



# LAW109: CRIMINAL JUSTICE

S2 2018

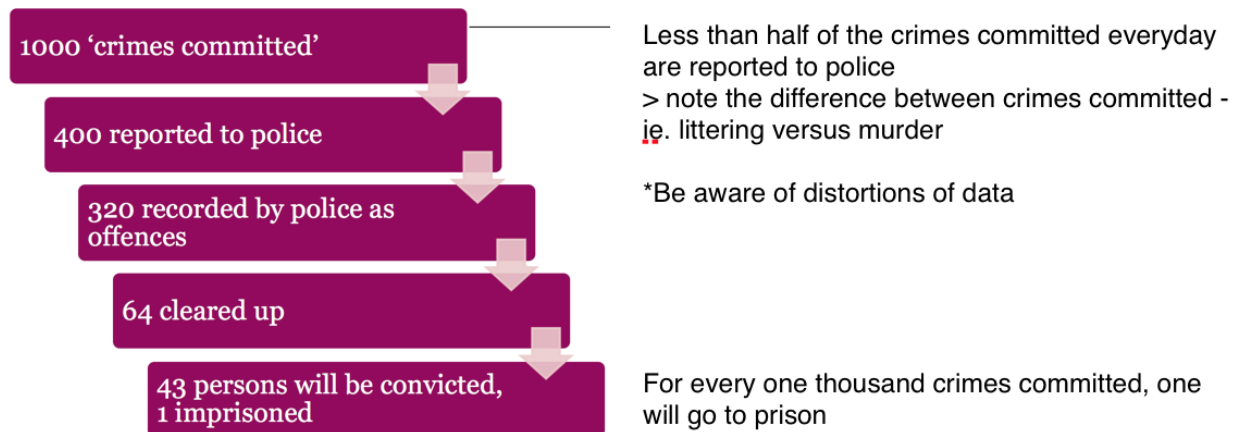
Macquarie University  
Macquarie Law School

## Contents

---

1. **Philosophy of Crime**
2. **General Principles and Criminal Responsibility**
3. **Homicide**
4. **Assault**
5. **Defences**

## CRIMES AND CRIMINAL JUSTICE



It should be noted that the law is constructed to condemn certain behaviours

- some of these attempts to condemn or control behaviour fail
- a good example is illicit drugs - their use has not been reduced but they are still a part of the criminal process (arrest/prosecution/penalty)

### WHAT IS CRIME

- There is no single accepted definition
- Crime is dictated by popular culture - books, tv shows (associations with jack the ripper, sherlock holmes etc)

“A crime (or offence) is a legal wrong that can be followed by criminal proceedings which may result in punishment”

*Glanville Williams, Textbook on Criminal Law (2nd ed, Stevens and Sons, 1983) 27*

The above quote has two qualifications:

- Can be followed - not necessarily
- May result in punishment - again no guarantee
- “a crime is what the law says a crime is”
- Does not clarify what should be a crime - does not provide whether the law is just or reasonable
- Not a sociologically useful definition

The definition of crime has changed immensely throughout time is not necessarily constant in comparable cultures

- even an observation of the US, UK and Australia will reveal different concepts of crime

Some of the most influential individuals in history have fallen on the wrong side of the law

- Socrates: death sentence for corrupting youth
- Alan Turing: homosexual relationship
- Oscar Wilde: sodomy
- Nelson Mandela
- Mahatma Ghandi: Sedition
- Mohammad Ali: Conscientious objection

