

CRIMINAL LAW NOTEBOOK 2026

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Introduction to Criminal Law

What is Crime?

- No universally accepted definition of a 'crime'.
- There is no single common feature to all crimes, other than the fact that crimes can attract punishment under the criminal law.
- Glanville Williams: a crime is 'a legal wrong that can be followed by criminal proceedings and which may result in punishment'.
- Criminal conduct includes '... such acts or omissions as are prohibited under appropriate penal provisions by authority of the State.'
 - Case: Lord Atkin → *Proprietary Articles Trade Associations v A-G (Canada) [1931] AC 310 at 324*
 - Certain conduct is prohibited by the law; and those who engage in that conduct are liable to punishment by the state.

Criminal vs civil liability

Civil liability: here, when a person commits a civil wrong, they're sued by the person who has been wronged and may be compelled to make some form of compensation/restitution.

Criminal liability: when a person commits a criminal wrong, they are exposed to prosecution and punishment by the state.

Theories: what should be a crime?

- These theories explain and give content to the body of regulation (legislation) that makes up the criminal law.

Moral theory (right vs wrong)

- There is a strong connection between those things which are regarded as morally wrong and those things that are prohibited by the criminal law.
- There is no consensus about what is right vs wrong. Examples:
 - Religions differ on moral principles.
 - Should adultery, abortion, sex work be criminalised?

Liberalism – the harm principle

- Stated by 19th century political philosopher John Stuart Mill.
- The state may only criminalise those acts that cause harm to another.
 - Harmless acts (or harm to self) should not be criminalised.
- Existence of crimes like theft, murder, burglary are easily justified according to this.

Utilitarianism

- *'The greatest good for the greatest number.'*
- a criminal law is justified whenever the good done by the prohibition outweighs the harm caused by the prohibited conduct.
 - Utilitarianism often disadvantages minority groups.

Human rights approach

- *'Conduct that is in breach of a human right'*.
- Captures a wide range of conduct, including racism & sexism, destruction of rainforests, nuclear testing and worker exploitation.

- But is not workable as a general basis for criminalisation.

Positivism

- Crime is that which parliament (or some other law-making body) declares to be a crime.
- As a theory, positivism is undeniably correct – but it is not useful in helping ascertain what makes certain conduct the subject of criminal prohibition.

Check + Limits on law-making

Constitutional limits

- Cth constitution
 - State legislation is subject to the Cth constitution. Examples:
 - States cannot legislate on topics exclusive to the Cth (s 51).
 - If there is a conflict between state and Cth, Cth law prevails (s 109).
 - Ch III provides constraints on state parliaments from conferring powers on state courts that impair the institutional integrity of those courts.

Judicial review

- ‘it is emphatically the province and duty of the judicial department to say what the law is’.
 - *Marbury v Marbury*, 5 U.S. 137 (1803) Marshall CJ
- E.g. HCA declared the previous crim law SA legislations invalid on 2 August 2023.
 - *Disorganized Developments Pty Ltd v South Australia* [2023] HCA 22.

Committee scrutiny

- Parliament has to consider complex questions and to be aware of the opinions and needs of the wider community, parliament created some temporary and standing committees that investigate issues.
- Examples:
 - Select committee on the prohibition of neo-Nazi symbols.
 - Select committee of artificial intelligence – using ai to commit crim offence.

Democratic system of govt

- The legislature (& executive are held accountable for criminal-law making through out democratic system of govt. this incorporates the concept of representative and responsible govt as well as the rule of law.

Executive’s role in criminal law making!

- Executive administers the criminal law. Members include: police, director of public prosecutions, corrections, attorney-general’s department, attorney-general of SA (Kyam Maher).
- Current SA attorney-general’s department crim law reform tests:
 - Criminalising coercive control
 - Criminalising deepfakes
 - Reviewing s 20A CLCA
 - Reviewing sexual consent laws in SA
 - Minimum age of criminal responsibility
 - Reviewing bail laws

Elements of Criminal Offences

Anatomy of crime

All criminal offences consist of two types of elements:

1. The *external* or *physical* element
 - (actus reus – wrongful act)
 - The voluntary occurrence of conduct specified in the definition of the offence.
2. The *fault* or *mental* element
 - (mens rea – guilty mind)
 - The mind of an accused and what they were thinking to make them criminally responsible for that conduct.

1) External or physical elements – *actus reus*

- This includes the occurrence of physical conduct, acts, omissions or events that are prohibited by the criminal law. It does not include what the defendant thought or intended, just what actually occurred.

