, when hypoglycaemic and whilst concussed).

### *Causation*

Where the crime as a consequence component, the Prosecution must prove that the defendant's conduct caused those results or consequences.

There are three main tests of causation:

- Substantial or significant cause test
- Natural consequences test
- Reasonable foreseeability test
- The "but for" test (no longer used)

These are objective tests.

### *Novus actus*

This is where a voluntary act (either by the victim or a third party), or an extraordinary occurrence amounts to a novus actus interveniens which breaks the chain of causation. This event means that the conduct of the defendant can no longer be said to be the substantial cause or consequence, nor is the consequence natural or reasonably foreseeable.

### *Mens rea*

This refers to the guilty mind. This encompasses several states of mind, for example: intention, knowledge, recklessness and negligence.

There is a presumption at common law that all criminal offences require the proof of mens rea, but this may be replaced where the offence is strict or absolute liability.

A subjective mens rea state requires that the mental state be evaluated from the position of the defendant's actual state of mind at the time that they performed the AR.

An objective tests means that the mental state is evaluated from the perspective of the reasonable, hypothetical person in the situation of the defendant.

### *Subjective mens rea states*

Intention: purpose with which the defendant acts or the defendant means to do a particular act or bring about a result

Knowledge: usually associated with the circumstance component

Recklessness: the defendant foresees a risk that a certain consequence may result from their conduct but they go ahead anyway. The amount of risk that the defendant must foresee depends on the specific offence.

Advertent recklessness – defendant thinks about the risk of consequence and acts anyway.

Inadvertent recklessness – the defendant fails to even turn their mind to the risk of the consequence

### *Objective mens rea states*

Negligence: arises where there is a duty of care and the defendant's conduct involves such a great falling short of the standard of care which a reasonable person would have exercised in the situation, and that this merits criminal punishment.

### *Coincidence*

There is a general rule that there must be a coincidence between the AR and the MR (*Meyers*).

“An act does not make a man guilty of a crime unless his mind be also guilty”

## **ASSAULT**

### *Stats*

Assault is a very high volume offence.

There were 63,115 recorded incidents of assault in 2014, with 45, 831 being finalised.

### *Common assault*

The common law originally contained two separate offences: assault (the threat of unlawful physical contact) and battery (actual physical contact).

### *Legislation*

The offence of common assault is found under s 61 *Crimes Act 1900*.

It is:

61 Common assault prosecuted by indictment

Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.

There are two options for the AR of this offence:

1. Unlawful physical contact
2. Act creating apprehension of imminent unlawful physical contact

#### (1) Unlawful physical contact

This must be a voluntary act – an omission will not constitute assault (*Fagan*)

The act need not cause harm or injury. Examples include: touching/grabbing/pushing, touching clothing that they're wearing, spitting etc.

The application of force can only give rise to criminal liability if it occurs without the other persons express or implied consent.

(2) Apprehension of imminent physical contact

This is where the defendant creates in the victim an apprehension of immediate unlawful contact.

This also requires a positive act (*Fagan*).

Meaning of imminence: *Knight* – threatening and abusive phone call, absent potential of immediate violence, did not constitute assault CB 594.

*Zanker v Vartzokas*: verbal threat, within the context of continuing unlawful imprisonment, constituted threat of immediate violence, assault occasioning ABH

The mens rea for assault is either:

1. Intention, OR
2. Recklessness.

Recklessness is a subjective fault element. The prosecution must prove that the defendant foresaw the possibility of the relevant consequence yet acted anyway (*Blackwell*)

*Consent*

While a person can consent to a “common assault” where no actual bodily harm is inflicted, rendering the conduct non-criminal, it is another question as to whether a recipient’s consent to intentionally (or recklessly) inflicted physical harm thereby can provide a defence to the assault. In the case of *Brown*, a number of exceptions were described to which the principle that a person cannot consent to harm, eg: prize, fighting, sparring and boxing, contact sports, surgery, lawful correction, dangerous pastimes, bravado, religious mortification, rough horseplay, and prostitution.