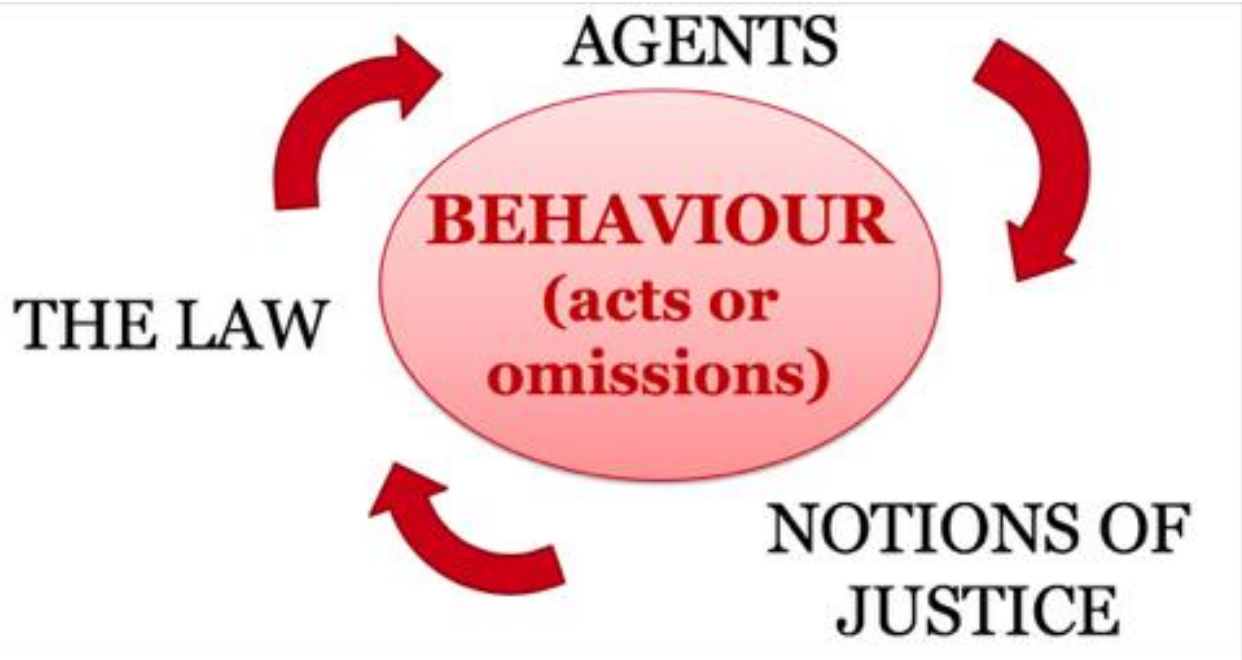
Our understanding of crime has changed since these times

Criminal law is greatly influenced by social and political dimensions, perhaps more than any other area of law

This is evident in knee jerk reforms such as:

- Bail reform
- One Punch laws
- Anti-terrorism laws
- Control Orders
- Police Powers

### **CRIMINAL JUSTICE NEXUS**



Crimes can be both an action or a failure to action.

Behaviour can be either criminal or undesirable, **AGENTS** decide what the law should or should not be (such as parliamentarians, the public, lobbyists etc) also have influence over this.

**NOTIONS OF JUSTICE** are then considered and are subject to change over time.

The **LAW** is then constructed in the interest of a number of stakeholders including:

- The victims
- The accused
- defenders

In contemporary society there has been a rise in the rights of victims (ie. victim impact statements)

### **HOW SHOULD THE CONTENT OF CRIMINAL LAW BE DETERMINED**

- Prevention of harm
- Enforcement of Morality
- Preserving Community Welfare and the Public Interest

## UNIVERSAL DECLARATION OF HUMAN RIGHTS

### Article 29

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and **respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.**

These schools of thought are reflecting in Australian Law and in the Declaration of Human Rights

### THE PREVENTION OF HARM

*'...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'*

Analysis of the harm principle:

- What do we mean by harm
- How do we quantify it
- Must the harm be direct or do we include indirect forms of harm
- Is offence the same as being harmed
- Does the principle accommodate concerns of potential harm (ie. environmental law - release of damaging pollutants - may not harm initially)

### ENFORCEMENT OF MORALITY

Lord Devlin, *The Enforcement of Morals* (OUP, 1965)

179

*'...society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence'*

*Test for immorality: if conduct arouses feelings of indignation or revulsion in ordinary people.*

- This is a vague and difficult to measure - who or what is the ordinary person

Criticisms of morals in law:

- In systems where law and religion are aligned, morality inherently has legal force
- Relationship between sin and crime
- Should sin be crime
- In a legal system that is aligned with religion what happens to minority groups
- Beyond religions ideas of morality as a concept of common social morality

### COMMUNITY WELFARE

- Criminal law as what is best for the community as a whole
- As a cost to society - financial harm, damages, violence etc.
- Maintenance of social order and national security
- How far can the protections of community welfare go?
- The interdependence of autonomy and welfare
- Smoking/drinking etc. should we be allowed to take risks or should the state protect us

### Terrorism laws

- planning a terrorist attack is a crime - condemning an act before it is committed
- Planning other crimes is not illegal
- Changing a traditional understanding of the law

All three schools of thought can conflict, a decision must be made to favour one school

# HOMICIDE

Homicide crimes are those which involve the death of a human being. Various homicide charges include:

1. Murder
2. Voluntary Manslaughter
3. Involuntary Manslaughter

Homicides are regarded by the community as a crime against humanity rather than a mere infraction of legal code.