1a	Conduct	Act (most common)
1b	Conduct	Omission (where statutory/common law duty exists)
1c	Conduct	State of affairs (possession, unlawful on premises)
2	Circumstances	External to accused (e.g. absence of consent)
3	Result/consequence	Not always required

Below is a detailed description of the above physical elements:

1) Conduct (an act or omission)

Almost all criminal offences contain a conduct element. The conduct can be:

A positive act

- Most offences involve positive acts, which incorporates people ‘doing things’:
 - murder (shooting a victim)
 - assault (making physical contact)
 - theft (dealing with property)
 - causing death by driving (driving a car)

An omission

- An omission/failure to act may also give rise to criminal liability if the accused has duty to act under statute or common law.
- The general rule at **common law** is that ‘[i]t is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder’. → **R v Comey (1882)**.
- Where there is a legal duty to act, the accused may be criminally responsible for failing to act reasonably in accordance with that duty. These duties (under common law) involve:
 - **Family relationships** → **R v Russell [1933]** → the defendant witnessed his wife drowning his children and he was held responsible for manslaughter as parents have a duty of care towards their children.
 - **When someone voluntarily undertakes the care of another** → **R v Taktak (1988)**
 - **Where an accused has created a situation of danger** → **R v Miller [1982]**
- Omissions overlap with negligence, and the test of negligence in the criminal law is similar to the tort of negligence.

- The main difference: breach of duty must be gross as to warrant criminal punishment.
 - The breach must be criminal negligence – a great falling short of the standard of care required of a reasonable person in the circumstances.

2) Circumstances

- A form of conduct may not be a crime unless in certain circumstances. Examples:
 - Presence of consent is a circumstance → hence sex is not a crime, but rape is.
 - Indecency and consent in assault is a circumstance → basic assault with a sexual connotation to it makes it indecent assault.
 - Consent in taking property is a circumstance → borrowing something is not a crime, but theft is,
- A physical element may inquire into the mental state of the victim. (whether consent was given in rape).
- Inquiries into the mental state of someone is a physical element as it relates to circumstances external to the defendant.

3) State of Affairs

- Aka ‘state of being’ or ‘status offence’ which criminalises the status of a defendant. Example:
 - being drunk/disorderly.
 - being a member of a prescribed criminal organisation.
 - being in a public place.

4) Result

- The external element of an offence may be the result of physical conduct (result crime) or the conduct itself (conduct/circumstance crime) – where the result is not required.
- Where the physical element is a *result*, the prosecution must prove that the defendant *caused* it.

Result crime

- Requires that the conduct of the accused results in a certain consequence (e.g. death is the ‘result’ that is required for the charge of ‘murder’ to be applied).
- The physical act of the accused must have ‘ed the occurrence of that consequence (e.g. someone stabbing someone else for their death to occur) → **R v Hallett [1969]; Royall v The Queen [1991]**.
- The conduct need not be a direct cause of the consequence - it does not even have to be the sole cause - it is enough that the conduct is an ‘operating and substantial cause’.

Conduct crime

- Prohibits certain conduct regardless of the consequences (e.g. unlawful possession of firearm may constitute the external element even if the firearm isn’t charged and there are no victims).

Conduct (act)	Most common. Engaging in a positive act or doing something.
Conduct (omission)	Failure to act where a statutory or common law duty exists.
State of affairs	Easier to think of as a state of being or status offence (e.g. drunk or disorderly, in a public place)
Circumstances (in which conduct or result occur)	Usually external to accused and not always required (e.g. lack of consent in rape)
Result or consequence of conduct	Not always required (e.g. causing the death of a human being in murder)

1) Fault or mental elements – *mens rea*

- Includes the occurrence of one or more fault elements, which can include:
 - o Intention
 - o Recklessness
 - o Knowledge

Intention

- The word 'intentional' in code jurisdictions means the same as in common law → *R v Vallance (1961)* → in common law, intentional basically accords with the ordinary, natural meaning of the word → *R v Wilmot (No 2) [1985]*.
- Where the accused meant to do the act (in the case of a conduct crime) or meant the consequences (in the case of a result crime) → they will have acted intentionally.
- In many cases, it will be necessary to infer a person's intention from their conduct and the surrounding circumstances.
- **Intention vs motive:**
 - o Intention is not the same as motive → *Pemble v The Queen (1971)*; *Parker v The Queen (1963)*.
 - A person acts with intention if they mean to do a particular act or bring a particular result. Motive is the reason why the act was done or the result desired.
 - E.g. the motive for murder may be jealousy, hatred or fear. These emotions/motives may give rise to the intention to kill → this intention then converts the physical act of killing into a criminal act → *Hyams v DPP [1975]*.
 - Motive is not an element of the offence – you don't have to prove it but it can: (1) help the jury to be satisfied that the accused had intention or (2) help in sentencing.
 - *Western Australia v Johnson [2020]* → husband acquitted of murder of wife through alleged staged car accident. so strong evidence of motive in combination with other evidence can justify a conviction.
 - *Plomp v The Queen (1963)* → husband convicted murder by jury of his wife who he claimed to have drowned accidentally. however, she was a good swimmer and the surf conditions were normal. husband was also having an affair with another woman and had represented himself as a widower.
 - *Dansie v The Queen [2020]* → wife in wheelchair drowned when pushed into pond by husband which he claimed to have occurred accidentally. husband's motives were strong and he was then convicted for murder.
 - *R v Abu-Mahmoud [2020]* → crime was motivated by revenge for the death of the accused's nephew.

Recklessness

- Unlike intention, 'recklessness' is a technical legal term and does not bear its ordinary meaning – its specific legal meaning in common law is modified in statute.

- Is a state of mind in which an accused foresees the possibility, although not the certainty, of his or her actions producing a particular result → but still continues to act, taking the risk of the unintended result occurring → *R v Crabbe (1985)*.
 - o Recklessness differs from intention because here, the accused does not have the aim or purpose to bring that consequence - but they do foresee that it may occur and still acts.

includes different meanings for different offences:

1. Recklessness for murder: *Crabbe v The Queen (1985)* 156 CLR 464:
 doing an act **knowing it is probable** that death or grievous bodily harm will result - not enough to act knowing it is **possible** that death or grievous bodily harm might result

2. Recklessly for causing harm/serious harm CLCA ss 24/23
 s 21 recklessly—a person is reckless in causing harm or serious harm to another if the person—
 (a) is aware of a **substantial risk** that his or her **conduct could result in harm or serious harm**; and
 (b) **engages in the conduct despite the risk** and without adequate justification

3. Reckless indifference for sexual offences
 s 47—Reckless indifference — to consent, if he or she—
 (a) is aware of the **possibility** the other person might not be consenting/ has withdrawn consent, but **decides to proceed regardless** of that possibility; or
 (b) is aware of the **possibility** that the other person might not be consenting/has withdrawn consent, but **fails to take reasonable steps to ascertain whether the other person does in fact consent**, before deciding to proceed; or
 (c) **does not give any thought as to whether or not the other person is consenting**/has withdrawn consent before deciding to proceed.

Knowledge

- To have ‘knowledge’, the defendant acted holding certain facts to be true.
 - o A person is said to intend a result when it is known or foreseen that it will be a consequence of action → *R v Wilmot (No 2) [1985]*.
- Where knowledge is the fault element, nothing less than actual knowledge is sufficient.
 - o This renders an awareness of the likelihood of a result or circumstances as not sufficient → *Pereira v DPP (1988)*.
 - o Knowledge required foresight of an outcome as a virtual certainty - not a possibility or even a probability.
 - o Synonyms of ‘knowledge’ in this case: ‘awareness’ and ‘foresight’.

Proof of offences

Voluntariness

- The only conduct for which people are to be held criminally liable
- In all jurisdictions, an accused cannot be criminally liable of an offence unless he or she committed the external element voluntarily.
 - o This means that no liability is attached to an involuntary act committed, regardless of how serious the outcome.
 - o The act/omission should be the result of an exercise of the free will of the accused → *Woolmington v DPP [1935]*; *R v Falconer (1990)*.
- Difference between common law vs code jurisdictions:
 - o Common law jurisdictions: voluntariness is treated as a positive requirement. The prosecution must prove beyond reasonable doubt that the accused’s act was voluntary – the accused would be acquitted if the prosecution is unable to prove this → *He Kaw Teh v The Queen (1935)*.

- Code jurisdictions: voluntariness is treated as a statutory defence that accused can raise to negate responsibility. It's not part of the actus reus, which is assumed to exist once the physical conduct is proven.
- Voluntariness (part of actus reus) – should not be confused with subjective intent (mens rea).
- An act can still be voluntary if the accused does not appreciate the nature or the consequences of the act or does not wish it to happen.
- Conduct may be involuntary if:
 - When the accused conduct was a 'reflex' action or the result of muscular spasms, convulsion or other unwilling bodily movement.
 - *Ryan v The Queen (1967)*
 - **facts:** the accused had been charged with murder of a service station attendant. the crown alleged that he had his finger on the trigger of a gun pointed at the victim's back. when he tried to find a cord in his pocket with the other hand, the victim made a sudden movement, causing the accused to step back and the gun discharged.
 - **issue:** the accused argued that the firing was not voluntary but because of an unwilling reflex action when the victim moved suddenly.
 - **decision:** the accused was still convicted because the HCA didn't focus on the pulling of the trigger but the pointing of the gun (which was clearly a voluntary act).
 - When the accused is concussed, or asleep, their conduct may be regarded as involuntary as the accused is said to be in a state of 'automatism'.
 - *Jiminez v The Queen (1992)*
 - **facts:** accused fell asleep while driving from Gold Coast to Sydney and collided with a tree, killing one of his passengers.
 - **issue:** was his conduct considered automatism and therefore involuntary?
 - **decision:** HCA said that since the accused was asleep, his actions weren't conscious and therefore involuntary. so, he could not be criminally responsible for driving in a manner dangerous to the public.

Standard of proof & burden of proof

It is the 'golden thread' of criminal law that an accused is innocent until proven guilty → *Woolmington v DPP [1935]*.

- Onus/burden of proof = which party needs to prove a particular fact?
- Standard of proof = the degree of proof that must be met by the party bearing the burden.
- Ordinarily, the prosecution bears the burden of proof in a criminal case – the evidential and legal burden is on the prosecution to prove each element of an offence beyond reasonable doubt.
- In relation to defences, the evidential burden rests on the accused. The onus then shifts to the prosecution to disprove the defence beyond reasonable doubt.