## 1. PATTERNS OF HOMICIDE

- 1) Homicide is a crime that is socially, historically and culturally determined
  - a. It is not necessarily just the random action of the deranged or pathological individuals
  - b. Diversity of homicide patterns around the world are evident as reflections of social and cultural factors
- 2) Homicide comprises a variety of offenders and victims in different social settings
- 3) Homicide in NSW is largely due to interpersonal disputes and rarely is instrumental or ideological
- 4) The majority of interpersonal killing involved intimates
  - a. Family members, friends and lovers are the most common victims
- 5) Homicide patterns reflect cultural norms
- 6) Homicide is a spontaneous rather than a premeditated crime
  - a. Most homicides arise from people responding to situations in a relatively unpremeditated manner
  - b. Frequently the response is fuelled by alcohol and is exacerbated by the availability of lethal weapons
- 7) Homicide offenders exhibit a wide range of moral culpability

## 2. RELATIONSHIP BETWEEN VICTIM AND OFFENDER

- In a report from the NSW Police from 1968-81, it was found that Females were most likely to kill and be killed within a family. Only rarely were they involved in other types of homicide. Males on the other hand, while also most likely to kill, and be killed within a domestic context, were considerably involved in homicides outside the family. One quarter of homicides are when friends/acquaintances are the killers. One fifth of them were strangers.
- The National Homicide Monitoring Program (NHMP) distinguishes between three categories of homicide: domestic homicide, acquaintance homicide and stranger homicide
- Stranger homicides include incidents where the victim and the offender were known to each other for less than 24 hours.
- Domestic homicides are subcategorised:
  - intimate partner homicide – where the victim and offender share a current or former intimate relationship, including homosexual and extramarital relationships
  - filicide – the killing of a child by a parent or step-parent
  - parricide – the killing of a parent or step-parent by a child
  - siblicide – the killing of a sibling

- Of the homicide incidents recorded between 2008-2010, 37% were acquaintance homicides, 36% were domestic homicides and 13% were stranger homicides.
- Of the domestic homicides, 66% were intimate partner, 12% filicides, 11% parricides, 2% siblicides and 9% other).
- Female victims are far more likely than male victims to be killed by someone with whom they have been intimate
- In 73% of intimate partner homicides, the deceased was female, while in 86% of acquaintance homicides and 78% of stranger homicides the victim was male.

## **2.1 FEMICIDE**

- Femicide is the killing of women aged 15 years and over
- 94% of offenders of femicide are male
- 60% of femicides involved killings by an intimate partner
- 11% of men were killed by an intimate partner, mainly females
- 90% of femicides were killed as a result of altercations of a domestic nature, including general domestic arguments, desertion or termination of an intimate relationship, and jealousy/rivalry.
- 40% of these victims were involved in an altercation involving desertion or termination of a relationship and jealousy, reinforcing other research which suggests that actual or imminent separation increases the risk of homicide.
- The lowest likelihood of femicide among intimates is associated with the victim being employed.

## **2.2 CHILD HOMICIDE**

- NHMP figures from 2008-2010 show that approximately 9% of homicide victims were children under 18, with 2% infanticides, where the child is aged less than one
- In 2006-07 parents were responsible for 85% of the deaths of children under 15 and no child victims were killed by a complete stranger
- Outside of the family context, males are more likely to commit homicide, however, inside of the family context, females are more likely to commit homicide. This varied with biological contexts; men killed both biological and their de facto children, whereas women only killed their biological children
- Neotacides – killing of a child within 24 hours of birth
- Neotacides exclusively involved female offenders. These women were trapped in a web of circumstances and were unable to face up to the unwanted pregnancy
- Biological fathers who killed their children were usually separated or threatened with separation from the child's mother.

## **2.3 KILLING FRIENDS AND ACCOMPLICES**

- NHMP data from 1999 showed that 80% of homicides involving friends and acquaintances occurred between a male victim and a male offender.
- Main influences were precipitated by alcohol 22%, bad debts or drugs 16%
- Of the total, acquaintances 70%, friends 27% and neighbours 2.5%

# **3. STATISTICS**

## **3.1 MALE VIOLENCE**

- In the coronial files covering all homicides reported in Victoria from 1985 to 1989, Polk identified four distinctively masculine scenarios of violence:



- In the first scenario, 27% of homicides evolved in the context of sexual relationships, with the bulk of these involving a male offender and a female victim. Most of these resulted from the attempt of the male to assert control over the behaviour of his partner through the use of violence, often in the context of jealousy.
- The second scenario involved homicides which stemmed from distinctively masculine confrontation arising out of defence of honour and maintenance of reputation in the face of verbal insult, a gesture or a jostle (22%), where both offender and victim were nearly always male and lower class.
- The third and fourth scenarios of male violence were comprised homicides associated with other criminal behaviour (16%), and those where the offender planned the use of violence to resolve a personal dispute that had developed over time (10%).

### 3.2 WEAPONS

- The NHMP data from 2008-2010 shows that 38% of victims were stabbed, 25% were beaten to death and 13% died from gunshot wounds.
- There has been an upward trend in the use of knives and sharp instruments over the past 10 year, whilst the use of firearms has decreased from 25% to 12% in 2009-2010.
- The 1996 Nationwide Agreement on Firearms was working in terms of making it more difficult for unsuitable individuals to legitimately obtain a firearm.
- From 1991-2001, the vast majority of firearm deaths in Australia were in fact suicides (77%). Homicides comprised of 15%

### 3.3 ALCOHOL AND HOMICIDE

- NHMP data for 2008-2010 shows that the consumption of alcohol by either victim or offender preceded nearly half of all homicide incidents, and most incidents involved drinking by both.
- While 43% of acquaintance homicides involved drinking by the offender and 36% of domestic homicides, the offender was drinking in only 19% of stranger homicides.
- Homicide incidents in 2000-2006 classified 47% as alcohol related
- 60% of alcohol related homicide involved alcohol consumption by both victim and offender, 21% by the offender alone, and 19% by the victim alone.
- In intimate homicides, those involving a male offender and female victim were less likely to be alcohol related (36%) than those where the offender was a female and the victim was a male (73%)

## 4. THE LEGAL FRAMEWORK

From the Crimes Act 1900 (NSW)

<p><b>CRIMES ACT 1900 (NSW)</b>  <b>s 18 Murder and Manslaughter Defined</b></p> <p>18 (1)(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.</p> <p>(b) Every other punishable homicide shall be taken to be manslaughter</p> <p>(2)(a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.</p> <p>(b) No punishment or forfeiture shall be incurred by any person who kills another person by misfortune only</p>
--

### ***Lavender [2005] HCA 37***

- The High Court held that s 18(2)(a) only related to the offence of murder, as defined in s 18(1)(a), not to manslaughter, which is defined at common law and referred to in s 18(1)(b).

PROOF OF MALICE WAS NOT AN ELEMENT OF MANSLAUGHTER.

- Lavender was working on a sand quarry
- There were children playing in the quarry
- Lavender chased the children off the property but his view was obstructed and ran over one of the children in the process, killing them
- Lavender was found guilty of manslaughter by criminal negligence
- He was found guilty on the basis that he had intent to scare and fell short of the expected duty of care (those driving a vehicle have a duty of care around them)
- It was clear the offender's actions were voluntary

### ***Coleman (1990) 19 NSWLR 467***

- Acts of murder which rely on intent to kill or cause grievous bodily harm or reckless indifference to human life all are performed 'maliciously'
- Hence they satisfy the requirement of Crimes Act 1900 (NSW) s 18(2)(a)

Manslaughter is left completely undefined in statute and hence must be defined in the common law.

There are two categories of involuntary manslaughter:

1. Manslaughter by an unlawful act.
2. Manslaughter by criminal negligence.

In allegations of murder, substantial scope is left to interpret the phrases in legislation 'reckless indifference to human life' and 'intent to kill'.

In appeals, homicide charges are grossly overrepresented.

## **5. CAUSATION**

- Homicide demands that a consequence, death, be caused by the accused.
- If the accused fails to cause death, they must be acquitted of both murder and manslaughter.
- The actus reus requirements of both offences are identical, with the exception of constructive manslaughter and constructive murder.
- The *most* that a person can be held criminally liable for if they fail to bring about death is an attempt. On a charge of attempted murder, it has been held that there must be proof of an actual intent to kill (*Knight* (1992) 175 CLR 495) even though the mens rea for the completed offence is broader; it is sufficient mens rea for murder that the accused intended grievous bodily harm, or was recklessly indifferent to human life.
- Apart from attempt, however, an assault or aggravated assault will usually have been committed

### **5.1 MURDER AND INVOLUNTARY MANSLAUGHTER**

- The difference is drawn primarily between the mens rea requirements
- Murder previously required proof of *malice aforethought*.